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WHEN: Tuesday, September 17, 2013
9 a.m.–12:30 p.m.

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

RESERVATIONS: (202) 741–6008

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Federal Register

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

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

FARM CREDIT ADMINISTRATION

12 CFR Parts 604, 611, 612, 619, 620, 621, 622, 623, and 630

RIN 3052–AC65

Unincorporated Business Entities; Effective Date

AGENCY: Farm Credit Administration.

ACTION: Final rule; notice of effective date.

SUMMARY: The Farm Credit Administration adopted a final rule to establish a regulatory framework for Farm Credit System institutions' use of unincorporated business entities organized under State law for certain business activities. In accordance with the law, the effective date of the final rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session.

DATES: Under the authority of 12 U.S.C. 2252, the regulation amending 12 CFR parts 604, 611, 612, 619, 620, 621, 622, 623, and 630 published on May 28, 2013 (78 FR 31822) is effective July 22, 2013.

FOR FURTHER INFORMATION CONTACT: Elna Luopa, Policy Analyst, Office of Regulatory Policy, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4414, TTY (703) 883–4056;

or

Wendy Laguarda, Assistant General Counsel, Office of General Counsel, Farm Credit Administration, McLean, Virginia 22102–5090, (703) 883–4020, TTY (703) 883–4056.

SUPPLEMENTARY INFORMATION: The Farm Credit Administration adopted a final rule to establish a regulatory framework for Farm Credit System (System) institutions' use of unincorporated business entities (UBEs) organized under State law for certain business activities. A UBE includes limited partnerships (LPs), limited liability partnerships (LLPs), limited liability limited partnerships (LLLPs), limited liability companies (LLCs), and any other unincorporated business entities, such as unincorporated business trusts, organized under State law. The final rule does not apply to UBEs that one or more System institutions may establish as Rural Business Investment Companies (RBICs) pursuant to the institutions' authority under the provisions of title VI of the Farm Security and Rural Investment Act of 2002, as amended (FSRIA), and United States Department of Agriculture (USDA) regulations implementing FSRIA. This rule does apply, however, to System institutions that organize UBEs for the express purpose of investing in RBICs. In accordance with 12 U.S.C. 2252, the effective date of the final rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulations is July 22, 2013.

(12 U.S.C. 2252(a)(9) and (10))

Dated: July 23, 2013.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2013–17996 Filed 7–25–13; 8:45 am]

BILLING CODE 6705–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AG44

Small Business Size Standards; Support Activities for Mining; Correction

AGENCY: U.S. Small Business Administration.

ACTION: Final rule; correction.

SUMMARY: The U.S. Small Business Administration (SBA) is correcting a final rule that appeared in the **Federal Register** on June 20, 2013 (78 FR 37404). The document amended SBA's Small Business Size Regulations by increasing small business size standards for three of the four industries in North American Industry Classification System (NAICS) Subsector 213, Support Activities for Mining, that are based on average annual receipts. This correction does not affect the revised size standards themselves or the Code of Federal Regulations.

DATES: Effective July 22, 2013.

FOR FURTHER INFORMATION CONTACT: Khem Sharma, Chief, Office of Size Standards, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

SUPPLEMENTARY INFORMATION: In FR Doc. 2013–14712 appearing on page 37404 in the June 20, 2013 **Federal Register** issue, the following correction is made:

1. On page 37406, in the heading for column 4 of Table 1, Summary of Revised Size Standards in NAICS Subsector 213, the word ''Proposed'' is corrected to read ''Revised.'' The corrected heading for Table 1 reads as follows:

NAICS code	NAICS industry title	Current size standard ($ million)	Revised size standard ($ million)

Dated: July 17, 2013.

Calvin Jenkins,

Deputy Associate Administrator for Government Contracting and Business Development.

[FR Doc. 2013–17946 Filed 7–25–13; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 35

[Docket No. FAA–2010–0940–0001; Amdt. No. 35–9A]

RIN 2120–AJ88

Critical Parts for Airplane Propellers; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Correcting amendment.

SUMMARY: The FAA is correcting a final rule published on January 18, 2013 (78 FR 4038). In that rule, the FAA established airworthiness standards for airplane propellers. That action required a safety analysis to identify a propeller critical part. Manufacturers would identify propeller critical parts, and establish engineering, manufacturing, and maintenance processes for propeller critical parts. An unintentional error was introduced in § 35.15 when we revised paragraph (d). We did not intend to revise paragraph (d). This correction will add paragraph (d) to the end of paragraph (c), and restore the former paragraph (d).

DATES: Effective July 26, 2013.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Jay Turnberg, Engine and Propeller Directorate Standards Staff, ANE–111, Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts, 01803–5299; telephone (781) 238–7116; facsimile (781) 238–7199, email: *jay.turnberg@faa.gov.* For legal questions concerning this action, contact Vincent Bennett, FAA Office of the Regional Counsel, ANE–7, Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts, 01803–5299; telephone (781) 238–7044; facsimile (781) 238–7055, email: *vincent.bennett@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On January 18, 2013, the FAA published a final rule titled, ''Critical Parts for Airplane Propellers'' (78 FR 4038).

In that final rule the FAA revised the regulation to require a safety analysis to identify a propeller critical part and require that critical parts meet the prescribed integrity specifications of § 35.16, Propeller critical parts. However, in amending § 35.15 we inadvertently revised paragraph (d), when we added the new requirements. This was not our intention. This correction will add paragraph (d) to the end of paragraph (c), and restore the former paragraph (d).

List of Subjects in 14 CFR Part 35

Air transportation, Aircraft, Aviation safety, Safety.

The Correcting Amendment

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

PART 35—AIRWORTHINESS STANDARDS: PROPELLERS

■ 1. The authority citation for part 35 continues to read as follows:

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

■ 2. Amend § 35.15 by revising paragraphs (c) and (d) to read as follows:

§ 35.15 Safety analysis.

* * * * *

(c) The primary failures of certain single propeller elements (for example, blades) cannot be sensibly estimated in numerical terms. If the failure of such elements is likely to result in hazardous propeller effects, those elements must be identified as propeller critical parts. For propeller critical parts, applicants must meet the prescribed integrity specifications of § 35.16. These instances must be stated in the safety analysis.

(d) If reliance is placed on a safety system to prevent a failure progressing to hazardous propeller effects, the possibility of a safety system failure in combination with a basic propeller failure must be included in the analysis. Such a safety system may include safety devices, instrumentation, early warning devices, maintenance checks, and other similar equipment or procedures. If items of the safety system are outside the control of the propeller manufacturer, the assumptions of the safety analysis with respect to the reliability of these parts must be clearly stated in the analysis and identified in the propeller installation and operation instructions required under § 35.3.

* * * * *

Issued under authority provided by 49 U.S.C. 106(f), 44701(a), and 44703 in Washington, DC, on July 19, 2013.

Lirio Liu,

Director, Office of Rulemaking.

[FR Doc. 2013–17931 Filed 7–25–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0130; Directorate Identifier 2013–NE–07–AD; Amendment 39–17520; AD 2013–15–04]

RIN 2120–AA64

Airworthiness Directives; Hartzell Propeller, Inc. Propellers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Hartzell Propeller, Inc. propeller models HC–(1,D)2(X,V,MV)20–7, HC–(1,D)2(X,V,MV)20–8, and HC–(1,D)3(X,V,MV)20–8. This AD was prompted by failures of the propeller hydraulic bladder diaphragm and resulting engine oil leak. This AD requires replacement of the propeller hydraulic bladder diaphragm. We are issuing this AD to prevent propeller hydraulic bladder diaphragm rupture, loss of engine oil, damage to the engine, and loss of the airplane.

DATES: This AD is effective August 30, 2013.

ADDRESSES: For service information identified in this AD, contact Hartzell Propeller, Inc., 1 Propeller Place, Piqua, OH 45356; phone: 937–778–4397; fax: 937–778–4391; email: *techsupport@hartzellprop.com.* You may view this service information at the FAA, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

The Docket Operations office is located at Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

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 AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Mark Grace, Aerospace Engineer,

Chicago Aircraft Certification Office, FAA, Propulsion Branch, 2300 E. Devon Avenue, Des Planes, IL 60018; phone: 847–294–7377; fax: 847–294–7834; email: *mark.grace@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. The NPRM published in the **Federal Register** on March 26, 2013 (78 FR 18255). The NPRM proposed to require replacement of the propeller hydraulic bladder diaphragm with a redesigned bladder diaphragm that includes a tab, visible after installation, which contains the bladder diaphragm batch/lot number.

Comments

We gave the public the opportunity to participate in developing this AD. We have considered the comment received. Hartzell Propeller, Inc. supports the NPRM (78 FR 18255, dated March 26, 2013).

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD as proposed.

Costs of Compliance

We estimate that this AD will affect about 400 propellers installed on airplanes of U.S. registry. We also estimate that it will take about 4 hours per propeller to replace the bladder diaphragm. The average labor rate is $85 per hour. We estimate parts costs at $53 per engine. Based on these figures, we estimate the cost of this AD on U.S. operators to be $157,200. Our cost estimate is exclusive of possible warranty coverage.

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

This AD will not have federalism implications under Executive Order 13132. This AD will 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 that this AD:

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

(2) Is not a ''significant rule'' under 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.

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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):

2013–15–04 Hartzell Propeller, Inc.: Amendment 39–17520; Docket No. FAA–2013–0130; Directorate Identifier 2013–NE–07–AD.

(a) Effective Date

This AD is effective August 30, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Hartzell Propeller, Inc. propeller models HC–(1,D)2(X,V,MV)20–7, HC–(1,D)2(X,V,MV)20–8, and HC–(1,D)3(X,V,MV)20–8 with a propeller hydraulic bladder diaphragm, part number (P/N) B–119–2, without tab, installed.

(d) Unsafe Condition

This AD was prompted by failures of the propeller hydraulic bladder diaphragm and resulting engine oil leak. We are issuing this AD to prevent propeller hydraulic bladder diaphragm rupture, loss of engine oil, damage to the engine, and loss of the airplane.

(e) Compliance

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

(f) Bladder Diaphragm Replacement

(1) Within 12 months after the effective date of this AD, remove from service the propeller hydraulic bladder diaphragm, P/N B–119–2, without tab.

(2) Install a redesigned propeller hydraulic bladder diaphragm, P/N B–119–2, with tab. The bladder diaphragm, eligible for installation, is identified by a tab with a batch/lot number. The tab is visible after installation and confirms the installation of the proper redesigned propeller hydraulic bladder diaphragm, P/N B–119–2, with tab, in the Hartzell propeller assembly.

(g) Installation Prohibition

After the effective date of this AD, do not install into any engine any hydraulic bladder diaphragm, P/N B–119–2, that is without tab.

(h) Alternative Methods of Compliance (AMOCs)

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

(i) Related Information

(1) For more information about this AD, contact Mark Grace, Aerospace Engineer, Chicago Aircraft Certification Office, FAA, Propulsion Branch, 2300 E. Devon Avenue, Des Planes, IL 60018; phone: 847–294–7377; fax: 847–294–7834; email: *mark.grace@faa.gov.*

(2) Refer to Hartzell Alert Service Bulletin No. HC–ASB–61–338 for related information.

(3) For service information identified in this AD, contact Hartzell Propeller Inc., 1 Propeller Place, Piqua, OH 45356–2634; phone: 937–778–4379; fax: 937–778–4391; email: *techsupport@hartzellprop.com.* You may view this service information at the FAA, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

(j) Material Incorporated by Reference

None.

Issued in Burlington, Massachusetts, on July 16, 2013.

Colleen M. D'Alessandro,

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

[FR Doc. 2013–17664 Filed 7–25–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0628; Directorate Identifier 2013–NM–132–AD; Amendment 39–17523; AD 2013–15–07]

RIN 2120–AA64

Airworthiness Directives; the Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 787–8 airplanes. This AD requires either removal or inspection of the Honeywell fixed emergency locator transmitter (ELT), and corrective action if necessary. This AD was prompted by a report of a fire involving a Honeywell fixed ELT. We are issuing this AD to prevent a fire in the aft crown of the airplane, or to detect and correct discrepancies within the ELT that could cause such a fire.

DATES: This AD is effective on July 26, 2013.

We must receive comments on this AD by September 9, 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:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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 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: Kenneth Fairhurst, Senior Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6466; fax: 425–917–6590; email: *Kenneth.Fairhurst@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We have received a report of a fire involving the Honeywell fixed emergency locator transmitter (ELT) on a Model 787–8 airplane. The investigation indicates that the ELT may have initiated the event. Discrepancies within the ELT, if not corrected, could cause a fire in the aft crown of the airplane.

FAA's Determination

We are issuing 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.

AD Requirements

This AD requires either removing the Honeywell fixed ELT, or inspecting the ELT (for discrepancies associated with the ELT, ELT battery, and associated wiring), and doing corrective action if necessary, in accordance with a method approved by the FAA.

The applicability of this AD is limited to in-service airplanes, which have been delivered with Honeywell fixed ELTs having part number 1152682–2. Future production airplanes will be addressed prior to delivery.

We recognize that various civil aviation authorities (CAA) have different operational requirements regarding the use of ELTs. While the United States does not require a fixed ELT to be installed for operation, operation of an airplane without an ELT in a particular country's airspace may require coordination with that country's CAA.

Interim Action

This AD is considered to be interim action. Because the fire occurred on a Model 787–8 airplane, required actions in this AD are focused on Honeywell fixed ELTs installed on that model. However, we acknowledge that ELTs are installed on various other aircraft; therefore, continued investigation is required. Once final action has been identified, we might consider further rulemaking.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because discrepancies within the Honeywell fixed ELT could cause a fire in the aft crown of the airplane. Therefore, we find that notice and opportunity for prior public comment are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number FAA–2013–0628 and Directorate Identifier 2013–NM–132–AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this 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 AD.

Costs of Compliance

We estimate that this AD affects 6 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Removal or inspection	1 work-hour × $85 per hour = $85	$0	$85	$510

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

Authority for This Rulemaking

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

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

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will 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 that this AD:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA amends 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):

2013–15–07 the Boeing Company: Amendment 39–17523; Docket No. FAA–2013–0628; Directorate Identifier 2013–NM–132–AD.

(a) Effective Date

This AD is effective on July 26, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 787–8 airplanes, certificated in any category, line numbers 7 through 9 inclusive, 23, 24, 27, 29, 31, 33 through 35 inclusive, 37, 38, 40 through 42 inclusive, 44 through 72 inclusive, 74 through 78 inclusive, 80, 82 through 84 inclusive, 86, 87, 89, 92, 94 through 99 inclusive, 101, 102, 108, and 111.

(d) Subject

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 23, Communications.

(e) Unsafe Condition

This AD was prompted by a report of a fire involving the Honeywell fixed emergency locator transmitter (ELT). We are issuing this AD to prevent a fire in the aft crown of the airplane, or to detect and correct discrepancies within the ELT that could cause such a fire.

(f) Compliance

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

(g) Honeywell Fixed ELT Removal or Inspection

Within 10 days after the effective date of this AD, do the actions specified in either paragraph (g)(1) or (g)(2) of this AD.

(1) Remove the Honeywell fixed ELT using a method approved in accordance with the procedures specified in paragraph (h) of this AD.

(2) Inspect the Honeywell fixed ELT for discrepancies, and do all applicable corrective actions before further flight, using a method approved in accordance with the procedures specified in paragraph (h) of this AD.

(h) Alternative Methods of Compliance (AMOCs)

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

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

(i) Related Information

For more information about this AD, contact Kenneth Fairhurst, Senior Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, Washington 98057–3356; phone: 425–917–6466; fax: 425–917–6590; email: *Kenneth.Fairhurst@faa.gov.*

(j) Material Incorporated by Reference

None.

Issued in Renton, Washington, on July 23, 2013.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–18110 Filed 7–25–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 61, 121, 135, 141, and 142

[Docket No.: FAA–2010–0100; Amdt. Nos. 61–130; 121–365; 135–127; 141–1; 142–9]

RIN 2120–AJ67

Pilot Certification and Qualification Requirements for Air Carrier Operations

Correction

In rule document 2013–16849 beginning on page 42324 in the issue of

Monday, July 15, 2013, make the following correction:

On page 42326, in Table 1, the table section beneath the heading ''Scenario: (3) Serve as an SIC (first officer) in part 121 operations'' should read as follows:

Scenario: **(3) Serve as an SIC (first officer) in part 121 operations**

Previous requirements	Requirements in final rule
Hold: (1) At least a commercial pilot certificate with an appropriate category and class rating; (2) An instrument rating; and (3) At least a second-class medical certificate.	Hold: (1) An ATP certificate with appropriate aircraft type rating OR—An ATP certificate with restricted privileges and an appropriate aircraft type rating; and (2) At least a second-class medical certificate. (Ref. §§ 121.436 and 61.23).

[FR Doc. C1–2013–16849 Filed 7–25–13; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2013–0620]

Drawbridge Operation Regulation; Lake Washington Ship Canal, Seattle, WA

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 Montlake Bridge across the Lake Washington Ship Canal, mile 5.2, at Seattle, WA. The deviation is necessary to accommodate vehicular traffic attending football games at Husky Stadium at the University of Washington, Seattle, Washington. This deviation allows the bridge to remain in the closed position two hours before and two hours after each game. Please note that the game times for five of the seven games scheduled for Husky Stadium have not yet been determined due to NCAA television scheduling.

DATES: This deviation is effective from 5 p.m. to 7 p.m. and 10 p.m. to 11:59 p.m. on August 31, 2013; 12:01 a.m. to 11:59 p.m. on September 21, 2013; 12:01 a.m. to 11:59 p.m. on September 28, 2013; 12:01 a.m. to 11:59 p.m. on October 12, 2013; 12:01 a.m. to 11:59 p.m. on October 26, 2013; 12:01 a.m. to 11:59 p.m. on November 9, 2013; 10:30 a.m. to 12:30 p.m. and 3:30 p.m. to 5:30 p.m. on November 29, 2013.

ADDRESSES: The docket for this deviation, [USCG–2013–0620] 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 Steven M. Fischer, Lieutenant Commander, Bridge Specialist, Thirteenth District, Coast Guard; telephone 206–220–7277, email *Steven.M.Fischer2@uscg.mil.* If you have questions on viewing the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Washington State Department of Transportation, on behalf of the University of Washington Police Department, has requested that the Montlake Bridge bascule span remain closed and need not open to vessel traffic to facilitate timely movement of pre-game and post game football traffic. The Montlake Bridge crosses the Lake Washington Ship Canal at mile 5.2 and while in the closed position provides 30 feet of vertical clearance throughout the navigation channel and 46 feet of vertical clearance throughout the center 60-feet of the bridge. These vertical clearance measurements are made in reference to the Mean Water Level of Lake Washington. Vessels which do not require a bridge opening may continue to transit beneath the bridges during this closure period. Under normal conditions this bridge opens on signal, subject to the list of exceptions provided in 33 CFR 117.1051(e).

This deviation period will cover the dates August 31, 2013 to November 29, 2013 as follows. From 5:00 p.m. to 7:00 p.m. and from 10:00 p.m. to 11:59 p.m. on August 31, 2013; from 10:30 a.m. to 12:30 p.m. and from 3:30 p.m. to 5:30 p.m. on November 29, 2013. The times for the closures on September 21, 2013, September 28, 2013, October 12, 2013, October 26, 2013, and November 09, 2013 will be determined and announced in the Coast Guard's Local Notice to Mariners and Broadcast Notice to Mariners as they become available. Due to NCAA television scheduling, the times for the games are not currently available.

The deviation allows the bascule span of the Montlake Bridge to remain in the closed position and need not open for maritime traffic from 5:00 p.m. to 7:00 p.m. and 10:00 p.m. to 11:59 p.m. on August 31, 2013, and from 10:30 a.m. to 12:30 p.m. and 3:30 p.m. to 5:30 p.m. on November 29, 2013, for times to be determined on September 21, 2013, September 28, 2013, October 12, 2013, October 26, 2013, and November 09, 2013. The bridge shall operate in accordance with 33 CFR 117.1051(e) at all other times. Waterway usage on the Lake Washington Ship Canal ranges from commercial tug and barge to small pleasure craft. Mariners will be notified and kept informed of the bridge's operational status via the Coast Guard Notice to Mariners publication and Broadcast Notice to Mariners as appropriate. The draw span will be required to open, if needed, for vessels engaged in emergency response operations during this closure period.

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

Dated: July 16, 2013.

Daryl R. Peloquin,

Acting Bridge Administrator, Thirteenth Coast Guard District.

[FR Doc. 2013–18029 Filed 7–25–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2013–0661]

RIN 1625–AA00

Safety Zone; Alpena Area HOG Rally Fireworks, Alpena, Michigan

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone in the Captain of the Port, Sault Sainte Marie zone. This safety zone is intended to restrict vessels from certain portions of water areas within Sector Sault Sainte Marie Captain of the Port zone, as defined by Coast Guard regulations. This temporary safety zone is necessary to protect spectators and vessels from the potential hazards associated with fireworks displays.

DATES: This rule is effective from 9:30 p.m. until 11:30 p.m. on July 27, 2013.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2013–0661 and are available online by going to *www.regulations.gov,* inserting USCG–2013–0661 in the ''SEARCH'' box, and then clicking ''search.'' They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or email MST1 Thomas Link, U.S. Coast Guard Sector Sault Sainte Marie, telephone 906–253–2443, email at *Thomas.a.link@uscg.mil.* If you have questions on viewing 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
TFR Temporary Final Rule

A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM with respect to this rule because doing so would be impracticable. The final details for this event were not received by the Coast Guard with sufficient time to publish an NPRM. Thus, delaying this rule to wait for a comment period to run would be impracticable because it would inhibit the Coast Guard's ability to protect the public from the potential hazards associated with maritime fireworks displays.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. For the same reasons discussed in the preceding paragraph, a 30 day notice period would be impracticable and contrary to the public interest.

B. Basis and Purpose

The legal basis for the rule is the Coast Guard's authority to establish regulated navigation areas and limited access areas: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

On the evening of July 27, 2013, the Michigan Harley Owners Group will conclude a rally in Alpena, Michigan with a fireworks display. Fireworks will be launched near the end of Mason Street, South of State Avenue, approximately 50 yards west of Thunder Bay in Alpena, Michigan. The Captain of the Port, Sault Sainte Marie has determined that the fireworks event poses hazards to the public, including collisions among spectator craft and debris falling into the water.

C. Discussion of Rule

With the aforementioned hazards in mind, the Captain of the Port Sault Sainte Marie has determined that this temporary safety zone is necessary to ensure the safety of vessels and people during the fireworks event. The temporary safety zone will encompass all U.S. waters of Lake Huron within an 800-foot radius of the fireworks launch site located near the end of Mason Street, South of State Avenue, at position 45°02′42″ N, 083°26′48″ W (NAD 83). The safety zone will be effective and enforced from 9:30 p.m. to 11:30 p.m. on July 27, 2013.

Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port Sault Sainte Marie or his designated representative. All persons and vessels permitted to enter the safety zone established by this rule shall comply with the instructions of the Coast Guard Captain of the Port or his designated representative. The Captain of the Port or his designated representative may be contacted via VHF Channel 16.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security. We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues.

The safety zone created by this rule will be small and enforced for only two hours. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the Captain of the Port.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which might be small entities: the owners or operators of vessels intending to transit or anchor

within the 800-foot radius of the launch site on the evening of July 27, 2013.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: this rule will only be enforced for two hours. Vessels may safely pass outside the safety zone during the event. In the event that this temporary safety zone affects vessel traffic, vessels may request permission from the Captain of the Port Sault Sainte Marie to transit through the safety zone. Additionally, the Coast Guard will give notice to the public via a Local Notice to Mariners that the regulation is in effect.

3. Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

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

5. Federalism

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

6. Unfunded Mandates Reform Act

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

7. Taking of Private Property

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

8. Civil Justice Reform

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

9. Protection of Children

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

10. Indian Tribal Governments

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

11. Energy Effects

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

12. Technical Standards

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

13. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a safety zone and, therefore it is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket USCG–2013–0661 where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165–REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T09–0661 to read as follows:

§ 165.T09–0661 Safety Zone; Alpena Area HOG Rally Fireworks, Alpena, Michigan.

(a) *Location.* The following area is a temporary safety zone: All U.S. navigable waters of Lake Huron within an 800-foot radius of the fireworks launch site located near the end of Mason Street, South of State Avenue in Alpena, Michigan, at position 45°02′42″ N, 083°26′48″ W (NAD 83).

(b) *Effective and enforcement period.* This rule is effective and will be enforced from 9:30 p.m. until 11:30 p.m. on July 27, 2013.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port Sault Sainte Marie or his on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port

Sault Sainte Marie or his on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port Sault Sainte Marie is: any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port Sault Sainte Marie to act on his or her behalf. The on-scene representative of the Captain of the Port Sault Sainte Marie will be aboard either a Coast Guard or Coast Guard Auxiliary vessel.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Sault Sainte Marie, or his on-scene representative to obtain permission to do so. The Captain of the Port Sault Sainte Marie or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port Sault Sainte Marie or his on-scene representative.

Dated: July 17, 2013.

S. C. Teschendorf,

Captain, U. S. Coast Guard, Captain of the Port, Sault Sainte Marie.

[FR Doc. 2013–18025 Filed 7–25–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–1084]

Safety Zones; Annual Fireworks Events in the Captain of the Port Buffalo Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: At various times throughout the month of July, the Coast Guard will enforce certain safety zones located in 33 CFR 165.939. This action is necessary and intended for the safety of life and property on navigable waters during this event. During each enforcement period, no person or vessel may enter the respective safety zone without the permission of the Captain of the Port Buffalo.

DATES: The regulations in 33 CFR 165.939(a)(4) will be enforced on July 27, 2013, from 9 p.m. to 10:15 p.m.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Waterways Management Division, Coast Guard Sector Buffalo, 1 Fuhrmann Blvd., Buffalo, NY 14203; Coast Guard telephone 716–843–9343, email *SectorBuffaloMarineSafety@uscg.mil.*

SUPPLEMENTARY INFORMATION:

The Coast Guard will enforce the Safety Zones; Annual Fireworks Events in the Captain of the Port Buffalo Zone listed in 33 CFR 165.939 for the following events:

(1) *Lyme Community Days Fireworks, Chaumont, NY;* The safety zone listed in 33 CFR 165.939(a)(4) will be enforced from 9 p.m. to 10:15 p.m. on July 27, 2013.

Pursuant to 33 CFR 165.23(a)(4), entry into, transiting, or anchoring within these safety zones during an enforcement period is prohibited unless authorized by the Captain of the Port Buffalo or his designated representative. Those seeking permission to enter one of these safety zones may request permission from the Captain of Port Buffalo via channel 16, VHF–FM. Vessels and persons granted permission to enter one of these safety zones shall obey the directions of the Captain of the Port Buffalo or his designated representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice is issued under authority of 33 CFR 165.939 and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of these enforcement periods via Broadcast Notice to Mariners or Local Notice to Mariners. If the Captain of the Port Buffalo determines that one of these safety zones need not be enforced for the full duration stated in this notice he or she may use a Broadcast Notice to Mariners to grant general permission to enter the respective safety zone.

Dated: July 23, 2013.

B. W. Roche,

Captain, U.S. Coast Guard, Captain of the Port Buffalo.

[FR Doc. 2013–18033 Filed 7–25–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2013–0615]

RIN 1625–AA00

Safety Zone; Sherman Private Party Fireworks, Lake Michigan, Winnetka, IL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on Lake Michigan near Winnetka, IL. This safety zone is intended to restrict vessels from a portion of Lake Michigan due to a fireworks display. This temporary safety zone is necessary to protect the surrounding public and vessels from the hazards associated with the fireworks display.

DATES: This rule is effective from 9 p.m. until 11 p.m. on August 17, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2013–0615. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, contact or email MST1 Joseph McCollum, U.S. Coast Guard Sector Lake Michigan, at 414–747–7148 or *Joseph.P.McCollum@uscg.mil.* If you have questions on viewing 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
TFR Temporary Final Rule

A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act

(APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking with respect to this rule because doing so would be impracticable. The final details for this event were not known to the Coast Guard until there was insufficient time remaining before the event to publish an NPRM. Delaying the effective date of this rule to wait for a comment period to run is impracticable because it would inhibit the Coast Guard's ability to protect spectators and vessels from the hazards associated with a maritime fireworks display, which are discussed further in the basis and purpose section.

Under 5 U.S.C. 553(d)(3), The Coast Guard finds that good cause exists for making this temporary rule effective less than 30 days after publication in the **Federal Register**. For the same reasons discussed in the preceding paragraph, waiting for a 30-day notice period to run would be impracticable and contrary to the public interest.

B. Basis and Purpose

The legal basis for the rule is the Coast Guard's authority to establish regulated navigation areas and limited access areas: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

A fireworks display involving a tug and barge is expected to take place on Lake Michigan near Winnetka, IL during the evening of August 17, 2013. The Coast Guard anticipates that spectators will congregate around the launch position during the display. The Captain of the Port, Lake Michigan, has determined that the fireworks display will pose a significant risk to public safety and property. Such hazards include falling debris, flaming debris, and collisions among spectator vessels.

C. Discussion of the Final Rule

With the aforementioned hazards in mind, the Captain of the Port, Lake Michigan, has determined that this temporary safety zone is necessary to ensure the safety of spectators and vessels during the fireworks display on Lake Michigan. This zone will be effective and enforced from 9 p.m. until 11 p.m. on August 17, 2013. This zone will encompass all waters of Lake Michigan within a 1000-foot radius of an approximate launch position at 42° 6′24.2″ N, 87°43′7.9″ W (NAD 83).

Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port, Lake Michigan, or his designated on-scene representative. The Captain of the Port or his designated on-scene representative may be contacted via VHF Channel 16.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security.

We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone created by this rule will be small and enforced for only one day in August. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the Captain of the Port.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which might be small entities: the owners or operators of vessels intending to transit or anchor in a portion of Lake Michigan near Winnetka, IL on August 17, 2013.

This safety zone will not have a significant economic impact on a substantial number of small entities for the reasons cited in the *Regulatory Planning and Review* section. Additionally, before the enforcement of the zone, we would issue local Broadcast Notice to Mariners so vessel owners and operators can plan accordingly.

3. Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

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

5. Federalism

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

6. Protest Activities

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

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a safety zone and, therefore it is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T09–0615 to read as follows:

§ 165.T09–0615 Safety Zone; Sherman Private Party Fireworks, Lake Michigan, Winnetka, IL.

(a) *Location.* All waters of Lake Michigan within a 1000-foot radius of an approximate launch position at 42°6′24.2″ N, 87°43′7.9″ W (NAD 83).

(b) *Effective and Enforcement Period.* This rule is effective and will be enforced from 9 p.m. until 11 p.m. on August 17, 2013.

(c) *Regulations.* (1) In accordance with the general regulations in section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port, Lake Michigan or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port, Lake Michigan or his designated on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port, Lake Michigan is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port, Lake Michigan to act on his behalf.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port, Lake Michigan or his on-scene representative to obtain permission to do so. The Captain of the Port, Lake Michigan or his on-scene representative may be contacted via VHF Channel 16.

Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port, Lake Michigan, or his on-scene representative.

Dated: July 16, 2013.

M. W. Sibley,

Captain, U.S. Coast Guard, Captain of the Port, Lake Michigan.

[FR Doc. 2013–18027 Filed 7–25–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2013–0614]

RIN 1625–AA00

Safety Zone; Sister Bay Marina Fest Fireworks and Ski Show, Sister Bay, WI

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on Sister Bay near Sister Bay, WI. This safety zone is intended to restrict vessels from a portion of Sister Bay due to a fireworks display and ski show. This temporary safety zone is necessary to protect the surrounding public and vessels from the hazards associated with the fireworks display and ski show in Sister Bay on August 31, 2013.

DATES: This rule is effective from 1 p.m. until 10 p.m. on August 31, 2013. This rule will be enforced from 1 p.m. until 3:15 p.m., and from 8:15 p.m. until 10 p.m. on August 31, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket USCG–2013–0614. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the

Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, contact or email MST1 Joseph McCollum, U.S. Coast Guard Sector Lake Michigan, at 414–747–7148 or *Joseph.P.McCollum@uscg.mil.* If you have questions on viewing 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
TFR Temporary Final Rule

A. Regulatory History and Information

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

Under 5 U.S.C. 553(d)(3), The Coast Guard finds that good cause exists for making this temporary rule effective less than 30 days after publication in the **Federal Register**. For the same reasons discussed in the preceding paragraph, waiting for a 30 day notice period to run would be impracticable and contrary to the public interest.

B. Basis and Purpose

The legal basis for the rule is the Coast Guard's authority to establish regulated navigation areas and limited access areas: 33 U.S.C. 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

During the afternoon of August 31, 2013, the Village of Sister Bay will sponsor a ski show involving 5 power-boats on the waters of Sister Bay near Sister Bay, Wisconsin. This ski show is scheduled to take place in the vicinity of the Sister Bay Marina. The Coast Guard anticipates a large number of spectator vessels, as well as Marina traffic, during the time of the ski show.

During the evening of August 31, 2013, the Sister Bay Advancement Association will sponsor a fireworks display on the waters of Sister Bay near Sister Bay, Wisconsin. The Coast Guard anticipates a large number of spectators to congregate around the launch position during the display.

The Captain of the Port, Lake Michigan, has determined that the ski show and fireworks display will pose a significant risk to public safety and property. Such hazards include falling debris, flaming debris, and collisions among spectator vessels and vessels involved in the ski show.

C. Discussion of the Final Rule

With the aforementioned hazards in mind, the Captain of the Port, Lake Michigan, has determined that this temporary safety zone is necessary to ensure the safety of spectators and vessels during the fireworks display and ski show within Sister Bay. This zone will be effective and enforced from 1 p.m. until 3:15 p.m. and from 8:15 p.m. until 10 p.m. on August 31, 2013. This zone will encompass all waters of Sister Bay within a 1000-foot radius of a position at 45°11′33.0″ N, 87°7′23.0″ W (NAD 83).

Entry into, transiting, or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port, Lake Michigan, or his designated on-scene representative. The Captain of the Port or his designated on-scene representative may be contacted via VHF Channel 16.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security.

We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone created by this rule will be small and enforced for only one day in August. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the Captain of the Port.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in a portion of Sister Bay on August 31, 2013.

This safety zone will not have a significant economic impact on a substantial number of small entities for the reasons cited in the *Regulatory Planning and Review* section. Additionally, before the enforcement of the zone, we would issue local Broadcast Notice to Mariners so vessel owners and operators can plan accordingly.

3. Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to

the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

4. Collection of Information

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

5. Federalism

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

6. Protest Activities

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

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a safety zone and, therefore it is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T09–0614 to read as follows:

§ 165.T09–0614 Safety Zone; Sister Bay Marina Fest Fireworks and Ski Show, Sister Bay, WI.

(a) *Location.* All waters of Sister Bay within a 1000-foot radius of a position at 45°11′33.0″ N, 87°7′23.0″ W (NAD 83).

(b) *Effective and Enforcement Period.* This rule is effective and will be enforced from 1 p.m. until 3:15 p.m. and from 8:15 p.m. until 10 p.m. on August 31, 2013.

(c) *Regulations.* (1) In accordance with the general regulations in section 165.23 of this part, entry into, transiting, or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port, Lake Michigan or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port, Lake Michigan or his designated on-scene representative.

(3) The ''on-scene representative'' of the Captain of the Port, Lake Michigan is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port, Lake Michigan to act on his behalf.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port, Lake Michigan or his on-scene representative to obtain permission to do so. The Captain of the Port, Lake Michigan or his on-scene representative may be contacted via VHF Channel 16. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the Captain of the Port, Lake Michigan, or his on-scene representative.

Dated: July 16, 2013.

M. W. Sibley,

Captain, U.S. Coast Guard, Captain of the Port, Lake Michigan.

[FR Doc. 2013–18030 Filed 7–25–13; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1983–0002; FRL–9839–6]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Deletion of the Cannon Engineering Corp. Superfund Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) Region 1 is publishing a direct final Notice of Deletion of the Cannon Engineering Corp. (CEC), Superfund (Site), located in Bridgewater, Massachusetts, from the National Priorities List (NPL). The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This direct final deletion is being published by EPA with the concurrence of the State of Massachusetts, through the Massachusetts Department of Environmental Protection (MassDEP), because EPA has determined that all appropriate response actions under CERCLA, have been completed. However, this deletion does not preclude future actions under Superfund.

DATES: This direct final deletion is effective September 24, 2013 unless EPA receives adverse comments by August 26, 2013. If adverse comments are received, EPA will publish a timely withdrawal of the direct final deletion in the **Federal Register** informing the public that the deletion will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–1983–0002, by one of the following methods:

- *http://www.regulations.gov.* Follow on-line instructions for submitting comments.
- *Email: golden.derrick@epa.gov* or *brown.rudy@epa.gov.*
- *Fax:* 617–918–0448 or 617–918–0031
- *Mail:* Derrick Golden, EPA Region 1—New England, 5 Post Office Square, Suite 100, Mail Code OSRR07–4, Boston, MA 02109–3912 or Rudy Brown, EPA Region 1—New England, 5 Post Office Square, Suite 100, Mail Code ORAO1–1, Boston, MA 02109–3912.
- *Hand delivery:* Derrick Golden, EPA Region 1—New England, 5 Post Office Square, Suite 100, Mail Code OSRR07–4, Boston, MA 02109–3912 or Rudy Brown, EPA Region 1—New England, 5 Post Office Square, Suite 100, Mail Code ORAO1–1, Boston, MA 02109–3912. Such deliveries are only accepted during the Docket's normal hours of operation (9:00 a.m. to 5:00 p.m.), and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID no. EPA–HQ–SFUND–1983–0002. 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. 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 EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment 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 *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 statue. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at:

U.S. Environmental Protection Agency, Records Center, 5 Post Office Square, Suite 100, Boston, MA 02109, 617–918–1440, Monday–Friday: 9:00 a.m.–5:00 p.m., Saturday and Sunday—Closed, and

Bridgewater Public Library, 15 South Street, Bridgewater, MA 02324, 508–697–3331, Monday–Wednesday: 9:00 a.m.–8:00 p.m., Thursday: 10:00 a.m.–5:00 p.m., Friday: 10:00 a.m.–2:00 p.m., Saturday: 10:00 a.m.–2:00 p.m., Sunday: Closed.

FOR FURTHER INFORMATION CONTACT: Derrick Golden, Remedial Project Manager, U.S. Environmental Protection Agency, Region 1 New England, 5 Post Office Square, Mail code OSRR07–4, Boston, MA 02109–3912, (617) 918–1448, *email: golden.derrick@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. NPL Deletion Criteria
III. Deletion Procedures
IV. Basis for Site Deletion
V. Deletion Action

I. Introduction

EPA Region 1 is publishing this direct final Notice of Deletion of the Cannon Engineering Corp. (CEC) Superfund (Site), from the National Priorities List (NPL). The NPL constitutes Appendix B of 40 CFR part 300, which is the Oil and Hazardous Substances Pollution Contingency Plan (NCP), which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, as amended. EPA maintains the NPL as the list of sites that appear to present a significant risk to public health, welfare, or the environment. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund (Fund). As described in 300.425(e)(3) of the NCP, sites deleted from the NPL remain eligible for Fund-financed remedial actions if future conditions warrant such actions.

Because EPA considers this action to be noncontroversial and routine, this action will be effective September 24, 2013 unless EPA receives adverse comments by August 26, 2013. Along with this direct final Notice of Deletion, EPA is co-publishing a Notice of Intent to Delete in the ''Proposed Rules'' section of the **Federal Register**. If adverse comments are received within

the 30-day public comment period on this deletion action, EPA will publish a timely withdrawal of this direct final Notice of Deletion before the effective date of the deletion, and the deletion will not take effect. EPA will, as appropriate, prepare a response to comments and continue with the deletion process on the basis of the Notice of Intent to Delete and the comments already received. There will be no additional opportunity to comment.

Section II of this document explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses the Cannon Engineering Corp. (CEC) Superfund Site and demonstrates how it meets the deletion criteria. Section V discusses EPA's action to delete the Site from the NPL unless adverse comments are received during the public comment period.

II. NPL Deletion Criteria

The NCP establishes the criteria that EPA uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making such a determination pursuant to 40 CFR 300.425(e), EPA will consider, in consultation with the state, whether any of the following criteria have been met:

i. Responsible parties or other persons have implemented all appropriate response actions required;

ii. all appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or

iii. the remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, the taking of remedial measures is not appropriate.

Pursuant to CERCLA section 121(c) and the NCP, EPA conducts five-year reviews to ensure the continued protectiveness of remedial actions where hazardous substances, pollutants, or contaminants remain at a site above levels that allow for unlimited use and unrestricted exposure. EPA conducts such five-year reviews even if a site is deleted from the NPL. EPA may initiate further action to ensure continued protectiveness at a deleted site if new information becomes available that indicates it is appropriate. Whenever there is a significant release from a site deleted from the NPL, the deleted site may be restored to the NPL without application of the hazard ranking system.

III. Deletion Procedures

The following procedures apply to deletion of the Site:

(1) EPA consulted with the state of Massachusetts prior to developing this direct final Notice of Deletion and the Notice of Intent to Delete co- published today in the ''Proposed Rules'' section of the **Federal Register**.

(2) EPA has provided the state 30 working days for review of this notice and the parallel Notice of Intent to Delete prior to their publication today, and the state, through the Massachusetts Department of Environmental Protection (MassDEP), has concurred on the deletion of the Site from the NPL.

(3) Concurrently with the publication of this direct final Notice of Deletion, a notice of the availability of the parallel Notice of Intent to Delete is being published in a major local newspaper, the Bridgewater Independent. The newspaper notice announces the 30-day public comment period concerning the Notice of Intent to Delete the Site from the NPL.

(4) The EPA placed copies of documents supporting the proposed deletion in the deletion docket and made these items available for public inspection and copying at the Site information repositories identified above.

(5) If adverse comments are received within the 30-day public comment period on this deletion action, EPA will publish a timely notice of withdrawal of this direct final Notice of Deletion before its effective date and will prepare a response to comments and continue with the deletion process on the basis of the Notice of Intent to Delete and the comments already received.

Deletion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Deletion of a site from the NPL does not in any way alter EPA's right to take enforcement actions, as appropriate. The NPL is designed primarily for informational purposes and to assist EPA management. Section 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions, should future conditions warrant such actions.

IV. Basis for Site Deletion

The following information provides EPA's rationale for deleting the Site from the NPL:

Site Background and History

The Cannon Engineering Corp. Superfund site (CEC), CERCLIS ID No. MAD079510780, is a 7-acre area of land and is located in a small industrial park in the western part of the Town of Bridgewater, Massachusetts. The site is located approximately 31 miles south from the city of Boston Massachusetts. Prior to 1969, the industrial park consisted of a wooded lowland bordered to the north, south, and east by rural agricultural land. Current land use around the site consists of industrial development in the immediate vicinity to the north and east, and a wooded lowland to the south and west, and agricultural and residential development in the outlying areas.

The CEC facility is one of the four separate but related sites which form the Cannons Site Group. The others are Cannons Plymouth Harbor located in Plymouth, Massachusetts; Tinkham's Garage in Londonderry, New Hampshire; and Gilson Road in Nashua, New Hampshire. All four sites are being handled under one enforcement effort.

CEC first purchased the parcel of land at the Site in November, 1974. The property was developed by them to handle, store, and incinerate chemical wastes. These activities occurred frequently at the Site between 1974 and November, 1980 when operations at the Site ceased after the MassDEP (then called the Department of Environmental Quality Engineering) revoked CEC's Waste License, citing document falsification and other waste reporting violations.

Over 700 drums and approximately 155,000 gallons of liquid waste and sludge in bulk storage were left behind on-site by CEC. Between 1980 and 1982, MassDEP and EPA conducted Site inspections, performed sampling and analyses and confirmed the presence of chemical contamination at the Site. Several tanks and drums were also observed to be leaking. In order to alleviate the problem of leaking contamination and wastes left on-site, the MassDEP performed a removal action. In October 1982, MADEP's contractor, Jet Line Services, Inc., removed approximately 155,000 gallons of sludge and liquid wastes that were stored in tanks and approximately 711 drums from the Site. A subsequent removal was conducted by the group of Potentially Responsible Parties (the ''PRP Group'') in June1988. The PRP Group removed the bulk contents of an underground tank, a septic tank, 3 tanker trailers and small (5 gallon or less) containers from laboratory and storage areas at the Site.

In December of 1982, the Site was proposed for inclusion on the NPL, (49 FR 40320) and the site was made final to the NPL on September 8, 1983, (51 FR 21054).

The property was redeveloped in November of 1996, when Osterman Propane, Inc., relocated its propane storage and distribution operations to the Site.

Remedial Investigation

The RI/FS was completed in May of 1987 and evaluated contamination present in air, soils, sediment, surface water and groundwater. Past operations of the facilities at the CEC Site have resulted in the contamination of localized areas of soil, sediments, surface water, and groundwater by chemical wastes.

The findings of the RI/FS determined the following: (1.) Soils, ranging from 4 inches to 22 feet below ground surface, were contaminated with volatile organic compounds (VOCs), semi-organic compounds (SVOCs), polychlorinated biphenyls (PCBs) and pesticides. (2.) Ambient air sampling detected the presence of VOCs. (3.) Groundwater sampling indicated the presence of VOCs, SVOCs and no PCBs nor pesticides. (4.) Sediment sampling results indicated the presence of VOCs, SVOCs and no PCBs and no pesticides. (5.) Surface water sampling results indicated the presence of VOCs, SVOCs and no PCBs nor pesticides. For specific details see the report entitled*: Final Report, Remedial Investigation, Cannons Engineering Corporation Site, Bridgewater, Massachusetts, May 1987.*

The Selected Remedy

In March of 1988, EPA issued a Record of Decision (ROD) for the cleanup of the Site. The cleanup actions were divided into two operable units. The major components of the cleanup remedies for the site included:

1. Management of Migration (MOM)

The MOM portion of the remedy included a twenty year groundwater monitoring program to assure that contamination above the Maximum Contaminant Levels (MCLs) did not migrate off-site, and to also assure that contaminant levels on-site naturally attenuated. The 1988 ROD estimated that groundwater cleanup target levels, based on the ingestion of on-site groundwater, would be achieved within 15 to 20 years. The Year 20 groundwater sampling event was completed in September of 2010. The management of migration remedy also required that institutional controls be placed on the property to restrict the use of groundwater at the Site. The institutional controls were implemented in 1991 in the form of a deed restriction on the properties.

2. Source Control

In summary, the source control portion of the remedy provided for fencing the entire Site to restrict access, onsite thermal aeration of soils contaminated with volatile organic compounds (VOCs) and treatment of PCB contaminated soils offsite by incineration.

In addition, onsite buildings and tanks were decontaminated and removed, and soils under those structures were sampled, along with other soil locations. Any contaminated soils that posed a threat to human health and the environment, were remediated via one of the above mentioned thermal treatment technologies.

All remedial actions, construction activities and cleanup levels related to the Source Control Operable Unit were completed and achieved. Therefore, on September 30, 1991, EPA prepared an Interim Close-out Report (ICOR) for the Site and it is included into the Administrative Record.

The remedial action objectives, as set forth in the 1988 ROD, identified to mitigate threats to public health are as follows:

- Prevent direct contact with contaminated soils throughout the site
- prevent ingestion of contaminated soils, standing water in the wet area
- prevent ingestion of contaminated groundwater
- prevent exposure to contaminants in the buildings, aboveground and underground tanks, and associated structures

The remedial action objectives identified to mitigate threats to the environment are as follows:

- Prevent the exposure of wildlife to contaminated soil, sediments, and standing water in the wet area
- prevent future wetlands contamination from surface water runoff and discharge

There are no ROD amendments for the Site; however an Explanation of Significant Differences (ESD) was signed in May of 2013. The ESD was issued to explain a modification to the selected cleanup levels for the MOM portion of the remedy, as set forth in the March 31, 1988, ROD for the Site. The MOM groundwater remedy was selected in 1988, before the 1993 revisions to the Massachusetts Contingency Pan (MCP). The MCP is the clean up regulations for the Massachusetts Department of Environmental Protection (MassDEP). Prior to 1993, the MCP classified all groundwater within the Commonwealth as a Class 1, or a potable aquifer. Therefore in the 1988 ROD the ingestion of groundwater was assumed to be a potential exposure pathway and Maximum Contaminant Levels (MCLs) were applicable. However, in 1993, MassDEP revised the MCP, which now established new groundwater categories for purpose of remediating waste sites. MassDEP conducted a reevaluation of site groundwater in the fall of 2012 and determined that the site is no longer located in a Class 1 or a potable aquifer. Because the ingestion of site groundwater is no longer considered a potential exposure pathway, MCL's are no longer applicable nor appropriate for cleanup goals at the Site.

Due to the reclassification of groundwater use at the Site, in March of 2012, EPA's risk assessor conducted a cumulative human health and ecological risk assessment. This assessment was performed on all of the remaining contaminated groundwater using the annual groundwater data from 2009, 2010 and 2011. The conclusions of the cumulative risk assessment determined that that there is no unacceptable human health risks because there is no foreseeable use of this groundwater for drinking water purposes at the site. The EPA risk assessment memo is included as attachment 2 to the May 2013 ESD, which is included in the Administrative Record for the Site.

Furthermore because the MOM and SC remedial actions are complete and both human health and ecological risks are within EPA's acceptable range, EPA prepared a Final Close Out Report (FCOR), dated June 2013. The FCOR is included in the administrative record and deletion docket for the site and a copy was also sent to the Bridgewater public library.

Response Actions

As required in the ROD, fencing of the perimeter to restrict uncontrolled access was completed in December 1988. As part of the Remedial Design, an asbestos inspection was performed and asbestos containing materials (ACMs) were found in several of the former onsite buildings. The proper removal and offsite disposal of all ACMs was completed in the spring of 1990. Decontamination, demolition and disposal of all on-site structures, including buildings, storage tanks, piping and an electrical transformer, was completed in February of 1990.

Approximately 397 tons of PCB contaminated soils were excavated transported and properly incinerated offsite. Post-excavation confirmatory samples verified that PCB concentrations in the remaining soils were below the 9 ppm cleanup level.

The PCB soil excavations were backfilled with a clean fill and this action was completed in August of 1990.

Between June 11, 1990 and October 10, 1990, a total of 11,330 tons of VOC contaminated soils were excavated and thermally aerated on-site using the Low Temperature Thermal Aeration Unit (LTTA). Post-excavation confirmatory sampling verified that VOC contaminated soil removal to the remedial design excavation levels was achieved. The VOC treated soils were replaced on site and used as part of the fill material in the excavations.

The MOM component of the remedy included the installation of 6 new overburden monitoring wells and 3 new bedrock monitoring wells for the long term monitoring of groundwater quality. Long term groundwater, surface water, sediment and seep monitoring began in 1990 and were completed in September of 2010.

The final field activities involved Site restoration that included wetland restoration of 35,000 square feet of wetlands and then topsoil material was added and then re-graded and seeded. The entire upland area, approximately 99,000 square feet, was backfilled with the treated VOC and SVOC soils and was also re-graded and seeded. Drainage and erosion controls were implemented as part of the final Site restoration activities. All remedial action activities were complete by July of 1991, when the roll-off containers were removed from the Site and all of the final grading, seeding, and landscaping activities were completed.

Cleanup Goals

The soil and groundwater cleanup levels were established in part, from utilizing an Organic Leaching Model, as well as expressions for partitioning and retardation of contaminant movement relative to groundwater. The cleanup levels were set to be within EPA's acceptable risk range of 1×10^{-4} to 1×10^{-6} and additional details may be found in the Remedial Action Report for the Site, dated October 1991.

Overall, a total of 11,330 tons of VOC and SVOC impacted soils were excavated and thermally aerated onsite and 396.65 tons of PCB impacted soils were excavated and incinerated off-site. These removal quantities were sufficient to satisfy the specified clean-up levels as verified by the confirmatory sampling programs and is documented in the September 1991 Interim Final Closeout Report, EPA.

Operation and Maintenance

Long Term groundwater, sediment, surface water and seep sampling was conducted at the site for twenty years, per the 1988 ROD. These sampling efforts were completed in September of 2010. EPA will continue to conduct future Five Year Reviews at the site to ensure the remedies remain protective of both human health and the environment. The PRP Group shall adhere to and maintain compliance with the institutional controls/deed restrictions for the Site. At some point in the future, the PRP Group may need to properly abandon the groundwater monitoring wells as directed by EPA, with MassDEP concurrence.

Institutional Controls (ICs), in the form of a deed restriction, was placed on the properties which comprise the Site. The ICs state the following:

- The Site is restricted to certain types of municipal or town uses, until EPA and MassDEP provide certification that other uses are permissible, i.e., no residential use.
- No excavation is allowed from below the level of the groundwater table, until EPA and MassDEP provide certification otherwise.
- No groundwater may be extracted from any point on the site nor shall it serve as a drinking water supply or be used for any other purpose until EPA and MassDEP provide certification otherwise.

These ICs were placed on the Site in 1991 and were recorded and filed with the Plymouth Massachusetts Registry of Deeds. The ICs currently remain in place and were verified in the 2010 Five Year Review.

Five-Year Reviews

Five Year Reviews have been competed for the Site in 1995, 2000, 2005, and 2010.

All of these Five Year Review determined that:

- The source control remedy, as documented by EPA, was complete in 1991, and judged by EPA to still be protective
- The groundwater remedy for the Cannon Engineering Corp. Site is expected to be protective of human health and the environment upon completion, and in the interim, exposure pathways that could result in unacceptable risks are being controlled through institutional controls.

The next Five Year Review will be completed in 2015.

Community Involvement

In 1982, EPA released a community relations plan which kept the local citizens group and other interested parties informed through activities such as informational meetings, community updates, press releases and public meetings. A hard copy of the 2010 Five Year Review was provided to the Bridgewater Town Clerk and Health Agent. A notice announcing the Five Year Review was placed in a local newspaper of general circulation. A notice announcing EPA's intent to delete the site from the NPL was placed in a local newspaper, the Bridgewater Independent.

Determination That the Site Meets the Criteria for Deletion in the NCP

The implemented remedy achieves the degree of cleanup specified in the ROD for all pathways of exposure. All selected remedial action objectives and clean-up levels are consistent with agency policy and guidance. No further Superfund responses are needed to protect human health and the environment at the Site.

The National Contingency Plan (NCP) specifies that EPA may delete a site from the NPL if ''all appropriate responsible parties or other persons have implemented all appropriate response actions required'' or ''all appropriate fund financed response under CERCLA has been implemented and no further response action by responsible parties is appropriate''. EPA, with the concurrence of the Commonwealth of Massachusetts through the MassDEP by a letter dated May 22, 2013, believes these criteria for deletion have been satisfied. Therefore EPA is proposing the deletion of the Site from the NPL. All of the completion requirements for the Site have been met as described in the Cannons Engineering Final Closeout Report (FCOR), dated June 2013.

V. Deletion Action

The EPA, with concurrence of the Commonwealth of Massachusetts through the MassDEP, has determined that all appropriate response actions under CERCLA, other than Five Year Reviews have been completed. Therefore, EPA is deleting the Site from the NPL.

Because EPA considers this action to be noncontroversial and routine, EPA is taking it without prior publication. This action will be effective September 24, 2013 unless EPA receives adverse comments by August 26, 2013. If adverse comments are received within the 30-day public comment period, EPA will publish a timely withdrawal of this direct final notice of deletion before the effective date of the deletion, and it will not take effect. EPA will prepare a

response to comments and continue with the deletion process on the basis of the notice of intent to delete and the comments already received. There will be no additional opportunity to comment.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: July 18, 2013.

H. Curtis Spalding,

Regional Administrator, EPA Region 1—New England.

For the reasons set out in this document, 40 CFR part 300 is amended as follows:

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

■ 1. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

■ 2. Table 1 of Appendix B to part 300 is amended by removing ''Cannon Engineering Corp. (CEC)'', ''Bridgewater'', ''MA''.

[FR Doc. 2013–18049 Filed 7–25–13; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

46 CFR Part 502

[Docket No. 13–06]

RIN 3072–AC52

Commission's Rules of Practice and Procedure; Practice Before the Commission, Parties to Proceedings, and Rulemakings

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission (FMC or Commission) amends its Rules of Practice and Procedure regarding practice before the Commission, parties to proceedings, and rulemakings, to update, clarify, and reduce the burden on parties to proceedings before the Commission.

DATES: Effective: July 29, 2013.

FOR FURTHER INFORMATION CONTACT: Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street NW., Washington, DC 20573–0001, Tel.: (202) 523–5725, Email: *secretary@fmc.gov.* Rebecca A. Fenneman, General Counsel, Federal Maritime Commission, 800 North Capitol Street NW., Washington, DC 20573–0001, Tel.: (202) 523–5740, Email: *generalcounsel@fmc.gov.*

SUPPLEMENTARY INFORMATION: The Commission's Rules of Practice and Procedure, 46 CFR Part 502, govern procedures before the Commission. 46 CFR 502.1–502.991. The rules are in place to secure just, speedy, and inexpensive resolution of proceedings before the Commission. The Commission is engaged in an ongoing process of reviewing its rules of practice and revising those that are outdated, unclear, or unduly burdensome. This effort resulted in revision to Subpart A to modernize and clarify general filing requirements effective February 24, 2011, and amendments to Subparts E and L, effective November 12, 2012. See 76 FR 10258, Feb. 24, 2011 and 77 FR 61519, Oct. 10, 2012. As part of this continuing process, the Commission has determined to amend Subparts B, C, D, and certain additional sections in E. The amendments include transferring certain rules from one subpart to another without change in substance to better reflect the subject matter addressed by existing subparts. The amendments also include revisions for purposes of clarification, modernization, or to reflect current practice, technical, non-substantive changes to effect renumbering and removal of rules, as well as correction of some typographical errors in the rules.

A description of the more significant changes follows:

Section 502.25—Presiding Officer

The Final Rule restates the presiding officer's authority presently contained in Subpart J § 502.147 and includes in separate paragraphs the provisions presently found in §§ 502.145, 146, and 149. The Commission has determined that provisions related to the presiding officer's authority and functions are more appropriately described in proximity to the definition of the presiding officer in ''Subpart B—Appearance and Practice Before the Commission.'' Subheadings are added describing the presiding officer's authority for ease of reference without change in substance of the enumerated powers. Current § 502.148 governing the consolidation of proceedings is moved and restated in a new § 502.79 in Subpart E governing proceedings.

Section 502.27—Persons Not Attorneys at Law

Section 502.27 is amended to streamline the Commission's rules regarding practice before the Commission by persons who are not admitted to the practice of law by a State bar. The rule is updated to provide that the application for admission may be obtained on-line or from the Secretary. The provisions previously found in Sections 502.29 and 502.30 governing a non-attorney's qualifications for admission to practice, to continue representing others after admission, and the right to a hearing in the event of denial of admission, suspension, or disbarment are folded into this section for clarity.

Exhibit No. 1 to Subpart B [§§ 502.23, 502.26, 502.27] of Part 502—Notice of Appearance

Exhibit No. 1 to Subpart B, a sample format for a Notice of Appearance, is amended to request an indication of authority for representation, and to allow for selection of technologically current methods of service of notices and orders in proceedings. The revised form is consistent with current Commission practice.

Section 502.41—Parties; How Designated

Section 502.41 of Subpart C is revised to add to the term ''party'' a unit of a government agency representing such agency. It also reflects the current citations of other rules that were renumbered by prior amendments.

Section 502.42—Bureau of Enforcement

Section 502.42 is amended to simplify the language describing when the Bureau of Enforcement may become a party to proceedings.

Section 502.43—Substitution of Parties

Section 502.43 is modified to harmonize the language of the Federal Rules of Civil Procedure.

Section 502.44—Necessary and Proper Parties in Certain Complaint Proceedings

Section 502.44 is eliminated as unnecessary.

Subpart D—Rulemaking

Language in §§ 502.52, 502.53, 502.54, and 502.55 is revised for clarity. The requirement that service on prior participants be made when submitting comments or replies beyond the initial round in proposed rulemaking proceedings, also found in § 502.114, is reiterated in § 502.57

Subpart E, Section 502.79—Consolidation of Proceedings

New § 502.79 restates the language of current § 502.148 authorizing the consolidation of proceedings involving substantially the same issues. The Commission has determined that this provision is more appropriately stated in Subpart E, governing proceedings.

Section 502.201(h)—Duty To Disclose; General Provisions Governing Discovery

Section 502.201(h) is amended to make the timing of the parties' conference consistent with the requirements of § 502.64. It also corrects a typographical error with respect to the discovery period which was changed to 150 days effective November 12, 2012.

These amendments affect only the Commission's Rules of Practice and Procedure and, as such, are not subject to the general notice of proposed rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 553(b)(A). The Commission has determined to publish the amendments as a final rule. Therefore, this final rule is not subject to the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

This Final Rule is not a ''major rule'' under 5 U.S.C. 804(2).

List of Subjects in 46 CFR Part 502

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Maritime carriers, Penalties, Reporting and recordkeeping requirements.

For the reasons stated in the **SUPPLEMENTARY INFORMATION**, the Federal Maritime Commission amends 46 CFR part 502 as follows.

PART 502—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 502 is revised to read as follows:

Authority: 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561–569, 571–596; 5 U.S.C. 571–584; 18 U.S.C. 207; 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. 305, 40103–40104, 40304, 40306, 40501–40503, 40701–40706, 41101–41109, 41301–41309, 44101–44106; E.O. 11222 of May 8, 1965.

■ 2. Amend § 502.21 by revising the heading of paragraph (b), and by revising paragraph (c) to read as follows:

§ 502.21 Appearance.

* * * * *

(b) *Non-parties.* * * *

(c) *Special appearance.* An appearance may be either general, that is, without reservation, or it may be special, that is, confined to a particular issue or question. A person who desires to appear specially must expressly so state when entering the appearance, and, at that time, shall also state the questions or issues to which the appearance is confined; otherwise the appearance will be considered general. [Rule 21.]

■ 3. Amend § 502.23 by revising paragraphs (a), (c), and (d), and adding paragraph (e), to read as follows:

§ 502.23 Notice of appearance; substitution and withdrawal of representative.

(a) Upon filing of a complaint instituting proceedings or filing of an answer to an order or complaint, the party filing shall notify the Commission of the name(s), address(es), telephone number(s), and email address(es) of the person or persons who will represent the party in the pending proceeding. Each person who appears in a representative capacity in a proceeding must deliver a written notice of appearance to the Secretary stating for whom the appearance is made. Such notice must indicate whether the representative wishes to be notified of notices, orders and decisions by either email or facsimile transmission. All appearances shall be noted in the record. Motions for leave to intervene must indicate the name(s), address(es), telephone number(s), and email address(es) of the person or persons who will represent the intervenor in the pending proceeding if the motion is granted.

* * * * *

(c) An attorney must represent in the Notice of Appearance that he is admitted to practice and in good standing. A non-attorney must describe his or her authority to act in such capacity.

(d) If an attorney or other representative of record is superseded, there shall be filed a stipulation of substitution signed both by the attorney(s) or representative(s) and by the party, or a written notice from the party to the Commission with a Notice of Appearance included. Substitution of counsel or representative will not, by itself, be considered good cause for delaying a proceeding.

(e) If an attorney wishes to withdraw from representing a party, and written consent is not obtained, or if the party is not otherwise represented, the withdrawing attorney shall file an appropriate motion seeking permission to withdraw and provide appropriate reasons for making the motion. Such motion will be decided in consideration of the factors and standards set forth in Rule 1.16 of the American Bar Association's Model Rules of Professional Conduct and by the courts. [Rule 23.]

■ 4. Revise § 502.25 to read as follows:

§ 502.25 Presiding officer.

(a) *Definition.* Presiding officer includes, where applicable, one or more members of the Commission or an administrative law judge.

(b) *Functions and powers.* The officer designated to hear a case shall have the following powers:

(1) *Notices of hearing, subpoenas, depositions, pleadings and scope of proceedings.* To arrange and give notice of hearing; sign and issue subpoenas authorized by law; take or cause depositions to be taken; rule upon proposed amendments or supplements to pleadings; and, delineate the scope of a proceeding instituted by order of the Commission by amending, modifying, clarifying, or interpreting said order.

(2) *Alternative means of dispute resolution and conferences for settlement or simplification of issues.* To inform the parties as to the availability of one or more alternative means of dispute resolution, encourage use of such methods, and require consideration of their use at an early state of the proceeding; hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution; transmit the request of parties for the appointment of a mediator or settlement judge, as provided by § 502.91; and require the attendance at any such conference pursuant to 5 U.S.C 556(c)(8), of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy.

(3) *Hearings, evidence, procedural requests, motions, oaths and affirmations, and witnesses.* To regulate the course of a hearing; prescribe the order in which evidence shall be presented; dispose of procedural requests or similar matters; hear and rule upon motions; administer oaths and affirmations; examine witnesses; direct witnesses to testify or produce evidence available to them; rule upon offers of proof and receive relevant, material, reliable, and probative evidence; act upon motions to intervene; permit submission of facts, arguments, offers of settlement, and proposals of adjustment; and, if the parties so request, issue formal opinions providing tentative evaluations of the evidence submitted; hear oral argument at the close of the testimony.

(4) *Time management and other matters.* To fix the time for filing briefs, motions, and other documents to be

filed in connection with hearings and the administrative law judge's decision thereon, except as otherwise provided by the rules in this part; act upon petitions for enlargement of time to file such documents, including answers to formal complaints; and dispose of any other matter that normally and properly arises in the course of proceedings.

(5) *Exclusion of persons from a hearing.* To exclude any person from a hearing for disrespectful, disorderly, or inappropriate language or conduct.

(c) *Functions and powers pursuant to Reorganization Plan No. 7 of 1961.* All of the functions delegated in subparts A to Q and subpart T of this part, inclusive, to the Chief Judge, presiding officer, or administrative law judge include the functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter, pursuant to the provisions of section 105 of Reorganization Plan No. 7 of 1961. [Rule 147.]

(d) *Designation of administrative law judge.* An administrative law judge will be designated by the Chief Administrative Law Judge to preside at hearings required by statute, in rotation so far as practicable, unless the Commission or one or more members thereof shall preside, and will also preside at hearings not required by statute when designated to do so by the Commission.

(e) *Attachment of functions.* In proceedings handled by the Office of Administrative Law Judges, its functions shall attach:

(1) Upon the service by the Commission of a Notice of Filing of Complaint and Assignment of complaint filed pursuant to § 502.62, or § 502.182, or upon referral under subpart T of this part; or

(2) Upon reference by the Commission of a petition for a declaratory order pursuant to § 502.68; or

(3) Upon forwarding for assignment by the Office of the Secretary of a special docket application pursuant to § 502.271; or

(4) Upon the initiation of a proceeding and ordering of hearing before an administrative law judge pursuant to § 502.63.

(f) *Unavailability.* If the presiding officer assigned to a proceeding becomes unavailable, the Commission, or Chief Judge (if such presiding officer was an administrative law judge), shall designate a qualified officer to take his or her place. Any motion predicated upon the substitution of a new presiding officer for one originally designated shall be made within ten (10) days after notice of such substitution.

(g) *Disqualification of presiding or participating officer.* Any presiding or participating officer may at any time withdraw if he or she deems himself or herself disqualified, in which case there will be designated another presiding officer. If a party to a proceeding, or its representative, files a timely and sufficient affidavit of personal bias or disqualification of a presiding or participating officer, the Commission will determine the matter as a part of the record and decision in the case. [Rule 25.]

■ 5. Amend § 502.26 by removing ''An attorney must represent in writing, filed with the Secretary, that he is admitted to practice and in good standing.''

■ 6. Amend § 502.27 by revising paragraphs (a)(2), (b) and (c), and adding paragraphs (a)(3), (d) and (e) to read as follows:

§ 502.27 Persons not attorneys at law.

(a) * * *

(2) The application for admission to practice before the Commission by persons not attorneys at law can be downloaded from the Commission's Web site, *www.fmc.gov,* or acquired from the Secretary of the Commission and must be accompanied by a fee as required by § 503.43(e) of this chapter. The application should be sent to the Federal Maritime Commission, Washington, DC 20573.

(3) All applicants must complete the following certification:

I. __ (Name) __, certify under penalty of perjury under the laws of the United States, that I have not been convicted, after September 1, 1989, of any Federal or State offense involving the distribution or possession of a controlled substance, or that if I have been so convicted, I am not ineligible to receive Federal benefits, either by court order or operation of law, pursuant to 21 U.S.C. 862.

(b) The Commission, in its discretion, may call upon the applicant for a full statement of the nature and extent of his or her qualifications. If the Commission is not satisfied as to the sufficiency of the applicant's qualifications, it will so notify him or her by registered mail, whereupon he or she shall be granted a hearing upon request for the purpose of showing his or her qualifications. If the applicant presents to the Commission no request for such hearing within twenty (20) days after receiving the notification above referred to, his or her application shall be acted upon without further notice.

(c) The Commission may deny admission to, suspend, or prohibit any person from practice before the Commission who it finds does not possess the requisite qualifications to represent others or is lacking in character, integrity, or proper professional conduct. Non-attorneys who have been admitted to practice before the Commission may be excluded from such practice only after being afforded an opportunity to be heard.

(d) A non-attorney may not practice before the Commission unless and until an application has been approved.

(e) Paragraph (d) of this section shall not apply, however, to any person who appears before the Commission on his or her own behalf or on behalf of any corporation, partnership, or association of which he or she is a partner, officer, or regular employee. [Rule 27.]

§ 502.29 [Removed and Reserved]

■ 7. Remove and reserve § 502.29.

§ 502.30 [Removed and Reserved]

■ 8. Remove and reserve § 502.30.

■ 9. Revise Exhibit No. 1 to Subpart B of Part 502 to read as follows:

Exhibit No. 1 to Subpart B [§§ 502.23, 502.26, 502.27] of Part 502—Notice of Appearance

Federal Maritime Commission

Docket No. _____:

Please enter my appearance in this proceeding as counsel for _____.

Indicate authority for representation [choose one of the following]:

____ I am an attorney admitted to practice and in good standing before the courts of the State of _____.

____ I am admitted to practice before the Commission pursuant to 46 C.F.R. 502.27.

____ I am an officer, director, or regular employee of the party.

I request to be informed of service of notices, orders and decisions in this proceeding by [choose one of the following]:

[ ] electronic mail
[ ] facsimile transmission
[ ] regular mail

_____
[Name]

_____
[Address]

_____
[Telephone No.]

_____
[Fax No.]

_____
[Email address]

_____
[Signature]

■ 10. Revise § 502.41 to read as follows:

§ 502.41 Parties; how designated.

The term ''party,'' whenever used in this part, includes any natural person, corporation, association, firm,

partnership, trustee, receiver, agency, public or private organization, government agency, or unit thereof representing said agency. A party who files a complaint under § 502.62 shall be designated as ''complainant.'' A party against whom relief or other affirmative action is sought in a proceeding commenced under § 502.62 or § 502.73 or a party named in an order of investigation issued by the Commission shall be designated as ''respondent,'' except that in investigations instituted under section 11(c) of the Shipping Act of 1984, 46 U.S.C. 41302(a)–(b), 41307(b), the parties to the agreement shall be designated as ''proponents'' and the parties protesting the agreement shall be designated as ''protestants.'' A person who has been permitted to intervene under § 502.68 shall be designated as ''intervenor.'' All parties and persons designated in this section shall be parties to the proceeding. No person other than a party or its representative may introduce evidence or examine witnesses at hearings. [Rule 41].

■ 11. Revise § 502.42 to read as follows:

§ 502.42 Bureau of Enforcement.

The Bureau of Enforcement shall be a party to proceedings upon designation by the Commission or upon leave to intervene granted pursuant to § 502.68. The Bureau's representative shall be served with copies of all papers, pleadings, and documents in every proceeding in which the Bureau is a party. The Bureau shall actively participate in any proceeding to which it is a party, to the extent required in the public interest, subject to the separation of functions required by section 5(c) of the Administrative Procedure Act. [Rule 42]

■ 12. Revise § 502.43 to read as follows:

§ 502.43 Substitution of parties.

The Commission or presiding officer may order an appropriate substitution of parties in the event of a party's death, incompetence, transfer of its interest, or other appropriate circumstance. [Rule 43]

§ 502.29 [Removed and Reserved]

■ 13. Remove § 502.44.

■ 14. Revise § 502.52(b) to read as follows:

§ 502.52 Notice of proposed rulemaking.

* * * * *

(b) Except where notice or hearing is required by statute, paragraph (a) of this section shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice of the Commission, or when the Commission for good cause finds (and incorporates the findings and a brief statement of reasons therefor in the rules issued) that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. [Rule 52]

■ 15. Amend § 502.53 as follows:

■ a. Amend paragraph (a) by removing ''to present the same orally in any manner'' and adding ''for oral presentation'' in its place;

■ b. Amend paragraph (b) by adding ''rulemaking'' in between ''In those'' and ''proceedings''; and

■ c. Add a new paragraph (c) to read as follows.

§ 502.53 Participation in rulemaking.

* * * * *

(c) Where a formal hearing is held in a rulemaking proceeding, interested persons will be afforded an opportunity to participate through submission of relevant, material, reliable, and probative written evidence properly verified, except that such evidence submitted by persons not present at the hearing will not be made a part of the record if objected to by any party on the ground that the person who submits the evidence is not present for cross-examination.

■ 16. Revise § 502.54 to read as follows:

§ 502.54 Contents of rules.

The Commission will incorporate in any publication of proposed or final rules a concise and general statement of their basis and purpose. [Rule 54.]

■ 16. Revise § 502.55 to read as follows:

§ 502.55 Effective date of rules.

The publication or service of any substantive rule shall be made not less than thirty (30) days prior to its effective date except:

(a) As otherwise provided by the Commission for good cause found that notice and public procedure thereon are impractical, unnecessary, or contrary to the public interest;

(b) In the case of rules granting or recognizing exemption or relieving restriction; interpretative rules; or statements of policy.

(c) Interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice. [Rule 55.]

■ 17. Add new § 502.57 to subpart D to read as follows:

§ 502.57 Service by parties of pleadings and other documents.

Service on all prior commenters must be shown when submitting comments or replies beyond the initial round on a notice of proposed rulemaking. A list of all participants may be obtained from the Secretary of the Commission.

■ 18. Add new § 502.79 to subpart E to read as follows:

§ 502.79 Consolidation of proceedings.

The Commission or the Chief Administrative Law Judge (or designee) may order two or more proceedings which involve substantially the same issues consolidated and heard together.

§§ 502.145–502.149 [Removed and Reserved]

■ 19. Remove and reserve § 502.145–§ 502.149.

§ 502.201 [Amended]

■ 20. Amend § 502.201(h) by removing ''14 days,'' and adding ''15 days'' in its place, and removing ''120-day,'' and adding ''150-day'' in its place.

By the Commission.

Karen V. Gregory,

Secretary.

[FR Doc. 2013–17953 Filed 7–25–13; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket Nos. 10–90; 07–135; 05–337; 03–109; GN Docket No. 09–51; CC Docket Nos. 01–92, 96–45; WT Docket No. 10–208; FCC 11–161; FCC 12–52]

Annual Report for Mobility Fund Phase I Support and Record Retention

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection associated with the Commission's Annual Report for Mobility Fund Phase I Support and Record Retention, adopted as part of the Connect America Fund & Intercarrier Compensation Reform Order and the Third Order on Reconsideration. This notice is consistent with the Order, which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of the rules.

DATES: The rules in §§ 54.1008(d) and (e), 54.1009(a) through (c) and 54.1010, published at 76 FR 73830, November 29, 2011 are effective July 26, 2013.

FOR FURTHER INFORMATION CONTACT: Rita Cookmeyer, Wireless

Telecommunications Bureau, 202–418–0434, via the Internet at *Rita.Cookmeyer@fcc.gov.*

SUPPLEMENTARY INFORMATION: This document announces that on March 28, 2013, OMB approved, for a period of three years, the information collection requirements contained in 47 CFR 54.1008(d) and (e), 54.1009(a) through (c) and 54.1010 and the new FCC Form 690. The Commission publishes this document to announce the effective date of these rule sections. See, In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support, WC Docket Nos. 10–90, 07–135, 05–337, 03–109; GN Docket No. 09–51; CC Docket Nos. 01–92, 96–45; WT Docket No. 10–208; FCC 11–161, 76 FR 73830 and FCC 12–52, 77 FR 30904, May 24, 2012. If you have any comments on the burden estimates listed below, or how the Commission can improve the collections and reduce any burdens caused thereby, please contact Judith B. Herman, Federal Communications Commission, Room 1–B441, 445 12th Street SW., Washington, DC 20554. Please include the OMB Control Number, 3060–1185, in your correspondence. The Commission will also accept your comments via email at *PRA@fcc.gov.*

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received OMB approval on March 28, 2013, for the information collection requirements contained in 47 CFR part 54. Under 5 CFR 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a current, valid OMB Control Number. The OMB Control Number is 3060–1185. The foregoing notice is required by the Paperwork Reduction Act of 1995, Pub. L. 104–13, October 1, 1995, and 44 U.S.C. 3507.

The total annual reporting burdens and costs for the respondents are as follows:

OMB Control Number: 3060–1185.

OMB Approval Date: 03/28/2013.

OMB Expiration Date: 03/31/2016.

Title: Annual Report for Mobility Fund Phase I Support, FCC Form 690 and Record Retention Requirements.

Form Number: FCC Form 690.

Respondents: Business or other for-profit entities, not-for-profit institutions, and state, local or tribal government.

Number of Respondents and Responses: 70 respondents; 820 responses.

Estimated Time per Response: 18 hours.

Frequency of Response: On occasion and annual reporting requirements, third party disclosure requirements and recordkeeping requirements.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in 47 U.S.C. sections 154, 254 and 303(r) of the Communications Act of 1934, as amended.

Total Annual Burden: 14,830 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: Impact Assessment:

Nature and Extent of Confidentiality: There is no need for confidentiality. The information collected on FCC Form 690 will be made available for public inspection. Applicants may request materials or information submitted to the Commission be given confidential treatment under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will use this information to ensure that each winning bidder is meeting its obligations for receiving Mobility Fund Phase I support. On November 18, 2011, the Federal Communications Commission released a Report and Order in the Universal Service Fund & Intercarrier Compensation Transformation Order (USF/ICC) proceeding, WC Docket Nos. 10–90, 07–135, 05–337, 03–109; GN Docket No. 09–51; CC Docket Nos. 01–92, 96–45; WT Docket No. 10–208; FCC 11–161. On May 14, 2012, the Commission released the Third Order on Reconsideration of the USF/ICC Report and Order which revised certain Mobility Fund Phase 1 rules. In adopting the rules, the Commission provided for one-time support to immediately accelerate deployment of networks for mobile broadband services in unserved areas. Thus, the information is being collected to meet the objectives of the Universal Service Fund program.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–17930 Filed 7–25–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 87 and 90

[WT Docket No. 11–202; FCC 13–95]

Radiolocation Operations in the 78–81 GHz Bands; Request by the Trex Enterprises Corporation for Waiver

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) amends its rules to permit the certification, licensing, and use of foreign object debris (FOD) detection radar equipment in the 78–81 GHz band. The presence of FOD on airport runways, taxiways, aprons, and ramps poses a significant threat to the safety of air travel. FOD detection radar equipment will be authorized on a licensed basis.

DATES: Effective August 26, 2013.

FOR FURTHER INFORMATION CONTACT: Tim Maguire, Mobility Division, Wireless Telecommunications Bureau, (202) 418–2155.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Report and Order* (*R&O*), in WT Docket No. 11–202; FCC 13–95, adopted July 10, 2013, and released July 11, 2013. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554, or by downloading the text from the Commission's Web site at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0301/FCC-13-30A1.pdf.* The complete text also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street SW., Suite CY–B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *FCC504@fcc.gov* or calling the Consumer and Government Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

I. Background

1. Foreign object debris (FOD) at airports, including any substance, debris, or object in a location that can damage aircraft or equipment, can seriously threaten the safety of airport personnel and airline passengers, and can have a negative impact on airport logistics and operations. Trex

Enterprises Corporation (Trex) has developed radar technology that meets the Federal Aviation Administration's (FAA) guidance and performance specifications for FOD detection equipment and can reduce this risk to personal safety and property by detecting the presence of FOD on airport runways. The 78–81 GHz band in which Trex's equipment operates is allocated on a primary basis for Federal and non-Federal radio astronomy and radiolocation systems, but is not listed in the table of frequencies available under part 90, which authorizes non-Federal radiolocation operations such as Trex's FOD detection equipment.

2. In the *Notice of Proposed Rule Making and Order* in this proceeding, the Commission proposed to amend part 90 to permit non-Federal radiolocation operations, including FOD radar detection technology, in the 78–81 GHz band, and granted Trex a waiver of part 90 to permit certification, manufacture, and licensing of its FOD detection radar equipment pending the resolution of its petition for rulemaking.

II. Discussion

3. No commenter supports part 90 licensing of any 78–81 GHz band non-Federal radiolocation other than FOD detection. We therefore amend part 90 to authorize only FOD detection radar on a licensed basis.

4. We do not adopt technical specification for FOD detection radar in the 78–81 GHz band. Applications will be considered and authorized on a case-by-case basis. FOD detection radar will be licensed on the condition that the main beamwidth of the antenna (azimuth or elevation) does not illuminate a public roadway near the airport.

5. Authorization of other potential uses of the 78–81 GHz band will be considered in other proceedings. The Commission may at that time consider whether to adopt additional rules governing FOD detection radar in the band (such as the adoption of technical specifications) in order to ensure compatibility between FOD detection radar and other uses, including those that may operate on an unlicensed basis under part 15 of the Commission's rules. Until such technical specifications or other rules are adopted, we will consider the technical parameters required under the waiver when authorizing FOD equipment. During this period we will also accept applications for equipment authorization for devices using similar or more conservative parameters than those specified in the waiver. Any request for equipment authorization of devices with parameters that, in our evaluation, may be considered to cause more interference as compared with the technical parameters in the waiver will be reviewed on a case-by-case basis.

III. Procedural Matters

A. Paperwork Reduction Act Analysis

6. This document does not contain new or modified information collection requirements.

B. Report to Congress

7. The Commission will send a copy of the *R&O* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

C. Final Regulatory Flexibility Analysis

8. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM* in WT Docket No. 11–202, 77 FR 1661, January 11, 2012. The Commission sought written public comment on the proposals in the *NPRM,* including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Need for, and Objectives of, the Report and Order

9. The rules adopted in the *Report and Order* are intended to amend the Part 90 rules to permit foreign object debris (FOD) detection equipment to be certified and licensed. We believe the use of FOD technology will be a critical tool in the detection of FOD at airports. FOD includes any substance, debris, or object in a location that can damage aircraft or equipment, can seriously threaten the safety of airport personnel and airline passengers and have a negative impact on airport logistics and operations.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA

10. No comments were submitted specifically in response to the IRFAs. Nonetheless, we have considered the potential economic impact on small entities of the rules discussed in the IRFAs, and we have considered alternatives that would reduce the potential economic impact on small entities of the rules enacted herein.

Description and Estimate of the Number of Small Entities to Which Rules Will Apply

11. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by the rules changes adopted in this *Report and Order.*

12. The SBA has developed a small business size standard for airport operations within the two broad economic census categories of ''Air Traffic Control'' and ''Other Airport Operations.'' Under both categories, the SBA deems a business to be small if it has average annual receipts of seven million dollars or less. For the census category of Airport Operations, Census Bureau data for 2007 show that there were 1,895 firms in this category that operated for the entire year. Of this total, 1,567 had annual revenue of less than five million dollars, and 167 had annual revenue between five and ten million dollars. Thus, under this category and associated small business size standard, the majority of firms can be considered small.

13. The Census Bureau defines the category of ''RF Equipment Manufacturers'' as follows: ''This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.'' The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: All such firms having 750 or fewer employees. According to Census bureau data for 2007, there were a total of 939 firms in this category that operated that year. Of this total, 912 had fewer than 500 employees and 27 had 500 or more

employees. Thus, under this size standard, the majority of firms can be considered small.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

14. There are no projected reporting, recordkeeping or other compliance requirements.

Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

15. The RFA requires an agency to describe the steps it has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

16. We believe the changes adopted in the *R&O* will promote flexibility and more efficient use of the spectrum, and allow licensees to better meet their communication needs. In this *R&O,* we will allow the certification, licensing, and use of foreign object debris detection radar in the 78–81 GHz band.

17. The Commission will send a copy of the *R&O* in WT Docket No. 11–202 including the Final Regulatory Flexibility Analysis, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *R&O,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the SBA. A copy of the *R&O* and the Final Regulatory Flexibility Analysis (or summaries thereof) will also be published in the **Federal Register**.

List of Subjects in 47 CFR parts 87 and 90

Communications equipment; Radio.

Federal Communications Commission.

Sheryl D. Todd,

Deputy Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 87 and 90 as follows:

PART 87— AVIATION SERVICES

■ 1. The authority citation for part 87 continues to read as follows:

Authority: 47 U.S.C. 154, 303 and 307(e), unless otherwise noted.

■ 2. Section 87.5 is amended by adding a definition ''Air operations area'' in alphabetical order to read as follows:

§ 87.5 Definitions.

* * * * *

Air operations area. All airport areas where aircraft can operate, either under their own power or while in tow. The airport operations area includes runways, taxiways, apron areas, and all unpaved surfaces within the airport's perimeter fence. An apron area is a surface in the air operations area where aircraft park and are serviced (refueled, loaded with cargo, and/or boarded by passengers).

* * * * *

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

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

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7), and Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112–96, 126 Stat. 156.

■ 4. Section 90.103(b) is amended by adding a new entry at the end of the table in paragraph (b), and by adding paragraph (c)(30) to read as follows:

§ 90.103 Radiolocation Service.

* * * * *

(b) * * *

RADIOLOCATION SERVICE FREQUENCY TABLE

Frequency or band	Class of stations	Limitations
*	*	*
78,000–81,000	.....do	30

(c) * * *

(30) Use is limited to foreign object debris detection in airport air operations areas (see section 87.5 of this chapter). The radar must be mounted and utilized so when in use it does not, within the main beamwidth of the antenna (azimuth or elevation), illuminate a public roadway near the airport.

* * * * *

[FR Doc. 2013–18013 Filed 7–25–13; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R5–ES–2012–0045; 4500030113]

RIN 1018–AY12

Endangered and Threatened Wildlife and Plants; Endangered Species Status for Diamond Darter

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered species status under the Endangered Species Act of 1973 (Act), as amended, for diamond darter (*Crystallaria cincotta*), a fish species from Kentucky, Indiana, Ohio, Tennessee, and West Virginia. The effect of this regulation will be to add this species to the Lists of Endangered and Threatened Wildlife.

DATES: This rule becomes effective August 26, 2013.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* and at the West Virginia Field Office. Comments and materials we received, as well as supporting documentation used in preparing this rule, are available for public inspection at *http://www.regulations.gov.* All of the comments, materials, and documentation that we considered in this rulemaking are available, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, West Virginia Field Office, 694 Beverly Pike, Elkins, WV 26241, by telephone (304) 636–6586 or by facsimile (304) 636–7824.

FOR FURTHER INFORMATION CONTACT: John Schmidt, Acting Field Supervisor, West Virginia Fish and Wildlife Office (see **ADDRESSES** section). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act (Act), a species may warrant protection through listing if it is endangered throughout all or a significant portion of its range. Listing a species as an endangered or threatened species can only be completed by issuing a rule. We will also be finalizing a designation of

critical habitat for the diamond darter under the Act in the near future.

This rule will finalize the listing of the diamond darter (*Crystallaria cincotta*) as an endangered species.

The basis for our action. Under the Act, we can determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) Overutilization for commercial, recreational, scientific, or educational purposes; (C) Disease or predation; (D) The inadequacy of existing regulations; or (E) Other natural or manmade factors affecting its continued existence. The Act also requires that we designate critical habitat concurrently with listing determinations, if designation is prudent and determinable. We have determined that the diamond darter is endangered by water quality degradation; habitat loss; a small population size that makes the species vulnerable to the effects of the spread of invasive species; loss of genetic fitness; and catastrophic events, such as toxic spills.

Peer review and public comment. We sought comments from independent specialists to ensure that our designation is based on scientifically sound data, assumptions, and analyses. We invited these peer reviewers to comment on our listing proposal. We also considered all comments and information received during the comment periods.

Previous Federal Actions

Please refer to the proposed listing rule for the diamond darter (77 FR 43906, July 26, 2012) for a detailed description of previous Federal actions concerning this species.

We will also finalize a designation of critical habitat for the diamond darter under the Act in the near future.

Background

Please refer to the proposed listing rule for the diamond darter (77 FR 43906, July 26, 2012) for a complete summary of the species' information.

Summary of Biological Status and Threats

The diamond darter, a fish species in the perch family, inhabits medium to large, warmwater streams with moderate current and clean sand and gravel substrates (Simon and Wallus 2006, p. 52). In the Elk River of West Virginia, the diamond darter has been collected from riffles and pools where swift currents result in clean-swept, predominately sand and gravel substrates that lack silty depositions (Osier 2005, p. 11).

Historical records of the species indicate that the diamond darter was distributed throughout the Ohio River Basin and that the range included the Muskingum River in Ohio; the Ohio River in Ohio, Kentucky, and Indiana; the Green River in Kentucky; and the Cumberland River Drainage in Kentucky and Tennessee. The species is currently known to exist only within the lower Elk River in Kanawha and Clay Counties, West Virginia, where it was rediscovered in 1980 (Cincotta and Hoeft 1987, p. 133), and is considered extirpated from the remainder of the Ohio River Basin (Cicerello 2003, p. 3; Welsh and Wood 2008, pp. 62, 68). The species has not been collected since 1899 in Ohio, 1929 in Kentucky, and 1939 in Tennessee (Grandmaison *et al.* 2003, p. 6).

Despite extensive surveys using multiple gear types, including many specifically targeting the diamond darter, no diamond darters have been found anywhere besides the Elk River, West Virginia, in more than 70 years. The diamond darter has been extirpated from most of its historical range, and is currently known to occur only within a single reach of the Elk River in West Virginia. Extirpation from these historical habitats likely resulted from a progression of habitat degradation and subsequent reductions in fish populations; this started with a significant increase in siltation due to land use changes beginning in the mid 1800s and continuing into the early 1900s, followed by water quality degradation associated with increases in sewage, industrial discharges, and mining effluents entering the water, and then finally the impoundment of rivers that inundated riffle habitat and further increased the amount of siltation (Preston and White 1978, pp. 2–4; Trautman 1981, pp. 21–29; Pearson and Pearson 1989, pp. 181–184). The combination of these factors, culminating in the impoundment of rivers, likely led to population reductions and then eventual extirpations of the diamond darter from historical habitats.

A number of factors have likely allowed the Elk River to continue to support this species. The Elk River watershed is dominated by steep, relatively inaccessible terrain. As a result, the area was not easy to settle or develop, and large-scale land use changes, industrial development, and human population increases, along with the resultant siltation and reductions in water quality, did not begin in this area until much later and were much less pervasive than in many other portions of the species' range (Northern and Southern West Virginia Railroad Company 1873, pp. 9–32; Brooks 1910, p. 1; West Virginia Agricultural Experiment Station 1937, p. 1; Trautman 1981, pp. 13–35; Strager 2008, p. 9). In addition, the Elk River is located adjacent to the main Appalachian Plateau, with steep valleys and underlying porous soils. This allows for the absorption of a considerable portion of rainfall, which tends to retard runoff and maintain the flow of larger streams in the watershed even in periods of low rainfall (Baloch *et al.* 1970, p. 3). Finally, the Elk River is still free flowing and largely unimpounded for much of its length. These factors likely reduced the duration and severity of historical water quality degradation and siltation experienced in this watershed compared to other portions of the species' range. Other species, such as the Western sand darter, show a similar pattern to the diamond darter of extirpation in other Ohio River watersheds, while retaining populations within the Elk River (Cincotta and Welsh 2010, pp. 318–325).

Very little information is available on the reproductive biology and early life history of the diamond darter (Welsh *et al.* 2008, p. 1; Ruble and Welsh 2010, p. 1), but spawning likely occurs mid-April to May, and larvae hatch within 7 to 9 days afterward (Ruble *et al.* 2010, pp. 11–12). If the diamond darter's reproductive behavior is similar to crystal darters in the wild, then females may be capable of multiple spawning events and producing multiple clutches of eggs in one season (George *et al.* 1996, p. 75). Crystal darters lay their eggs in side channel riffle habitats over sand and gravel substrates in moderate current. Adult crystal darters do not guard their eggs (Simon and Wallus 2006, p. 56). Embryos develop in the clean interstitial spaces of the coarse substrate (Simon and Wallus 2006, p. 56).

After hatching, the larvae are pelagic and drift within the water column (Osier 2005, p. 12; Simon and Wallus 2006, p. 56; NatureServe 2008, p. 1). The larva may drift downstream until they reach slower water conditions such as pools, backwaters, or eddies (Lindquist and Page 1984, p. 27). Darter larva may be poorly developed skeletally and unable to hold position or swim upstream where stronger currents exist (Lindquist and Page 1984, p. 27). It is not known how long diamond darters or crystal darters remain in this pelagic phase, but the pelagic phase of other darters adapted to larger rivers lasts for 15 to 30 days (Rakes 2013, p.

1). The duration of time that larvae drift in the current (the drift interval) differs between species based on the size of the stream the larvae use and the food that the larvae eat (Lindquist and Page 1984, pp. 27–28). Species with smaller drift intervals may have reduced genetic exchange as less mixing may occur between stocks in upstream and downstream populations, and, therefore, they may be more susceptible to genetic isolation (Lindquist and Page 1984, pp. 28–29). Downstream movement of young during larval drift must be offset by upstream migration of juveniles and adults, so species with longer drift intervals likely undertake more extensive spawning migrations than those without (Lindquist and Page 1984, p. 27). The life expectancy and age of first reproduction of diamond darters is unknown in the wild, but has been reported to range from two to four years, although some authors have suggested the potential to live up to seven years (Osier 2005, Simon and Wallus 2006). Individual diamond darters have been maintained in captivity for 2 years.

Although there are currently insufficient data available to develop an overall population estimate for the species, the results of numerous survey efforts confirm that the species is extremely rare. Fish surveys have been conducted in the Elk River in 1936, 1971, 1973, 1978 to 1983, 1986, 1991, 1993, 1995, 1996, and every year since 1999 (Welsh *et al.* 2004, pp. 17–18; Welsh 2008, p. 2; Welsh 2009a, p. 1). Survey methods included backpack and boat electrofishing, underwater observation, kick seines, bag seines, benthic trawls, and spotlights (Welsh *et al.* 2004, p. 4; Welsh *et al.* 2012, 1–18). Starting in early 1990s, the timing of sampling and specific methods used were targeted towards those shown to be effective at capturing *Crystallaria* and similar darter species during previous efforts (Welsh *et al.* 2004, pp. 4–5; Hatch 1997, Shepard *et al.* 1999, and Katula 2000 in Welsh *et al.* 2004, p. 9; Ruble 2011a, p. 1). Despite extensive and targeted survey efforts within the species' known range and preferred habitat in the Elk River, fewer than 125 individuals have been collected in the more than 30 years since the species was first collected in the Elk River (SEFC 2008 p. 10; Cincotta 2009a, p. 1; Cincotta 2009b, p. 1; Welsh 2009b, p. 1, Ruble and Welsh 2010, p. 2). Over 80 percent of these collections occurred in the past 5 years. The increased capture rates in recent years are most likely a direct result of more focused conservation efforts, including recent research on the species' habitat requirements, coupled with the availability of habitat maps for the entire Elk River, which has allowed survey efforts to concentrate on specific areas of the Elk River where diamond darters are most likely to be found. Also, the development and use of new survey techniques that have a higher detection rate for diamond darters have resulted in more comprehensive surveys (Ruble 2011a, p. 1; West Virginia Division of Natural Resources (WVDNR) 2012, p. 83; Welsh *et al.* 2012, pp. 8–10).

For example, previous research documented that diamond darters are most likely to be captured in shoals and concentrate in these areas to forage. In 2012, additional focused survey efforts were conducted in selected shoals that had previously been mapped, and either had previous diamond darter captures or appeared to be highly suitable habitat for the species based on visual assessments (Ruble 2011a, p. 1; Welsh *et al.* 2012, pp. 8–10). Habitat evaluations were conducted within these shoals to refine the delineation areas that appeared to have the most likely foraging habitat for the species; areas were then sampled using survey techniques that have been most successful at locating diamond darters (Welsh *et al.* 2012, pp. 1–18). Surveys were conducted during low water conditions and during the time of night when diamond darters were expected to be active and foraging, so that most diamond darters present should be visible. Transects were spaced across the surveyed areas so that the entire delineated habitat area was sampled (Welsh *et al.* 2012, p. 9). Ten of the 28 shoals within the range of the species were sampled. The number of diamond darters located at each shoal ranged from 0 to 20. A total of 82 diamond darters were documented. Four additional shoals located upstream of King Shoals, outside the currently known range of the diamond darter, were also sampled. No diamond darters were located in these upstream areas (Welsh *et al.* p. 10). These recent numbers provide a sense of the potential distribution and total abundance of the species present in the Elk River in 1 year.

Summary of Comments and Recommendations

In the proposed rule to list the diamond darter as endangered and designate critical habitat that published on July 26, 2012 (77 FR 43906), we requested that all interested parties submit written comments by September 25, 2012. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. Newspaper notices inviting general public comment were published in the Charleston Gazette and the Courier Journal, which in combination cover all affected counties in West Virginia and Kentucky. We did not receive any requests for a public hearing. The second comment period opened on March 29, 2013, and closed on April 29, 2013 (78 FR 19172), and requested comments on the proposed rule and a draft economic analysis (DEA) prepared in support of the proposed critical habitat designation.

During the first comment period, we received 14 comment letters, 1 of which was a duplicate, from 13 individuals or entities directly addressing the proposed listing of the diamond darter as endangered. During the second comment period, we received 10 additional comment letters, 1 of which bulk-submitted approximately 4,840 form letters, from 9 individuals or entities. General, nonsubstantive comments of an editorial nature were incorporated in the final rule as appropriate. Substantive comments regarding the proposed listing are summarized and addressed below. Comments addressing the proposed designation of critical habitat and the associated DEA, rather than the proposed listing, are discussed and addressed under a separate rulemaking finalizing a designation of critical habitat for the diamond darter under the Act, that we intend to publish in the near future.

Peer Reviewer Comments

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinion from five knowledgeable individuals with scientific expertise on the diamond darter and its habitat, biological needs, and threats. We received individual responses from three of the peer reviewers. One peer reviewer's response was incorporated into comments submitted by his employer, the WVDNR. Those comments are addressed under *Comments from States.*

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding the listing of the diamond darter. The peer reviewers all generally concurred with our conclusions and provided supporting information on the taxonomy, distribution, and threats described in the proposed rule. Two peer reviewers explicitly concurred that threats to the only remaining population of the diamond darter in the Elk River, West Virginia, were accurately

described, and that scientific evidence supported listing the species as endangered. One peer reviewer also commented about the similarities between the diamond darter and the only other species in the genus, the crystal darter, and described how that species has also been extirpated from much of its historic range. Minor edits as a result of these peer reviewer comments were incorporated into the final rule as appropriate. We received one additional substantive comment as described below.

(1) *Comment:* The extent of potential larval drift should be considered when describing potential diamond darter distribution. Additional research is needed to determine how far larval drift occurs and what larvae are eating in the wild.

Our Response: We concur that it is important to consider requirements of larval life stages and the potential for larval drift. We have added information to the life history section about potential larval movements. We also concur that additional species-specific research on this topic is needed so we can more accurately describe the life history of this species. However, the Act requires that the Secretary shall make determinations solely on the basis of the best available scientific and commercial data available. Because further information about the diamond darter's larval stage is not available and the current data supports our endangered status determination for the species, we have determined that larval drift information is not required to finalize the listing of the diamond darter.

Federal Agency Comments

The only Federal agency comments we received were from the Natural Resources Conservation Service (NRCS). The NRCS submitted comment letters during each of the two comment periods.

(2) *Comment:* The NRCS acknowledged its responsibility under section 7(a)(1) of the Act to conserve listed species and its numerous programs that focus on aquatic restoration that could benefit the diamond darter. The agency indicated a willingness to work with us to concentrate implementation of its programs in the areas that support the diamond darter. The agency also indicated that it has already incorporated programmatic measures to ensure many of its activities avoid adverse effects to the diamond darter and include implementation of species-specific conservation measures. The agency recommended that the Service work with the NRCS to update these programmatic agreements and develop mutually acceptable avoidance measures and beneficial practices for the diamond darter. The programmatic approach will reduce regulatory burdens on landowners who are working with the NRCS and will expedite conservation of the species.

Our Response: The Service concurs that the NRCS has acted proactively to protect the diamond darter and other sensitive aquatic species and that the NRCS has many programs that can benefit this species. We appreciate its support and recognize that partnerships are essential for the conservation of the diamond darter and other federally listed or imperiled species. We fully support developing and updating programmatic approaches to recover this species and look forward to continued work with the NRCS.

Comments From States

Section 4(i) of the Act states, ''the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.'' We received comments from two State agencies, the WVDNR and the West Virginia Department of Environmental Protection (WVDEP). Comments received from the State agencies are summarized below, followed by our responses to their additional substantive comments.

The WVDNR concurred with the proposed designation and stated that the Service has ''conclusively substantiated that the only known population of this species . . . is vulnerable to destruction, modification, or curtailment of its habitat or range, and is without adequate existing regulations to assist its continued survival.'' The agency further stated that the Service has provided an ''overwhelming amount of data'' that the species meets the criteria for endangered status, and that the only known population of this species could be extirpated by a single adverse event or from chronic pollution or sedimentation. The agency provided additional comments supportive of our description of the species' taxonomy, and of our descriptions of habitats used by the species.

The WVDNR agreed with our assessment of the threats to the species' habitat and range as listed under the Summary of Factors Affecting the Species—Factor A, including sedimentation, mining, and oil and gas development. The agency stated that the documentation provided demonstrates conclusively that the threats described may either independently or cumulatively impact the existence of the diamond darter in the Elk River. The agency particularly noted the threats associated with sedimentation, and described it as one of the most underrated impacts to aquatic environments in the State. The agency suggested that increased inspections and enforcement of regulations at mining, gas, and forestry sites to control sedimentation within the Elk River watershed should occur. The WVDNR concurred that there were no major threats associated with overutilization or disease or predation as described under the Summary of Factors Affecting the Species—Factors B and C, respectively, but expressed a willingness to develop additional protections for this species through the West Virginia scientific collecting or fishing permit process, if this is deemed necessary. In regard to Factor D, the WVDNR concurred that existing regulatory mechanisms are often vague and are not directly applicable to the needs of the diamond darter. Existing laws such as the Clean Water Act, Surface Mining Control and Reclamation Act, and State natural resource laws may indirectly mitigate threats, but protections under the Act may be necessary to provide for the continued maintenance and preservation of the last remaining population. Finally, the WVDNR expressed a willingness to work with us on developing a recovery plan.

The WVDEP concurred that the diamond darter's small remaining population is susceptible to the effects of diminished genetic variability and invasive species such as *Didymosphenia geminate,* but questioned the significance of various threats to the species, as well as our description of embeddedness and sedimentation in relation to the species' habitat requirements. A summary of additional substantive comments received from State agencies and our responses are provided below.

(3) *Comment:* The WVDNR does not concur with Woolman (1892) that the diamond darter was probably always uncommon throughout its range. Rather, based on recent sampling efforts, the WVDNR suggested that the species is evasive to standard collecting methods that were common during Woolman's time period. The agency, therefore, concurs with Trautman (1981) that the species was probably common before 1900 and suggests that diamond darter populations must be of a certain size before their presence can be detected with traditional collecting methods. The agency submits that the diamond darter was first detected in the Elk River in the 1980s because the diamond darter

population had increased in response to water quality improvements resulting from environmental regulations enacted in the late 1970s. The agency provided additional data regarding similar population increases seen in other fish in the Ohio, Monongahela, Kanawha, and Little Kanawha Rivers.

Our Response: We have reexamined the original text from Woolman (1892, pp. 249–288). His statement about the species being ''not widely distributed, nor common anywhere'' appears to refer specifically to the results of his surveys within selected streams in Kentucky, and does not apply to the species' entire range. Woolman does not provide detailed descriptions of the methods used during his collection, but based on references to seines in several places of the document, and the description of the conditions experienced at sampling sites, it appears his collections were made during the day using seines. Based on our review of recent captures and survey techniques used and the biology of the species, we concur that diamond darters are not likely to be frequently captured by the sampling techniques used by Woolman. In addition, Woolman captured multiple diamond darters with relatively little effort (time spent sampling) while conducting surveys using seine nets during the day when the species is likely to be buried in the sand. Woolman's sampling method is in comparison to the level of effort recently required to collect multiple diamond darters using seine nets at night when the species is likely more active and not buried in the sand. This discrepancy in sampling methodology would indicate that diamond darters were likely more abundant and thus more likely to be captured, during the time of Woolman's sampling. It therefore seems reasonable and logical to infer that diamond darters were historically more widespread and abundant than would be indicated by the results of surveys conducted by Woolman and others of his time period who were using methods now known to be not well suited to documenting the species and during times of day when the species is less likely to be active.

It is also reasonable to assume that water quality improvements since the late 1970s may have had a positive effect on diamond darter populations, similar to the effect on populations of other fish species. In addition to the data cited by the WVDNR, surveys on the Ohio River mainstem between 1957 and 2001 documented a general improvement in abundance and diversity of fish populations over that time. Of the 56 species whose population trends could be analyzed, 35 (62 percent) showed an increase (Thomas *et al.* 2004, p. 436). In addition, 11 out of 13 fish species listed as of special concern, threatened, or endangered by one or more of the Ohio River border States showed population increases (Thomas *et al.* 2004, p. 439). These improvements were attributed to improved water quality in the Ohio River mainstem and its tributaries (Pearson and Pearson 1989, p. 186; Thomas *et al.* 2004, pp. 440–442). This may be one factor that allowed the diamond darter to be detected in the Elk River in the late 1980s. Another factor may be that, before the 1950s, the West Virginia fish fauna were poorly sampled due to difficult terrain and limited roads, so few surveys took place historically in the Elk River and other relatively inaccessible West Virginia watersheds, while there are more extensive records from watersheds in other States that were more accessible and, thus, more frequently sampled (Cincotta and Welsh 2010, p. 323).

Therefore, we concur that the diamond darter was likely more abundant and widespread than may be indicated by historical surveys, and also may have responded positively to previous water quality improvements. However, we lack empirical data on which to base historical estimates of population or distribution beyond the actual results of collections as described in the *Species Distribution and Status* section of the proposed listing rule, and we cannot speculate on historical distribution or actual historical abundances of the diamond darter in those areas, including in the Elk River. Current survey methods using multiple gear types, or using methods targeted toward capturing the diamond darter, provide a more accurate indication of the current potential abundance and distribution of the species.

(4) *Comment:* The WVDNR commented that the only record for the Western sand darter in the State is from the same area as the diamond darter, and that the Western sand darter shares a pattern of extirpation within Ohio River drainages similar to that seen in the diamond darter. The Elk River likely functioned as a refugium for these two species because of the fairly large size of the watershed, the free-flowing nature of much of the Elk River, and its position adjacent to the montane, high-gradient flows of the main Appalachian Plateau, all of which kept the habitats sufficiently clean.

Our Response: We concur that these factors allowed the Elk River to serve as a refugium for many aquatic species, including both the diamond darter and the Western sand darter. Of the watersheds that either currently or were historically known to support the species, the Elk River is unique in having this combination of factors, and this combination of factors likely allowed this river to continue to support these species despite historical perturbations. Cincotta and Welsh (2010, pp. 318–325) provide additional documentation of the Western sand darter's similar pattern of historical rangewide distribution and extirpation, as well as subsequent rediscovery in the Elk River in the mid-1980s. We have added a discussion in the final rule about additional factors that may have allowed the Elk River to retain populations of the diamond darter, and referenced similar trends in distribution and abundance seen in the Western sand darter.

(5) *Comment:* The WVDEP suggests that the primary and most direct cause of the diamond darter's decline was from habitat loss and population isolation associated with historical impoundment of streams that the species inhabited, rather than water quality degradation or inadequate regulatory mechanisms. The agency suggested that the diamond darter likely has persisted in the Elk River because it is largely unimpounded, and that the impacts of impoundment are understated in the proposed rule.

Our Response: We concur that impoundment was one of the most direct and dramatic historical causes of diamond darter habitat loss. Impoundment of rivers for navigation may have been the final factor resulting in extirpation of the diamond darter from many of its historical habitats. However, most citations that discuss historical conditions within the previous range of the diamond darter mention a progression of habitat degradation and subsequent reductions in fish populations; this progression started with a significant increase in siltation due to land use changes in the mid-1800s and continued into the early 1900s, followed by water quality degradation associated with increases in sewage, industrial discharges, and mining effluents entering the water, and then, finally, the impoundment of rivers that inundated riffle habitat and further increased the amount of siltation (Preston and White 1978, pp. 2–4; Trautman 1981, pp. 21–29; Pearson and Pearson 1989, pp. 181–184). Consistent with the discussions in these references, we conclude that the combination of these factors, culminating in the impoundment of rivers, likely led to population reductions and then eventual extirpations of the fish species. We have thus retained discussions of

siltation and the various sources of water quality degradation as threats to the diamond darter discussed under the Summary of Factors Affecting the Species—Factor A. We have also included a statement about the significance of impoundment in extirpating the species from much of its historical range. See our response to comment #4 for further discussion of factors that may have allowed the species to survive in the Elk River, including the river's relatively free-flowing condition, and our response to comment #3 for discussion of the potential effects of historical water quality degradation and regulatory mechanisms.

(6) *Comment:* The WVDEP commented that the concept of embeddedness described in the proposed rule is inconsistent with the species' habitat requirements. The agency stated that, if the diamond darter occupies habitats with ample sand, some embeddedness of the larger particles in these areas is expected and necessary. If diamond darters are captured on sand, they are likely not being collected from substrates with 'sparse to low embeddedness.' The agency further suggested that the concepts of siltation versus sedimentation be clarified since it would appear that the diamond darter is susceptible to the effects of siltation, which is the accumulation of fines (e.g., particles smaller than sand), while being dependent upon a relative abundance of sand to fulfill life history functions.

Our Response: Embeddedness is generally described as a measure of the degree that cobble, gravel, and boulder substrates are surrounded, impacted in, or covered by fine materials (Shipman 2000, p. 12). As substrates become embedded, the surface area available to macroinvertebrates and fish (shelter, spawning, and egg incubation) is decreased (Barbour *et al.* 1999, pp. 5–13; Sylte and Fischenich 2007, p. 12). Researchers use at least five methods for measuring embeddedness, but sampling methods are not standardized and ''fines'' are not consistently defined (Sylte and Fischenich 2007, p. 12). As noted by WVDEP, many methodologies include sands as ''fines'' that increase embeddedness (Barbour *et al.* 1999, pp. 5–13). However, other methods are more ambiguous. For example, Shipman (2000, p. 12) explains that ''naturally sandy streams are not considered embedded; however, a sand predominated stream that is the result of anthropogenic activities that have buried the natural course substrates is considered embedded.'' These inconsistent definitions may make use of the term embeddedness confusing, particularly for a species such as the diamond darter that requires substrates with a high natural percentage of sands.

We concur with the WVDEP that the diamond darter is susceptible to the effects of siltation, which is the accumulation of fines, or particles smaller than sand, while being dependent upon a relative abundance of natural sand to fulfill certain life-history functions. We have therefore clarified in the final rule that the diamond darter requires substrates that are not embedded with fine silts or clays, and removed references to measures of embeddedness that are not consistently defined.

We have also clarified our use of the terms siltation and sedimentation. We note that many publications use these two terms interchangeably and do not define or differentiate between the terms. For the final rule, we have used the term siltation to specifically refer to the pollution of water by fine particulate terrestrial material, with a particle size dominated by silt or clay. It refers both to the increased concentration of suspended sediments and to the increased accumulation (temporary or permanent) of fine sediments on stream bottoms; whereas, sedimentation refers to the deposition of suspended soil particles of various sizes from large rocks to small particles (Wikipedia 2013a, p. 1; Wikipedia 2013b, p. 1). Sedimentation is used as the opposite of erosion, is often caused by land use changes or disturbances, and is a common source of siltation in a stream (Wikipedia 2013b, p. 1). However, while we have clarified terminology, the best available data illustrate that the diamond darter requires low levels of siltation and substrates with naturally high percentages of sands that are not embedded with silts and clays. Excess sedimentation can degrade diamond darter habitat by both increasing siltation resulting in increased substrate embeddedness and by destabilizing stream channels, banks, and substrates.

(7) *Comment:* The WVDEP commented that the impacts of coal mining activities may not be a leading threat to the species. Less than four percent of the watershed has been subjected to coal mining activities. Coal mining activities that are compliant with the State's water quality standards are less likely to affect the diamond darter than other historical activities such as impoundment. The WVDEP stated it is unlikely that any constituents commonly associated with mining, including conductivity, emanating from permitted, compliant activities will adversely affect the persistence of the diamond darter. The agency suggests that, because the species has persisted through time periods with little or no water quality regulation, when water quality conditions were more polluted than they are now, the species may not be overly sensitive to water quality degradation associated with mining.

Our Response: The Service has identified numerous activities that are cumulatively contributing to the present or threatened destruction, modification, or curtailment of the diamond darter's habitat or range, as described in the Summary of Factors Affecting the Species—Factor A. The Service concurs that current coal mining activities that are fully compliant with all existing State and Federal regulatory requirements, when compared to historical activities such as impoundment and unregulated mining, are certainly less likely to be a threat to the diamond darter and its habitats. However, impacts from historical mining, such as acid mine drainage from abandoned mined lands, continue to be a significant source of water quality degradation in the Elk River watershed (WVDEP 2011b, p. 41). The WVDEP has also identified active mining as one source of selenium, metals, and sedimentation, which are currently impairing biological conditions in Elk River watersheds (WVDEP 2011b, pp. 29, 37, 63). While the overall percentage of the entire Elk River watershed subjected to mining activities may be small, watersheds of some Elk River tributaries, such as Leatherwood Creek, are highly dominated by mining activity and include mining permits encompassing 81 to 100 percent of the subwatersheds (WVDEP 2011b, p. 37). Mining is likely a significant factor affecting the water quality of streams, such as Leatherwood Creek, that are principle tributaries to the Elk River. The effects of these mining activities conducted both within the Elk River mainstem and in Elk River tributaries, coupled with the effects from other activities described in Factor A, are continuing threats to the diamond darter.

As discussed in the proposed rule (77 FR 43906) and below, the diamond darter has already been extirpated from most of its historical range. As described in our response to comment #5, these extirpations were likely a result of the cumulative effects of siltation, water quality degradation, and impoundment. Our response to comment #3 provides more information on how other fish populations in the Ohio River basin have responded to water quality improvements since major

environmental regulations were enacted, and how the diamond darter population may have had a similar response. We have no information to suggest that the diamond darter is less sensitive to water quality degradation than these other more common species; rather the diamond darter's pattern of extirpation in other watersheds suggests they may be more sensitive to water quality degradation and cumulative effects.

(8) *Comment:* The WVDEP commented that, although mining-associated water quality impacts have been noted in the Elk River, the WVDNR considers the Elk River a ''high quality stream,'' and WVDEP benthic macroinvertebrate surveys indicate good biological conditions in the stream. Similar comments were received from members of the public including the West Virginia Chamber of Commerce (WVCC) and other industry and trade groups. The commenters all suggested the stream classification and results of macroinvertebrate studies are evidence that threats from mining, forestry, and oil and gas may be overstated, and that existing regulatory mechanisms are adequately protecting the diamond darter.

Our Response: The Elk River's listing as a ''high quality stream'' by the WVDNR does not indicate that there is a lack of threats to the species or water quality degradation in the watershed. As noted in the proposed rule (77 FR 43906) and below, criteria for placement on the high-quality streams list are based solely on the presence of significant fisheries populations and the use of those populations by the public (WVDNR 2001, p. 36). Water quality or threats to the watershed are not included as criteria for determining whether a stream should be added to the list (Brown 2009, p. 1). The WVDEP previously identified some streams listed on both the WVDNR high-quality streams list and the WVDEP impaired waterways list under section 303(d) of the Clean Water Act (CWA). The WVDEP explains that the dual listing indicates both that the streams support game fisheries and that the game fisheries therein may be threatened (WVDEP 2005, p. 31). The Elk River simultaneously occurred on both lists in 2010.

The WVDEP reports detailing the results of the Elk River benthic macroinvertebrate surveys state that larger rivers, as opposed to smaller rivers, offer a wider variety of microhabitats, and, therefore, the high benthic macroinvertebrate scores may mask some degradation in water quality (WVDEP 1997, p. 41). These WVDEP reports also identify coal mining, oil and gas development, erosion and sedimentation, timber harvesting, water quality degradation, and poor wastewater treatment as threats to the Elk River watershed (WVDEP 1997, p. 15; WVDEP 2008b, pp. 1–2; WVDEP 2011b, pp. viii–ix). We conclude that the Elk River's listing as a high-quality stream and high benthic macroinvertebrate scores are insufficient evidence to conclude that there are no significant threats to the watershed.

Public Comments

We received public comments from 12 individuals or organizations. Four individuals provided letters supporting the listing, and one of these individuals provided substantive information corroborating our threats analysis. Three organizations, The Nature Conservancy (TNC), the West Virginia Rivers Coalition (WVRC), and Kentucky Waterways Alliance, also supported the proposed rule and provided substantive comments or additional supporting information corroborating our threats analysis. The Center for Biological Diversity (CBD), on behalf of 16 additional organizations, submitted comments in support of the proposed listing and reiterated information presented in the proposed rule. In addition, approximately 4,840 individuals associated with CBD provided form letters supporting the proposed listing that reiterated the comments provided by CBD. The WVRC, CBD, and associated individuals urged the Service to act quickly to finalize the listing of the species, with the WVRC suggesting that protection is needed now while there still may be a viable breeding population of diamond darters. Four organizations, the WVCC, the West Virginia Oil and Natural Gas Association (WVONGA), the West Virginia Coal Association (WVCA), and the West Virginia Forestry Association (WVFA), did not support the proposed rule and provided additional substantive comments. These four organizations each submitted separate comments during both of the comment periods, and all urged the Service to delay listing of the species until a more thorough record regarding the proposal was developed. A summary of the substantive comments we received regarding the proposed listing and our responses are provided below.

(9) *Comment:* The WVCC, WVCA, WVFA, and WVONGA all commented that listing the diamond darter is not warranted because the proposed rule underestimates the effectiveness of existing regulatory mechanisms. These commenters suggest that coal, oil and gas, and forestry activities are effectively regulated by a comprehensive network of overlapping Federal and State laws such that threats from these industries are not significant. They cite the requirements and protections provided by the Clean Water Act, the West Virginia Pollution Control Act, the West Virginia Oil & Gas Act, the 2011 West Virginia Horizontal Well Act, the West Virginia Abandoned Well Act, the WVDEP Erosion and Sediment Control Manual, and the mandatory use of best management practices (BMPs) for timbering activities. The commenters state that many of these regulations and requirements were specifically designed with protection of water quality and reduction of sedimentation as their primary goals, and the commenters suggest that these regulatory mechanisms have been documented to be effective at reducing sedimentation, pollution, and metals in waterways.

Our Response: We concur that the network of existing regulatory mechanisms cited above has resulted in improvements in water and habitat quality when compared to conditions prior to enactment of these laws (See our response to comment #2). Many of these regulations were designed to protect water quality, reduce the amount of erosion and sedimentation occurring in streams, or both. When these regulations are fully complied with and vigorously enforced, they can be effective at reducing adverse effects from the regulated activities. We have made reference to these additional laws in our discussion of the Summary of Factors Affecting the Species—Factor D, and cited some examples of where compliance with these regulatory mechanisms has been shown to reduce potential threats. However, as discussed in the Summary of Factors Affecting the Species—Factor A, degradation of the diamond darter's habitat is continuing despite these regulatory mechanisms.

In addition, there are a number of threats that are not addressed by any existing regulatory mechanisms. Unregulated threats include geographic isolation, invasive species, accidental spills and catastrophic events, and non-forestry-related activities occurring on private lands that contribute sediments and other non-point-source pollutants to the Elk River watershed. Because the only remaining population of this species is restricted to one small reach of one stream, these unregulated threats alone make listing the diamond darter warranted. The cumulative effects of all the threats listed under the Summary of Factors Affecting the Species—Factors A, B, C, and E, including ongoing habitat degradation, coupled with the

effects of other natural and manmade factors affecting the species' continued existence, further justify listing the diamond darter as endangered.

(10) *Comment:* The WVCC, WVCA, WVFA, and WVONGA all commented that the only evidence the proposed rule cites to support the claim that existing regulatory mechanisms are inadequate is the small size of the current diamond darter population. They suggest there is no evidence that a sizable diamond darter population ever existed in the Elk or any other river and that, without evidence of a once-thriving population, the proposed rule's conclusion that existing regulatory mechanisms are to blame for the species' low population is unsupported. They further state that the adverse effects of inbreeding and small population size are not merely an ongoing threat to the diamond darter, but have been affecting the species for many decades. This factor alone could explain why the population has not increased despite relatively high water quality in the mainstem Elk River. They concluded that until genetic robustness of the population is evaluated, the claim that existing regulatory mechanisms are inadequate is unsupported and is arbitrary and capricious.

Our Response: We concur that adverse effects of inbreeding and small population size have likely been affecting the last remaining population of the diamond darter for many years. However, the small size of the diamond darter population is not cited as evidence of the inadequacy of existing regulatory mechanisms as described under the Summary of Factors Affecting the Species—Factor D. Rather, the small size and restricted range are cited as separate and distinct threats to the species under the Summary of Factors Affecting the Species—Factor E (Other Natural or Manmade Factors Affecting Its Continued Existence). The Act requires that the Secretary shall make determinations solely on the basis of the best available scientific and commercial data available. Because further information about the diamond darter's genetic robustness is not available and the current data supports our endangered status determination for the species, we disagree that additional research on the genetic robustness of the population is required prior to finalizing the listing of the diamond darter.

(11) *Comment:* The WVCC, WVCA, WVFA, and WVONGA all commented that the increased capture rates of the diamond darter in the last 5 years compared to when surveys began indicate that the population, while admittedly small, is benefitting from, rather than being failed by, existing regulatory mechanisms. These organizations further assert that WVDNR's comments about the species' historical abundance and susceptibility to sampling methods raises significant questions about our current estimation of the abundance of the diamond darter, as detailed in the proposed rule.

Our Response: The increased capture rates in the last few years are most likely a direct result of the increased survey and research efforts by the Service and our partners. These efforts include (1) recent research on the species' habitat requirements, coupled with the availability of habitat maps for the entire Elk River, that has allowed survey efforts to focus on specific areas of the Elk River where diamond darters are most likely to be concentrated, and (2) the development and use of new species-specific survey techniques over the past three survey seasons that resulted in more comprehensive and effective surveys (Ruble 2011a, p. 1; WVDNR 2012, p. 83; Welsh 2012, pp. 8–10). See our responses to comments #3 and #9 for additional information on the relationship between current and historical survey methods and our estimation of potential population trends, as well as the benefits of existing regulatory mechanisms.

(12) *Comment:* The WVCC, WVCA, WVFA, and WVONGA all commented that there are insufficient data to quantitatively define specific water quality standards required by the diamond darter, and noted that the proposed rule references water quality conditions seen at locations where the ''sister species,'' the crystal darter, is found. Commenters suggest that use of the crystal darter as a surrogate for the diamond darter is not justified because the ranges of these two species do not overlap and the two species are genetically distinct. The commenters suggest that water quality conditions should be observed where the diamond darter population currently exists, and that the crystal darter should not be used to establish water quality parameters.

Our Response: The Service would prefer to have species-specific data to be able to quantitatively describe the water quality conditions that the diamond darter needs to survive and thrive. However, these data are currently not available. In the absence of these data, we have described habitat and water quality conditions from locations where the diamond darter or the closely related crystal darter has been found. Surrogate species have long been used to establish water quality criteria or evaluate risks to a species (U.S. Environmental Protection Agency (USEPA) 1995, pp. 1–16; Dwyer *et al.* 2005, pp. 143–154). Because the crystal darter is in the same genus, shares many similar life-history traits, and was previously considered the same species as the diamond darter, information on this species can reasonably be used to infer factors or conditions that may also be important to the diamond darter. Additional research, while needed to determine whether existing water quality conditions at diamond darter capture sites are adequate to protect all life stages of the species, is not required before the Service can draw conclusions about the species' status based on the best available scientific and commercial data. The final rule does not establish specific numeric water quality parameters that are necessary for the diamond darter.

(13) *Comment:* The WVCC, WVCA, WVFA, and WVONGA all commented that conductivity was cited as a threat to the diamond darter even though an appropriate conductivity range for the diamond darter has not yet been established and scientific studies have not conclusively shown that elevated conductivity causes harm to fish species. Two overall concerns were detailed in support of this comment: (1) None of the studies cited in the rule conclude that conductivity, independent of the dissolved metals and sediment observed at the test sites, caused the observed scarcity of fish; and (2) conductivity varies naturally from region to region due to the availability of different ionic constituents, so that data from potential effects of conductivity from one region of the country should not be applied to other regions. They expressed concern that the proposed rule could impede industries from acquiring permits if their discharges would elevate conductivity. They suggested that until a causal relationship between elevated conductivity and harm to fish species is scientifically established, conductivity should not be listed as a threat to the diamond darter, and industries should not face increased scrutiny for this water quality parameter. They further recommended that, if an ideal conductivity range for the diamond darter was included in the final rule, it should be based on sampling from the Elk River or direct testing on the diamond darter.

Our Response: We concur that none of the studies cited in the proposed rule definitively conclude that conductivity, independent of the dissolved metals and sediment observed at the test sites, caused the observed scarcity of fish. However, these studies found a strong correlation between increased

conductivity levels and the absence or reduction of sensitive fish populations (Mattingly *et al.* 2005, pp. 59–62; Thomas 2008, pp. 3–6; Service 2009, pp. 1–4). Furthermore, basic chemistry and physiology provide information on how increased conductivity may affect fish populations. Conductivity is an estimate of the ionic strength of a salt solution (USEPA 2011, p. 1). High ionic salt concentrations impede effective osmoregulation in fish and other aquatic organisms and impair their physiological systems that extract energy from food, regulate internal pH and water volume, excrete metabolic wastes, guide embryonic development, activate nerves and muscles, and fertilize eggs (Pond *et al.* 2008, p. 731; USEPA 2011, p. 27). Thus, there is a strong physiological and chemical basis to suggest that high conductivity levels can adversely affect the fitness and survival of fish species such as the diamond darter. In addition, the diamond darter forages on benthic macroinvertebrates. Studies have demonstrated a causal relationship between high conductivity levels and impairment of benthic macroinvertebrate populations (Pond *et al.* 2008, pp. 717–737; USEPA 2011, pp. A1–40). A recent USEPA study evaluated the potential confounding effects of metals, sediments, and other water quality parameters and still found that biological impairment of benthic macroinvertebrate populations was a result of increased conductivity (USEPA 2011, pp. B1–37). Thus, high conductivity levels could also adversely affect the availability of foods that the diamond darter needs to survive. We therefore conclude that increased conductivity could pose a threat to the diamond darter's ability to feed, breed, and survive, and have retained and enhanced the discussion of this topic in the final rule.

We also concur that conductivity varies naturally from region to region due to the availability of different ionic constituents, so that data on conductivity from one region of the country may not be applicable to other regions. Studies from West Virginia (that included data from watersheds immediately adjacent to the Elk River) and Kentucky found that an aquatic conductivity level of 300 microSiemans/cm (µS/cm) should avoid the local extirpation of 95 percent of native stream macroinvertebrate species. The study noted that, because 300 µS/cm would only protect against total extirpation rather than just a reduction in abundance, conductivity level was not fully protective of sensitive species or higher quality, exceptional waters (USEPA 2011, p. xiv). These data, coupled with the information provided on fish species such as the Cumberland darter and the Kentucky arrow darter (*Etheostoma sagitta spilotum*) that occur within the historic range of the diamond darter in Kentucky, provide applicable regional information pertinent to the diamond darter. However, it is outside the scope of this final rule to establish water quality criteria for permitted discharges. Water quality criteria and permit conditions are established by appropriate State and Federal regulatory agencies and under consultation with the Service, if required. The Service would willingly work with industry groups and regulatory agencies to develop additional research to fully evaluate conductivity limits to species in the Elk River, including the diamond darter.

(14) *Comment:* The WVCC, WVCA, WVFA, and WVONGA all suggested that listing the diamond darter under the Act will do nothing to ensure the species' long-term survival, but will place a regulatory burden on a wide range of human activities. The organizations note that little is known about the diamond darter's reproductive techniques, water quality parameters, or food choices, and that the genetic fitness of the diamond darter's remaining population has not been evaluated. The organizations therefore conclude that using species-specific conservation measures would be more efficient and cost effective than using a broad legal mechanism like the Act to improve the long-term survival of the diamond darter.

Our Response: The Act requires that the Service make listing determinations solely on the basis of the best scientific and commercial data available regarding the status of the species and the presence of existing conservation efforts. The Act does not allow listing to be avoided based on the potential for perceived benefits or burdens that will result from the listing, or the potential to develop future conservation efforts in the absence of listing. However, the Service would welcome assistance from these groups to develop additional conservation measures targeted toward diamond darter recovery.

(15) *Comment:* The Nature Conservancy commented that the diamond darter is one of the most critically endangered aquatic species in the United States. The organization supports the Service's efforts to list the species now while a sufficient population may be available from which to restore the species to a nonthreatened status. The organization also noted that it is working on a watershed assessment of the Elk River that will assess cumulative effects contributing to degradation of aquatic resources, and help identify priority areas for restoration and protection.

Our Response: We appreciate TNC's support of conservation of the diamond darter and have discussed the results of the draft watershed assessment with the organization. The draft supports our assessment of threats to the diamond darter, as detailed in Factor A, and also will be useful in planning future recovery efforts for the diamond darter and other listed species in the watershed. We look forward to enhancing our partnerships with TNC and other organizations so that we can work toward the recovery of listed species.

(16) *Comment:* The Nature Conservancy concurred with our assessment of threats to the species and commented that coal mining, oil and gas development and infrastructure, sedimentation, water quality degradation, and poor wastewater treatment all pose significant threats to the diamond darter. The organization noted that many of these land use changes in the Elk River watershed are occurring on large, previously undeveloped, and privately owned forestland tracts along tributaries that were once managed primarily as forestland and that contributed to maintaining this river's ecological condition.

Our Response: We have reviewed additional information developed by TNC (see comment #17) that supports our assessment of threats. We concur that degradation of water quality in tributaries directly affects the ecological condition of the mainstem Elk River. Our discussion of threats under Factor A notes many examples of water quality degradation occurring within tributaries to the Elk River.

(17) *Comment:* The Nature Conservancy commented that Japanese knotweed (*Fallopia japonica*) and other invasive, nonnative plants associated with riparian areas are infesting the banks of the Elk River. These invasive species reduce stream bank stability and alter vegetation communities and the types of detritus, insects, and other natural inputs that enter the aquatic system and, therefore, pose a threat to the diamond darter.

Our Response: Japanese knotweed has already been found in the upstream portions of the Elk River watershed (Schmidt 2013, p. 1). We concur that this and other invasive riparian plants could pose an additional threat, particularly if they occur along the

portion of the Elk River that supports the diamond darter, and we have added text under Factor E to that regard.

Summary of Changes From Proposed Rule

We fully considered comments from peer reviewers, State and Federal agencies, and the public on the proposed rule to develop this final listing of the diamond darter. This final rule incorporates appropriate changes to our proposed listing based on the received comments discussed above and newly available scientific and commercial data. Substantive changes include new or additional information on: (1) Why the species was extirpated from most of its historical range and why it has survived in the Elk River; (2) the results of survey efforts and research conducted since the proposed rule; (3) threats from invasive riparian plants; (4) definitions for substrate embeddedness and siltation and the threat that they pose; (5) potential threats from increased conductivity; and (6) conservation measures and cumulative effects. Although our analysis of these threats is somewhat different from that in our proposed rule, the analysis and our conclusions are a logical outgrowth on the proposed rule commenting process, and none of the information changes our determination that listing this species as endangered is warranted.

In addition, we added Indiana to the diamond darter's historical range column of the § 17.11 endangered and threatened wildlife table in the regulatory section of the final rule. Although Indiana was included in the Historical Range/Distribution discussion of the proposed rule, we inadvertently left it out of the § 17.11 endangered and threatened wildlife table in the regulatory section of the proposed rule. Inclusion of Indiana in the historical range column of the § 17.11 endangered and threatened wildlife table in the regulatory section of the final rule corrects that error.

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR 424) set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1) of the Act: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below.

A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

As indicated by the continued persistence of the diamond darter, the Elk River in West Virginia currently provides overall high-quality aquatic habitat. The Elk River is one of the most ecologically diverse rivers in the State (Green 1999, p. 2), supporting more than 100 species of fish and 30 species of mussels, including 5 federally listed mussel species (Welsh 2009a, p. 1). The river, including those portions that are within the range of the diamond darter, is listed as a ''high quality stream'' by the WVDNR (WVDNR 2001, pp. 1, 2, 5). Streams in this category are defined as having ''significant or irreplaceable fish, wildlife, and recreational resources'' (WVDNR 2001, p. iii). In an evaluation of the watershed, the WVDEP noted that all four sampling sites tested within the mainstem of the Elk River scored well for benthic macroinvertebrates on the West Virginia Stream Condition Index, with results of 77 or higher out of a potential 100 points (WVDEP 1997, p. 41).

Criteria for placement on the high-quality streams list are based solely on the quality of fisheries populations and the utilization of those populations by the public and do not include water quality or threats to the watershed (WVDNR 2001, p. 36; Brown 2009, p. 1). Despite the high quality of the fishery populations, continuing and pervasive threats exist within the watershed. In fact, the WVDEP evaluation also noted that because larger rivers offer a wider variety of microhabitats, the high benthic macroinvertebrate scores may mask some degradation in water quality (WVDEP 1997, p. 41). Noted threats to the Elk River watershed include sedimentation and erosion, coal mining, oil and gas development, timber harvesting, water quality degradation, and poor wastewater treatment (WVDEP 1997, p. 15; Strager 2008, pp. 1–39; WVDEP 2008b, pp. 1–2). Significant degradation to the water quality has also been documented in the Elk River's tributaries (WVDEP 2011b, p.viii). Water quality in these tributaries directly contributes to and affects the ecological condition of the mainstem Elk River. Water quality degradation of tributaries is also important because diamond darters congregate and forage in shoals that are often located near tributary mouths (Welsh *et al.* 2012, p. 3).

Many sources have recognized that *Crystallaria* species appear to be particularly susceptible to habitat alterations and changes in water quality. Threats similar to those experienced in the Elk River watershed have likely contributed to the extirpation of *Crystallaria* within other watersheds (Clay 1975, p. 315; Trautman 1981, pp. 24–29, 646; Grandmaison 2003, pp. 16–19). In addition, the current range of the diamond darter is restricted and isolated from other potential and historical habitats by impoundments.

Siltation (Sedimentation)

Many publications use the terms siltation and sedimentation interchangeably, and do not define or differentiate between the terms. For this rule, we have used the term siltation specifically to refer to the pollution of water by fine particulate material, with a particle size dominated by silt or clay. It refers both to the increased concentration of fine-sized suspended sediments and to the increased accumulation (temporary or permanent) of fine sediments on stream bottoms, whereas sedimentation refers to the deposition of suspended soil particles of various sizes from large rocks to small particles. Sedimentation is used as the opposite of erosion, is often caused by land use changes or disturbances, and is a common source of siltation in a stream.

The USEPA has identified excess sediment as the leading cause of impairment to the Nation's waters (USEPA 2013, p. 1). Excess sediment in streams and resulting sedimentation can degrade fish habitat by altering the stability of the stream channel, scouring stream banks and substrates, destabilizing the substrates and habitats that fish such as the diamond darter rely on, and aggrading the stream bottom, which covers the substrates with excess sediments and buries, crushes, or suffocates benthic invertebrates, fish eggs, and fish larvae (Waters 1995, pp. 114–115; USEPA 2013, pp. 1–6). Excess sediment in streams can also lead to siltation.

Siltation has long been recognized as a pollutant that alters aquatic habitats by reducing light penetration, changing heat radiation, increasing turbidity, and covering the stream bottom (Ellis 1936 in Grandmaison *et al.* 2003, p. 17). Increased siltation has also been shown to abrade and suffocate bottom-dwelling organisms, reduce aquatic insect diversity and abundance, and, ultimately, negatively affect fish growth,

survival, and reproduction (Berkman and Rabeni 1987, p. 285). Siltation directly affects the availability of food for the diamond darter by reducing the diversity and abundance of aquatic invertebrates on which the diamond darter feeds (Powell 1999, pp. 34–35), and by increasing turbidity, which reduces foraging efficiency (Berkman and Rabeni 1987, pp. 285–294). Research has found that when the percentage of fine substrates increases in a stream, the abundance of benthic insectivorous fishes decreases (Berkman and Rabeni 1987, p. 285). Siltation also affects the ability of diamond darters to successfully breed by filling the small interstitial spaces between sand and gravel substrates with smaller particles. Diamond darters lay their eggs within these interstitial spaces. The complexity and abundance of interstitial spaces is reduced dramatically with increasing inputs of silts and clays. Siltation results in an increase in substrate embeddedness. As substrates become more embedded by silts and clays, the surface area available to fish for shelter, spawning, and egg incubation is decreased (Barbour *et al.* 1999, pp. 5–13; Sylte and Fischenich 2007, p. 12). Consequently, the amount and quality of breeding habitat for species such as the diamond darter is reduced (Bhowmik and Adams 1989, Kessler and Thorp 1993, Waters 1995, and Osier and Welsh 2007 all in Service 2008, pp. 15–16).

Many researchers have noted that *Crystallaria* species are particularly susceptible to the effects of siltation, and Grandmaison *et al.* (2003, pp. 17–18) summarize the information as follows: ''Bhowmik and Adams (1989) provide an example of how sediment deposition has altered aquatic habitat in the Upper Mississippi River system, where the construction of locks and dams has resulted in siltation leading to a successional shift from open water to habitats dominated by submergent and emergent vegetation. This successional process is not likely to favor species such as the crystal darter, which rely on extensive clean sand and gravel raceways for population persistence (Page 1983). For example, the crystal darter was broadly distributed in tributaries of the Ohio River until high silt loading and the subsequent smothering of sandy substrates occurred (Trautman 1981). In the Upper Mississippi River, the relative rarity of crystal darters has been hypothesized as a response to silt deposition over sand and gravel substrates (Hatch 1998)''. Although the Trautman (1981) citation within the above quote mentions the crystal darter, we now know that he was referring to individuals that have since been identified as diamond darters. In summary, *Crystallaria* species, including both the diamond darter and the crystal darter, are known to be particularly susceptible to the effects of siltation, and populations of these species have likely become extirpated or severely reduced in size as a result of this threat.

Siltation, along with excess sedimentation, has been identified as a threat to the Elk River system. Portions of the lower Elk River were listed as impaired due to elevated levels of iron and, previously, aluminum (USEPA 2001b, p. 1–1; Strager 2008, p. 36; WVDEP 2008a, p. 18; WVDEP 2008b, p. 1; WVDEP 2012, pp. 14–15). The WVDEP has since revised the water quality criteria for aluminum to address bioavailability of that metal, and established maximum amounts of pollutants allowed to enter the waterbody (known as Total Maximum Daily Loads (TMDL)) (WVDEP 2008a, p. A–2; WVDEP 2010, p. 26). The WVDEP identified that impairment due to metals, including iron, usually indicates excess sediment conditions (WVDEP 2008b, p. 5), and identified coal mining, oil and gas development, timber harvesting, all-terrain vehicle usage, and stream bank erosion as sources of increased sediment entering the Elk River watershed (USEPA 2001b, pp. 1–1, 3–4 and 6; WVDEP 2008b, p. 1). Within two subwatersheds that make up approximately 11 percent of the total Elk River watershed area, the WVDEP identified 433 kilometers (km) (269 miles (mi)) of unimproved dirt roads and 76 km (47 mi) of severely eroding stream banks (WVDEP 2008b, p. 5). An estimated 1,328 hectares (ha) (3,283 acres (ac)) of lands were actively timbered in those two watersheds in 2004 (WVDEP 2008b, p. 6). A review of the West Virginia Department of Forestry (WVDOF) inventory of registered logging sites estimated 16,381 ha (40,479 ac) of harvested forest, 1,299 ha (3,209 ac) of land disturbed by forestry-related roads and landings, and 518 ha (1,281 ac) of burned forest within portions of the Elk River watershed that are impaired by excess sediment and metals (WVDEP 2011c, pp. 34–35).

Coal Mining

Coal mining occurs throughout the entire Elk River watershed. Most of the active mining occurs in the half of the watershed on the south side of the Elk River, which flows east to west (Strager 2008, p. 17). The most recent summarized data, as of January 2008, indicates more than 5,260 ha (13,000 ac) of actively mined areas including 91 surface mine permits, 79 underground mine permits, 1,351 ha (3,339 ac) of valley fills, 582 km (362 mi) of haul roads, 385 km (239 mi) of mine drainage structures, 473 National Pollutant Discharge Elimination System (NPDES) discharge points associated with mines, and 3 mining related dams (Strager 2008, pp. 19–21). There are also 615 ha (1,519 ac) of abandoned mine lands and 155 mine permit sites that have forfeited their bonds and have not been adequately remediated (Strager 2008, p. 18). Approximately 47 percent of the entire Elk River watershed is within the area that the USEPA has identified as potentially being subject to mountaintop removal mining activities (Strager 2008, p. 17).

Coal mining can contribute significant amounts of sediment to streams and degrade their water quality. Impacts to instream water quality (chemistry) occur through inputs of dissolved metals and other solids that elevate stream conductivity, increase sulfate levels, alter stream pH, or a combination of these (Curtis 1973, pp. 153–155; Pond 2004, pp. 6–7, 38–41; Hartman *et al.* 2005, p. 95; Mattingly *et al.* 2005, p. 59; Palmer *et al.* 2010, pp. 148–149). As rock strata and overburden (excess material) are exposed to the atmosphere, precipitation leaches metals and other solids (e.g., calcium, magnesium, sulfates, iron, and manganese) from these materials and carries them in solution to receiving streams (Pond 2004, p. 7). If valley fills are used as part of the mining activity, precipitation and groundwater percolate through the fill and dissolve minerals until they discharge at the toe of the fill as surface water (Pond *et al.* 2008, p. 718). Both of these scenarios result in elevated conductivity, sulfates, hardness, and increased pH in the receiving stream. Increased levels of these metals and other dissolved solids have been shown to exclude other sensitive fish species and darters from streams, including the federally threatened blackside dace (*Chrosomus cumberlandensis*) in the upper Cumberland River Basin (Mattingly *et al.* 2005, pp. 59–62). The Kentucky arrow darter was found to be excluded from mined watersheds when conductivity exceeded 250 μS/cm (Thomas 2008, pp. 3–6; Service 2009, pp. 1–4).

High ionic salt concentrations associated with increased conductivity impede effective osmoregulation in fish and other aquatic organisms and impair their physiological systems that extract energy from food, regulate internal pH and water volume, excrete metabolic wastes, guide embryonic development,

activate nerves and muscles, and fertilize eggs (USEPA 2011, p. 27; Pond *et al.* 2008 p. 731). Thus, high conductivity levels could adversely affect the fitness and survival of fish species such as the diamond darter. In addition, high conductivity levels could also adversely affect the availability of forage populations of benthic macroinvertebrates that the diamond darter needs to survive. Studies have demonstrated a causal relationship between high conductivity levels and impairment of benthic macroinvertebrate populations (USEPA 2011, pp. A1–40; Pond *et al.* 2008, pp. 717–737). Studies from West Virginia (that included data from watersheds immediately adjacent to the Elk River) and Kentucky found that an aquatic conductivity level of 300 µS/cm was expected to avoid the local extirpation of 95 percent of native stream macroinvertebrate species. The study noted that, because this level was developed to protect against extirpation rather than reduction in abundance, it was not fully protective of sensitive species or higher quality, exceptional waters (USEPA 2011, p. xiv).

Water quality impacts from both active and historical mining have been noted in the Elk River watershed (WVDEP 2011b, pp. 29, 37, 41, 63). For example, in the Jacks Run watershed, a tributary to the Elk River, one-third of the entire watershed had been subject to mining-related land use changes that cleared previously existing vegetation. In a sampling site downstream of mining, the WVDEP documented substrates embedded with dark silt, most likely from manganese precipitate or coal fines, and benthic scores that indicated severe impairment (WVDEP 1997, p. 60). Another Elk River tributary, Blue Creek, had low pH levels associated with contour mining and acid drainage, and three sample sites had pH values of 4.2 or less (WVDEP 1997, p. 47; WVDEP 2008b, p. 6). At pH levels of 5.0 or less, most fish eggs cannot hatch (USEPA 2009, p. 2).

Sampling sites below a large mining reclamation site in the Buffalo Creek drainage of the Elk River watershed had violations of the West Virginia water quality criteria for acute aluminum and manganese, poor habitat quality, and substrates that were heavily embedded with coal fines and clay (WVDEP 1997, pp. 4, 56–57). Other sites in the watershed, where topographic maps showed extensive surface mining, had pH readings of 4.7, elevated aluminum levels, and benthic communities that were dominated by acid-tolerant species (WVDEP 1997, pp. 4, 56–57).

A U.S. Geological Survey (USGS) study of the Kanawha River Basin, which includes the Elk River, found that streams draining basins that have been mined since 1980 showed increased dissolved sulfate, decreased median bed-sediment particle size, and impaired benthic invertebrate communities when compared to streams not mined since 1980. Stream-bottom sedimentation in mined basins was also greater than in undisturbed basins (USGS 2000, p. 1). In streams that drained areas where large quantities of coal had been mined, the benthic invertebrate community was impaired in comparison to rural parts of the study area where little or no coal had been mined since 1980 (USGS 2000, p. 7). That report notes that benthic invertebrates are good indicators of overall stream water quality and that an impaired invertebrate community indicates that stream chemistry or physical habitat, or both, are impaired, causing a disruption in the aquatic food web (USGS 2000, p. 8).

In another study that specifically evaluated fish data, the Index of Biotic Integrity (IBI) scores at sites downstream of valley fills were significantly reduced by an average of 10 points when compared to unmined sites, indicating that fish communities were degraded below mined areas (Fulk *et al.* 2003, p. iv). In addition, that study noted a significant correlation between the number of fishes that were benthic invertivores and the amount of mining in the study watershed: The number of those types of fish species decreased with increased mining (Fulk *et al.* 2003, pp. 41–44). As described above in the Life History section, the diamond darter is a benthic invertivore. The effects described above are often more pronounced in smaller watersheds that do not have the capacity to buffer or dilute degraded water quality (WVDEP 1997, p. 42; Fulk *et al.* 2003, pp. ii–iv). Because the mainstem Elk River drains a relatively large watershed, these types of adverse effects are more likely to be noticed near the confluences of tributaries that are most severely altered by mining activities such as Blue Creek, which occurs within the known range of the diamond darter, and Buffalo Creek, which is upstream of the known diamond darter locations.

Threats from coal mining also include the potential failure of large-scale mine waste (coal slurry) impoundment structures contained by dams constructed of earth, mining refuse, and various other materials, which could release massive quantities of mine wastes that could cover the stream bottoms. There are currently two coal slurry impoundments within the Elk River watershed. These impoundments have a capacity of 6,258,023 and 1,415,842 cubic meters (m^3) (221,000,000 and 50,000,000 cubic feet (cf)). The larger structure covers 19 ha (48 ac) and is considered a ''class C'' dam whose failure could result in the loss of human life and serious damage to homes and industrial and commercial facilities (Strager 2008, pp. 21–22). A third coal refuse disposal impoundment is permitted and planned for construction with an additional 54,821 m^3 (1,936,000 cf) of capacity (Fala 2009, p. 1; WVDEP 2012, p. 1). These three impoundments are on tributaries of the Elk River upstream of the reach of river known to support the diamond darter. In October 2000, a coal slurry impoundment near Inez, Kentucky, breached, releasing almost 991,090 m^3 (35,000,000 cf) of slurry into the Big Sandy Creek watershed. ''The slurry left fish, turtles, snakes and other aquatic species smothered as the slurry covered the bottoms of the streams and rivers and extended out into the adjacent floodplain'' (USEPA 2001a, p. 2). Over 161 km (100 mi) of stream were impacted by the spill (USEPA 2001a, p. 2). If a similar dam failure were to occur in the Elk River watershed, it could have detrimental consequences for the entire diamond darter population.

Abandoned underground mines also have potential to fill with water and ''blow out,'' causing large discharges of sediment and contaminated water. Similar events have happened in nearby areas, including one in Kanawha County, West Virginia, in April 2009 that discharged ''hundreds of thousands of gallons of water'' onto a nearby highway, and caused a ''massive earth and rock slide'' (Marks 2009, p. 1). A second situation occurred in March 2009 in Kentucky where water from the mine portal was discharged into a nearby creek at an estimated rate of 37,854 liters (l) (10,000 gallons (ga)) a minute (Associated Press 2009, p. 1). In addition to the increased levels of sediment and potential smothering of stream habitats, discharges from abandoned mine sites often have elevated levels of metals and low pH (Stoertz *et al.* 2001, p. 1). In 2010, a fish kill occurred in Blue Creek, a tributary of the Elk River in Kanawha County, when a contractor working for WVDEP attempted to clean up an abandoned mine site. When the contractor breached an impoundment, the mine discharged highly acidic water that then flowed into the stream. Approximately 14.5 km (9 mi) of Blue Creek was affected by the fish kill (McCoy 2010, p. 1). The effects

of the fish kill were stopped by response crews 9.5 km (5.9 mi) upstream from where Blue Creek enters the Elk River within the known range of the diamond darter.

Oil and Gas Development

The Elk River watershed is also subject to oil and gas development, with more than 5,800 oil or gas wells in the watershed according to data available through January 2011 (WVDEP 2011a, p. 1). The lower section of the Elk River, which currently contains the diamond darter, has the highest concentration of both active and total wells in the watershed, with more than 2,320 active wells and 285 abandoned wells (WVDEP 2011a, p. 1).

Although limited data are available to quantify potential impacts, development of oil and gas resources can increase sedimentation rates in the stream and degrade habitat and water quality in a manner similar to that described for coal mining. Oil and gas wells can specifically cause elevated chloride levels through discharge of brine and runoff from materials used at the site, and the erosion of roads associated with these wells can contribute large amounts of sediment to the streams (WVDEP 1997, p. 54). For example, WVDEP sampling sites within Summers Fork, a tributary to the Elk River with a ''high density of oil and gas wells,'' had elevated chloride and conductivity levels, as well as impaired benthic invertebrate scores, despite ''good benthic substrate'' (WVDEP 1997, p. 52). Within the Buffalo Creek watershed, another Elk River tributary, the impaired benthic invertebrate scores at sample sites were attributed to oil compressor stations next to the creek, pipes running along the bank parallel to the stream, and associated evidence of past stream channelization (WVDEP 1997, p. 55).

High levels of siltation have been noted in the impaired sections of the Elk River (USEPA 2001b, pp. 3–6). Oil and gas access roads have been identified as a source that contributes ''high'' levels of sediment to the Elk River (USEPA 2001b, pp. 3–7). The WVDEP estimates the size of the average access road associated with an oil or gas well to be 396 meters (m) (1,300 feet (ft)) long by 7.6 m (25 ft) wide or approximately .30 ha (0.75 ac) per well site (WVDEP 2008b, p. 10). If each of the wells in the watershed has this level of disturbance, there would be more than 1,821 ha (4,500 ac) of access roads contributing to increased sedimentation and erosion in the basin. Lack of road maintenance, improper construction, and subsequent use by the timber industry and all-terrain vehicles can increase the amount of erosion associated with these roads (WVDEP 2008b, pp. 5–6).

Shale gas development is an emerging issue in the area. Although this is currently not the most productive area of the State, the entire current range of the diamond darter is underlain by the Marcellus and Utica Shale formation and potentially could be affected by well drilling and development (National Energy Technology Laboratory (NETL) 2010 pp. 6–10). The pace of drilling for Marcellus Shale gas wells is expected to increase substantially in the future, growing to about 700 additional wells per year in West Virginia starting in 2012 (NETL 2010, p. 27). This amount is consistent with what has been reported in the area around the Elk River. In March 2011, there were 15 Marcellus Shale gas wells reported within Kanawha County (West Virginia Geological and Economic Survey (WVGES) 2011, p. 1). As of January 2012, there were 188 completed Marcellus Shale gas wells within Kanawha County and an additional 27 wells that had been permitted (WVGES 2012, p. 1). Data specific to the Elk River watershed are not available for previous years, but currently at least 100 completed and 21 additional permitted Marcellus Shale gas wells are within the watershed (WVGES 2012, p. 1). The WVONGA suggests that the region where the diamond darter exists may experience a surge in oil and natural gas exploration and drilling above the levels experienced in the previous 5 years (WVONGA 2013).

Marcellus Shale gas wells require the use of different techniques than previously used for most gas well development in the area. When compared to more traditional methods, Marcellus Shale wells usually require more land disturbance and more water and chemicals for operations. In addition to the size and length of any required access roads, between 0.8 and 2.0 ha (2 and 5 ac) are generally disturbed per well (Hazen and Sawyer 2009, p. 7). Each well also requires about 500 to 800 truck trips to the site (Hazen and Sawyer 2009, p. 7). Construction of these wells in close proximity to the Elk River and its tributaries could increase the amount of siltation in the area due to erosion and subsequent sedimentation from the disturbed area, road usage, and construction.

Shale gas wells typically employ a technique called hydrofracking, which involves pumping a specially blended liquid mix of water and chemicals down a well, into a geologic formation. The pumping occurs under high pressure, causing the formation to crack open and form passages through which gas can flow into the well. During the drilling process, each well may use between 7 and 15 million liters (2 and 4 million ga) of water (Higginbotham *et al.* 2010, p. 40). This water is typically withdrawn from streams and waterbodies in close proximity to the location where the well is drilled. Excessive water withdrawals can reduce the quality and quantity of habitat available to fish within the streams, increase water temperatures, reduce dissolved oxygen concentrations, and increase the concentration of any pollutants in the remaining waters (Freeman and Marcinek 2006, p. 445; Pennsylvania State University 2010, p. 9). Increasing water withdrawals has been shown to be associated with a loss of native fish species that are dependent on flowing-water habitats. Darters were one group of species that were noted to be particularly vulnerable to this threat (Freeman and Marcinek 2006, p. 444).

In addition to water withdrawals, there is a potential for spills and discharges from oil and gas wells, particularly Marcellus Shale drilling operations. Pipelines and ponds used to handle brine and wastewaters from fracking operations can rupture, fail, or overflow and discharge into nearby streams and waterways. In Pennsylvania, accidental discharges of brine water from a well site have killed fish, invertebrates, and amphibians up to 0.4 mi (0.64 km) downstream of the discharge even though the company immediately took measures to control and respond to the spill (PADEP 2009, pp. 4–22). In 2011, the WVDEP cited a company for a spill at a well site in Elkview, West Virginia. Up to 50 barrels of oil leaked from a faulty line on the oil well site. The spill entered a tributary of Indian Creek, traveled into Indian Creek and then flowed into the Elk River (Charleston Gazette 2011, p. 1). This spill occurred within the reach of the Elk River known to be occupied by the diamond darter and, therefore, could have affected the species and its habitat.

Water Quality/Sewage Treatment

One common source of chemical water quality impairments is untreated or poorly treated wastewater (sewage). Municipal wastewater treatment has improved dramatically since passage of the 1972 amendments to the Federal Water Pollution Control Act (which was amended to become the Clean Water Act in 1977), but some wastewater treatment plants, especially smaller plants, continue to experience maintenance and operation problems that lead to discharge of poorly treated sewage into

streams and rivers (OEPA 2004 in Service 2008, p. 23). According to the data available in 2008, there were a total of 30 sewage treatment plants within the Elk River watershed (Strager 2008, p. 30).

Untreated domestic sewage (straight piping) and poorly operating septic systems are still problems within the Elk River watershed (WVDEP 1997, p. 54; WVDEP 2008b, p. 3). Untreated or poorly treated sewage contributes a variety of chemical contaminants to a stream, including ammonia, pathogenic bacteria, nutrients (e.g., phosphorous and nitrogen), and organic matter, that can increase biochemical oxygen demand (BOD) (Chu-Fa Tsai 1973, pp. 282–292; Cooper 1993, p. 405). The BOD is a measure of the oxygen consumed through aerobic respiration of micro-organisms that break down organic matter in the sewage waste. Excessive BOD and nutrients in streams can lead to low dissolved oxygen (DO) levels in interstitial areas of the substrate where a high level of decomposition and, consequently, oxygen depletion takes place (Whitman and Clark 1982, p. 653). Low interstitial DO has the potential to be particularly detrimental to fish such as the diamond darter, which live on and under the bottom substrates of streams and lay eggs in interstitial areas (Whitman and Clark 1982, p. 653). Adequate oxygen is an important aspect of egg development, and reduced oxygen levels can lead to increased egg mortality, reduced hatching success, and delayed hatching (Keckeis *et al.* 1996, p. 436).

Elevated nutrients in substrates can also make these habitats unsuitable for fish spawning, breeding, or foraging and reduce aquatic insect diversity, which may impact availability of prey and ultimately fish growth (Chu-Fa Tsai 1973, pp. 282–292; Wynes and Wissing 1981, pp. 259–267). Darters are noted to be ''highly sensitive'' to nutrient increases associated with sewage discharges, and studies have demonstrated that the abundance and distribution of darter species decreases downstream of these effluents (Katz and Gaufin 1953, p. 156; Wynes and Wissing 1981, p. 259). Elevated levels of fecal coliform signal the presence of improperly treated wastes (WVDEP 2008a, p. 7) that can cause the types of spawning, breeding, and foraging problems discussed above.

The reach of the Elk River from the mouth to River Mile 102.5, which includes the area supporting the diamond darter, was on the State's list of impaired waters under section 303(d) of the CWA due to violations of fecal coliform levels in 2008 and 2010 (WVDEP 2008a, p. 18; WVDEP 2010, p. 26). There have been noticeable increases in fecal coliform near population centers adjacent to the Elk River, including the cities of Charleston, Elkview, Frametown, Gassaway, Sutton, and Clay (WVDEP 2008b, p. 8). Elk River tributaries near Clendenin also show evidence of organic enrichment and elevated levels of fecal coliform (WVDEP 1997, p. 48). The WVDEP notes that failing or nonexistent septic systems are prevalent throughout the lower Elk River watershed (WVDEP 2008b, p. 1). To address water quality problems, the WVDEP conducted a more detailed analysis of two major tributary watersheds to the lower Elk River. The agency found that all residences in these watersheds were ''unsewered'' (WVDEP 2008b, p. 7). The Kanawha County Health Department Sanitarians estimate that the probable failure rate for these types of systems is between 25 and 30 percent, and monitoring suggests it may be as high as 70 percent (WVDEP 2008b, p. 7).

In another study, it was noted that straight pipe and grey water discharges are often found in residences within the Elk River watershed because the extra grey water would overburden septic systems. These untreated wastes are discharged directly into streams. This grey water can contain many household cleaning and disinfectant products that can harm stream biota (WVDEP 1997, p. 54). Finally, there is the potential for inadvertent spills and discharges of sewage waste. In 2010, a section of stream bank along the Elk River near Clendenin failed and fell into the river, damaging a sewerline when it fell. The line then discharged raw sewage into the river (Marks 2010, p. 1). The diamond darter is known to occur in the Elk River near Clendenin; therefore, this discharge likely affected the species.

Impoundment

Impoundment of previously occupied rivers was one of the most direct and significant historical causes of range reduction and habitat loss for the diamond darter. One of the reasons the diamond darter may have been able to persist in the Elk River is because the river remains largely unimpounded. Although there is one dam on the Elk River near Sutton, an approximately 161-km (100-mi) reach of the river downstream of the dam, including the portion that supports the diamond darter, retains natural, free-flowing, riffle and pool characteristics (Strager 2008, p. 5; Service 2008). All the other rivers with documented historical diamond darter occurrences are now either partially or completely impounded. There are 4 dams on the Green River, 8 dams on the Cumberland River, and 11 locks and dams on the Muskingum River. A series of 20 locks and dams have impounded the entire Ohio River for navigation. Construction of most of these structures was completed between 1880 and 1950; however, the most recent dam constructed on the Cumberland River was completed in 1973 (Clay 1975, p. 3; Trautman 1981, p. 25; Tennessee Historical Society 2002, p. 4; American Canal Society 2009, p. 1; Ohio Division of Natural Resources 2009, p. 1).

These impoundments have permanently altered habitat suitability in the affected reaches and fragmented stream habitats, blocking fish immigration and emigration between the river systems, and preventing recolonization (Grandmaison *et al.* 2003, p. 18). Trautman (1981, p. 25) notes that the impoundment of the Muskingum and Ohio Rivers for navigation purposes almost entirely eliminated riffle habitat in these rivers, increased the amount of silt settling on the bottom, which covered former sand and gravel substrates, and affected the ability of the diamond darter to survive in these systems. In addition, almost the entire length of the Kanawha River, including the 53 km (33 mi) upstream of the confluence with the Elk River and an additional 93 km (58 mi) downstream to Kanawha's confluence with the Ohio River, has been impounded for navigation (U.S. Army Corps of Engineers (ACOE) 1994, pp. 1, 13, 19). The dams and impoundments on this system likely impede movement between the only remaining population of the diamond darter in the Elk River and the larger Ohio River watershed, including the other known river systems with historical populations. Range fragmentation and isolation (see Factor E below) is noted to be a significant threat to the persistence of the diamond darter (Warren *et al.* 2000 in Grandmaison *et al.* 2003, p. 18).

Direct Habitat Disturbance

There is the potential for direct disturbance, alteration, and fill of diamond darter habitat in the Elk River. Since 2009, at least three proposed projects had the potential to directly disturb habitat in the Elk River in reaches that are known to support the species. Plans for these projects have not yet been finalized. Project types have included bridges and waterline crossings. Direct disturbances to the habitat containing the diamond darter could kill or injure adult individuals, young, or eggs. Waterline construction that involves direct trenching through

the diamond darter's habitat could destabilize the substrates, leading to increased sedimentation and erosion. Placement of fill in the river could result in the overall reduction of habitat that could support the species, and could alter flows and substrate conditions, making the area less suitable for the species (Welsh 2009d, p. 1).

In addition, the expansion of gas development in the basin will likely lead to additional requests for new or upgraded gas transmission lines across the river. The WVONGA suggests that the region where the diamond darter exists may experience a surge in oil and natural gas exploration and drilling above the levels experienced in the previous 5 years, and that new pipeline stream crossings are expected because the industry is working to provide new users with access to this expanded supply (WVONGA 2013).

Pipeline stream crossings can affect fish habitat; food availability; and fish behavior, health, reproduction, and survival. The most immediate effect of instream construction is the creation of short-term pulses of highly turbid water and total suspended solids (TSS) downstream of construction (Levesque and Dube 2007, pp. 399–400). Although these pulses are usually of relatively short duration and there is typically a rapid return to background conditions after activities cease, instream construction has been shown to have considerable effects on stream substrates and benthic invertebrate communities that persist after construction has been completed (Levesque and Dube 2007, pp. 396–397). Commonly documented effects include substrate compaction, as well as silt deposition within the direct impact area and downstream that fills interstitial spaces and reduces water flow through the substrate, increasing substrate embeddedness and reducing habitat quality (Reid and Anderson 1999, p. 243; Levesque and Dube 2007, pp. 396–397; Penkal and Phillips 2011, pp. 6–7). Construction also directly alters stream channels, beds, and banks resulting in changes in cover, channel morphology, and sediment transport dynamics. Stream bank alterations can lead to increased water velocities, stream degradation, and stream channel migrations. Removal of vegetation from the banks can change temperature regimes and increase sediment and nutrient loads (Penkal and Phillips 2011, pp. 6–7).

These instream changes not only directly affect the suitability of fish habitat, but also affect the availability and quality of fish forage by altering the composition and reducing the density of benthic invertebrate communities within and downstream of the construction area (Reid and Anderson 1999, pp. 235, 244; Levesque and Dube 2007, pp. 396–399; Penkal and Phillips 2011, pp. 6–7). Various studies have documented adverse effects to the benthic community that have been apparent for between 6 months and 4 years post-construction (Reid and Anderson 1999, pp. 235, 244; Levesque and Dube 2007, pp. 399–400). Stream crossings have also been shown to affect fish physiology, survival, growth, and reproductive success (Levesque and Dube 2007, p. 399). Studies have found decreased abundance of fish downstream of crossings, as well as signs of physiological stress such as increased oxygen consumption and loss of equilibrium in remaining fish downstream of crossings (Reid and Anderson 1999, pp. 244–245; Levesque and Dube 2007, pp. 399–401). Increased sediment deposition and substrate compaction from pipeline crossing construction can degrade spawning habitat, result in the production of fewer and smaller fish eggs, impair egg and larvae development, limit food availability for young-of-the-year fish, and increase stress and reduce disease resistance of fish (Reid and Anderson 1999, pp. 244–245; Levesque and Dube 2007, pp. 401–402).

The duration and severity of these effects depends on factors such as the duration of disturbance, the length of stream segment directly impacted by construction, and whether there are repeated disturbances (Yount and Niemi 1990, p. 557). Most studies documented recovery of the affected stream reach within 1 to 3 years after construction (Yount and Niemi 1990, pp. 557–558, 562; Reid and Anderson 1999, p. 247). However, caution should be used when interpreting results of short-term studies. Yount and Niemi (1990, p. 558) cite an example of one study that made a preliminary determination of stream recovery within 1 year, but when the site was reexamined 6 years later, fish biomass, fish populations, macroinvertebrate densities, and species composition were still changing. It was suspected that shifts in sediment and nutrient inputs to the site as a result of construction in and around the stream contributed to the long-term lack of recovery. In another study, alterations in channel morphology, such as increased channel width and reduced water depth, were evident 2 to 4 years post-construction at sites that lacked an intact forest canopy (Reid and Anderson 1999, p. 243).

There is also the potential for cumulative effects. While a single crossing may have only short-term or minor effects, multiple crossings or multiple sources of disturbance and sedimentation in a watershed can have cumulative effects on fish survival and reproduction that exceed the recovery capacity of the river, resulting in permanent detrimental effects (Levesque and Dube 2007, pp. 406–407). Whether or how quickly a stream population recovers depends on factors such as the life-history characteristics of the species and the availability of unaffected populations upstream and downstream as a source of organisms for recolonization (Yount and Niemi 1990, p. 547). Species such as the diamond darter that are particularly susceptible to the effects of siltation and resulting substrate embeddedness, and that have limited distribution and population numbers, are likely to be more severely affected by instream disturbances than other more common and resilient species. The WVONGA suggests that the region where the diamond darter exists may experience a surge in oil and natural gas exploration and drilling above the levels experienced in the previous 5 years (WVONGA 2013).

Conservation Efforts To Reduce Habitat Destruction, Modification, or Curtailment of Its Range

The NRCS and the Federal Highway Administration/West Virginia Department of Transportation have worked with the Service to develop programmatic agreements on how their agencies will address federally listed species for many of their routine project types. After the diamond darter became a candidate species in 2009, both agencies voluntarily agreed to update their programmatic agreements to address protection of the diamond darter. These agreements now include a process to determine when the species may be affected by projects, avoidance measures that can be used to ensure their projects are not likely to adversely affect the species, conditions describing when additional consultation with the Service shall occur, and, in some cases, other measures that can be incorporated into projects to benefit the species. These programmatic agreements, which were completed in 2011, should help reduce or avoid effects from small-scale highway construction projects and NCRS conservation practices, and can help these agencies design and implement projects to benefit the species.

Summary of Factor A

In summary, there are significant threats to the diamond darter from the present and threatened destruction, modification, or curtailment of its

habitat. Threats include sedimentation and siltation from a variety of sources, discharges from activities such as coal mining and oil and gas development, pollutants originating from inadequate wastewater treatment, habitat changes and isolation caused by impoundments, and direct habitat disturbance. These threats are ongoing and severe and occur throughout the species' entire current range. We have no information indicating that these threats are likely to be appreciably reduced in the future, and in the case of gas development and associated instream disturbances associated with gas transmission lines, we expect this threat to increase over the next several years as shale gas development continues to intensify.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Due to the small size and limited distribution of the only remaining population, the diamond darter is potentially vulnerable to overutilization. Particular care must be used to ensure that collection for scientific purposes does not become a long-term or substantial threat. It is possible that previous scientific studies may have impacted the population. Of the fewer than 50 individuals captured through 2011, 14 either died as a result of the capture or were sacrificed for use in scientific studies. Nineteen were removed from the system and were used for the establishment of a captive breeding program. Two have died in captivity. It should be noted that there were valid scientific or conservation purposes for most of these collections. To verify the identification and permanently document the first record of the species in West Virginia, the specimen captured in 1980 was preserved as a voucher specimen consistent with general scientific protocols of the time. Subsequent surveys in the 1990s were conducted for the specific purpose of collecting additional specimens to be used in the genetic and morphological analyses required to determine the taxonomic and conservation status of the species. The extent and scope of these studies were determined and reviewed by a variety of entities including the WVDNR, the Service, USGS, university scientists, and professional ichthyologists (Tolin 1995, p. 1; Wood and Raley 2000, pp. 20–26; Lemarie 2004, pp. 1–57; Welsh and Wood 2008, pp. 62–68).

In addition, when these collections were initiated, insufficient data were available to establish the overall imperiled and unique status of the species. Because these studies are now complete, there should be limited need to sacrifice additional individuals for scientific analysis, and thus, this potential threat has been reduced. The captive-breeding program was established after a review of the conservation status of the species identified imminent threats to the last remaining population, and species experts identified the need to establish a captive ''ark'' population to avert extinction in the event of a spill or continued chronic threats to the species. The establishment of this program should contribute to the overall conservation of the species and may lead to the eventual augmentation of populations. However, caution must still be used to ensure that any additional collections do not affect the status of wild populations.

It is possible that future surveys conducted within the range of the species could inadvertently result in mortality of additional individuals. For example, during some types of inventory work, fish captured are preserved in the field and brought back to the lab for identification. Young-of-the-year diamond darters are not easily distinguished from other species, and their presence within these samples may not be realized until after the samples are processed. This was the case during studies recently conducted by a local university (Cincotta 2009a, p. 1). Future surveys should be designed with protocols in place to minimize the risk that diamond darters will be inadvertently taken during nontarget studies. The WVDNR currently issues collecting permits for all surveys and scientific collections conducted within the State and incorporates appropriate conditions into any permits issued for studies that will occur within the potential range of the species. This limits the overall potential for overutilization for scientific purposes.

We know of no recreational or educational uses for the species. Although the species has no present commercial value, it is possible that live specimens may be collected for the aquarium trade or for specimen collections (Walsh *et al.* 2003 in Grandmaison *et al.* 2003 p. 19) and that once its rarity and potential collection locations become more widely known, it may become attractive to collectors. At this time, this is not known to be a widespread threat, although there is some evidence of individuals attempting to collect other darters and rare fish in West Virginia and other States for personal or academic collections (North American Native Fishes Association 2007, pp. 1–5). Uncontrolled collection from the remaining diamond darter population could have deleterious effects on the reproductive and genetic viability of the species.

Conservation Efforts To Reduce Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

In response to the proposed listing of the diamond darter, the WVDNR has incorporated wording into State fishing regulations to clarify that collection of the diamond darter for any purpose is not authorized unless conducted under a valid State scientific collecting permit (WVDNR 2013, p. 8).

Summary of Factor B

We find that overutilization for commercial, recreational, scientific, or educational purposes is a minor threat to the diamond darter at this time. For a species like the diamond darter, with a small range and population size, there is the potential that overutilization for scientific purposes or personal collections could have an effect on the viability of the species. However, there is limited need for additional research that would require the sacrifice of individuals. Based on our review of the best available scientific and commercial data, the threat of overutilization is not likely to increase in the future.

C. Disease or Predation

There is no specific information available to suggest that disease or predation presents a threat to diamond darters. Although some natural predation by fish and wildlife may occur, darters usually constitute only an almost incidental component in the diet of predators (Page 1983, p. 172). This incidental predation is not considered to pose a threat to the species.

Commonly reported parasites and diseases of darters, in general, include black-spot disease, flukes, nematodes, leeches, spiny-headed worms, and copepods (Page 1983, p. 173). None of the best available data regarding diamond darters captured to date, or reports on the related crystal darter, note any incidences of these types of issues. As a result, we find that disease or predation does not currently pose a threat to the species, and we have no available data that indicate disease or predation is now or likely to become a threat to the diamond darter in the future.

Conservation Efforts To Reduce Disease or Predation

Since neither disease nor predation currently present threats to the diamond

darter, no conservation efforts are being conducted to reduce these threats.

D. The Inadequacy of Existing Regulatory Mechanisms

Few existing Federal or State regulatory mechanisms specifically protect the diamond darter or its aquatic habitat where it occurs. The diamond darter and its habitats are afforded some protection from water quality and habitat degradation under the Clean Water Act of 1977 (33 U.S.C. 1251 et seq.)(CWA), the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1234–1328), the West Virginia Logging and Sediment Control Act (WVSC § 19–1B), the West Virginia Pollution Control Act (WVSC § 22–11–1.), the West Virginia Horizontal Well Act (WVSC § 22–6A), the West Virginia Abandoned Well Act (WVSC § 22–10–1), and additional West Virginia laws and regulations regarding natural resources and environmental protection (WVSC § 20–2–50; § 22–6A; § 22–26–3). Many of these regulations and requirements were specifically designed with protection of water quality and the reduction of sedimentation as their primary goals. However, as demonstrated under Factor A, degradation of habitat for this species is ongoing despite the protection afforded by these existing laws and corresponding regulations. These laws have resulted in some improvements in water quality and stream habitat for aquatic life, including the diamond darter, but water quality degradation, sedimentation and siltation, non-point-source pollutants, and habitat alteration continue to threaten the species.

Although water quality has generally improved since major environmental regulations like the CWA and Surface Mining Control and Reclamation Act (30 U.S.C. 1234–1328) were enacted or amended in the late 1970s, degradation of water quality within the range of the diamond darter continues. In 2010, a total of 102 streams within the Elk River watershed totaling 1,030 km (640 mi) were identified as impaired by the WVDEP and were placed on the State's CWA 303(d) list (WVDEP 2010, p. 16). Identified causes of impairment that were identified include existing mining operations, abandoned mine lands, fecal coliform from sewage discharges, roads, oil and gas operations, timbering, land use disturbance (urban, residential, or agriculture), and stream bank erosion (WVDEP 2011b, pp. viii–ix).

For water bodies on the CWA 303(d) list, States are required to establish a TMDL for the pollutants of concern that will improve water quality to meet the applicable standards. The WVDEP has established TMDLs for total iron, dissolved aluminum, total selenium, pH, and fecal coliform bacteria in the Elk River watershed (WVDEP 2012, pp. viii–x). The total iron TMDL is used as a surrogate to address impacts associated with excess sediments (WVDEP 2011b, p. 47). The TMDLs for the Elk River watershed were approved in 2012, and address 165 km (102.5 mi) of Elk River from Sutton Dam to the confluence with the Kanawha River, including the entire reach known to support the diamond darter, and 214 other impaired tributaries in the watershed. The draft 2012 WVDEP CWA 303(d) report places these impaired streams in a category where TMDLs have been developed but where water quality improvements are not yet documented (WVDEP 2012, pp. 14–15). An additional six streams, totaling 63 km (39 mi) within the Elk River watershed, were listed as having impaired biological conditions due to mining, but TMDLs for these streams were not developed (WVDEP 2012, p. 9).

Because these TMDLs for some of these impaired streams have just recently been established, it is not known how effective they will be at reducing the levels of these pollutants, or how long streams within the Elk River watershed will remain impaired. The TMDLs apply primarily to point-source discharge permits, not the non-point sources that may also contribute to sediment loading in the watershed. The Service is not aware of any other current or future changes to State or Federal laws that will substantially affect the currently observed degradation of water quality from point-source pollution that is considered to be a continuing threat to diamond darter habitats.

When existing laws that regulate some of these activities are fully complied with and vigorously enforced they can be effective at reducing the scope of threats from the regulated activity. For example, when forestry BMPs are fully and correctly applied they can be effective at reducing sedimentation into waterways. Studies have found a strong correlation between BMP application and prevention of sediment movement into surface water (Schuler and Briggs 2000 p. 133). However, these same studies also found that imperfect application of BMPs reduced their effectiveness and that logging operations can increase sediment loading into streams if they do not have properly installed BMPs (Schuler and Briggs 2000 p. 133; WVDEP 2011b, p. 35). One study evaluating the effects of forestry haul roads documented that watershed turbidities increased significantly following road construction and that silt fences installed to control erosion became ineffectual near stream crossings, allowing substantial amounts of sediment to reach the channel (Wang *et al.* 2010, p. 1).

The WVDOF periodically evaluates compliance with BMPs; this evaluation indicates a trend of increasing compliance with BMPs (Wang *et al.* 2002, p. 1). The most recently available survey of randomly selected logging operations throughout West Virginia estimated that overall compliance with these BMPs averaged 74 percent, and compliance with specific categories of BMPs ranged from 81 percent compliance with BMPs related to construction of haul roads, to only 55 percent compliance with BMPs related to the establishment and protection of streamside management zones (Wang *et al.* 2007, p. 60). In addition, the WVDOF estimates that illicit logging operations represent approximately 2.5 percent of the total harvested forest area throughout West Virginia (WVDEP 2011c, pp. 34–35). These illicit operations most likely do not have properly installed BMPs and can contribute excessive sediment to streams.

West Virginia State laws regarding oil and gas drilling, including recently enacted changes to West Virginia State Code § 22–6A, are generally designed to protect fresh water resources like the diamond darter's habitat, but the laws do not contain specific provisions requiring an analysis of project impacts to fish and wildlife resources. They also do not contain or provide any formal mechanism requiring coordination with, or input from, the Service or the WVDNR regarding the presence of federally threatened, endangered, or candidate species or other rare and sensitive species. They also do not contain any provisions that would avoid or minimize direct loss of diamond darters.

West Virginia State Code § 20–2–50 prohibits taking fish species for scientific purposes without a permit. The WVDNR issues collecting permits for surveys conducted within the State and incorporates appropriate conditions into any permits issued for studies that will occur within the potential range of the species. This should limit the number of individuals impacted by survey and research efforts. Current West Virginia fishing regulations prohibit collecting any diamond darter specimens in the State without a West Virginia scientific collecting permit, and further specify that the diamond darter

cannot be collected as bait (WVDNR 2013, p. 8).

The diamond darter is indirectly provided some protection from Federal actions and activities through the Act because the Elk River also supports five federally endangered mussel species. The reach of the Elk River currently known to support the diamond darter also supports the pink mucket (*Lampsilis abrupta*), the northern riffleshell (*Epioblasma torulosa rangiana*), the rayed bean (*Villosa fabalis*), and the snuffbox (*Epioblasma triquetra*). The clubshell mussel (*Pleurobema clava*) occurs in the reach of the Elk River upstream of the diamond darter. Many of the same management recommendations made to avoid adverse effects during consultations for endangered mussels, such as avoiding instream disturbances and controlling sedimentation, would also benefit the diamond darter. However, protective measures for listed freshwater mussels in the Elk River have generally involved surveys for mussel species presence and development of minimization measures in areas with confirmed presence. The diamond darter is more mobile and, therefore, is likely to be present within a less restricted area than most mussel species. Surveys for mussels will not detect diamond darters. As a result, these measures provide some limited protection for the diamond darter in the Elk River, but only in specific locations where it co-occurs with these mussel species. Currently, no requirements within the scope of Federal or State environmental laws specifically consider the diamond darter during Federal or State-regulated activities, or ensure that projects will not jeopardize the diamond darter's continued existence.

Summary of Factor D

Few existing laws specifically protect the diamond darter. A number of existing Federal and State regulatory mechanisms are designed to protect water quality and reduce sedimentation, which could reduce threats to the diamond darter. However, degradation of water quality and habitat is ongoing throughout the current range of the diamond darter, despite these existing regulatory mechanisms governing some activities that contribute to this threat. We have no information indicating that these threats are likely to be appreciably reduced in the future.

E. Other Natural or Manmade Factors Affecting Its Continued Existence

Didymosphenia geminate

The presence of *Didymosphenia geminate,* an alga known as ''didymo'' or ''rock snot'' has the potential to adversely affect diamond darter populations in the Elk River. This alga, historically reported to occur in cold, northern portions of North America (e.g., British Columbia), has been steadily expanding its range within the last 10 to 20 years, and has now been reported to occur in watersheds as far east and south as Arkansas and North Carolina (Spaulding and Elwell 2007, pp. 8–21). The species has also begun occurring in large nuisance blooms that can dominate stream surfaces by covering 100 percent of the substrate with mats up to 20 cm (8 in) thick, extending over 1 km (0.6 mi) and persisting for several months (Spaulding and Elwell 2007, pp. 3, 6). Didymo can greatly alter the physical and biological conditions of streams in which it occurs and cause changes to algal, invertebrate, and fish species diversity and population sizes; stream foodweb structure; and stream hydraulics (Spaulding and Elwell 2007, pp. 3, 12). Didymo is predicted to have particularly detrimental effects on fish, such as the diamond darter, that inhabit stream bottom habitats or consume bottom-dwelling prey (Spaulding and Elwell 2007, p. 15).

While didymo was previously thought to be restricted to coldwater streams, it is now known to occur in a wider range of temperatures, and it has been documented in waters with temperatures that were as high as 27 °C (80 °F) (Spaulding and Elwell 2007, pp. 8, 10, 16). It can also occur in a wide range of hydraulic conditions including slow-moving, shallow areas and areas with high depths and velocities (Spaulding and Elwell 2007, pp. 16–17). Didymo can be spread large distances either through the water column or when items such as fishing equipment, boots, neoprene waders, and boats are moved between affected and unaffected sites (Spaulding and Elwell 2007, pp. 19–20). For example, in New Zealand, didymo spread to two sites over 100 km (62.1 mi) and 450 km (279.6 mi) away from the location of the first documented bloom within 1 year (Kilroy and Unwin 2011, p. 254).

Although didymo has not been documented to occur in the lower Elk River where the diamond darter occurs, in 2008 the WVDNR documented the presence of didymo in the upper Elk River, above Sutton Dam near Webster Springs, which is over 120 km (74.5 mi) upstream from known diamond darter locations (WVDNR 2008, p. 1). Anglers have also reported seeing heavy algal mats, assumed to be didymo, in the upstream reach of the river (WVDNR 2008, p. 1). Therefore, there is potential that the species could spread downstream to within the current range of the diamond darter in the future. If it does spread into the diamond darter habitat, it could degrade habitat quality and pose a significant threat to the species.

Invasive Riparian Plants

Invasive, nonnative plants associated with riparian areas, such as Japanese knotweed, have the potential to adversely affect diamond darter populations in the Elk River. Japanese knotweed is a species native to eastern Asia that was introduced in the United States as an ornamental landscape plant (Barney 2006, p. 704). The species forms dense, monotypic stands that exclude native vegetation (Urgenson 2006, p. 6). Once introduced into an area, it spreads rapidly through riparian areas as flood waters carry root and stem fragments downstream and these fragments then regenerate to form new populations (Urgenson 2006, p. 1).

Healthy, functioning, riparian forests are an essential component of maintaining water and habitat quality in streams, and streams are adversely affected when riparian areas are invaded by species such as Japanese knotweed (Urgenson 2006, p. 35). Streambanks dominated by Japanese knotweed populations are less stable and more prone to erosion because Japanese knotweed has shallower roots compared to native riparian trees and woody shrubs. Because Japanese knotweed dies back in winter, it also leaves streambanks more exposed to erosive forces (Urgenson 2006, pp. 35–36). Thus, knotweed can increase streambank erosion, increase sedimentation in streams, and alter channel morphology. In addition, riparian areas dominated by Japanese knotweed change the natural composition of leaf litter entering the stream. This change affects nutrient cycling and organic matter inputs into the aquatic food web, and can have long-lasting effects on microhabitat conditions and aquatic life of affected stream systems (Urgenson 2006, pp. i, 31). Because leaf litter from Japanese knotweed is of lower nutritional quality than native vegetation, it can negatively impact the productivity of aquatic macroinvertebrates, which are a primary food source for fishes like the diamond darter (Urgenson 2006, p. 32).

Japanese knotweed has already been found in the upstream portions of the Elk River watershed (Schmidt 2013, p. 1). In 2012, Service biologists and their partner organizations documented and initiated control measures on 25 Japanese knotweed populations on the mainstem Elk River and its tributaries. These populations were located near the Randolph-Webster County line approximately 161 km (100 mi) upstream of the range of the diamond darter. Some of these populations were over 0.1 ha (0.25 ac) in size and had doubled in size in the 2 years since first documented (Schmidt 2013, p. 1). Japanese knotweed is difficult to control and eradicate. Effective eradication requires many years of focused efforts, and often populations are discovered downstream before 100 percent mortality is achieved in the treated area (Urgenson 2006, p. 37).

Geographic Isolation and Loss of Genetic Variation

The one existing diamond darter population is small in size and range, and is geographically isolated from other areas that previously supported the species. The diamond darter's distribution is restricted to a short stream reach, and its small population size makes it extremely susceptible to extirpation from a single catastrophic event (such as a toxic chemical spill or storm event that destroys its habitat). Its small population size reduces the potential ability of the population to recover from the cumulative effects of smaller chronic impacts to the population and habitat such as progressive degradation from runoff (non-point-source pollutants) and direct disturbances.

Species that are restricted in range and population size are more likely to suffer loss of genetic diversity due to genetic drift, potentially increasing their susceptibility to inbreeding depression and reducing the fitness of individuals (Soule 1980, pp. 157–158; Hunter 2002, pp. 97–101; Allendorf and Luikart 2007, pp. 117–146). Similarly, the random loss of adaptive genes through genetic drift may limit the ability of the diamond darter to respond to climate change and other changes in its environment and the catastrophic events and chronic impacts described above (Noss and Cooperrider 1994, p. 61). Small population sizes and inhibited gene flow between populations may increase the likelihood of local extirpation (Gilpin and Soulé 1986, pp. 32–34). The long-term viability of a species is founded on the conservation of numerous local populations throughout its geographic range (Harris 1984, pp. 93–104). These separate populations are essential for the species to recover and adapt to environmental change (Harris 1984, pp. 93–104; Noss and Cooperrider 1994, pp. 264–297). The current population of the diamond darter is restricted to one section of one stream. This population is isolated from other suitable and historical habitats by dams that are barriers to fish movement. The level of isolation and restricted range seen in this species makes natural repopulation of historical habitats or other new areas following previous localized extirpations virtually impossible without human intervention.

Climate Change

Climate change (as defined by the Intergovernmental Panel on Climate Change (2007, p. 78)) has the potential to increase the vulnerability of the diamond darter to random catastrophic events and to compound the effects of restricted genetic variation and population isolation. Current climate change predictions for the central Appalachians indicate that aquatic habitats will be subject to increased temperatures and increased drought stress, especially during the summer and early fall (Buzby and Perry 2000, p. 1774; Byers and Norris 2011, p. 20). There will likely be an increase in the variability of stream flow, and the frequency of extreme events, such as droughts, severe storms, and flooding, is likely to increase Statewide (Buzby and Perry 2000, p. 1774; Byers and Norris 2011, p. 20). While the available data on the effects of climate change are not precise enough to predict the extent to which climate change will degrade diamond darter habitat, species with limited ranges that are faced with either natural or anthropomorphic barriers to movement, such as the dams that fragmented and isolated the historical diamond darter habitat, have been found to be especially vulnerable to the effects of climate change (Byers and Norris 2011, p. 18). Thus, the small population size and distribution of the diamond darter makes the species particularly susceptible to risks from catastrophic events, loss of genetic variation, and climate change.

Conservation Efforts To Reduce Other Natural or Manmade Factors Affecting Its Continued Existence

The West Virginia Invasive Species Working Group (WVISWG) is a group of State and Federal agencies, nongovernmental organizations, and private stakeholders dedicated to working together on nonnative invasive species issues that affect West Virginia. The primary mission of the WVISWG is to maintain an inclusive Statewide group to facilitate actions for the prevention or reduction of negative impacts of invasive species on managed and natural terrestrial and aquatic communities through coordinated planning and communication, assessment and research, education, and control. The WVISWG is developing a Statewide invasive species strategic plan to provide guidance and coordination for invasive species management actions across the State. These voluntary efforts may help to reduce the spread of didymo and Japanese knotweed and other invasive riparian plants that are a threat to the diamond darter and its habitat.

The Service, WVDNR, USGS West Virginia Cooperative Fish and Wildlife Research Unit at West Virginia University, and Conservation Fisheries, Inc. (CFI) are working together to conduct research on the reproductive biology and life history of the diamond darter and are attempting to establish a captive population to avert extinction and preserve genetic diversity. Although diamond darters have successfully bred in captivity, no larvae have survived to adulthood. Additional research and funding is needed for this effort to be fully successful.

Summary of Factor E

In summary, because the diamond darter has a small geographic range and small population size, it is subject to several other ongoing natural and manmade threats. These threats include the spread of invasive, nonnative species such as *Didymosphenia geminate* and Japanese knotweed; loss of genetic fitness; and susceptibility to spills, catastrophic events, and impacts from climate change. The severity of these threats is high because the diamond darter's small range and population size reduces its ability to adapt to environmental change. Further, our review of the best available scientific and commercial information indicates that these threats are likely to continue or increase in the future.

Cumulative Effects From Factors A Through E

Some of the threats discussed in this rule could work in concert with one another to cumulatively create situations that potentially impact the diamond darter beyond the scope of the individual threats that we have already analyzed. As described in Factor A, the reach of the Elk River inhabited by the diamond darter is threatened by numerous sources of habitat and water quality degradation, including

sedimentation and siltation from multiple sources, coal mining, oil and gas development, and inadequate sewage treatment. All these threats likely reduce the amount and quality of the diamond darter's remaining available habitat and are sources of chronic and continued degradation of its habitat. As described above, these threats also likely reduce the amount of forage available to the species, reduce the fitness of remaining individuals, and decrease breeding success and survival of young. These chronic threats likely affect the ability of the diamond darter population in the Elk River to grow and thrive, making it less resilient to potential acute threats such as accidental spills and catastrophic events. In a review of population and stream responses to various types of disturbances, Yount and Niemi (1990, pp. 547–555) found that populations or streams that were affected by multiple chronic sources of disturbance and degradation were less resilient and less likely to recover quickly from additional individual disturbances. In addition, they found that the availability of unaffected populations in nearby streams, tributaries, or upstream and downstream reaches that would provide a source of organisms for recolonization was one of the key factors that allowed affected populations to recover from disturbances (Yount and Niemi 1990, p. 547).

There are no unaffected populations or stream reaches available to the diamond darter. The diamond darter's current range is already severely restricted and isolated from other suitable habitats by dams and impoundments. The one remaining diamond darter population is small and occurs in one reach of a single river that is already affected by multiple chronic sources of degradation. Thus, the current remaining population has very little resiliency and a very limited ability to recover from additional individual disturbances. Cumulatively, these factors make the diamond darter particularly susceptible to extinction from additional threats such as direct disturbances, invasive species, spills, and long-term effects of climate change. These ongoing cumulative threats to the diamond darter are occurring throughout the species' entire current range. We have no information indicating that these threats are likely to be appreciably reduced in the future.

Summary of Factors

We have carefully assessed the best scientific and commercial data available regarding the past, present, and future threats to the diamond darter. The primary threats to the diamond darter are related to the present or threatened destruction, modification, or curtailment of its habitat or range (Factor A) and other natural or manmade factors affecting its continued existence (Factor E). The species is currently known to exist only in the lower Elk River, West Virginia. This portion of the watershed is impacted by ongoing water quality degradation and habitat loss from activities associated with coal mining and oil and gas development, sedimentation and siltation from these and other sources, inadequate sewage and wastewater treatment, and direct habitat loss and alteration. The impoundment of rivers in the Ohio River Basin, such as the Kanawha, Ohio, and Cumberland Rivers, has eliminated much of the species' habitat and isolated the existing population from other watersheds that the species historically occupied. The small size and restricted range of the remaining diamond darter population makes it particularly susceptible to extirpation from spills and other catastrophic events, the spread of invasive species, and effects of genetic inbreeding.

The species could be vulnerable to overutilization for scientific or recreational purposes (Factor B), but the significance of this threat is minimized through the State's administration of scientific collecting permits. There are no known threats to the diamond darter from disease or predation (Factor C). Although some regulatory mechanisms exist (Factor D), they do not succeed in alleviating these threats. In addition to the individual threats discussed under Factors A and E, each of which is sufficient to warrant the species' listing, the cumulative effect of these factors is such that the magnitude and imminence of threats to the diamond darter are significant throughout its entire current range.

Determination

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' We find that the diamond darter, which consists of only one population (occurrence), is presently in danger of extinction throughout its entire range, due to the immediacy, severity, and scope of the threats described above. Because the species is currently limited to one small, isolated population in an aquatic environment that is currently facing numerous, severe, and ongoing threats to its habitat and water quality, we find that the diamond darter does not meet the definition of a threatened species. Therefore, on the basis of the best available scientific and commercial data, we list the diamond darter as endangered in accordance with sections 3(6) and 4(a)(1) of the Act.

Under the Act and our implementing regulations, a species may warrant listing if it is threatened or endangered throughout all or a significant portion of its range. The diamond darter is highly restricted in its range and the threats to the survival of the species are not restricted to any particular significant portion of that range. Therefore, we assessed the status of the species throughout its entire range. Accordingly, our assessment and determination apply to the species throughout its entire range.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protections required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent

recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan identifies site-specific management actions that set a trigger for review of the five factors that control whether a species remains endangered or may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (comprising species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our West Virginia Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribal, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Once this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the States of Kentucky, Ohio, Tennessee, and West Virginia will be eligible for Federal funds to implement management actions that promote the protection or recovery of the diamond darter. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they carry out, authorize, or fund are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within the species' habitat that may require consultation as described in the preceding paragraph include the issuance of section 404 Clean Water Act permits by the ACOE; construction and management of gas pipeline and power line rights-of-way or hydropower facilities by the Federal Energy Regulatory Commission; construction and maintenance of roads, highways, and bridges by the Federal Highway Administration; pesticide regulation by the USEPA; and issuance of coal mining permits by the Office of Surface Mining.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.21 for endangered wildlife, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import, export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. Under the Lacey Act (18 U.S.C. 42–43; 16 U.S.C. 3371–3378), it is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species, and at 17.32 for threatened species. With regard to endangered wildlife, a permit must be issued for the following purposes: For scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities.

Our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), is to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within the range of listed species. The following activities could potentially result in a violation of section 9 of the Act; this list is not comprehensive:

(1) Unauthorized collecting, handling, possessing, selling, delivering, carrying, or transporting of the species, including import or export across State lines and international boundaries, except for properly documented antique specimens at least 100 years old, as defined by section 10(h)(1) of the Act.

(2) Violation of any permit that results in harm or death to any individuals of this species or that results in degradation of its habitat to an extent that essential behaviors such as breeding, feeding and sheltering are impaired.

(3) Unlawful destruction or alteration of diamond darter habitats (e.g., unpermitted instream dredging, impoundment, water diversion or withdrawal, channelization, discharge of fill material) that impairs essential behaviors such as breeding, feeding, or sheltering, or results in killing or injuring a diamond darter.

(4) Unauthorized discharges or dumping of toxic chemicals or other pollutants into waters supporting the diamond darter that kills or injures individuals, or otherwise impairs essential life-sustaining behaviors such as breeding, feeding, or finding shelter.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the West Virginia Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

National Environmental Policy Act

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this

determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

References Cited

A complete list of all references cited in this rule is available on the Internet at *http://www.regulations.gov* or upon request from the West Virginia Field Office (see **FOR FURTHER INFROMATION CONTACT**).

Author(s)

The primary author of this document is staff from the West Virginia Field Office (see **ADDRESSES**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245; unless otherwise noted.

■ 2. Amend § 17.11(h) by adding an entry for ''Darter, diamond'' to the List of Endangered and Threatened Wildlife in alphabetical order under Fishes to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
FISHES							
*	*	*	*	*	*		*
Darter, diamond	*Crystallaria cincotta*	U.S.A. (IN, KY, OH, TN, WV).	Entire	E	815	NA	NA
*	*	*	*	*	*		*

Dated: July 18, 2013.

Stephen Guertin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2013–17938 Filed 7–25–13; 8:45 am]

BILLING CODE 4310–55–P

Proposed Rules

Federal Register
Vol. 78, No. 144
Friday, July 26, 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

Federal Energy Regulatory Commission

18 CFR Part 38

[Docket No. RM05–5–022]

Standards for Business Practices and Communication Protocols for Public Utilities

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission proposes to incorporate by reference in its regulations Version 003 of the Standards for Business Practices and Communication Protocols for Public Utilities adopted by the Wholesale Electric Quadrant (WEQ) of the North American Energy Standards Board (NAESB). These standards modify NAESB's WEQ Version 002 and Version 002.1 Standards.

DATES: Comments are due September 24, 2013.

ADDRESSES: Comments, identified by Docket No. RM05–5–022, may be filed in the following ways:

- Electronic Filing through *http://www.ferc.gov.* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- *Mail/Hand Delivery:* Those unable to file electronically may mail or hand-deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures Section of this document.

FOR FURTHER INFORMATION CONTACT:

Tony Dobbins (technical issues), Office of Energy Policy and Innovation, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–6630.

Gary D. Cohen (legal issues), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8321.

SUPPLEMENTARY INFORMATION:

Notice of Proposed Rulemaking

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144 FERC ¶ 61,026

(Issued July 18, 2013.)

1. In this notice of proposed rulemaking (NOPR), the Federal Energy Regulatory Commission (Commission) proposes to amend its regulations under the Federal Power Act [1] to incorporate by reference, with certain enumerated exceptions, the latest version of the Standards for Business Practices and Communication Protocols for Public Utilities (Version 003) adopted by the Wholesale Electric Quadrant (WEQ) of the North American Energy Standards Board (NAESB) and filed with the Commission as a package on September 18, 2012 (September 18 Filing), as modified in a report filed with the Commission on January 30, 2013.

[1] 16 U.S.C. 791a, *et seq.*

2. These revised standards update earlier versions of these standards that the Commission previously incorporated by reference into its regulations at 18 CFR 38.2. These new and revised standards include modifications to support Order Nos. 890, 890–A, 890–B and 890–C,[2] including the standards to support Network Integration Transmission Service on an Open Access Same-Time Information System (OASIS), Service Across Multiple Transmission Systems (SAMTS), standards to support the Commissions policy regarding rollover rights for redirects on a firm basis, standards that incorporate the functionality for transmission providers to credit redirect requests with the capacity of the parent reservation and standards modifications to support consistency across the OASIS-related standards.

3. The Version 003 Standards also include modifications to the OASIS-related standards that NAESB states support Order Nos. 676, 676–A, 676–E and 717 and add consistency.[3] In addition, NAESB states that it made modifications to the Coordinate Interchange standards to compliment the updates to the e-Tag specifications,[4] modifications to the Gas/Electric Coordination standards to provide consistency between the two markets [5] and re-organized and revised definitions to create a standard set of terms, definitions and acronyms applicable to all NAESB WEQ standards.[6] NAESB states that the Version 003 Standards also include standards related to Demand Side Management and Energy Efficiency,[7] which the Commission incorporated by reference in Docket No. RM05–5–020 [8] after NAESB filed its Version 003 report, and Smart Grid-related standards that NAESB previously filed with the Commission in Docket No. RM05–5–021.[9]

I. Background

4. NAESB is a non-profit standards development organization established in January 2002 that serves as an industry forum for the development and promotion of business practice standards that promote a seamless marketplace for wholesale and retail natural gas and electricity. Since 1995, NAESB and its predecessor, the Gas Industry Standards Board, have been accredited members of the American National Standards Institute (ANSI), complying with ANSI's requirements that its standards reflect a consensus of the affected industries.

5. NAESB's standards include business practices that streamline the transactional processes of the natural gas and electric industries, as well as communication protocols and related standards designed to improve the efficiency of communication within each industry. NAESB supports all four quadrants of the gas and electric industries—wholesale gas, wholesale electric, retail gas, and retail electric. All participants in the gas and electric industries are eligible to join NAESB and participate in standards development.

6. NAESB develops its standards under a consensus process so that the standards draw support from a wide range of industry members. NAESB's procedures are designed to ensure that all industry members can have input into the development of a standard, whether or not they are members of NAESB, and each standard NAESB adopts is supported by a consensus of the relevant industry segments. Standards that fail to gain consensus support are not adopted.

7. In Order No. 676, the Commission not only adopted business practice standards and communication protocols for the wholesale electric industry, it also established a formal ongoing process for reviewing and upgrading the Commission's OASIS standards and other wholesale electric industry business practice standards. In later orders in this series, the Commission incorporated by reference: (1) The Version 001 Business Practice Standards; [10] (2) the Version 002.1 Business Practice Standards; [11] (3) business practice standards categorizing various demand response products and services; [12] and (4) OASIS-related Business Practice Standards related to Demand Side Management and Energy Efficiency.[13]

8. In Order No. 890, the Commission revisited the *pro forma* Open Access Transmission Tariff (OATT) first established in Order No. 888 [14] and adopted a revised *pro forma* OATT designed to better achieve the objectives of preventing undue discrimination and providing greater specificity and transparency. In later orders in this series, the Commission affirmed, with clarifications, the basic findings that it made in Order No. 890.

9. A number of the findings made by the Commission in the Order No. 890 series of orders necessitated revisions to the Business Practice Standards for Public Utilities so that there would be no inconsistency between the requirements of Order No. 890 and the Business Practice Standards. Accordingly, NAESB set up a work project to review the existing business practice standards, identify which standards would need revision to prevent any inconsistencies with the Order No. 890 requirements, and develop and adopt the needed revised standards. Those revised standards form

[2] *Preventing Undue Discrimination and Preference in Transmission Service,* Order No. 890, FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g,* Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g,* Order No. 890–B, 123 FERC ¶ 61,299 (2008), *order on reh'g and clarification,* Order No. 890–C, 126 FERC ¶ 61,228 (2009) (Order No. 890–C). The Version 002 standards also included revisions made in response to Order No. 890 (*see infra* P 11).

[3] *Standards for Business Practices and Communication Protocols for Public Utilities,* Order No. 676, FERC Stats. & Regs. ¶ 31,216, (2006), *reh'g denied,* Order No. 676–A, 116 FERC ¶ 61,255 (2006), *Final Rule,* Order No. 676–B, FERC Stats. & Regs. ¶ 31,246 (2007), *Final Rule,* Order No. 676–C, FERC Stats. & Regs. ¶ 31,274 (2008), *order granting clarification and denying reh'g,* Order No. 676–D, 124 FERC ¶ 61,317 (2008), *Final Rule,* Order No. 676–E, FERC Stats. & Regs. ¶ 31,299 (2009) (Order No. 676–E); *Standards of Conduct for Transmission Providers,* Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008) (Order No. 717).

[4] September 18 Filing, transmittal at 2 (citing NAESB WEQ Electronic Tagging—Functional Specifications, Version 1.8.1).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Standards for Business Practices and Communication Protocols for Public Utilities,* Order No. 676–G, 78 FR 14654 (Mar. 7, 2013), FERC Stats. & Regs. ¶ 31,343 (Feb. 21, 2013). In this rule, the Commission incorporated by reference into its regulations updated business practice standards adopted by NAESB's WEQ to categorize various products and services for demand response and energy efficiency and to support the measurement and verification of these products and services in organized wholesale electric markets. These same standards are included without revision in the Version 003 standards.

[9] These standards were originally cited in a NAESB July 2011 report filed with the Commission and were resubmitted as part of WEQ Version 003. *See* Report of the North American Energy Standards Board on Smart Grid Related Standards, Docket No. RM05–5–021 (filed July 7, 2011); NAESB September 18 Filing at 2.

[10] *Standards for Business Practices and Communication Protocols for Public Utilities,* Order No. 676–C, FERC Stats. & Regs. ¶ 31,274, *reh'g denied,* Order No. 676–D, 124 FERC ¶ 61,317 (2008).

[11] *Standards for Business Practices and Communication Protocols for Public Utilities,* Order No. 676–E, FERC Stats. & Regs. ¶ 31,299 (2009). This order also incorporated revisions made in response to Order Nos. 890, 890–A, and 890–B.

[12] *Standards for Business Practices and Communication Protocols for Public Utilities,* Order No. 676–F, FERC Stats. & Regs. ¶ 31,309 (2010).

[13] Order No. 676–G, *see supra* n.8.

[14] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g,* Order No. 888–A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g,* Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC,* 225 F.3d 667 (D.C. Cir. 2002), *aff'd sub nom. New York* v. *FERC,* 535 U.S. 1 (2002).

part of the package of revisions included in the WEQ Version 003 Standards. These revisions are in addition to the Order No. 890-related revisions incorporated by reference in Order No. 676–E.

10. In total, NAESB's WEQ Version 003 business practice standards include the following standards: [15]

WEQ [16]	Standards & models related to:
000	Abbreviations, Acronyms, and Definition of Terms, Version 003.
001	Open Access Same-Time Information System (OASIS), Version 003.
002	OASIS Standards and Communication Protocols (S&CP), Version 003.
003	OASIS S&CP Data Dictionaries.
004	Coordinate Interchange.
005	ACE Equation Special Cases.
006	Manual Time Error Corrections.
007	Inadvertent Interchange Payback.
008	Transmission Loading Relief.
009	Standards of Conduct.
010	Contracts Related Standards.
011	Gas/Electric Coordination.
012	Public Key Infrastructure (PKI).
013	OASIS Implementation Guide.
014	WEQ/WGQ eTariff Related Standards.
015	Measurement and Verification of Wholesale Electricity Demand Response.
016	Specifications for Common Electricity Product and Pricing Definition.
017	Specifications for Common Schedule Communication Mechanism for Energy Transactions.
018	Specifications for Wholesale Standard Demand Response Signals.
019	Customer Energy Usage Information Communication.
020	Smart Grid Standards Data Element Table.
021	Measurement and Verification of Energy Efficiency Products.

11. The Version 003 standards include five categories of standards not previously incorporated by reference by the Commission that were developed by NAESB in response to the Order No. 890 series of orders. These include: (1) Standards that NAESB previously submitted to support SAMTS;[17] (2) part two of the standards modifications to the WEQ–001–9.7 Business Practice Standard requested in FERC Order No. 890–A[18] related to rollover rights to requests for redirect on a firm basis; (3) the WEQ–001–9.1.3.1 and WEQ–001–10.3.1.1 Business Practice standards that provide for transmission providers to process redirect requests in a manner in which the request would be processed in a manner that counts the available transfer capability encumbered by the parent reservation as available for the redirected request; [19] (4) standards to support Network Integration Transmission Service on the OASIS; [20] and (5) standards modifications to support consistency across the NAESB OASIS standards.[21]

12. In Order No. 717, the Commission made several modifications related to the posting requirements associated with the Standards of Conduct. Specifically, the Commission discontinued the requirement for public utilities to post standards of conduct information on their OASIS sites.[22] In response, WEQ's Business Practice Subcommittee modified the WEQ–001, WEQ–002 and WEQ–003 Business Practice Standards to remove reference to the standards of conduct-related obligations with the exception of a few template structures that may be implemented at the option of the transmission provider. WEQ's OASIS Subcommittee also modified standards WEQ–013–2.6.81 and WEQ–013–2.6.82 to clarify the listing of service types, modified standards WEQ–001–14.1.3 and WEQ–001–15.1.2 regarding the timing of required postings of narratives, and made modifications to standards WEQ–001, WEQ–002 and WEQ–003 (concerning standards of conduct posting requirements) in response to Order No. 717.

13. The Joint Electric Scheduling Subcommittee (JESS), a standing joint subcommittee made up of participants from NAESB and the North American Electric Reliability Corporation (NERC), has been tasked with coordinating efforts to maintain and modify, as needed, the coordinate interchange business practice standards in WEQ–004 with their associated reliability standards. JESS now leads the effort to harmonize the Coordinate Interchange (WEQ–004) standards with the WEQ–001, WEQ–003 and WEQ–013 Business Practice Standards in light of revisions made to the Electronic Tagging Functional Specification, previously maintained by NERC, and now maintained and updated, as needed, by NAESB. The WEQ adopted additional modifications to the WEQ–004 standards to use abbreviations, acronyms, definitions and terms consistent with those in Standard WEQ–000 and to provide consistency across all WEQ standards.

14. WEQ adopted modifications to support consistency between the WEQ business practice standards and the Wholesale Gas Quadrant (WGQ) Gas/Electric Coordination standards. In addition, WEQ made modifications to the business practice standards to harmonize the terms and definitions contained within the WEQ business practice standards with the definitions of those terms used in the business practice standards for other quadrants. These changes were also coordinated to be consistent with definitions and terms contained in the NERC Glossary.

15. Also included in the WEQ Version 003 standards are standards developed to support Smart Grid applications as well as standards related to the measurement and verification of Demand Response (DR) and Energy Efficiency (EE) products. These standards have been referenced in earlier reports filed with the Commission before the completion of the WEQ Version 003 standards. The Smart Grid application standards had been referenced in a report filed with the Commission on July 7, 2011 in Docket No. RM05–5–021. The DR and EE measurement and verification standards were referenced in a report filed with the Commission on May 2, 2011 in Docket No. RM05–5–021 and have been the subject of Commission action.[23]

16. Finally, NAESB's September 18 Filing includes an interpretation of standards WEQ–001–9.1 and WEQ–001–10.1 and recites the results of a quadrant wide effort to provide a common location for all abbreviations, acronyms and definitions of terms that created the WEQ–000 Business Practice Standards and addresses both internal inconsistencies and inconsistencies between the standards and terms and definitions in the NERC Glossary.

II. Discussion

17. As discussed below, with certain enumerated exceptions, we propose to

[15] All of the standards were filed with the Commission as a package on September 18, 2012 and were modified on January 30, 2013.

[16] With the exception of standards WEQ 009 and 010, which are unchanged from Versions 002 and 002.1, NAESB's Version 003 Report adopts revisions to multiple subsections of each of the WEQ standards listed.

[17] *See* September 18 Filing at 3 & n.13 (citing submittal of NAESB Standards Development to Support Coordination of Requests for Transmission Service Across Multiple Transmission Systems (Docket No. RM05–5–013) on October 7, 2011, with minor corrections on January 25, 2012).

[18] *See* September 18 Filing at 3 (citing NAESB WEQ Business Practices Standards Crediting Redirect Requests with the Capacity of the Parent Reservation).

[19] *Id.* at 3.

[20] *Id.*

[21] *Id.*

[22] Order No. 717, FERC Stats. & Regs. ¶ 31,280 at PP 213–218 and PP 235–239.

[23] *Standards for Business Practices and Communication Protocols for Public Utilities,* Order No. 676–G, 78 FR 14654 (Mar. 7, 2013), FERC Stats. & Regs. ¶ 31,343 (Feb. 21, 2013).

incorporate by reference (into the Commission's regulations at 18 CFR 38.2) the NAESB WEQ Version 003 standards.[24] The Version 003 standards will update the Version 002.1 standards currently incorporated by reference into the Commission's regulations.[25]

18. We note that, in a separate rulemaking (in Docket No. RM13–17–000) being issued concurrently with this NOPR, the Commission is proposing new standards on coordination between natural gas and electricity markets. Depending on the outcome of that proceeding, we are considering situating the incorporation by reference that we are proposing in this NOPR in a different section in Part 38 than section 38.2. This should not, however, affect the substance of our proposal.

A. Revisions to OASIS Standards Made To Comply With Order No. 890 Objectives and Requirements

19. In the NAESB WEQ Version 003 standards, NAESB has developed new standards and revised existing standards designed to ensure consistency with certain policies articulated by the Commission in Order Nos. 890, 890–A and 890–B.

1. Service Across Multiple Transmission Systems (SAMTS)

20. The SAMTS business practice standards were developed to provide a process for customers to complete cross-regional transactions in response to the Commission's requirement that transmission providers develop business practice standards in this area.[26] SAMTS-related standards include modified and added terms in the Abbreviations, Acronyms and Definition of Terms (newly created WEQ–000), OASIS Business Practice Standards (WEQ–001), OASIS Standards and Communication Protocols (WEQ–002), OASIS Data Dictionary (WEQ–003), and the OASIS Implementation Guide (WEQ–013). The SAMTS standards address the coordination of point-to-point transmission service and/or network transmission service requests across multiple transmission systems. The process requires each affected provider to independently evaluate its portion of the linked request with the opportunity for reconciliation by the customer once all evaluations are complete. The customer communicates reconciled information to each of the affected providers.

2. Network Integration Transmission Service (NITS)

21. Network Integration Transmission Service allows a Network Customer to integrate, economically dispatch and regulate its current and planned Network Resources to serve its Network Load in a manner comparable to the way a Transmission Provider uses its Transmission System to serve its Native Load Customers.[27] The Commission required that utilities use OASIS to request designation of new network resources and to terminate designation of network resources.[28] In response to this requirement as well as other directives within Order No. 890[29] and subsequent orders,[30] NAESB's WEQ Executive Committee adopted business practice standards to support the OASIS functionality associated with NITS. These new and revised standards fall within the WEQ–000, WEQ–001, WEQ–002 and WEQ–003 Business Practice Standards.

22. The new/revised standards are designed to provide functionality that:

- Allows transmission providers to handle requests (loads, designation of a network resource, non-designated resources) on a customer-by-customer basis,
- allows the option of tracking designated network resource scheduling rights, and
- allows a customer to designate an agent to administer OASIS transactions on its behalf.

23. NAESB has proposed Standard WEQ–001–106.2.5, which appears to contemplate a Transmission Provider refusing a request to terminate a secondary network service. We request comment on the purpose of this standard and on whether the Commission should incorporate this standard by reference. We note that, in Order No. 890–A, the Commission found that it was not appropriate to allow a Transmission Provider to deny requests to terminate network resource designations, although Order No. 890–A did not directly address the issue of terminating secondary network service.[31]

3. Rollover Rights for Redirects

24. In Order No. 676, the Commission incorporated by reference NAESB's proposed standards for dealing with redirects, with the exception of WEQ–001–9.7 which the Commission viewed as inconsistent with the *pro forma* OATT and Commission policies on rollover rights.[32] In Order No. 676–E, the Commission incorporated by reference new and modified NAESB standards related to rollover rights with the continued exception of standard WEQ–001–9.7. The Commission noted in Order No. 676–E that the filed NAESB standards represented only the first part of a two part process through which NAESB will fully develop standards that are consistent with the Commission's policy on rollover rights as articulated in Order Nos. 890, 890–A and 676.[33] As explained in Order No. 676–E, NAESB stated that the second part of this process would include modifications to Standard 001–9.7, as directed by Order No. 890.[34]

25. In the Version 003 standards, NAESB modified WEQ–001–9.7 so that it would conform to the Commission's policy granting rollover rights to requests for redirect on a firm basis.[35]

[24] Consistent with our past practice, we do not propose to incorporate by reference into the Commission's regulations the following standards: Standards of Conduct for Electric Transmission Providers (WEQ–009); Contracts Related Standards (WEQ–010); and WEQ/WGQ eTariff Related Standards (WEQ–014). We do not propose to incorporate by reference standard WEQ–009 because it contains no substantive standards and merely serves as a placeholder for future standards. We do not propose to incorporate by reference standard WEQ–010 because this standard contains an optional NAESB contract regarding funds transfers and the Commission does not require utilities to use such contracts. In addition, we do not propose to incorporate by reference standard WEQ–014, eTariff Related Standards, because the Commission already has adopted standards and protocols for electronic tariff filing based on the NAESB standards. *See Electronic Tariff Filings,* Order No. 714, FERC Stats. & Regs. ¶ 31,276 (2008). Also, we do not propose to incorporate by reference NAESB's interpretation of its standards on Gas/Electric Coordination (WEQ–011). While interpretations may provide useful guidance, NAESB's interpretations are not binding on the Commission and we will not require utilities to comply with those interpretations (although we will require compliance with all the standards that we incorporate by reference into the Commission's regulations). Additionally, as discussed more specifically the NITS section below, we do not propose to incorporate by reference certain portions of WEQ–001.

[25] *See supra* n.11.

[26] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1377.

[27] Order No. 890, *Pro Forma* OATT, Section III (Network Integration Transmission Service) Preamble.

[28] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 385.

[29] *Id.,* PP 1477, 1504, 1532, and 1541.

[30] Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 at P 919; Order No. 890–B, 123 FERC ¶ 61,299 at P 188; Order No. 890–C, 126 FERC ¶ 61,228 at P 17.

[31] *Id.* P 950.

[32] Order No. 676, FERC Stats. & Regs. ¶ 31,216 at P 52.

[33] Order No. 890, FERC Stats. & Regs. ¶ 31,241 at PP 1231–1239; Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 at PP 644–651; Order No. 676–E, FERC Stats. & Regs. ¶ 31,299 at P 94.

[34] Order No. 676–E, FERC Stats. & Regs. ¶ 31,299 at P 7 & n.12 (citing NAESB Version 002.1 filing letter dated Feb. 19, 2009).

[35] As we stated in *Entergy Services, Inc.,* 143 FERC ¶ 61,143, at P 25 & n.68 (2013), our guiding precedent on the issue of when a customer requesting redirect loses rights on the original path

Continued

NAESB modified the WEQ–001–9 Business Practice Standards and modified the definition of Unexercised Rollover Rights and added a definition for Capacity Eligible for Rollover to make the NAESB standards consistent with the Commission's regulations. NAESB also made relevant modifications to standards WEQ–001, WEQ–002 and WEQ–013 and provided examples for the conveyance of rollover rights with a redirect on a firm basis provided in Appendix B of the WEQ–001 standards.

4. Redirect Requests and Available Transfer Capacity (ATC) Credit

26. In the Version 003 Standards, NAESB added standards WEQ–001–10.3.1.1 and WEQ–001–9.1.3.1, which provide that transmission providers are to process redirect requests in a manner that considers the available transfer capability encumbered by the parent reservation as available for the redirected request. The revised standards were designed to avoid violation of first come, first served queue priority principles.

5. OASIS Introduction and Applicability Sections

27. NAESB proposed modifications to the introduction and applicability sections of the OASIS standards to promote consistency within the standards. The introductory section of the standards provides a brief description of the purpose of the standard, while the applicability section identifies the entities that are affected by the standard. In addition, modifications were made to the organization and the structure of standards WEQ–001 and WEQ–013 for purposes of consistency.

6. Commission Proposal

28. With the exceptions noted, we propose to incorporate by reference Version 003 of these standards into the Commission's regulations.

B. Revisions to OASIS Standards Not Related to Order No. 890 Objectives and Requirements

29. In Version 003, NAESB also made modifications to address three issues not related to the requirements established in the Order No. 890 and not the subject of a report previously provided to the Commission. In Order No. 717, the Commission modified the posting requirements for waivers and exercises of discretion as well as some other posting requirements.[36] Of particular note, the Commission eliminated the requirement for public utilities (and pipelines) to post standards of conduct information on OASIS and instead required transmission providers to post that information on their Web sites.[37] NAESB modified WEQ–001, WEQ–002 and WEQ–003 to remove reference to the standards of conduct related obligations with the exception of a few template structures that may be implemented at the option of the transmission provider.

30. In Order No. 676–E, the Commission declined to incorporate NAESB WEQ–001–14.1.3 and WEQ–001–15.1.2 (both related to ATC Narrative) because these standards did not meet the Commission's requirement to post the ATC narrative as soon as feasible.[38] To correct this deficiency, NAESB modified those two standards to provide that transmission providers strive to post narratives within one business day and requiring a posting within five business days. NAESB's report does not present any reason why a transmission provider would need five business days to post an ATC narrative and we remain concerned that the five-business day requirement does not meet the Commission's requirement to post the ATC narrative as soon as feasible. We invite comments on the necessity for taking longer than one day to post the ATC narrative.

31. In addition, NAESB made minor modifications to standards WEQ–013–2.6.8.1 and WEQ–013–2.6.8.2 to clarify that the listings of service types therein constitute examples and are not definitive. With the exceptions noted, we propose to incorporate by reference Version 003 of these standards into the Commission's regulations.

C. Other Standards

1. Coordinate Interchange Standards

32. As explained above, JESS is leading efforts to modify the Coordinate Interchange (WEQ–004) standards and, additionally, to make related modifications to WEQ–001, WEQ–003 and WEQ–013 Business Practice Standards to ensure that the standards are consistent with current Electronic Tagging Functional specifications (now maintained by NAESB) as well as to incorporate a guideline standardizing the rounding of partial megawatt hours schedules.[39] Additional modifications were made to ensure consistency across all WEQ standards.

2. Gas/Electric Coordination Standards

33. In the Version 003 standards, NAESB made modifications to eliminate inconsistencies between definitions used by the NAESB quadrants as well as the NERC Glossary.[40] This included changing the terms ''Power Plant Operator'' and ''Power Plant Operator's Facility'' to ''Power Plant Gas Coordinator'' and ''Power Plant Gas Coordinator's Facility,'' respectively.[41] Additionally, a definition for ''Transportation Service Provider'' was added and revisions were made to ensure the consistent application of the terms ''Balancing Authority'' and ''Reliability Coordinator.''[42] We propose to incorporate by reference Version 003 of these standards into the Commission's regulations.

3. Public Key Infrastructure (PKI) Standards

34. NAESB first developed Public Key Infrastructure (PKI) Standards in 2007 and the Commission incorporated the PKI standard (Standard WEQ–12), Version 001, by reference into its regulations in Order No. 676–C.[43] The NAESB PKI Standards incorporated by reference by the Commission in Order No. 676–C were limited to requirements that an Authorized Certification Authority (ACA) must meet in order to issue certificates that are compliant with the NAESB PKI Standards and the minimum physical characteristics that a certificate must meet in order to achieve compliance with the NAESB PKI Standards.[44] These standards did not identify business transactions by public utilities that required the use of PKI.

35. On rehearing, in Order No. 676–D, the Commission explained that the NAESB standards apply to Certificate Authorities seeking certification from NAESB, but did not require that public utilities use PKI. The Commission explained: ''the PKI Standards are designed to provide uniform standards for an encryption system that companies can, *but are not required to, use* to enhance security for business

was set in *Dynegy Power Marketing, Inc.,* 99 FERC ¶ 61,054, at P 9 (2002), where we held that a transmission customer receiving firm transmission service does not lose its rights to its original path until the redirect request satisfies all of the following criteria: (1) It is accepted by the transmission provider; (2) it is confirmed by the transmission customer; and (3) it passes the conditional reservation deadline under OATT section 13.2.

[36] Order No. 717, FERC Stats. & Regs. ¶ 31,280 at PP 213–218; PP 235–249.

[37] Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 247.

[38] Order No. 676–E, FERC Stats. & Regs. ¶ 31,299 at P 39.

[39] *See* NAESB Version 003 Report at 9.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See* Order No. 676–C, FERC Stats. & Regs. ¶ 31,274 at P 75.

[44] *Id.*

transactions taking place over the Internet.'' (emphasis added).[45] The Commission further explained that ''[t]he standards do not require that public utilities use PKI for all business transactions over the Internet and the standards permit public utilities to conduct business transactions over the Internet that do not involve the use of [ACAs].'' [46]

36. In a series of filings, NAESB reported on its updated PKI standards for Version 003. The revised standards are divided into two sections. First, Standard WEQ–012 specifies those transactions for which public utilities need to use PKI. The WEQ–012 standards specify the minimum authentication requirements that end entities [47] must meet when conducting transactions under NAESB Business Practice Standards defined in Standards WEQ–000, WEQ–001, WEQ–002, WEQ–003, WEQ–004 and WEQ–013. This includes the use of PKI in communicating with the Electric Industry Registry (EIR) of commercial transaction information useful for electronic tagging.[48] Under these standards, for these specific purposes, public utilities need to use NAESB-certified ACAs for PKI.

37. Second, NAESB developed ACA Accreditation Requirements and ACA Process requirements that ACAs must meet to receive certification from NAESB. NAESB has not adopted these accreditation requirements as standards.

38. NAESB explains [49] that, given the importance and inter-play of OASIS, electronic tagging, and the EIR, a common PKI standard used to secure access is a significant improvement over simple user name and password authentication in common use. NAESB states that its PKI program provides assurance that (1) the party initiating a data exchange is positively identified by its electronic certificate, (2) the data exchanged is encrypted and unaltered in transit, and (3) each party to the transaction (i.e, the initiating party and the counter-party) is the intended recipient of the information exchanged, through mutual authentication. NAESB further explains that this mutual authentication process allows two entities or computers, in this case, the end entity and the service provider operating the system, to authenticate the identities of one another through challenge-response protocols.

39. Given the improvement represented by the revised standards over the Version 002 standards, we propose to incorporate by reference the NAESB WEQ–012 standards. These standards, when adopted, will require public utilities to conduct transactions securely when using the internet and will eliminate confusion over which transactions involving public utilities must follow the approved PKI procedures to secure their transactions. We also understand the necessity for the standards to require that all ACAs be certified under a common set of certification requirements so that all participants have a common list of ACAs from which they can choose. Having a common list of ACAs enhances the efficiency of transactions as each party can be assured that a counter party's certificate meets these minimum requirements.[50] While we find that NAESB's certification provides efficiency benefits, we are not proposing to incorporate by reference the NAESB ACA Accreditation Requirements and ACA Process requirements, as NAESB has not adopted these requirements as standards and the Commission does not have jurisdiction over ACAs.[51]

4. Smart Grid Standards

40. The NAESB WEQ Version 003 Business Practice Standards include five wholesale business practice standards related to Smart Grid that define use cases, data requirements, and a common model to represent customer energy usage: [52]

- NAESB WEQ–016—Specifications for Common Electricity Product and Pricing Definition;
- NAESB WEQ–017—Specifications for Common Schedule Communication Mechanism for Energy Transactions;
- NAESB WEQ–018—Specifications for Wholesale Standard Demand Response Signals;
- NAESB WEQ–019—Customer Energy Usage Information Communication; and
- NAESB WEQ–020—Smart Grid Standards Data Elements Table.

41. We propose, in this NOPR, to incorporate by reference standards WEQ–016, WEQ–017, WEQ–018, WEQ–019 and WEQ–020 into the Commission's regulations. The Commission notes that NAESB ratified changes to Standard WEQ–019 on March 21, 2013. We understand that this standard provides for energy usage information and this revision is consistent with the Green Button Initiative, promoted by the White House Office of Science and Technology Policy,[53] which allows consumers access to their energy usage information. These standards will not only be used by the wholesale electric industry, but also are important initiatives for use in ongoing utility programs for consumer data access. We, therefore, invite comment on whether the Commission should incorporate by reference the version of Standard WEQ–019 ratified by NAESB membership on March 21, 2013, rather than the version contained in Version 003.

5. Standards Related to Terms, Definition and Acronyms

42. The Version 003 WEQ Business Practice Standards create a common location for all abbreviations, acronyms and definitions of terms and houses this information in a newly created standard WEQ–000. In accordance with Commission guidance.[54] NAESB also set out to ensure definition consistencies internally and with the NERC Glossary and revised the NAESB definitions accordingly.

6. Commission Proposal

43. With the exceptions noted, we propose to incorporate by reference Version 003 of these standards into the Commission's regulations.

D. Implementation

44. Consistent with our past practice, we propose that, once the Commission incorporates these standards by reference into its regulations, public utilities must implement these

[45] Order No. 676–D, 124 FERC ¶ 61,317 at P 7.

[46] *Id.* P 9.

[47] NAESB defines ''end entities'' as including utilities and other independent grid operators.

[48] NAESB has replaced NERC in supporting the Electric Industry Registry (EIR) as these data relate to business transactions rather than reliability. Under NERC, the registry was referred to as the Transmission System Information Network (TSIN).

[49] January 30, 2013 Filing.

[50] In proposing to incorporate by reference Standard WEQ–012, we recognize that while the electric industry is not insubstantial, it may represent only a small portion of an ACA's clientele, and that NAESB has a legitimate concern in setting certification standards that provide potential customers with sufficient competitive alternatives in choosing suppliers to provide price competition in PKI services.

[51] *See Reporting on North American Energy Standards Board Public Key Infrastructure Standards,*140 FERC ¶ 61,149, at P 13 (2012) (where the Commission stated it does not have jurisdiction over NAESB or the Certification Authorities as public utilities). Since the ACA Accreditation Requirements and ACA Process apply to non-jurisdictional entities, and we are not proposing to incorporate these standards as federal regulations, we will not opine upon these requirements, including the lifetime of the root keys.

[52] *See supra* n.9.

[53] *See http://www.whitehouse.gov/blog/2012/01/18/green-button-providing-consumers-access-their-energy-data.*

[54] NAESB's efforts in this regard are in accordance with the Commission's findings in Order No. 676, FERC Stats. & Regs. ¶ 31,241 at P 40 and Order No. 676–C, 126 FERC ¶ 61,228 at P 8.

standards even before they have updated their tariffs to incorporate these changes. The Commission is also proposing, consistent with our regulation at 18 CFR 35.28(c)(1)(vii), to require each public utility to revise its OATT to include the Version 003 standards that we are proposing to incorporate by reference herein. For standards that do not require implementing tariff provisions, the Commission is proposing to permit the public utility to incorporate the WEQ standard by reference in its OATT. We are not, however, proposing to require a separate tariff filing to accomplish this change. Consistent with our prior practice, we are proposing to give public utilities the option of including these changes as part of an unrelated tariff filing.[55]

III. Notice of Use of Voluntary Consensus Standards

45. The NAESB WEQ Version 003 Business Practice Standards were adopted by NAESB under NAESB's consensus procedures.[56] As the Commission found in Order No. 676, adoption of consensus standards is appropriate because the consensus process helps ensure the reasonableness of the standards by requiring that the standards draw support from a broad spectrum of all segments of the industry. Moreover, since the industry itself has to conduct business under these standards, the Commission's regulations should reflect those standards that have the widest possible support. In section 12(d) of the National Technology Transfer and Advancement Act of 1995, Congress affirmatively requires federal agencies to use technical standards developed by voluntary consensus standards organizations, like NAESB, as means to carry out policy objectives or activities unless use of such standards would be inconsistent with applicable law or otherwise impractical.[57]

46. Office of Management and Budget Circular A–119 (section 11) (February 10, 1998) provides that Federal Agencies should publish a request for comment in a NOPR when the agency is seeking to issue or revise a regulation proposing to adopt a voluntary consensus standard or a government-unique standard. In this NOPR, the Commission is proposing to incorporate by reference a voluntary consensus standard developed by the WEQ.

IV. Information Collection Statement

47. The following collection of information contained in this proposed rule is subject to review by the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d). OMB's regulations require approval of certain information collection requirements imposed by agency rules.[58] Upon approval of a collection(s) of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of this rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

48. The Commission solicits comments on the Commission's need for this information, whether the information will have practical utility, the accuracy of the provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques.

49. The following burden estimate is based on the projected costs for the industry to implement the new and revised business practice standards adopted by NAESB and proposed to be incorporated by reference in this NOPR.

Data collection	Number of respondents (1)	Number of responses per respondent (2)	Hours per response (3)	Total number of hours (1) × (2) × (3)
FERC–516[59] (tariff filing)	132	1	6	792
FERC–717[60] (compliance with standards)	132	1	[61] 30	3,960
Totals				4,752

Costs to Comply with Paperwork Requirements:

The estimated annual costs are as follows:

- FERC–516: 132 entities * 1 response/entity * (6 hours/response * $72/hour[62]) = $57,024.
- FERC–717: 132 entities * 1 response/entity * (30 hours/response * $72/hour) = $285,120.

Titles: Electric Rate Schedule Filing (FERC–516); Open Access Same Time Information System and Standards for Business Practices and Communication Protocols for Public Utilities (FERC–717).

Action: Proposed collection.

OMB Control Nos.: 1902–0096 (FERC–516); 1902–0173 (FERC–717).

Respondents: Business or other for profit (Public Utilities—Generally not applicable to small businesses).[63]

Frequency of Responses: One-time implementation (business procedures, capital/start-up).

[55] *See* Order No. 676, FERC Stats. & Regs. ¶ 31,216 at P 100.

[56] Under this process, to be approved a standard must receive a super-majority vote of 67 percent of the members of the WEQ's Executive Committee with support from at least 40 percent from each of the five industry segments—transmission, generation, marketer/brokers, distribution/load serving entities, and end users. For final approval, 67 percent of the WEQ's general membership must ratify the standards.

[57] Public Law 104–113, 12(d), 110 Stat. 775 (1996), 15 U.S.C. 272 note (1997).

[58] 5 CFR 1320.11 (2012).

[59] ''FERC–516'' is the Commission's identifier that corresponds to OMB control no. 1902–0096 which identifies the information collection associated with Electric Rate Schedules and Tariff Filings.

[60] ''FERC–717'' is the Commission's identifier that corresponds to OMB control no. 1902–0173 which identifies the information collection associated with Standards for Business Practices and Communication Protocols for Public Utilities.

[61] The 30-hour estimate was developed in Docket No. RM05–5–013, when the Commission prepared its estimate of the scope of work involved in transitioning to the NAESB Version 002.1 Business Practice Standards. *See* Order No. 676–E, FERC Stats. & Regs. ¶ 31,299 at P 134. We have retained the same estimate here, because the scope of the tasks involved in the transition to Version 003 of the Business Practice Standards is very similar to that for the transition to the Version 002.1 Standards.

[62] The estimated hourly loaded cost (salary plus benefits) is a composite estimate that includes legal, technical, and support staff rates, based on data from the Bureau of Labor Statistics at *http://bls.gov/oes/current/naics3_221000.htm.* Loaded costs are BLS rates divided by 0.703 and rounded to the nearest dollar (*http://www.bls.gov/news.release/ecec.nr0.htm*).

[63] *See infra* P 56.

50. *Necessity of the Information:* This proposed rule, if implemented would upgrade the Commission's current business practice and communication standards and protocols modifications to support compliance with requirements established by the Commission in Order Nos. 890, 890–A, 890–B and 890–C, as well as modifications to the OASIS-related standards to support Order Nos. 676, 676–A, 676–E and 717. In addition, NAESB made modifications to the Coordinate Interchange standards to compliment the updates to the e-Tag specifications, modifications to the Gas/Electric Coordination standards to provide consistency between the two markets and re-organized and revised definitions to create a standard set of terms, definitions and acronyms applicable to all NAESB WEQ standards. The Version 003 Standards also include standards related to Demand Side Management and Energy Efficiency, which the Commission separately acted on in Docket No. RM05–5–020 after NAESB filed its Version 003 report, and Smart Grid-related standards that NAESB previously filed with the Commission in Docket No. RM05–5–021 and to increase the efficiency of the wholesale electric power grid.

51. *Internal Review:* The Commission has reviewed the revised business practice standards and has made a preliminary determination that the proposed revisions that we propose here to incorporate by reference are both necessary and useful. In addition, the Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimate associated with the information requirements.

52. Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, Office of the Executive Director, 888 First Street NE., Washington, DC 20426 [Attn: Ellen Brown, email: *DataClearance@ferc.gov,* phone: (202) 502–8663, fax: (202) 273–0873].

53. Comments concerning the information collections proposed in this NOPR and the associated burden estimates should be sent to the Commission at this docket and may also by email to the Office of Management and Budget, Office of Information and Regulatory Affairs [Attention: Desk Officer for the Federal Energy Regulatory Commission]. For security reasons, comments should be sent by email to OMB at the following email address: *oira_submission@omb.eop.gov.* Please reference the docket number of this Notice of Proposed Rulemaking (Docket No. RM05–5–022) in your submission.

V. Environmental Analysis

54. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[64] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.[65] The actions proposed here fall within categorical exclusions in the Commission's regulations for rules that are clarifying, corrective, or procedural, for information gathering, analysis, and dissemination, and for sales, exchange, and transportation of electric power that requires no construction of facilities.[66] Therefore, an environmental assessment is unnecessary and has not been prepared in this NOPR.

VI. Regulatory Flexibility Act Certification

55. The Regulatory Flexibility Act of 1980 (RFA)[67] generally requires a description and analysis of proposed rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's Office of Size Standards develops the numerical definition of a small business.[68] The Small Business Administration has established a size standard for electric utilities, stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million megawatt hours (MWh).[69]

56. The Commission seeks comment on the estimated impact of the proposed rule on small business entities. The Commission estimates that 5 of the 132 respondents are small. The Commission estimates that the impact on these entities is consistent with the paperwork burden of $2,592 per entity used above.[70] The Commission does not consider $2,592 to be a significant economic impact.

57. Based on the above, the Commission certifies that the proposed Reliability Standards will not have a significant impact on a substantial number of small entities. Accordingly, no initial regulatory flexibility analysis is required.

VII. Comment Procedures

58. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due September 24, 2013. Comments must refer to Docket No. RM05–5–022, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

59. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

60. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

61. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VIII. Document Availability

62. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE., Room 2A, Washington, DC 20426.

[64] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,783 (1987).

[65] 18 CFR 380.4.

[66] *See* 18 CFR 380.4(a)(2)(ii), 380.4(a)(5), 380.4(a)(27).

[67] 5 U.S.C. 601–612.

[68] 13 CFR 121.101 (2012).

[69] 13 CFR 121.201, Sector 22, Utilities & n.1.

[70] 36 hours at $72/hour = $2,592

63. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

64. User assistance is available for eLibrary and the Commission's Web site during normal business hours from the Commission's Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

List of Subjects in 18 CFR Part 38

Conflict of interests, Electric power plants, Electric utilities, Incorporation by reference, Reporting and recordkeeping requirements.

By direction of the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

In consideration of the foregoing, the Commission proposes to amend Chapter I, Title 18, Part 38 of the *Code of Federal Regulations,* as follows:

PART 38—BUSINESS PRACTICE STANDARDS AND COMMUNICATION PROTOCOLS FOR PUBLIC UTILITIES

■ 1. The authority citation for part 38 continues to read as follows:

Authority: 16 U.S.C. 791–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. In § 38.2, paragraphs (a)(1) through (13) are revised and paragraphs (a)(14) and (15) are added to read as follows:

§ 38.2 Incorporation by reference of North American Energy Standards Board Wholesale Electric Quadrant standards.

(a) * * *

(1) Abbreviations, Acronyms, and Definition of Terms (WEQ–000, Version 003, July 31, 2012, as modified by NAESB final actions ratified on Oct. 4, 2012, Nov. 28, 2012 and Dec. 28, 2012);

(2) Open Access Same-Time Information System (OASIS), Version 2.0 (WEQ–001, Version 003, July 31, 2012, as modified by NAESB final actions ratified on Dec. 28, 2012) with the exception of Standards 001–14.1.3 and 001–15.1.2);

(3) Open Access Same-Time Information System (OASIS) Business Practice Standards and Communication Protocols (S&CP), Version 2.0 (WEQ–002, Version 003, July 31, 2012, as modified by NAESB final actions ratified on Nov. 28, 2012 and Dec. 28, 2012);

(4) Open Access Same-Time Information System (OASIS) Data Dictionary Business Practice Standards, Version 2.0 (WEQ–003, Version 003, July 31, 2012, as modified by NAESB final actions ratified on Dec. 28, 2012);

(5) Coordinate Interchange (WEQ–004, Version 003, July 31, 2012, as modified by NAESB final actions ratified on Dec. 28, 2012);

(6) Area Control Error (ACE) Equation Special Cases (WEQ–005, Version 003, July 31, 2012);

(7) Manual Time Error Correction (WEQ–006, Version 003, July 31, 2012);

(8) Inadvertent Interchange Payback (WEQ–007, Version 003, July 31, 2012);

(9) Transmission Loading Relief (TLR)—Eastern Interconnection (WEQ–008, Version 003, July 31, 2012);

(10) Gas/Electric Coordination (WEQ–011, Version 003, July 31, 2012);

(11) Public Key Infrastructure (PKI) (WEQ–012, Version 003, July 31, 2012, as modified by NAESB final actions ratified on Oct. 4, 2012);

(12) Open Access Same-Time Information System (OASIS) Implementation Guide, Version 2.0 (WEQ–013, Version 003, July 31, 2012, as modified by NAESB final actions ratified on Dec. 28, 2012);

(13) Measurement and Verification of Wholesale Electricity Demand Response (WEQ–015, Version 003, July 31, 2012);

(14) NAESB Specifications for Common Electricity Product and Pricing Definition (WEQ–016, Version 003, July 31, 2012);

(15) Specifications for Common Schedule Communication Mechanism for Energy Transactions (WEQ–017, Version 003, July 31, 2012);

(16) Specifications for Wholesale Standard Demand Response Signals (WEQ–018, Version 003, July 31, 2012);

(17) NAESB Customer Energy Usage Information Communication (WEQ–019, Version 003, July 31, 2012);

(18) Smart Grid Standards Data Element Table (WEQ–020, Version 003, July 31, 2012); and

(19) Measurement and Verification of Energy Efficiency Products (WEQ–021, Version 003, July 31, 2012).

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 3285 and 3286

[Docket No. FR–5631–P–01]

RIN 2502–AJ15

Model Manufactured Home Installation Standards: Ground Anchor Installations

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the Manufactured Home Model Installation Standards by adopting recommendations made by the Manufactured Home Consensus Committee to revise existing requirements for ground anchor installations and establish standardized test methods to determine ground anchor performance and resistance. The performance of conventional ground anchor assemblies is critical to the overall quality and structural integrity of manufactured housing installations. While HUD's Model Manufactured Home Installation Standards reference a nationally recognized testing protocol for ground anchor assemblies, there is currently no national test method for rating and certifying ground anchor assemblies in different soil classifications. This proposed rule would establish a uniform test method that could be used by all states for rating and certifying the performance of ground anchor assemblies.

DATES: *Comment Due Date:* September 24, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly

encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m., weekdays, at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the Federal Information Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:

Henry S. Czauski, Acting Deputy Administrator, Office of Manufactured Housing Programs, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 9164, Washington, DC 20410; telephone number 202–708–6409 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

The National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401–5426) (the Act) authorizes HUD to establish the Federal Manufactured Home Construction and Safety Standards (the Construction and Safety Standards, or Standards) codified in 24 CFR part 3280. The Act was amended in 2000 by the Manufactured Housing Improvement Act of 2000 (Pub. L. 106–569), which expanded the purposes of the Act and created the Manufactured Housing Consensus Committee (MHCC). The Manufactured Housing Improvement Act also authorized the Department to establish Model Installation Standards and program requirements pertaining to the installation of new manufactured homes, and assigned responsibility to the MHCC to develop and submit to the Secretary proposed model manufactured home installation standards.

The MHCC began work on its installation standards recommendations in 2002. In August 2005, as part of that standards development process, the Installation Subcommittee of the MHCC developed a draft Ground Anchor Assembly Test Protocol (GAATP). Because of past concerns regarding ground anchor performance, identified during prior research conducted by the Department, and since the draft GAATP had not been independently validated, HUD elected not to include the proposal in the Model Manufactured Home Installation Standards final rule, which was published on October 19, 2007 (72 FR 59338). Instead, HUD sponsored an extensive literature review and multisite ground anchor testing study to verify the adequacy of the draft testing protocol and to determine whether any areas in the draft GAATP required change or enhancement to improve reliability. HUD's ground anchor assembly site study is available on the HUD user database at *http://www.huduser.org/portal/publications/detech/grnd_anchor_2d.html.*

Because there was no nationally recognized testing protocol in 2005 that was universally accepted for testing and certifying ground anchor assemblies in different soil classifications throughout the country, HUD elected to include a provision in § 3282.402 to act as a place-marker in the Model Installation Standards while the research was being completed.

II. Ground Anchor Verification Testing

A. Background

Ground anchors consist of a specific assembly designed to transfer home anchoring loads to the ground. Ground anchors are used extensively in manufactured housing installations and are economical, readily available, and can be installed with relatively lightweight tools and equipment. Anchors are typically constructed with a circular shaft of one or more helixes. A head connects at the opposite side of the anchor which then connects with the home's frame or sidewalls. Helical anchors are designed to be augured into the ground and may also be installed with stabilizer plates to increase the lateral capacity of the anchor.

One significant limitation of ground anchors arises from multiple soil-anchor response mechanisms as a function of soil type, anchor depth, and load configuration. In cohesive soils, excessive anchor movements in a vertical direction can approach or exceed the soil's shear strength. In such cases, the ground anchor is supported by the soil's residual shear strength, resulting in a decrease in anchor capacity. In granular soils, large lateral movements may produce failure planes that can reduce the strength on the vertical direction. In either case, ground anchor movements of several inches can have significant negative impacts on long-term performance and the safety of the home.

B. Ground Anchor Assembly Site Study

The ground anchor assembly site study was conducted to provide HUD with an assessment of the draft GAATP using various ground anchor assemblies, test configurations, and under different site soil conditions. A new test rig was developed for the field testing program in order to facilitate an efficient and repeatable method of ground anchor testing. A total of 74 conventional anchors were tested, at three different locations, with the testing rig developed for the project. An additional 30 duplicate tests were conducted at the Georgia test site using one of the anchor manufacturers testing apparatus for comparative testing purposes. Overall, 104 tests were performed.

Ground anchor resistance varies significantly based on the type of soil in which the anchor is embedded, and is significantly lower in weaker soil conditions. One of the major issues examined in the study was the impact and reliability of anchor performance when the type of site soil was determined by the Unified Soil Classification System (USCS) recommended in the draft GAATP and § 3285.202, as compared to other soil testing methods. The test data from the study found that the USCS was generally a very poor indicator of ground anchor performance and should not be relied upon to determine anchor resistance, unless a significantly higher factor of safety is used to rate the anchor.

Although there were major differences between the project test rig and the lever arm test rig employed by the anchor manufacturer, similar results were achieved in the comparative testing of duplicate anchors that was performed between the two testing approaches.

Those differences in the anchor manufacturer's test rig were related to lack of load or displacement control, relaxation of the soil around the test anchor, in the support foot of the rig being within the cone of influence of the soil around the anchor, and in reporting the ultimate load resistance as an instantaneous, rather than sustained load. In addition, the ultimate loads reported using the anchor manufacturer's testing rig were typically about 20 percent higher or less conservative than values obtained using the project test rig.

In the HUD sponsored study, only one of the anchors tested actually achieved the ultimate load testing resistance requirements in the draft GAATP. However, ground anchor manufacturers who witnessed the testing stated that, with properly sized anchors for the soil classifications tested, their anchors would be capable of achieving the ultimate loads and deflection limits required by the draft test protocol. All of the angle pull anchors were tested at a minimum angle of 30 degrees to the ground. This is consistent with the current requirements of § 3285.402 and the earlier findings of field testing performed by ground anchor manufacturers in developing the draft GAATP. The anchor manufacturers' field tests had earlier found that ground anchor assemblies repeatedly failed well below the load resistance levels required by the draft GAATP, when tested at strap angles of 17–30 degrees. In view of those findings, the HUD sponsored field study only included anchor testing for angles of 30 degrees or greater.

Various improvements to the draft GAATP test procedures were employed in the study and were subsequently recommended to improve reliability and repeatability of ground anchor testing results (see section 5.6 of the Ground Anchor Verification Testing Task 2D Report, Final Report, March 1, 2008). These included the use of a test rig that limits the angle of pull to plus or minus (+/−) two degrees during the angle-pull anchor test and the proximity of the anchor to the test stand supports; use of a maximum and test displacement rate of 0.6 inches per minute; increasing the anchor pre-tension load to 1,000 pounds to set the anchor shaft to the stabilizer plate for angle-pull test configurations; standardizing anchor and stabilizer plate installations; and proper soil characterization at the test site, which did not rely solely on the USSC, such as provided in § 3285.202 of the Model Installation Standards.

III. Changes to the Draft GAATP Recommended by the MHCC

In 2003, the MHCC identified the need to develop criteria for testing and evaluating ground anchor assemblies used to secure manufactured homes against wind forces at the installation site. Its initial effort resulted in the draft GAATP that was developed by the Installation Subcommittee of the MHCC. Through extensive deliberation at 10, in-person and conference-call meetings of the Committee, review of public input on the draft documents, and consideration of test reports and research conducted by the Department, the MHCC voted unanimously at their March 2011 meeting to recommend that HUD adopt a revised version of its earlier ground anchor assembly testing proposal.

The following modifications were made to the draft GAATP in the MHCC proposal, entitled, ''Standard Test Methods for Establishing Working Load Design Values of Ground Anchor Assemblies Used for New Manufactured Home Installations'':

1. The soil test torque probe method would be required to be used in at least three locations to classify the soil at the certification test site (§ 3285.402(b)(3)(ii));
2. For soil classifications 3, 4A, and 4B, site testing would be required to be performed in the lower 50 percentile torque probe value and for soil classifications 1 and 2 the torque probe value would not be permitted to exceed 750 inch-pounds (§ 3285.402(b)(7)(iii));
3. A User Note would be added with regard to the positioning of the test rig supports and their proximity to the anchor assembly being tested (§ .3285.402(b)(7)(iii));
4. The number of field tests required would be reduced from a minimum of 6 tests to a minimum of 3 tests, due to improved reliability resulting from certification testing being conducted at the test site by the torque probe method, for the anchor certification to be determined in the lower 50 percentile of the soil classification being tested.
5. The anchor head would be not be able to extend more than ¾ inch above the stabilizer plate (§ 3285.402(b)(7)(iii));
6. The ground anchor would be permitted to be pretensioned up to 1,000 pounds so the anchor shaft contacts the stabilizer plate, instead of the 500-pound maximum pretensioning force allowed by the draft GAATP (§ 3285.402(b)(8));
7. The load and displacement criteria would be enhanced to require a minimum of five data points with a minimum of 500–1,000 pound increments of loading;
8. The working load design value and soil classification would now be required to be included for each type of anchor installation in the ground anchor assembly listing or certification;
9. A ground anchor tested in a given soil classification number could not be approved for use in a weaker or higher soil classification unless it is also tested in those soil conditions; and
10. The test report would be required to include the soil classification(s), including moisture content and methods for determining soil characteristics for each type of soil for which each ground anchor was evaluated and is certified for use, and the working load design value and minimum ultimate capacity for these soil classification(s).

IV. This Proposed Rule

HUD has reviewed the above described changes to the draft GAATP and the proposal from the MHCC and, other than formatting and editorial changes, is in agreement with these recommendations. The proposed rule would require determination of soil classification by the test probe method, at each testing site for which each anchor assembly is being certified, and would require the tests to be conducted in weaker soils at the lower 50 percentile torque probe value of the soil in which the anchor is being tested. A minimum of three tests must be performed at each certification test site and the anchor assembly must resist at least 4,725 pounds (3,150 pounds × 1.5 factor of safety) in the direction of the pull for each test method for which the anchor is being certified.

The proposed rule includes standard test methods for evaluating ground anchors by the anchor assembly/stabilizer plate test method, the vertical in-line anchor assembly test method, and the in-line ground anchor assembly test method. Failure criteria would be established as a displacement of 2 inches in either the horizontal or vertical direction prior to reaching a total working load of 3,150 pounds, or when the ground anchor head displaces 2 inches in the vertical direction or 3 inches in the horizontal direction prior to reaching a total load of 4,725 pounds, or when any component of the ground anchor shaft fails prior to reaching a total load of 4,725 pounds.

The proposed rule would require the working load design value for each installation method and soil classification to be reported in the ground anchor assembly listing or certification. The proposed rule would

also clarify that an anchor tested in a given soil classification would not be approved for use in a higher or stronger soil classification. The test report required by the proposed rule would include all conditions for each ground anchor assembly tested, the soil classification(s) for which the assembly is certified for use, and the working load design value and minimum ultimate capacity for those soil classification(s).

HUD Questions

The public is invited to comment on any of the specific provisions included in this proposed rule and is also invited to comment on the following questions and on any other related matters or suggestions regarding this proposed rule:

1. Are three anchor tests at each test certification site sufficient to ensure adequate reliability in rated anchor performance, in view of the variation and impact of soil type on the resistance of ground anchor assemblies, or should a minimum of six tests be required, as initially proposed in the draft GAATP?
2. Should the proposed rule be amended to include test requirements for an evenly controlled rate of anchor displacement (0.5 to 0.6 inches per minute) to prevent higher anchor load resistance from being certified, as found in the comparison tests in the HUD research study?
3. Should anchor certifications performed by a professional engineer be required to include follow-up investigations and/or testing to assure ongoing quality of ground anchor products and assemblies?

V. Costs and Benefits of Proposed Rule

As has been discussed in this preamble, this rule proposes to amend the Manufactured Home Model Installation Standards by adopting recommendations made by the MHCC to revise existing requirements for ground anchor installations. Specifically, the rule would establish a national standard for rating and certifying the performance of ground anchor assemblies. While difficult to predict, HUD has determined that the discounted benefits of the rule, including prevented property damage, personal injury, and loss of life are expected to exceed the estimated, one-time costs of between $250,000 and $375,000 imposed by this rule.

Under current practice, ground anchor producers hire third-party certifiers to test the performance of ground anchors in various soil types in order to provide installation instructions. To the extent that producers have not already tested to the proposed standards, they would need to retest and recertify the performance of their ground anchors. No subsequent retesting would be required. Based on estimates provided by one supplier of ground anchors, testing would cost each producer between $50,000 and $75,000. This one-time cost includes 2 to 3 days of testing at two different soil class sites, engineering costs for witnessing the tests, and costs for preparing the reports and certifications. There are five ground anchor producers. Thus, the aggregate one-time cost of this rule totals between $250,000 and $375,000. The true cost would most likely be near the lower end of this range since Florida has existing ground anchor standards that exceed those proposed in this rule.

The benefits provided by the rule would more than offset these one-time costs. Initially, the proposed standards, once implemented, will reasonably decrease the damage resulting from the failure of anchor systems, particularly during high wind events, including hurricanes and tornados, and in seismic events. John Krigger [1] reports, for example, that ''of the manufactured homes destroyed when Hurricane Andrew hit Louisiana, 55 percent of the structural failures were caused by anchor or tie-down failure.'' Similarly, the failure of ground anchor systems also results in collateral property damage to nearby buildings and throughout the community. According to Krigger, [2] 11 percent of manufactured homes failed during Hurricane Andrew because of large missiles (building materials flying through the air) or falling trees. During seismic events, limited primarily to California and Missouri, and high wind events, which due to tornados cover the entire country, failure of ground anchor systems can cause the home to separate from its gas lines, causing the house to explode and nearby buildings can also burn as a result.

According to the U.S. Census Bureau's Survey of Manufactured Homes, the sales price of a new manufactured home in August 2012 was $62,600. This provides an upper bound on the value of damage to a single home. Using this upper bound, costs would equal benefits if between 4 and 6 homes were not destroyed in the first year due to the new anchor standards. This is less than 0.02 percent of the total placements in 2011, which totaled 47,000.

The proposed rule might also reduce the number of injuries and deaths resulting from failed ground anchors. Brooks and Doswell [3] discuss the annual number of deaths from tornadoes and the particular risk to residents of manufactured homes. Their statistics show that 42 percent of deaths from tornadoes are to residents in manufactured homes. The National Oceanic and Atmospheric Association (NOAA) provides information on the number of fatalities and injuries from various weather events. According to NOAA, in 2011, there were 277 deaths of persons in mobile homes from tornadoes. Although it is difficult to estimate the number of deaths that could be prevented by the increased standards in this rule, it is likely that some deaths would be prevented. Government estimates of the value of a human life range from $6.2 million, used by the Department of Transportation (DOT), to $9.1 million used by the Environmental Protection Agency (EPA). The DOT estimate is based on the work of Taylor and Mozrek [4] who examine labor market, or revealed preference, studies. Using the DOT estimate, avoiding one death in the first year would offset the maximum one-time cost ($375,000) by $5.7 million. If one death were prevented in the 43rd year after implementation, the one-time cost of $375,000 would be exceeded, assuming a 7 percent discount rate. Thus, any deaths prevented prior to the 43rd year would yield net benefits from this rule.

Due to the lack of specific data on the damage and deaths caused by failed ground anchors, a precise measure of the prevented damage cannot be calculated. However, based on the above discussion, it appears likely that the benefits would more than offset the one-time costs imposed by this rule.

VI. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this proposed rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and given OMB control number 2502–0253. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not

[1] Krigger, John. ''Your Mobile Home: Energy and Repair Guide for Manufactured Housing,'' *Saturn Resource Management, Inc.,* June 1, 1998, 224 pages.

[2] Id.

[3] Brooks, Harold and Charles Doswell. 2002. ''Deaths in the 3 May 1999 Oklahoma City Tornado from a Historical Perspective'' *Weather and Forecasting,* volume 17, 354–361.

[4] Taylor, Laura and Janus Mozrek. 2002 ''What Determines the Value of a Life? A Meta-Analysis'' *Journal of Policy Analysis and Management,* Vol. 21, No. 2.

required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This proposed rule does not impose any Federal mandate on any State, local, or tribal government, or on the private sector, within the meaning of UMRA.

Environmental Review

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact is available for public inspection between the hours of 8 a.m. and 5 p.m., weekdays, in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street SW., Room 10276, Washington, DC 20410–0500.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has Federalism implications and either imposes substantial direct compliance costs on State and local governments and is not required by statute, or preempts State law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have Federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order. The Model Installation Standards by themselves do not affect governmental relationships or distribution of power. Therefore, HUD has determined that the Model Manufactured Home Ground Anchor Installation Standards do not have Federalism implications that warrant the preparation of a Federalism Assessment in accordance with Executive Order 13132.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. HUD has conducted a material and labor cost impact analysis for this rule. The potential cost impact would be based on costs associated with re-testing and listing or certifying current ground anchor assemblies in accordance with the proposed testing methods. The average per-home cost, estimated to be approximately $0.30 to $0.50 per anchor multiplied by an average of 16 anchors per home, multiplied by 50,000 homes produced in a year, is about $250,000 to $375,000 annually. This includes possible additional costs that may be incurred for redesign of existing anchor assemblies that may be needed to meet the testing requirements of the proposed rule. This does not represent a significant economic effect on either an industrywide or per-unit basis. This small increase in cost associated with this proposed rule would not impose a significant burden for a small business.

Notwithstanding HUD's determination that this rule would not have a significant economic effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that would meet HUD's and Federal statutory objectives.

Catalogue of Federal and Domestic Assistance

The Catalogue of Federal and Domestic Assistance number is 14.171.

List of Subjects

24 CFR Part 3285

Housing standards, Incorporation by reference, Installation, Manufactured homes.

24 CFR Part 3286

Administrative practice and procedure, Consumer protection, Intergovernmental relations, Manufactured homes, Reporting and recordkeeping requirements.

Accordingly, for the reasons discussed in this preamble, HUD proposes to amend 24 CFR parts 3285 and 3286 as follows:

PART 3285—MODEL MANUFACTURED HOME INSTALLATION STANDARDS

1. The authority citation for part 3285 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 5403, 5404, and 5424.

■ 2. In § 3285.5, add a new definition for *Site* in alphabetical order to read as follows:

§ 3285.5 Definitions.

* * * * *

Site. An area of land upon which a manufactured home is installed.

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■ 3. In § 3285.402 revise paragraph (a), redesignate paragraphs (b) and (c) as paragraphs (c) and (d), respectively, and add a new paragraph (b), to read as follows:

§ 3285.402 Ground anchor installations.

(a) *Ground anchor certification and testing.* Each ground anchor must be manufactured and provided with installation instructions, in accordance with its listing or certification. A nationally recognized testing agency must list, or a registered professional engineer or registered architect must certify, the ground anchor for use in a classified soil, as discussed in § 3285.202, based on the test methods in paragraph (b) of this section, or a professional engineer or registered architect must certify that the ground anchor is capable of resisting all loads in paragraph (c) of this section.

(b) *Standard test methods for establishing working load design values of ground anchor assemblies used for new manufactured home installations.*

(1) *Scope.*

(i) These testing procedures provide standard test methods for establishing both ultimate loads and load resistance design values.

(ii) Each assembly or component of an anchor assembly must be tested by the methods established by this section, and, therefore, be suitable, as listed or certified for installation in an appropriately classified soil, for installation of manufactured homes.

(iii) To secure approval of ground anchor assembly products and components, ground anchor manufacturers must have their products tested and listed by a nationally recognized testing laboratory, or tested and certified by an independent registered professional engineer.

(iv) The testing laboratory or independent registered engineer must be free from any conflict of interest from the product manufacturer and any of the product manufacturer's affiliates.

(2) *Definitions.* The definitions contained in this section apply to the terms used in subpart E of this part.

Allowable displacement limits. Criteria establishing the maximum amount of displacement of a material, assembly, or component under load.

Certification Test Site. A site used for the purpose of anchor assembly qualification testing in accordance with this section.

Cohesive Soil. A soil with sufficient clay content to exhibit substantial plastic behavior when moist or wet (i.e., able to be readily molded or rolled into a 1/8-inch thread at a wide range of moisture contents).

Ground Anchor Manufacturer. Any person or company engaged in manufacturing or importing ground anchor assemblies.

Non-Cohesive Soil. Sand, gravel, and similar soils that are predominantly granular and lack a sufficient quantity of fine, clay-sized particles to exhibit the behavior of cohesive soil, as defined in this section.

Working anchor load. The ultimate anchor load in pounds divided by a factor of safety of 1.5.

Ultimate anchor load. The lower of either the highest load achieved during an individual test prior to failure due to exceeding allowable displacement limits or the load at failure of the anchoring equipment or its attachment point to the testing apparatus.

(3) *Determination of Soil Classification.*

(i) General Description of Soil Classification. The general description of soil classification shall be permitted by the use of the Table to § 3285.202.

(ii) Standards for Identification of Soil and Soil Classification. The soil test torque probe method must be used at the certification test site for soil classification. At a minimum, the soil test torque probe must be used at three sample locations representative of the extent of the certification site test area. Soil characteristics must be measured at a depth below ground surface of not greater than the anchor helix depth and not less than ⅔ of the anchor helix depth for each ground anchor depth evaluated within the test area. The lowest torque probe value resulting in the highest soil classification number must be used. Additional guidance regarding the soil test torque probe method is available at the Appendix to this section and at § 3285.202.

(iii) Classification in Non-Cohesive Soils. Ground anchor assemblies must be tested and listed or certified, and labeled for use in non-cohesive soil. Ground anchor assemblies are permitted to be tested, listed or certified, and labeled for use in cohesive soil.

(4) *Field testing apparatus.*

(i) The testing equipment for conducting tests to list or certify a ground anchor assembly for use in a classified soil must be capable of meeting the requirements of paragraph (b)(7) of this section, as determined by the testing agency.

(ii) The testing equipment shall be calibrated to meet the testing requirements of paragraph (b)(7) of this section, as determined by the testing agency.

(5) *Test specimens details and selection.*

(i) Test specimens are to be examined by the independent testing, listing, or certifying entity for conformance with engineered drawings, specifications, and other information provided by the ground anchor manufacturer or producer including:

(A) Dimensions and specifications on all welds and fasteners;

(B) Dimensions and specifications of all metal or material;

(C) Model number and its location on the ground anchor; and

(ii) Necessary test specimens and products for the installed anchor assembly tests must be randomly selected by the independent testing, listing, or certifying entity.

(6) *Test Requirements.*

(i) Field tests must be performed on each anchor assembly installed in a classified soil as defined in paragraph (b)(3) of this section.

(ii) Field test apparatuses must be as specified in paragraph (b)(4) of this section and must conform to the testing requirements of paragraph (b)(7) of this section.

(iii) Testing equipment shall be adequate for testing as determined by the testing agency.

(7) *Field Tests of Anchor Assemblies.*

(i) The soil characteristics at the certification test site must be identified and recorded according to paragraph (b)(3) of this section. The date, approximate time, and names of persons conducting and witnessing the anchor assembly tests must also be recorded at each certification test site.

(ii) Connection of the testing apparatus to the anchor assembly head must provide loading conditions to the anchor head, similar to actual site conditions. Adequacy of the connection must be determined by the testing agency or test engineer.

(iii) For soil classifications 3, 4A, and 4B, testing must be performed in the lower 50 percentile torque probe value of the soil classification being tested. For soil classifications 1 and 2, the torque probe value must not exceed 750 inch-pounds.

Note to paragraph (b)(6): As a recommended practice, the test rig soil reactions (bearing pads) should not be located closer to the center of the anchor assembly (anchor head) than the lesser of D, 4d, or 32 inches where D is the depth of the anchor helix and d is the diameter of the anchor helix, both in inches. However, experience with a particular test rig, types of anchors, and soil conditions may justify other acceptable dimensional tolerances.

(iv) A minimum of three tests must be performed and the result of each test must meet or exceed 4,725 pounds pull (3,150 × 1.5 factor of safety) in the direction of pull.

(v) Special-purpose anchor assemblies, including those needed to accommodate unique design loads identified by manufacturers in their installation instructions, may be certified under this section or to more stringent requirements such as higher working loads, more restrictive anchor head displacements, and/or tested angle limitations.

(vi) Angle of Pull. Where the test apparatus configuration results in a changing angle of pull due to anchor assembly displacement during a lateral angle pull test, the angle of pull at the Ultimate Anchor Load is to be recorded as the load angle for the test. Load angles are to be measured relative to the plane of the ground surface and shall be permitted to be rounded to the nearest 5-degree increment.

(vii) Displacement Measurement. Vertical displacement (for all tests) and horizontal displacement (for lateral angle pull tests) must be measured relative to the centerline of the test apparatus' connection to the ground anchor assembly (anchor head) and the ground. A stable ground reference point for displacement measurements must be located independent of the test apparatus and not closer to the anchor assembly than the soil reaction points of the test apparatus. Displacement measurements shall be taken using a device with not less than ⅛-inch reading increments. Measurements shall be permitted to be rounded to the nearest ⅛-inch increment.

(8) *Anchor assembly field test methods.*

(i) An anchor assembly must be tested in accordance with one or more of the assembly configurations addressed in paragraphs (b)(7)(iii), (iv), and (v) of this section. The as-tested configuration of any anchor assembly is a condition of the listing or certification. Alternate configurations are acceptable provided test conditions appropriately simulate actual end-use conditions and the as-tested configuration is addressed in the manufacturer's installation instructions.

(ii) Anchor assemblies designed for multiple connections to the manufactured home must be individually tested as specified in paragraphs (b)(8)(iii) and (iv) of this section.

(iii) Anchor assembly/stabilizer plate method. The following anchor assembly installation and testing must be consistently applied for all tests:

(A) The ground anchor is to be installed at an angle of 10–15 degrees from vertical to a depth of one-half (½) to two-thirds (⅔) of the anchor length.

(B) A stabilizer plate is to be driven vertically on the side of the ground anchor shaft facing the tensioning equipment three inches (3″) from the shaft, and the top of the plate must be installed flush with the soil surface or not more than one inch below the soil surface.

(C) The ground anchor is to be driven to its full depth into the soil with the bottom of the anchor head not more than ¾ inch above the stabilizer plate.

(D) The ground anchor head is to be attached to the tensioning equipment such that the tension load and displacement can be recorded. The tensioning equipment must be positioned to load the ground anchor and stabilizer plate at the minimum angle to the test site ground surface for which the anchor is being evaluated.

Note to paragraph (b)(8). Additional testing at angles of pull greater than the minimum angle of pull may be used to provide design values for specific angles of pull greater than the minimum angle for which evaluation is sought.

(E) The ground anchor is to be pretensioned to 500 pounds so that the anchor shaft contacts the stabilizer plate. If the anchor shaft does not come into contact with the stabilizer plate, an anchor setting load not to exceed 1,000 pounds is permitted to be applied and then released prior to reapplication of the 500-pound pretension force.

(F) The location of the ground anchor head is to be marked after it is pretensioned for measuring subsequent movement under test loading.

(G) Increase the load throughout the test. The recommended rate of load application must be such that the loading to not less than 4725 pounds is reached in not less than 2 minutes from the time the 500 pound pretension load is achieved.

(H) Record the load and displacement, at a minimum of 500–1000 pound increments, such that a minimum of five data points will be obtained to determine a load deflection curve. For each datum, the applied load and the ground anchor head displacement is to be recorded. In addition, the load and displacement is to be recorded at the failure mode identified in paragraph (b)(10) of this section. It is permissible to halt the addition of load at each loading increment for up to 60 seconds to facilitate taking displacement readings. The ultimate anchor load of the ground anchor assembly and corresponding displacement is to be recorded. The pretension load of 500 pounds should be included in the 4725 pound ultimate anchor load test. It is permissible to interpolate between displacement and load measurements to determine the ultimate anchor load.

(I) All ground anchor assemblies must be tested to the following:

(*1*) Failure due to displacement of the ground anchor assembly as established in paragraph (b)(9) of this section, or

(*2*) Failure of either the anchoring equipment or its attachment point to the testing apparatus, or to a minimum of 4725 pounds (when possible, tests should be taken to 6000 pounds to provide additional data, but this is NOT required).

(iv) Vertical in-line anchor assembly method. Anchor assembly installation and withdrawal procedures for test purposes are to be as follows, and are to be used consistently throughout all tests:

(A) The ground anchor must be installed vertically.

(B) The ground anchor must be driven to its full depth into the soil.

(C) The ground anchor head must be attached to the tensioning equipment such that the load and ground anchor head displacement can be recorded.

(D) The ground anchor must be pulled in line with the ground anchor shaft.

(E) The ground anchor shall be pretensioned to 500 pounds.

(F) The location of the ground anchor head must be marked after it is pretensioned for measuring subsequent movement under test loading.

(G) Increase the load throughout the test. The recommended rate of load application shall be such that the loading to not less than 4725 pounds is reached in not less than 2 minutes from the time the 500 pound pretension load is achieved.

(H) Record the load and displacement, at a minimum of 500–1000 pound increments, such that a minimum of five data points will be obtained to determine a load deflection curve. For each datum, the applied load and the ground anchor head displacement is to be recorded. In addition, the load and displacement is to be recorded at the failure mode identified in paragraph (b)(10) of this section. It is permissible to halt the addition of load at each loading increment for up to 60 seconds to facilitate taking displacement readings. The ultimate anchor load of the ground anchor assembly and corresponding displacement is to be recorded. The pretension load of 500 pounds should be included in the 4725 pound ultimate anchor load test. It shall be permissible to interpolate between displacement and load measurements to determine the ultimate anchor load.

(I) All ground anchor assemblies must be tested to the following:

(*1*) Failure due to displacement of the ground anchor assembly, as established in paragraph (b)(9) of this section, or

(*2*) Failure of either the anchoring equipment or its attachment point to the testing apparatus, or to a minimum of 4725 pounds (when possible, tests should be taken to 6000 pounds to provide additional data but this is NOT required).

(v) In-line ground anchor assembly method. Ground Anchor Assembly installation and withdrawal procedures for test purposes must be as follows, and must be used consistently throughout all tests:

(A) The ground anchor must be installed at an angle from the horizontal ground surface at which it is to be rated.

(B) The ground anchor must be driven to its full depth into the soil.

(C) The ground anchor head must be attached to the tensioning equipment such that tension and displacement can be recorded.

(D) The anchor must be pulled in line with the ground anchor shaft.

(E) The ground anchor shall be pretensioned 500 pounds.

(F) The location of the ground anchor head is to be marked after it is pretensioned for measuring subsequent movement under test loading.

(G) Increase the load throughout the test. The recommended rate of load application must be such that the loading to not less than 4725 pounds is reached in not less than 2 minutes from the time the 500 pound pretension load is achieved.

(H) Record the load and displacement, at a minimum of 500–1000 pound increments, such that a minimum of five data points will be obtained to determine a load deflection curve. For each datum, the applied load and the ground anchor head displacement are to be recorded. In addition, the load and displacement are to be recorded at the failure mode identified in paragraph (10) of this section. It shall be permissible to halt the addition of load at each loading increment for up to 60 seconds to facilitate taking displacement readings. The ultimate anchor load of the ground anchor assembly and corresponding displacement must be recorded. The pretension load of 500 pounds should be included in the 4725 pound ultimate anchor load test. It is permissible to interpolate between

displacement and load measurements to determine the ultimate anchor load.

(I) All ground anchor assemblies must be tested to the following:

(*1*) Failure due to displacement of the ground anchor assembly as established in paragraph (b)(9) of this section, or

(*2*) Failure of either the anchoring equipment or its attachment point to the testing apparatus, or to a minimum of 4725 pounds (when possible, tests should be taken to 6000 pounds to provide additional data, but this is NOT required)

(9) *Failure criteria.* The following conditions constitute failure of the ground anchor test assembly:

(i) When the ground anchor head, or its attachment point, displaces 2 inches in the vertical or horizontal direction from its pretensioned measurement position prior to reaching a total load of 3150 pounds (including any pretension load).

(ii) When the ground anchor head, or its attachment point, displaces 2 inches in the vertical direction or 3 inches in the horizontal direction from its pretensioned measurement position prior to reaching a total load of 4725 pounds (including any pretension load).

(iii) When breakage of any component of the ground anchor shaft occurs prior to reaching a total load of 4725 pounds.

(10) *Use of ultimate anchor loads to establish the working load design value.*

(i) The working load design value is the lowest ultimate anchor load determined by testing, divided by a 1.5 factor of safety.

(ii) The working load design value, for each installation method and soil classification, shall be stated in the ground anchor assembly listing or certification. An anchor tested in a given soil classification number must not be approved for use in a higher/weaker soil classification number. For example, an anchor tested in soil classification 3 must not be approved for soil classification 4A or 4B unless it is also tested in those soils. The 500 pound pretension is included in the ultimate anchor load.

(11) *Test Report.* The test report to support the listing or certification for each ground anchor assembly tested is to include all conditions under which the ground anchor assembly was tested, including the following:

(i) A copy of all test data accumulated during the testing.

(ii) The soil characteristics, including moisture content and methods for determining soil characteristics, for each type of soil for which the ground anchoring assembly was evaluated.

(iii) The model of the ground anchor assembly tested.

(iv) The ground anchor assembly test method used.

(v) Detailed drawings including all dimensions of the ground anchor assembly and its components.

(vi) Method of installation at the test site.

(vii) Date of installation and date of testing.

(viii) Location of the certification test site.

(ix) Test equipment used.

(x) A graph or chart for each anchor specimen tested indicating the loading increments in pounds and resulting displacement in inches.

(xi) The working load design value and ultimate anchor load, determined in accordance with paragraph (b)(10) of this section.

(xi) If required, a description of the stabilizer plate used in each ground anchor assembly/stabilizer plate test, including the name of the manufacturer.

(xii) Angle(s) of pull for which the anchor has been tested.

(xiii) Embedment depth of the ground anchor assembly.

(xiv) The application and orientation of the applied load.

(xv) A description of the mode and location of failure for each ground anchor assembly tested.

(xvi) Name and signature of the nationally recognized testing agency or registered professional engineer certifying the testing and evaluation.

(xvii) The soil classification(s) for which each ground anchor assembly is certified for use and the working load design value and minimum ultimate load capacity for those soil classification(s).

(12) *Approved ground anchor assemblies.* Each ground anchor manufacturer or producer must provide the following information for use of approved ground anchor assemblies, and this information must also be included in the listing or certification for each ground anchor assembly:

(i) Drawings showing ground anchor installation.

(ii) Specifications for the ground anchor assembly including:

(A) Soil classifications listed or certified for use;

(B) The working load and minimum ultimate anchor load capacity for the anchor assembly in the soil classification(s) for which it is listed or certified for use;

(C) Model number and its location on the anchor;

(D) Instructions for use, including pretensioning;

(E) Angle(s) of pull for which the anchor has been listed and certified; and

(F) Manufacturer, size, and type of stabilizer plate required.

Appendix to § 3285.402

Torque Probe Method for determining soil classification: This kit contains a 5-foot-long steel earth-probe rod, with a helix at the end. It resembles a wood-boring bit, on a larger scale. The tip of the probe is inserted as deep as the bottom helix of the ground anchor assembly that is being considered for installation. The torque wrench is placed on the top of the probe. The torque wrench is used to rotate the probe steadily so one can read the scale on the wrench. If the torque wrench reads 551 inch-pounds or greater, then a class 2 soil is present according to the Table to 24 CFR 3285.202(a)(3). A class 3 soil is from 351 to 550 inch-pounds. A class 4A soil is from 276 to 350 inch-pounds, and a class 4B soil is from 175 to 275 inch-pounds. When the torque wrench reading is below 175 inch-pounds, a professional engineer should be consulted.

* * * * *

PART 3286—MANUFACTURED HOUSING INSTALLATION RULES AND REGULATIONS

■ 4. The authority citation for part 3286 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 5404, and 5424.

■ 5. Revise § 3286.505 paragraph (e) to read as follows:

§ 3286.505 Minimum elements to be inspected.

* * * * *

(e) Anchorage including verification that the ground anchors have been installed in accordance with the manufacturer's instructions, in a soil classification permitted by the anchor listing or certification, with the required size and type of stabilizer plate, if required by the listing or certification, and at an orientation and angle of pull permitted by its listing or certification.

* * * * *

Dated: June 20, 2013.

Carol J. Galante,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2013–18001 Filed 7–25–13; 8:45 am]

BILLING CODE 4210–67–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2012–0767; FRL–9838–7]

Approval and Promulgation of Air Quality Implementation Plans; Missouri; Reasonably Available Control Technology (RACT) for the 8-Hour Ozone National Ambient Air Quality Standard (NAAQS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Missouri to EPA in a letter dated May 4, 2012. The purpose of the SIP revision is to amend Missouri's regulation for the Control of Volatile Organic Compounds (VOC) and meet the requirement to adopt reasonably available control technology (RACT) for sources covered by EPA's Control Technique Guidelines (CTG) for Industrial Cleaning Solvents. We are proposing to approve this revision because it satisfies the applicable requirements of the Clean Air Act (CAA) with respect to RACT for the Missouri portion of the St. Louis Metropolitan 1997 8-hour ozone nonattainment area.

DATES: Comments must be received on or before August 26, 2013.

ADDRESSES: Submit your comments identified by Docket ID No. EPA–R07–OAR–2012–0767, by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: kemp.lachala@epa.gov.*
3. *Mail or Hand Delivery or Courier:* Lachala Kemp, Air Planning and Development Branch, Environmental Protection Agency Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219.

Instructions: Direct your comments to Docket ID No. EPA–R07–OAR–2012–0767. 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. 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 EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket. All documents in the electronic docket are listed in the *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 U.S. Environmental Protection Agency Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219, from 8 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. EPA requests that you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. 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: Ms. Lachala Kemp, Air Planning and Development Branch, U.S. Environmental Protection Agency Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number (913) 551–7214; email address: *kemp.lachala@epa.gov.*

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

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I. What action is EPA proposing?
II. Statutory and Regulatory Background
III. Summary of Missouri's SIP Revision
IV. EPA's Proposed Action
V. Statutory and Executive Order Reviews

I. What action is EPA proposing?

EPA is proposing to approve a SIP revision submitted by the State of Missouri to EPA on May 4, 2012. The purpose of this revision is to control the emissions of VOCs, consistent with Control Techniques Guidelines (CTGs) issued by EPA, and to satisfy the RACT requirements of the CAA for the Missouri portion of the St. Louis metropolitan 1997 8-hour ozone nonattainment area. Specifically, the revision incorporates an amendment to an existing SIP-approved Missouri regulation 10 Code of State Regulations 10–5.455 to control emissions from Industrial Solvent Cleaning Operations in the St. Louis metropolitan area. The revision includes lowering the allowable emissions threshold for VOCs released per day from the use, storage and disposal of industrial cleaning solvents, and adds requirements for facilities that exceed the applicability threshold. EPA is proposing to approve this revision because the adoption by Missouri of this regulation represents RACT control levels for CTGs issued by EPA after 2006. In addition, EPA is proposing to approve this revision because it meets the requirements of the conditional approval the EPA issued on January 10, 2012. *See* 77 FR 3144 (January 23, 2012).

II. Statutory and Regulatory Background

CAA section 172(c)(1) requires that SIPs for nonattainment areas ''provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.'' The St. Louis metropolitan area—which includes the counties of Franklin, Jefferson, St. Charles and St. Louis and the city of St. Louis in Missouri—is currently designated as a moderate nonattainment area under the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS).[1] For areas in moderate nonattainment with the ozone NAAQS, section 182(b)(2) requires states to submit SIP revisions to EPA that require sources of VOCs that are subject to a CTG issued by EPA, and

[1] The St. Louis metropolitan area was also recently designated as a ''marginal'' nonattainment area for the 2008 ozone NAAQS.

all other major stationary sources,[2] in the nonattainment area to implement RACT.

EPA has defined RACT as the lowest emissions limitation that a particular source is capable of meeting by the application of control technology that is reasonably available, considering technological and economic feasibility. See 44 FR 53761 (September 17, 1979). EPA provides states with guidance concerning what types of controls could constitute RACT for certain source categories through the issuance of CTGs. *See* 71 FR 58745, at 58747 (October 5, 2006).

Section 183(e) of the CAA provides that EPA may issue a CTG in lieu of a national regulation for categories of consumer or commercial products where the Administrator determines that such guidance will be substantially as effective as regulations in reducing VOC emissions in ozone nonattainment areas.

III. Summary of Missouri's SIP Revision

On January 10, 2012, EPA took final action to conditionally approve a SIP revision submitted by the State of Missouri to EPA on January 17, 2007, with a supplemental revision submitted to EPA on June 1, 2011. See 77 FR 3144 (January 23, 2012). As part of that action, EPA also approved several VOC rules adopted by Missouri and submitted to EPA in a letter dated August 16, 2011. All of these rules addressed VOC RACT requirements for sources in categories for which EPA issued CTGs during 2006–2008. However, in August 2011, Missouri did not submit a RACT rule for inclusion into the Missouri SIP to address one CTG: Solvent Cleanup Operations. Based on Missouri's commitment to submit a rule for inclusion into the SIP to address this remaining CTG by December 31, 2012, EPA conditionally approved the Missouri SIP revisions that address the requirements of RACT.

On May 4, 2012, the Missouri Department of Natural Resources (MDNR) submitted to EPA a proposed SIP revision demonstrating compliance with the RACT requirements set forth by the CAA under the 8-hour ozone NAAQS. This submittal addressed source categories for Industrial Cleaning Solvents, a new CTG issued by EPA on October 5, 2006, for which states were required to address by October 5, 2007 (71 FR 58745).[3]

This revision will ensure that the requirements of this CTG will be incorporated into the VOC RACT rules for the St. Louis moderate ozone nonattainment area. EPA has reviewed this new VOC rule revision with respect to the RACT requirements and the recommendations in the new CTG and proposes to find that this revision meets RACT. Moreover, this rule is designed to fulfill the requirements of EPA's conditional approval of Missouri's VOC RACT SIP. A brief description of the VOC rule that is proposed for approval in this action is provided below.

10 CSR 10–5.455 Control of Emissions From Industrial Solvent Cleaning Operations

This rule is intended to reduce the VOC emissions from industrial cleaning operations that use organic solvents. The rule amendment adopted by Missouri on April 28, 2011, and submitted to EPA for inclusion into the Missouri SIP lowered the allowable emissions threshold for volatile organic compounds released per day from the use, storage and disposal of industrial cleaning solvents, and added requirements for facilities that exceed the applicability threshold. The rule amendment adopted by Missouri on February 2, 2012, incorporated equipment cleaning work practices as a compliance option for manufacturers of coatings, inks and resins. EPA believes that these changes make the limits consistent with the recommendations in the Federal CTG for this source category.

As discussed above, EPA published a final rulemaking which approved Missouri's submittal with respect to several other VOC rules to address RACT requirements. *See* 77 FR 3144. Therefore, today's action only addresses the Industrial Cleaning Solvents source category. This proposal does not reopen any other aspect of Missouri's VOC RACT SIP.

IV. EPA's Proposed Action

In today's action, EPA is proposing to approve a revision to Missouri's VOC rule 10 CSR 10–5.455 into Missouri's SIP, as EPA believes that this rule satisfies RACT for the Missouri portion of the St. Louis nonattainment area for Industrial Cleaning Solvents. EPA also believes that this rule satisfies the requirements of the conditional approval of Missouri's VOC RACT SIP referenced above. This action, if final, would mean that the Missouri SIP meets all of the applicable VOC RACT requirements for St. Louis under section 182(b)(2) of the Act, as they relate to the 1997 ozone NAAQS.

V. Statutory and Executive Order Reviews

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

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is

[2] For a moderate nonattainment area, a major stationary source is one which emits, or has the potential to emit, one hundred tons per year or more of VOCs. *See* CAA section 302(j).

[3] Under section 183(b), EPA is required to periodically review and, as necessary, update CTGs.

not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

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

Dated: July 8, 2013.

Karl Brooks,

Regional Administrator, Region 7.

[FR Doc. 2013–18056 Filed 7–25–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2013–0508; FRL–9838–3]

Revisions to the California State Implementation Plan, Antelope Valley Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Antelope Valley Air Quality Management District (AVAQMD) portion of the California State Implementation Plan (SIP). These revisions concern standards for continuous emissions monitoring systems and oxides of sulfur (SO_X) emissions. We are approving local rules that regulate continuous emissions monitoring systems and standards for gaseous sulfur emission sources under the Clean Air Act (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

DATES: Any comments must arrive by August 26, 2013.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2013–0508, by one of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the on-line instructions.
2. *Email: steckel.andrew@epa.gov.*
3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments 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 Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or email. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. 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: Generally, documents in the docket for this action are available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California 94105–3901. While all documents in the docket are listed at *www.regulations.gov,* some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Stanley Tong, EPA Region IX, (415) 947–4122, *tong.stanley@epa.gov.*

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

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I. The State's Submittal

A. What rules did the State submit?

Table 1 lists the rules addressed by this proposal with the dates that they were adopted by the local air agency and submitted by the California Air Resources Board.

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Adopted	Submitted
AVAQMD	218	Continuous Emission Monitoring	07/17/12	02/06/13
AVAQMD	218.1	Continuous Emission Monitoring Performance Specifications	07/17/12	02/06/13
AVAQMD	431.1	Sulfur Content of Gaseous Fuels	08/21/12	04/22/13

On April 9, 2013 for AVAQMD Rules 218 and 218.1, and on June 26, 2013 for AVAQMD Rule 431.1, EPA determined the submittals met the completeness criteria in 40 CFR Part 51 Appendix V, which must be met before formal EPA review.

B. Are there other versions of these rules?

We approved an earlier version of Rule 218 into the SIP on September 2, 2008 (73 FR 51226). AVAQMD adopted revisions to the SIP-approved version on July 17, 2012 and CARB submitted them to us on February 6, 2013.

There is no previous version of Rule 218.1 in the SIP. AVAQMD adopted Rule 218.1 on July 17, 2012 and CARB submitted it to us on February 6, 2013.

We approved an earlier version of Rule 431.1 into the SIP on October 19, 1984 (49 FR 41028).[1] AVAQMD adopted revisions to Rule 431.1 on August 21,

[1] The 1984 SIP approval of Rule 431.1 was actually for the South Coast Air Quality Management District (SCAQMD). The Antelope Valley Air Pollution Control District (AVAPCD) was formed on July 1, 1997 from the SCAQMD. All South Coast rules in effect at the time remain in effect under the newly formed AVAPCD until such time that Antelope Valley amended or rescinded the rule. On January 1, 2002, Antelope Valley Air Quality Management District replaced the AVAPCD.

2012 and CARB submitted them to us on April 22, 2013.

While we can act on only the most recently submitted version of these rules, we have reviewed materials provided with previous submittals.

C. What is the purpose of the submitted rule revisions?

Oxides of Nitrogen (NO_X) help produce ground-level ozone, smog and particulate matter, which harm human health and the environment. Sulfur Dioxide (SO_2) exposure is associated with adverse respiratory effects and can contribute to fine particle pollution. Carbon Monoxide (CO) contributes to the formation of smog and can also harm human health. Section 110(a) of the CAA requires States to submit regulations that control the primary and secondary National Ambient Air Quality Standards (NAAQS), which includes NO_X, SO_2, and CO emissions.

Rule 218 establishes requirements for continuous emission monitors of NO_X, SO_2, gaseous sulfur compounds, and CO. Rule 218 was amended to better define specifications and guidelines for continuous emission monitoring systems (CEMS), delete obsolete language, and clarify administrative requirements. The original SIP approved rule was separated into an administrative portion and a technical portion. Rule 218 now contains the administrative requirements for CEMS and covers applicability, the application and approval process for CEMS, and recordkeeping and reporting requirements for CEMS. The technical requirements for CEMS were update and form the basis for a new rule, Rule 218.1.

Rule 218.1 is a new rule and contains requirements for the certification of CEMS, the performance specifications of CEMS, and the operation and maintenance of CEMS.

Rule 431.1 limits the sulfur content of fuels such as landfill gases, sewage digester gases, refinery gases and other gaseous fuels.

EPA's technical support documents (TSD) have more information about these rules.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rules?

Generally, SIP rules must be enforceable (see section 110(a) of the Act) and must not relax existing requirements (see sections 110(l) and 193). The AVAQMD regulates an ozone nonattainment area classified as severe for the 1997 8-hour ozone NAAQS. AVAQMD is in attainment for the 1971 primary CO standard and designated as ''better than national standard'' for the 1971 primary SO_2 standard (see 40 CFR Part 81.305).

Guidance and policy documents that we use to evaluate enforceability requirements consistently include the following:

1. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988 (the Bluebook).
2. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (the Little Bluebook).
3. 40 CFR 60 Appendix B—Performance Specifications.
4. 40 CFR 60 Appendix F—Quality Assurance Procedures.
5. SO_2 Guideline Document, EPA 452/R–94–008, February 1994.

B. Do the rules meet the evaluation criteria?

We believe these rules are consistent with the relevant policy and guidance regarding enforceability and SIP relaxations. AVAQMD's staff report for Rule 431.1 estimates there is a maximum SOx emissions shortfall of approximately 10 pounds per day (~2 tons per year) when the locally enforced limit of 40 ppm is raised to 250 ppm. Since the existing SIP limit is 250 ppm, we do not consider this a SIP relaxation. AVAQMD also amended the 250 ppm sulfur limit in Rule 431.1 for selling sewage digester gases. The rule now allows two compliance options. The first option, a 40 ppm daily average, is clearly more stringent than the existing 250 ppm SIP limit. The second option, a 40 ppm monthly average combined with a 500 ppm 15-minute average allows short term intermittent emissions to exceed the existing 250 ppm SIP limit for selling sewage digester gas. We do not believe this short term 500 ppm 15-minute average would adversely impact the District's ability to maintain the SO_2 NAAQS for the following reasons: (1) A 40 ppm monthly average effectively limits a facility from emitting 500 ppm more than two days per month before it will exceed the 40 ppm monthly average limit; (2) District staff indicated there are two publicly owned treatment works and to their knowledge, the sewage digester gases are burned or flared (800 ppm existing SIP limit) and are not sold (250 ppm existing SIP limit); and (3) AVAQMD is in attainment for the 1971 primary SO_2 NAAQS, and California points out that for the 2010 SO_2 primary standard, ambient air quality monitoring in the Mojave Desert Air Basin shows a 2009 1-hour SO_2 design value of 10 ppb, well below the 2010 federal standard of 75 ppb and that there have been no violations of the federal 1-hour SO_2 standard measured over the last two decades, and violations are not expected in the future.[2] Since AVAQMD is in attainment for the SO_2 NAAQS, Rule 431.1 is not a required SIP submittal. The TSD has more information on our evaluation.

C. EPA Recommendations to Further Improve the Rules

Our comments to draft Rule 431.1 recommended AVAQMD revisit its Best Available Control Technology (BACT) analysis at a future date and consider cost information and data that may become available on carbon adsorption technology being tested under an experimental research permit in the South Coast Air Quality Management District. We are including this recommendation for the District to evaluate the next time AVAQMD amends Rule 431.1. We have no recommendations for Rules 218 or 218.1.

D. Public Comment and Proposed Action

Because EPA believes the submitted rules fulfill all relevant requirements, we are proposing to fully approve them as described in section 110(k)(3) of the Act. We will accept comments from the public on this proposal for the next 30 days. Unless we receive convincing new information during the comment period, we intend to publish a final approval action that will incorporate these rules into the federally enforceable SIP.

III. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the 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 proposed action merely proposes to approve State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);

[2] Letter from the California Air Resources Board (James Goldstene) to EPA Region 9 (Jared Blumenfeld) dated June 20, 2011, Page A24–32.

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

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

List of Subjects in 40 CFR Part 52

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

Dated: July 12, 2013.

Alexis Strauss,

Acting Regional Administrator, Region IX.

[FR Doc. 2013–18051 Filed 7–25–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2011–0868; EPA–R05–OAR–2012–0463; FRL–9837–8]

Approval and Promulgation of Air Quality Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Ohio; Redesignation of Cleveland-Akron-Lorain Area to Attainment of the 1997 Annual Standard and 2006 24-Hour Standard for Fine Particulate Matter

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the State of Ohio's requests to redesignate the Cleveland-Akron-Lorain area (Cleveland Area) to attainment for the 1997 annual and 2006 24-hour National Ambient Air Quality Standards (NAAQS or standards) for fine particulate matter ($PM_{2.5}$). EPA's proposed approval involves several additional related actions. EPA is proposing to determine that the Cleveland area has attained the 1997 annual and 2006 24-hour $PM_{2.5}$ standards. EPA is proposing to approve, as revisions to the Ohio state implementation plan (SIP), the state's plans for maintaining the 1997 annual and 2006 24-hour $PM_{2.5}$ standards in the area. EPA is proposing to approve the ammonia, Volatile Organic Compound (VOC), nitrogen oxide (NO_X), direct $PM_{2.5}$, and sulfur dioxide (SO_2) emission inventories submitted by the State as meeting the comprehensive emissions inventory requirement of the Clean Air Act (CAA). Finally, EPA finds adequate and is proposing to approve Ohio's NO_X and direct $PM_{2.5}$ Motor Vehicle Emission Budgets (MVEBs) for 2015 and 2022 for the Cleveland area. In the course of proposing to approve Ohio's request to redesignate the Cleveland area, EPA addresses a number of additional issues, including the effects of two decisions of the United States Court of Appeals for the District of Columbia (D.C. Circuit or Court): The Court's August 21, 2012, decision to vacate and remand to EPA the Cross-State Air Pollution Rule (CSAPR) and the Court's January 4, 2013, decision to remand to EPA two final rules implementing the 1997 $PM_{2.5}$ standard.

DATES: Comments must be received on or before August 26, 2013.

ADDRESSES: Submit your comments, identified by Docket ID Nos. EPA–R05–OAR–2011–0868 and EPA–R05–OAR–2012–0463, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: Aburano.Douglas@epa.gov.*
3. *Fax:* (312) 408–2279.
4. *Mail:* Doug Aburano, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand delivery:* Doug Aburano, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, 18th floor, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID Nos. EPA–R05–OAR–2011–0868 and EPA–R05–OAR–2012–0463. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions

on submitting comments, go to Section I of this document, ''What Should I Consider as I Prepare My Comments for EPA?''

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Kathleen D'Agostino, Environmental Engineer, at (312) 886–1767 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Kathleen D'Agostino, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–1767, *dagostino.kathleen@epa.gov.*

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

I. What should I consider as I prepare my comments for EPA?
II. What is the background for the proposal?
III. What are the criteria for redesignation to attainment?
IV. What is EPA's analysis of the State's request?
A. Attainment Determination and Redesignation
1. The Area Has Attained the 1997 Annual and 2006 24-Hour $PM_{2.5}$ NAAQS (Section 107(d)(3)(E)(i))
2. The Area Has Met All Applicable Requirements Under Section 110 and Part D; and the Area Has a Fully Approved SIP Under Section 110(k) (Sections 107(d)(3)(E)(v) and 107(d)(3)(E)(ii))
3. The Improvement in Air Quality Is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions (Section 107(d)(3)(E)(iii))
4. The Area Has a Fully Approved Maintenance Plan Pursuant to Section 175A of the CAA (Section 107(d)(3)(E)(iv))
B. Comprehensive Emissions Inventories
C. Ohio's MVEBs
V. Summary of Proposed Actions
VI. Statutory and Executive Order Reviews

I. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date, and page number).
2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

II. What is the background for the proposal?

Fine particulate pollution can be emitted directly from a source (primary $PM_{2.5}$) or formed secondarily through chemical reactions in the atmosphere involving precursor pollutants emitted from a variety of sources. Sulfates are a type of secondary particulate formed from SO_2 emissions from power plants and industrial facilities. Nitrates, another common type of secondary particulate, are formed from combustion emissions of NO_X from power plants, mobile sources and other combustion sources.

The first air quality standards for $PM_{2.5}$ were promulgated on July 18, 1997, at 62 FR 38652. EPA promulgated an annual standard at a level of 15 micrograms per cubic meter ($\mu g/m^3$) of ambient air, based on a three year average of annual mean $PM_{2.5}$ concentrations at each monitoring site. In the same rulemaking, EPA promulgated a 24-hour $PM_{2.5}$ standard at 65 $\mu g/m^3$, based on a three year average of the 98th percentile of 24-hour $PM_{2.5}$ concentrations at each monitoring site.

On January 5, 2005, at 70 FR 944, EPA published air quality area designations for the 1997 annual $PM_{2.5}$ standard based on air quality data for calendar years 2001–2003. In that rulemaking, EPA designated the Cleveland area as nonattainment for the 1997 $PM_{2.5}$ air quality standards (70 FR 995). EPA defined the Cleveland nonattainment area to include Cuyahoga, Lake, Lorain, Medina, Portage, and Summit Counties and Ashtabula Township in Ashtabula County.

On October 17, 2006, at 71 FR 61144, EPA retained the annual $PM_{2.5}$ standard at 15 $\mu g/m^3$ (2006 annual $PM_{2.5}$ standard), but revised the 24-hour standard to 35 $\mu g/m^3$, based again on the three year average of the 98th percentile of 24-hour $PM_{2.5}$ concentrations at each monitor.

On November 13, 2009, at 74 FR 58688, EPA published air quality area designations for the 2006 24-hour $PM_{2.5}$ standard. In that rulemaking, EPA designated the Cleveland area as nonattainment for the 2006 24-hour $PM_{2.5}$ standard and defined the area to include Cuyahoga, Lake, Lorain, Medina, Portage, and Summit Counties. The Ashtabula Township in Ashtabula County was not included as part of the 2006 24-hour $PM_{2.5}$ Cleveland nonattainment area. Ashtabula County was designated as unclassifiable/attainment.

In response to legal challenges of the 2006 annual $PM_{2.5}$ standard, the D.C. Circuit remanded this standard to EPA for further consideration. See *American Farm Bureau Federation and National Pork Producers Council, et al.* v. *EPA,* 559 F.3d 512 (D.C. Cir. 2009). On December 14, 2012, EPA finalized a rule revising the $PM_{2.5}$ annual standard to 12 $\mu g/m^3$ based on current scientific evidence regarding the protection of public health. EPA is not addressing the 2012 annual $PM_{2.5}$ standard in this proposal.

On September 14, 2011, at 76 FR 56641, EPA issued a final determination that the Cleveland area attained the 1997 annual $PM_{2.5}$ standard by the applicable attainment date of April 5, 2010, based on certified ambient monitoring data for the 2007–2009 monitoring period.

On October 5, 2011, the Ohio Environmental Protection Agency (Ohio EPA) submitted a request to EPA to redesignate the Cleveland area to attainment for the 1997 annual $PM_{2.5}$ NAAQS, and to approve the SIP revision containing an emissions inventory, maintenance plan and MVEBs for the area. On May 30, 2012, Ohio EPA submitted a similar request for the 2006 24-hour $PM_{2.5}$ standard. In a supplemental submission to EPA on April 30, 2013, Ohio provided ammonia and VOC emissions inventories to

supplement the comprehensive emissions inventories submitted as part of the redesignation requests.

In this proposed redesignation, EPA takes into account two recent decisions of the D.C. Circuit. In the first of the two Court decisions, the D.C. Circuit, on August 21, 2012, issued *EME Homer City Generation, L.P.* v. *EPA,* 696 F.3d 7 (D.C. Cir. 2012), which vacated and remanded CSAPR and ordered EPA to continue administering the Clean Air Interstate Rule (CAIR) ''pending . . . development of a valid replacement.'' *EME Homer City* at 38. The D.C. Circuit denied all petitions for rehearing on January 24, 2013. In the second decision, on January 4, 2013, in *Natural Resources Defense Council* v. *EPA,* the D.C. Circuit remanded to EPA the ''Final Clean Air Fine Particle Implementation Rule'' (72 FR 20586, April 25, 2007) and the ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$)'' final rule (73 FR 28321, May 16, 2008). 706 F.3d 428 (D.C. Cir. 2013).

III. What are the criteria for redesignation to attainment?

The CAA sets forth the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) of the CAA allows redesignation provided that: (1) The Administrator determines that the area has attained the applicable NAAQS; (2) the Administrator has fully approved the applicable SIP for the area under section 110(k) of the CAA; (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from the implementation of the applicable SIP, Federal emission control regulations, and other permanent and enforceable emission reductions; (4) the Administrator has fully approved a maintenance plan for the area meeting the requirements of section 175A of the CAA; and, (5) the state containing the area has met all requirements applicable to the area for purposes of redesignation under section 110 and part D of the CAA.

IV. What is EPA's analysis of the State's request?

A. Attainment Determination and Redesignation

As noted above, on September 14, 2011, EPA determined that the Cleveland area had attained the 1997 annual $PM_{2.5}$ standard by the applicable attainment date. EPA is proposing to determine that the Cleveland area continues to attain the 1997 annual standard and is attaining 2006 24-hour $PM_{2.5}$ standard with certified 2010–2012 monitoring data. EPA is also proposing to approve Ohio's maintenance plans for the area and to determine that the area has met all other applicable redesignation criteria under CAA section 107(d)(3)(E). The basis for EPA's proposed approval of the redesignation requests is as follows:

1. The Area Has Attained the 1997 Annual and 2006 24-Hour $PM_{2.5}$ NAAQS (Section 107(d)(3)(E)(i))

In this action EPA is proposing to determine that the Cleveland area continues to attain the 1997 annual $PM_{2.5}$ NAAQS. An area may be considered to be attaining the 1997 annual $PM_{2.5}$ NAAQS if there are no violations, as determined in accordance with 40 CFR 50.7 and part 50, appendix N, based on three complete consecutive calendar years of quality-assured air quality monitoring data. To attain this standard, the three year average of annual means must not exceed 15.0 μg/m³ at all relevant monitoring sites in the subject area. Under 40 CFR part 50, appendix N 4.1, a year of $PM_{2.5}$ data meets completeness requirements when at least 75 percent of the scheduled sampling days for each quarter have valid data.

The redesignation request includes monitoring data for the 2008–2010 time period. Certified monitoring data are also now available for the 2009–2011 and 2010–2012 time periods. Table 1, below, provides a summary of the $PM_{2.5}$ annual air quality monitoring data for the years 2008–2012. Table 2, below, provides the three year average of annual means for the 2008–2010, 2009–2011 and 2010–2012 time periods.

TABLE 1—ANNUAL MEAN $PM_{2.5}$ CONCENTRATIONS FOR THE CLEVELAND AREA

[μg/m³]

County	Monitor	Yearly annual mean				
		2008	2009	2010	2011	2012
Cuyahoga	39–035–0034	10.9	10.2	10.9	10.0	9.3
	39–035–0038	14.1	12.8	14.0	12.6	12.3
	39–035–0045	13.7	11.8	13.3	11.9	11.4
	39–035–0060	14.1	12.3	13.7	12.5	12.8
	39–035–0065	14.6	12.4	13.2	12.6	12.3
	39–035–1002	12.0	10.9	11.3	10.4	9.7
Lake	39–085–0007	.....	10.4	10.4	9.4	9.0
	39–085–3002	11.5	.....	.....	.....	.....
Lorain	39–093–3002	11.4	9.9	10.4	9.4	9.5
Medina	39–103–0003	11.8	10.8	10.8	.....	.....
	39–103–0004	.....	.....	.....	11.0	9.3
Portage	39–133–0002	12.1	11.1	11.2	10.5	9.3
Summit	39–153–0017	13.8	12.6	13.4	11.8	10.8
	39–153–0023	12.9	11.4	12.5	11.1	10.0

TABLE 2—THREE YEAR AVERAGE OF THE ANNUAL MEAN $PM_{2.5}$ CONCENTRATIONS FOR THE CLEVELAND AREA

[μg/m³]

County	Monitor	2008–2010	2009–2011	2010–2012
Cuyahoga	39–035–0034	10.7	10.4	10.1
	39–035–0038	13.6	13.1	13.0
	39–035–0045	12.9	12.3	12.2
	39–035–0060	13.4	12.8	13.0

TABLE 2—THREE YEAR AVERAGE OF THE ANNUAL MEAN $PM_{2.5}$ CONCENTRATIONS FOR THE CLEVELAND AREA—Continued

[μg/m³]

County	Monitor	2008–2010	2009–2011	2010–2012
	39–035–0065	13.4	12.7	12.7
	39–035–1002	11.4	10.9	10.5
Lake	39–085–0007	10.8	10.1	9.6
	39–085–3002	.....	.....	.....
Lorain	39–093–3002	10.6	9.9	9.7
Medina	39–103–0003	11.1	.....	.....
	39–103–0004	.....	.....	.....
Portage	39–133–0002	11.5	10.9	10.3
Summit	39–153–0017	13.3	12.6	12.0
	39–153–0023	12.3	11.7	11.2

Two monitors were operated in Lake County during the 2008–2012 time period. Site 39–085–3002 shut down on December 31, 2008 and site 39–085–0007 began operating on January 1, 2009. EPA approved the combination of these monitors for purposes of calculating the design value.

The data in Tables 1 and 2 show that all relevant $PM_{2.5}$ monitors in the Cleveland $PM_{2.5}$ nonattainment area have recorded $PM_{2.5}$ concentrations attaining the 1997 annual $PM_{2.5}$ standard during the 2008–2010, 2009–2011, and 2010–2012 time periods. On September 14, 2011, EPA determined that the Cleveland area had attained the 1997 annual $PM_{2.5}$ standard by the applicable attainment date.

Site 39–103–0003 in Medina County ceased operation on December 31, 2010, collecting complete data for all quarters in 2008–2010. Site 39–103–0004 began operation on September 1, 2009. However, because the site only began submitting data to EPA's Air Quality System in 2011, three years of data are not available for evaluation. Because the monitor in Medina County has historically recorded one of the lowest $PM_{2.5}$ concentrations in the area, we are confident that EPA can rely on the other monitors in the area to determine that the area continues to attain the standard for the 2010–2012 time period. Therefore, based on complete, quality assured and certified $PM_{2.5}$ monitoring data for the most recent, 2010–2012, time period, EPA concludes that the Cleveland area continues to attain the 1997 annual $PM_{2.5}$ standard.

In this action EPA is proposing to determine that the Cleveland area has attained the 2006 24-hour $PM_{2.5}$ NAAQS based on complete quality assured, certified data for the 2010–2012 monitoring period. An area may be considered to be attaining the 2006 24-hour $PM_{2.5}$ NAAQS if there are no violations, as determined in accordance with 40 CFR 50.13 and part 50, appendix N, based on three complete consecutive calendar years of quality-assured air quality monitoring data. To attain this standard, the three year average of the 98th percentile 24-hour concentration must not exceed 35 μg/m³ at all relevant monitoring sites in the subject area. Under 40 CFR part 50, appendix N 4.1, a year of $PM_{2.5}$ data meets completeness requirements when at least 75 percent of the scheduled sampling days for each quarter have valid data.

The redesignation request includes monitoring data for the 2008–2010 time period. Certified monitoring data are also now available for the 2009–2011 and 2010–2012 time periods. Table 3, below, provides a summary of the $PM_{2.5}$ 24-hour air quality monitoring data for the years 2008–2012. Table 4, below, provides the three year average of 98th percentile 24-hour concentrations for the 2008–2010, 2009–2011 and 2010–2012 time periods.

TABLE 3—98TH PERCENTILE 24-HOUR $PM_{2.5}$ CONCENTRATIONS FOR THE CLEVELAND AREA

[μg/m³]

County	Monitor	98th percentile 24-hour concentrations				
		2008	2009	2010	2011	2012
Cuyahoga	39–035–0034	31.5	24.7	26.8	22.6	19.5
	39–035–0038	39.4	29.9	30.5	29.7	28.8
	39–035–0045	35.3	23.5	32.7	25.2	24.5
	39–035–0060	36.9	28.9	30.9	26.5	33.5
	39–035–0065	33.8	28.9	27.3	27.0	23.3
	39–035–1002	30.1	20.5	26.5	23.9	19.9
Lake	39–085–0007	.....	19.8	26.9	23.3	19.4
	39–085–3002	28.0	.....	.....	.....	.....
Lorain	39–093–3002	32.1	21.5	24.4	23.1	22.0
Medina	39–103–0003	30.3	25.7	28.8	.....	.....
	39–103–0004	.....	.....	.....	25.0	19.1
Portage	39–133–0002	29.4	23.8	31.9	23.2	18.2
Summit	39–153–0017	37.6	29.2	32.7	26.4	20.3
	39–153–0023	32.7	24.8	30.2	24.8	19.8

TABLE 4—THREE YEAR AVERAGE OF THE 98TH PERCENTILE 24-HOUR $PM_{2.5}$ CONCENTRATIONS FOR THE CLEVELAND AREA

[μg/m³]

County	Monitor	2008–2010	2009–2011	2010–2012
Cuyahoga	39–035–0034	28	25	23
	39–035–0038	33	30	29
	39–035–0045	31	27	27
	39–035–0060	32	29	30
	39–035–0065	30	28	26
	39–035–1002	26	24	23
Lake	39–085–0007	25	23	23
	39–085–3002	25	.....	.....
Lorain	39–093–3002	26	23	23
Medina	39–103–0003	28	.....	.....
	39–103–0004	.....	.....	.....
Portage	39–133–0002	28	26	24
Summit	39–153–0017	33	29	26
	39–153–0023	29	27	25

The data in Tables 3 and 4 show all relevant $PM_{2.5}$ monitors in the Cleveland $PM_{2.5}$ nonattainment area have recorded $PM_{2.5}$ concentrations attaining the 2006 24-hour $PM_{2.5}$ NAAQS during the 2008–2010, 2009–2011, and 2010–2012 time periods. As with the annual standard, EPA combined data from two monitors in Lake County as Ohio requested. Both of these sites collected complete monitoring data during the quarters the monitors were operated.

As noted previously, two monitors were also operated in Medina County during the 2008–2012 time period. Site 39–103–0003 ceased operation on December 31, 2010, collecting complete data for all quarters in 2008–2010. Site 39–103–0004 began operation on September 1, 2009, began submitting data to EPA's Air Quality System in 2011, and does not have three years of data available for evaluation. Because the monitor in Medina County has historically recorded one of the lowest $PM_{2.5}$ concentrations in the area, we are confident that EPA can rely on the other monitors in the area to determine that the area is attaining the standard for the 2010–2012 time period.

Data for monitoring site 39–035–0060 are incomplete in 2009. However, data for the other sites in Cuyahoga County are complete and well below the 24-hour standard, with the highest 98th percentile 24-hour concentration being 29.9 μg/m³ at site 39–035–0038, the historical design value site. In addition, complete, quality-assured and certified $PM_{2.5}$ monitoring data at site 39–035–0060 for the most recent, 2010–2012, time period, show attainment of the 2006 24-hour $PM_{2.5}$ standard. Therefore, based on complete, quality-assured and certified $PM_{2.5}$ monitoring data for the most recent, 2010–2012, time period, EPA concludes that the Cleveland area is attaining the 2006 24-hour $PM_{2.5}$ standard.

2. The Area Has Met All Applicable Requirements Under Section 110 and Part D; and the Area Has a Fully Approved SIP Under Section 110(k) (Sections 107(d)(3)(E)(v) and 107(d)(3)(E)(ii))

We have determined that Ohio's SIP meets all applicable SIP requirements for purposes of redesignation for the Cleveland area under section 110 of the CAA (general SIP requirements) and all SIP requirements currently applicable for purposes of redesignation under part D of title I of the CAA, in accordance with section 107(d)(3)(E)(v). In addition, with the exception of the emissions inventory under section 172(c)(3), we have approved all applicable requirements of the Ohio SIP for purposes of redesignation, in accordance with section 107(d)(3)(E)(ii). As discussed below, in this action EPA is proposing to approve Ohio's 2005 and 2008 emissions inventories as meeting the section 172(c)(3) comprehensive emissions inventory requirement.

In making these determinations, we have ascertained which SIP requirements are applicable to the area for purposes of redesignation, and have determined that there are SIP measures meeting those requirements and that they are fully approved under section 110(k) of the CAA.

a. The Cleveland Area Has Met All Applicable Requirements for Purposes of Redesignation Under Section 110 and Part D of the CAA

i. Section 110 General SIP Requirements

Section 110(a) of title I of the CAA contains the general requirements for a SIP. Section 110(a)(2) provides that the implementation plan submitted by a state must have been adopted by the state after reasonable public notice and hearing, and, among other things, must: (1) Include enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the CAA; (2) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor ambient air quality; (3) provide for implementation of a source permit program to regulate the modification and construction of any stationary source within the areas covered by the plan; (4) include provisions for the implementation of part C, Prevention of Significant Deterioration (PSD) and part D, New Source Review (NSR) permit programs; (5) include criteria for stationary source emission control measures, monitoring, and reporting; (6) include provisions for air quality modeling; and, (7) provide for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) of the CAA requires that SIPs contain measures to prevent sources in a state from significantly contributing to air quality problems in another state. EPA holds that the requirements linked with a particular nonattainment area's designation are the relevant measures to evaluate in reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. Thus, we conclude that these requirements should not be construed to be applicable requirements for purposes of redesignation.

Further, we conclude that the other section 110 elements described above

that are not connected with nonattainment plan submissions and not linked with an area's attainment status are also not applicable requirements for purposes of redesignation. A state remains subject to these requirements after an area is redesignated to attainment. We conclude that only the section 110 and part D requirements that are linked with a particular area's designation are the relevant measures which we may consider in evaluating a redesignation request. This approach is consistent with EPA's existing policy on applicability of conformity and oxygenated fuels requirements for redesignation purposes, as well as with section 184 ozone transport requirements. See Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176, October 10, 1996) and (62 FR 24826, May 7, 1997); Cleveland-Akron-Lorain, Ohio, final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida, final rulemaking (60 FR 62748, December 7, 1995). See also the discussion on this issue in the Cincinnati, Ohio 1-hour ozone redesignation (65 FR 37890, June 19, 2000), and in the Pittsburgh, Pennsylvania 1-hour ozone redesignation (66 FR 50399, October 19, 2001).

We have reviewed the Ohio SIP and have concluded that it meets the general SIP requirements under section 110 of the CAA to the extent they are applicable for purposes of redesignation. EPA has previously approved provisions of Ohio's SIP addressing section 110 requirements, including provisions addressing particulate matter, at 40 CFR 52.1870. On December 5, 2007, and September 4, 2009, Ohio made submittals addressing ''infrastructure SIP'' elements required by section 110(a)(2) of the CAA. EPA approved elements of Ohio's submittals on July 13, 2011, at 76 FR 41075. The requirements of section 110(a)(2), however, are statewide requirements that are not linked to the $PM_{2.5}$ nonattainment status of the Cleveland area. Therefore, EPA believes that these SIP elements are not applicable requirements for purposes of review of the state's $PM_{2.5}$ redesignation requests.

ii. Part D Requirements

EPA is proposing to determine that, upon approval of the base year emissions inventories discussed in section IV.B. of this rulemaking, the Ohio SIP will meet the applicable SIP requirements for the Cleveland area applicable for purposes of redesignation under part D of the CAA. Subpart 1 of part D, found in sections 172–176 of the CAA, sets forth the basic nonattainment requirements applicable to all nonattainment areas. Subpart 4 of part D, found in sections 185–190 of the CAA, provides more specific requirements for particulate matter nonattainment areas.

(1) Subpart 1

(a) Section 172 Requirements

For purposes of evaluating these redesignation requests, the applicable section 172 SIP requirements for the Cleveland area are contained in sections 172(c)(1)–(9). A thorough discussion of the requirements contained in section 172 can be found in the General Preamble for Implementation of Title I (57 FR 13498, April 16, 1992).

Section 172(c)(1) requires the plans for all nonattainment areas to provide for the implementation of all Reasonably Available Control Measures (RACM) as expeditiously as practicable and to provide for attainment of the primary NAAQS. EPA interprets this requirement to impose a duty on all nonattainment areas to consider all available control measures and to adopt and implement such measures as are reasonably available for implementation in each area as components of the area's attainment demonstration. Because attainment has been reached, no additional measures are needed to provide for attainment, and section 172(c)(1) requirements are no longer considered to be applicable as long as the area continues to attain the standard until redesignation. See 40 CFR 51.1004(c).

The Reasonable Further Progress (RFP) requirement under section 172(c)(2) is defined as progress that must be made toward attainment. This requirement is not relevant for purposes of this redesignation because the Cleveland area is monitoring attainment of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. *Id.* The requirement to submit the section 172(c)(9) contingency measures is similarly not applicable for purposes of this redesignation. *Id.*

Section 172(c)(3) requires submission and approval of a comprehensive, accurate, and current inventory of actual emissions. Ohio submitted 2005 and 2008 emissions inventories along with their redesignation request and supplemented the inventories on April 30, 2013. As discussed below in section IV.B., EPA is proposing to approve the 2005 and 2008 emission inventories as meeting the section 172(c)(3) emissions inventory requirement for the Cleveland area.

Section 172(c)(4) requires the identification and quantification of allowable emissions for major new and modified stationary sources in an area, and section 172(c)(5) requires source permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA approved Ohio's current NSR program on January 10, 2003 (68 FR 1366). Nonetheless, since PSD requirements will apply after redesignation, the area need not have a fully-approved NSR program for purposes of redesignation, provided that the area demonstrates maintenance of the NAAQS without part D NSR. A detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.'' Ohio has demonstrated that the Cleveland area will be able to maintain the standard without part D NSR in effect; therefore, the state need not have a fully approved part D NSR program prior to approval of the redesignation request. The state's PSD program will become effective in the Cleveland area upon redesignation to attainment. See rulemakings for Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); and Grand Rapids, Michigan (61 FR 31834–31837, June 21, 1996).

Section 172(c)(6) requires the SIP to contain control measures necessary to provide for attainment of the standard. Because attainment has been reached, no additional measures are needed to provide for attainment.

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As noted above, we find that the Ohio SIP meets the section 110(a)(2) requirements applicable for purposes of redesignation.

(b) Section 176 Conformity Requirements

Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that Federally-supported or funded activities, including highway projects, conform to the air quality planning goals in the applicable SIPs. The requirement to determine conformity applies to transportation plans, programs, and projects developed, funded, or approved under Title 23 of the U.S. Code and the Federal Transit Act (transportation conformity) as well as to all other Federally-supported or funded projects (general conformity).

Section 176(c) of the CAA was amended by provisions contained in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), which was signed into law on August 10, 2005 (Pub. L. 109–59). Among the changes Congress made to this section of the CAA were streamlined requirements for state transportation conformity SIPs. State transportation conformity regulations must be consistent with Federal conformity regulations and address three specific requirements related to consultation, enforcement and enforceability. EPA believes that it is reasonable to interpret the transportation conformity SIP requirements as not applying for purposes of evaluating the redesignation request under section 107(d) for two reasons.

First, the requirement to submit SIP revisions to comply with the transportation conformity provisions of the CAA continues to apply to areas after redesignation to attainment since such areas would be subject to a section 175A maintenance plan. Second, EPA's Federal conformity rules require the performance of conformity analyses in the absence of Federally-approved state rules. Therefore, because areas are subject to the transportation conformity requirements regardless of whether they are redesignated to attainment and, because they must implement conformity under Federal rules if state rules are not yet approved, EPA believes it is reasonable to view these requirements as not applying for purposes of evaluating a redesignation request. *See Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), upholding this interpretation. *See* also 60 FR 62748, 62749–62750 (Dec. 7, 1995) (Tampa, Florida).

EPA approved Ohio's general conformity SIP on March 11, 1996 (61 FR 9646) and Ohio's transportation conformity SIP on and May 30, 2000 (65 FR 34395), and April 27, 2007 (72 FR 20945). Ohio is in the process of updating its approved transportation conformity SIP, and EPA will review its provisions when they are submitted.

Ohio has submitted onroad MVEBs for the Cleveland area of 1,371.35 tons per year (tpy) and 880.89 tpy primary $PM_{2.5}$ and 35,094.70 tpy and 17,263.65 tpy NO_X for the years 2015 and 2022, respectively. The area must use the MVEBs from the maintenance plan in any conformity determination that is made on or after the effective date of the adequacy finding and maintenance plan approval.

(2) Effect of the January 4, 2013, D.C. Circuit Decision Regarding $PM_{2.5}$ Implementation Under Subpart 4

(a) Background

As discussed above, on January 4, 2013, in *Natural Resources Defense Council* v. *EPA,* the D.C. Circuit remanded to EPA the ''Final Clean Air Fine Particle Implementation Rule'' (72 FR 20586, April 25, 2007) and the ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$)'' final rule (73 FR 28321, May 16, 2008) (collectively, ''1997 $PM_{2.5}$ Implementation Rule''). 706 F.3d 428 (D.C. Cir. 2013). The Court found that EPA erred in implementing the 1997 $PM_{2.5}$ NAAQS pursuant to the general implementation provisions of subpart 1 of part D of title I of the CAA, rather than the particulate-matter-specific provisions of subpart 4 of Part D of Title I. Although the Court's ruling did not directly address the 2006 $PM_{2.5}$ standard, EPA is taking into account the Court's position on subpart 4 and the 1997 $PM_{2.5}$ standard in evaluating redesignations for the 2006 standard.

(b) Proposal on This Issue

EPA is proposing to determine that the Court's January 4, 2013, decision does not prevent EPA from redesignating the Cleveland area to attainment. Even in light of the Court's decision, redesignation for this area is appropriate under the CAA and EPA's longstanding interpretations of the CAA's provisions regarding redesignation. EPA first explains its longstanding interpretation that requirements that are imposed, or that become due, after a complete redesignation request is submitted for an area that is attaining the standard, are not applicable for purposes of evaluating a redesignation request. Second, EPA then shows that, even if EPA applies the subpart 4 requirements to the Cleveland redesignation requests and disregards the provisions of its 1997 $PM_{2.5}$ implementation rule recently remanded by the Court, the state's requests for redesignation of this area still qualify for approval. EPA's discussion takes into account the effect of the Court's ruling on the area's maintenance plans, which EPA views as approvable when subpart 4 requirements are considered.

(i) Applicable Requirements for Purposes of Evaluating the Redesignation Requests

With respect to the 1997 $PM_{2.5}$ Implementation Rule, the Court's January 4, 2013, ruling rejected EPA's reasons for implementing the $PM_{2.5}$ NAAQS solely in accordance with the provisions of subpart 1, and remanded that matter to EPA, so that it could address implementation of the 1997 $PM_{2.5}$ NAAQS under subpart 4 of part D of the CAA, in addition to subpart 1. For the purposes of evaluating Ohio's redesignation requests for the area, to the extent that implementation under subpart 4 would impose additional requirements for areas designated nonattainment, EPA believes that those requirements are not ''applicable'' for the purposes of CAA section 107(d)(3)(E), and thus EPA is not required to consider subpart 4 requirements with respect to the Cleveland redesignation. Under its longstanding interpretation of the CAA, EPA has interpreted section 107(d)(3)(E) to mean, as a threshold matter, that the part D provisions which are ''applicable'' and which must be approved in order for EPA to redesignate an area include only those which came due prior to a state's submittal of a complete redesignation request. *See* ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (Calcagni memorandum). *See also* ''State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) on or after November 15, 1992,'' Memorandum from Michael Shapiro, Acting Assistant Administrator, Air and Radiation, September 17, 1993 (Shapiro memorandum); Final Redesignation of Detroit-Ann Arbor, (60 FR 12459, 12465–66, March 7, 1995); Final Redesignation of St. Louis, Missouri, (68 FR 25418, 25424–27, May 12, 2003); *Sierra Club* v. *EPA,* 375 F.3d 537, 541 (7th Cir. 2004) (upholding EPA's redesignation rulemaking applying this interpretation and expressly rejecting Sierra Club's view that the meaning of ''applicable'' under the statute is ''whatever should have been in the plan at the time of attainment rather than whatever actually was in the plan and already implemented or due at the time of attainment'').[1] In this case, at the time that Ohio submitted its redesignation requests, requirements under subpart 4

[1] Applicable requirements of the CAA that come due subsequent to the area's submittal of a complete redesignation request remain applicable until a redesignation is approved, but are not required as a prerequisite to redesignation. Section 175A(c) of the CAA.

were not due, and indeed, were not yet known to apply.

EPA's view that, for purposes of evaluating the Cleveland redesignation, the subpart 4 requirements were not due at the time the state submitted the redesignation requests is in keeping with the EPA's interpretation of subpart 2 requirements for subpart 1 ozone areas redesignated subsequent to the D.C. Circuit's decision in *South Coast Air Quality Mgmt. Dist.* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006). In *South Coast,* the Court found that EPA was not permitted to implement the 1997 8-hour ozone standard solely under subpart 1, and held that EPA was required under the statute to implement the standard under the ozone-specific requirements of subpart 2 as well. Subsequent to the *South Coast* decision, in evaluating and acting upon redesignation requests for the 1997 8-hour ozone standard that were submitted to EPA for areas under subpart 1, EPA applied its longstanding interpretation of the CAA that ''applicable requirements'', for purposes of evaluating a redesignation, are those that had been due at the time the redesignation request was submitted. *See, e.g.,* Proposed Redesignation of Manitowoc County and Door County Nonattainment Areas (75 FR 22047, 22050, April 27, 2010). In those actions, EPA therefore did not consider subpart 2 requirements to be ''applicable'' for the purposes of evaluating whether the area should be redesignated under section 107(d)(3)(E).

EPA's interpretation derives from the provisions of CAA Section 107(d)(3). Section 107(d)(3)(E)(v) states that, for an area to be redesignated, a state must meet ''all requirements 'applicable' to the area under section 110 and part D''. Section 107(d)(3)(E)(ii) provides that the EPA must have fully approved the ''applicable'' SIP for the area seeking redesignation. These two sections read together support EPA's interpretation of ''applicable'' as only those requirements that came due prior to submission of a complete redesignation request. First, holding states to an ongoing obligation to adopt new CAA requirements that arose after the state submitted its redesignation request, in order to be redesignated, would make it problematic or impossible for EPA to act on redesignation requests in accordance with the 18-month deadline Congress set for EPA action in section 107(d)(3)(D). If ''applicable requirements'' were interpreted to be a continuing flow of requirements with no reasonable limitation, states, after submitting a redesignation request, would be forced continuously to make additional SIP submissions that in turn would require EPA to undertake further notice-and-comment rulemaking actions to act on those submissions. This would create a regime of unceasing rulemaking that would delay action on the redesignation request beyond the 18 month timeframe provided by the CAA for this purpose.

Second, a fundamental premise for redesignating a nonattainment area to attainment is that the area has attained the relevant NAAQS due to emission reductions from existing controls. Thus, an area for which a redesignation request has been submitted would have already attained the NAAQS as a result of satisfying statutory requirements that came due prior to the submission of the request. Absent a showing that unadopted and unimplemented requirements are necessary for future maintenance, it is reasonable to view the requirements applicable for purposes of evaluating the redesignation request as including only those SIP requirements that have already come due. These are the requirements that led to attainment of the NAAQS. To require, for redesignation approval, that a state also satisfy additional SIP requirements coming due after the state submits its complete redesignation request, and while EPA is reviewing it, would compel the state to do more than is necessary to attain the NAAQS, without a showing that the additional requirements are necessary for maintenance.

In the context of this redesignation, the timing and nature of the Court's January 4, 2013, decision in *NRDC* v. *EPA* compound the consequences of imposing requirements that come due after the redesignation requests are submitted. The state submitted its redesignation requests on October 5, 2011, and May 30, 2012, but the Court did not issue its decision remanding EPA's 1997 $PM_{2.5}$ implementation rule concerning the applicability of the provisions of subpart 4 until January 2013.

To require the state's fully-completed and pending redesignation requests to comply now with requirements of subpart 4 that the Court announced only in its January, 2013, decision on the 1997 $PM_{2.5}$ implementation rule, would be to give retroactive effect to such requirements when the state had no notice that it was required to meet them. The D.C. Circuit recognized the inequity of this type of retroactive impact in *Sierra Club* v. *Whitman,* 285 F.3d 63 (D.C. Cir. 2002),[2] where it upheld the District Court's ruling refusing to make retroactive EPA's determination that the St. Louis area did not meet its attainment deadline. In that case, petitioners urged the Court to make EPA's nonattainment determination effective as of the date that the statute required, rather than the later date on which EPA actually made the determination. The Court rejected this view, stating that applying it ''would likely impose large costs on states, which would face fines and suits for not implementing air pollution prevention plans . . . even though they were not on notice at the time.'' *Id.* at 68. Similarly, it would be unreasonable to penalize the state of Ohio by rejecting its redesignation requests for an area that is already attaining the 1997 and 2006 $PM_{2.5}$ standards and that met all applicable requirements known to be in effect at the time of the requests. For EPA now to reject the redesignation requests solely because the state did not expressly address subpart 4 requirements of which it had no notice, would inflict the same unfairness condemned by the Court in *Sierra Club* v. *Whitman.*

(ii) Subpart 4 Requirements and Ohio's Redesignation Requests

Even if EPA were to take the view that the Court's January 4, 2013, decision requires that, in the context of pending redesignations for the 1997 and 2006 $PM_{2.5}$ standards, subpart 4 requirements were due and in effect at the time the state submitted its redesignation requests, EPA proposes to determine that the Cleveland area still qualifies for redesignation to attainment. As explained below, EPA believes that the redesignation request for the Cleveland area, though not expressed in terms of subpart 4 requirements, substantively meets the requirements of that subpart for purposes of redesignating the area to attainment.

With respect to evaluating the relevant substantive requirements of subpart 4 for purposes of redesignating the Cleveland area, EPA notes that subpart 4 incorporates components of subpart 1 of part D, which contains general air quality planning requirements for areas designated as nonattainment. *See* Section 172(c). Subpart 4 itself contains specific planning and scheduling requirements

[2] *Sierra Club* v. *Whitman* was discussed and distinguished in a recent D.C. Circuit decision that addressed retroactivity in a quite different context, where, unlike the situation here, EPA sought to give its regulations retroactive effect. *National Petrochemical and Refiners Ass'n* v. *EPA.* 630 F.3d 145, 163 (D.C. Cir. 2010), rehearing denied 643 F.3d 958 (D.C. Cir. 2011), cert denied 132 S. Ct. 571 (2011).

for PM_{10}[3] nonattainment areas, and under the Court's January 4, 2013, decision in *NRDC* v. *EPA,* these same statutory requirements also apply for $PM_{2.5}$ nonattainment areas. EPA has longstanding general guidance that interprets the 1990 amendments to the CAA, making recommendations to states for meeting the statutory requirements for SIPs for nonattainment areas. *See,* ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clear Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992) (the ''General Preamble''). In the General Preamble, EPA discussed the relationship of subpart 1 and subpart 4 SIP requirements, and pointed out that subpart 1 requirements were to an extent ''subsumed by, or integrally related to, the more specific PM–10 requirements.'' 57 FR 13538 (April 16, 1992). The subpart 1 requirements include, among other things, provisions for attainment demonstrations, reasonably available control measures (RACM), RFP, emissions inventories, and contingency measures.

For the purposes of this redesignation, in order to identify any additional requirements which would apply under subpart 4, we are considering the Cleveland area to be a ''moderate'' $PM_{2.5}$ nonattainment area. Under section 188 of the CAA, all areas designated nonattainment areas under subpart 4 would initially be classified by operation of law as ''moderate'' nonattainment areas, and would remain moderate nonattainment areas unless and until EPA reclassifies the area as a ''serious'' nonattainment area. Accordingly, EPA believes that it is appropriate to limit the evaluation of the potential impact of subpart 4 requirements to those that would be applicable to moderate nonattainment areas. Sections 189(a) and (c) of subpart 4 apply to moderate nonattainment areas and include the following: (1) An approved permit program for construction of new and modified major stationary sources (section 189(a)(1)(A)); (2) an attainment demonstration (section 189(a)(1)(B)); (3) provisions for RACM (section 189(a)(1)(C)); and (4) quantitative milestones demonstrating RFP toward attainment by the applicable attainment date (section 189(c)).

The permit requirements of subpart 4, as contained in section 189(a)(1)(A), refer to and apply the subpart 1 permit provisions requirements of sections 172 and 173 to PM_{10}, without adding to them. Consequently, EPA believes that section 189(a)(1)(A) does not itself impose for redesignation purposes any additional requirements for moderate areas beyond those contained in subpart 1.[4] In any event, in the context of redesignation, EPA has long relied on the interpretation that a fully approved nonattainment new source review program is not considered an applicable requirement for redesignation, provided the area can maintain the standard with a PSD program after redesignation. A detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.'' *See also* rulemakings for Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); and Grand Rapids, Michigan (61 FR 31834–31837, June 21, 1996).

With respect to the specific attainment planning requirements under subpart 4,[5] when EPA evaluates a redesignation request under either subpart 1 and/or 4, any area that is attaining the $PM_{2.5}$ standard is viewed as having satisfied the attainment planning requirements for these subparts. For redesignations, EPA has for many years interpreted attainment-linked requirements as not applicable for areas attaining the standard. In the General Preamble, EPA stated that:

> The requirements for RFP will not apply in evaluating a request for redesignation to attainment since, at a minimum, the air quality data for the area must show that the area has already attained. Showing that the State will make RFP towards attainment will, therefore, have no meaning at that point.

''General Preamble for the Interpretation of Title I of the Clean Air Act Amendments of 1990''; (57 FR 13498, 13564, April 16, 1992).

The General Preamble also explained that

> [t]he section 172(c)(9) requirements are directed at ensuring RFP and attainment by the applicable date. These requirements no longer apply when an area has attained the standard and is eligible for redesignation. Furthermore, section 175A for maintenance plans . . . provides specific requirements for contingency measures that effectively supersede the requirements of section 172(c)(9) for these areas.

Id.

EPA similarly stated in its 1992 Calcagni memorandum that, ''The requirements for reasonable further progress and other measures needed for attainment will not apply for redesignations because they only have meaning for areas not attaining the standard.''

It is evident that even if we were to consider the Court's January 4, 2013, decision in *NRDC* v. *EPA* to mean that attainment-related requirements specific to subpart 4 should be imposed retroactively[6] and thus are now past due, those requirements do not apply to an area that is attaining the 1997 and 2006 $PM_{2.5}$ standards, for the purpose of evaluating a pending request to redesignate the area to attainment. EPA has consistently enunciated this interpretation of applicable requirements under section 107(d)(3)(E) since the General Preamble was published more than twenty years ago. Courts have recognized the scope of EPA's authority to interpret ''applicable requirements'' in the redesignation context. *See Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004).

Moreover, even outside the context of redesignations, EPA has viewed the obligations to submit attainment-related SIP planning requirements of subpart 4 as inapplicable for areas that EPA determines are attaining the standard. EPA's prior ''Clean Data Policy'' rulemakings for the PM_{10} NAAQS, also governed by the requirements of subpart 4, explain EPA's reasoning. They describe the effects of a determination of attainment on the attainment-related SIP planning requirements of subpart 4. *See* ''Determination of Attainment for Coso Junction Nonattainment Area,'' (75 FR 27944, May 19, 2010). *See also* Coso Junction proposed PM_{10} redesignation, (75 FR 36023, 36027, June 24, 2010); Proposed and Final Determinations of Attainment for San Joaquin Nonattainment Area (71 FR 40952, 40954–55, July 19, 2006; and 71 FR 63641, 63643–47 October 30, 2006). In short, EPA in this context has also long concluded that to require states to meet superfluous SIP planning requirements is not necessary and not required by the CAA, so long as those areas continue to attain the relevant NAAQS.

Elsewhere in this notice, EPA proposes to determine that the area has attained the 2006 $PM_{2.5}$ standard and continues to attain the 1997 $PM_{2.5}$ standard. Under its longstanding

[3] PM_{10} refers to particulates nominally 10 micrometers in diameter or smaller.

[4] The potential effect of section 189(e) on section 189(a)(1)(A) for purposes of evaluating this redesignation is discussed below.

[5] I.e., attainment demonstration, RFP, RACM, milestone requirements, contingency measures.

[6] As EPA has explained above, we do not believe that the Court's January 4, 2013 decision should be interpreted so as to impose these requirements on the states retroactively. *Sierra Club* v. *Whitman, supra.*

interpretation, EPA is proposing to determine here that the area meets the attainment-related plan requirements of subparts 1 and 4.

Thus, EPA is proposing to conclude that the requirements to submit an attainment demonstration under 189(a)(1)(B), a RACM determination under section 172(c)(1) and section 189(a)(1)(c), a RFP demonstration under 189(c)(1), and contingency measure requirements under section 172(c)(9) are satisfied for purposes of evaluating the redesignation requests.

(iii) Subpart 4 and Control of $PM_{2.5}$ Precursors

The D.C. Circuit in *NRDC* v. *EPA* remanded to EPA the two rules at issue in the case with instructions to EPA to re-promulgate them consistent with the requirements of subpart 4. EPA in this section addresses the Court's opinion with respect to $PM_{2.5}$ precursors. While past implementation of subpart 4 for PM_{10} has allowed for control of PM_{10} precursors such as NO_X from major stationary, mobile, and area sources in order to attain the standard as expeditiously as practicable, CAA section 189(e) specifically provides that control requirements for major stationary sources of direct PM_{10} shall also apply to PM_{10} precursors from those sources, except where EPA determines that major stationary sources of such precursors ''do not contribute significantly to PM_{10} levels which exceed the standard in the area.''

EPA's 1997 $PM_{2.5}$ implementation rule, remanded by the D.C. Circuit, contained rebuttable presumptions concerning certain $PM_{2.5}$ precursors applicable to attainment plans and control measures related to those plans. Specifically, in 40 CFR 51.1002, EPA provided, among other things, that a state was ''not required to address VOC [and ammonia] as . . . $PM_{2.5}$ attainment plan precursor[s] and to evaluate sources of VOC [and ammonia] emissions in the State for control measures.'' EPA intended these to be rebuttable presumptions. EPA established these presumptions at the time because of uncertainties regarding the emission inventories for these pollutants and the effectiveness of specific control measures in various regions of the country in reducing $PM_{2.5}$ concentrations. EPA also left open the possibility for such regulation of VOC and ammonia in specific areas where that was necessary.

The Court in its January 4, 2013, decision made reference to both section 189(e) and 40 CFR 51.1002, and stated that, ''In light of our disposition, we need not address the petitioners' challenge to the presumptions in [40 CFR 51.1002] that volatile organic compounds and ammonia are not $PM_{2.5}$ precursors, as subpart 4 expressly governs precursor presumptions.'' *NRDC* v. *EPA,* at 27, n.10.

Elsewhere in the Court's opinion, however, the Court observed:

> Ammonia is a precursor to fine particulate matter, making it a precursor to both $PM_{2.5}$ and PM_{10}. For a PM_{10} nonattainment area governed by subpart 4, a precursor is presumptively regulated. See 42 U.S.C. 7513a(e) [section 189(e)].

Id. at 21, n.7.

For a number of reasons, EPA believes that its proposed redesignation of the Cleveland area is consistent with the Court's decision on this aspect of subpart 4. First, while the Court, citing section 189(e), stated that ''for a PM_{10} area governed by subpart 4, a precursor is 'presumptively regulated,' '' the Court expressly declined to decide the specific challenge to EPA's 1997 $PM_{2.5}$ implementation rule provisions regarding ammonia and VOC as precursors. The Court had no occasion to reach whether and how it was substantively necessary to regulate any specific precursor in a particular $PM_{2.5}$ nonattainment area, and did not address what might be necessary for purposes of acting upon a redesignation request.

However, even if EPA takes the view that the requirements of subpart 4 were deemed applicable at the time the state submitted the redesignation requests, and disregards the implementation rule's rebuttable presumptions regarding ammonia and VOC as $PM_{2.5}$ precursors (and any similar provisions reflected in the guidance for the 2006 $PM_{2.5}$ standard), the regulatory consequence would be to consider the need for regulation of all precursors from any sources in the area to demonstrate attainment and to apply the section 189(e) provisions to major stationary sources of precursors. In the case of the Cleveland area EPA believes that doing so is consistent with proposing redesignation of the area for the 1997 and 2006 $PM_{2.5}$ standards. The Cleveland area has attained the standards without any specific additional controls of VOC and ammonia emissions from any sources in the area.

Precursors in subpart 4 are specifically regulated under the provisions of section 189(e), which requires, with important exceptions, control requirements for major stationary sources of PM_{10} precursors.[7] Under subpart 1 and EPA's prior implementation rule, all major stationary sources of $PM_{2.5}$ precursors were subject to regulation, with the exception of ammonia and VOC. Thus we must address here whether additional controls of ammonia and VOC from major stationary sources are required under section 189(e) of subpart 4 in order to redesignate the area for the 1997 $PM_{2.5}$ standard. As explained below, we do not believe that any additional controls of ammonia and VOC are required in the context of this redesignation.

In the General Preamble, EPA discusses its approach to implementing section 189(e). *See* 57 FR 13538–13542. With regard to precursor regulation under section 189(e), the General Preamble explicitly stated that control of VOCs under other CAA requirements may suffice to relieve a state from the need to adopt precursor controls under section 189(e). 57 FR 13542. EPA in this proposal proposes to determine that the SIP has met the provisions of section 189(e) with respect to ammonia and VOCs as precursors. This proposed determination is based on our findings that (1) the Cleveland area contains no major stationary sources of ammonia, and (2) existing major stationary sources of VOC are adequately controlled under other provisions of the CAA regulating the ozone NAAQS.[8] In the alternative, EPA proposes to determine that, under the express exception provisions of section 189(e), and in the context of the redesignation of the area, which is attaining the 1997 annual $PM_{2.5}$ standard and the 2006 24-hour standard, at present ammonia and VOC precursors from major stationary sources do not contribute significantly to levels exceeding the 1997 $PM_{2.5}$ standard in the Cleveland area. *See* 57 FR 13539–42.

EPA notes that its 1997 $PM_{2.5}$ implementation rule provisions in 40 CFR 51.1002 were not directed at evaluation of $PM_{2.5}$ precursors in the context of redesignation, but at SIP plans and control measures required to bring a nonattainment area into attainment of the 1997 $PM_{2.5}$ NAAQS. By contrast, redesignation to attainment primarily requires the area to have already attained due to permanent and enforceable emission reductions, and to demonstrate that controls in place can

[7] Under either subpart 1 or subpart 4, for purposes of demonstrating attainment as expeditiously as practicable, a state is required to evaluate all economically and technologically feasible control measures for direct PM emissions and precursor emissions, and adopt those measures that are deemed reasonably available.

[8] The Cleveland area has reduced VOC emissions through the implementation of various control programs including VOC Reasonably Available Control Technology regulations and various onroad and nonroad motor vehicle control programs.

continue to maintain the standard. Thus, even if we regard the Court's January 4, 2013, decision as calling for ''presumptive regulation'' of ammonia and VOC for $PM_{2.5}$ under the attainment planning provisions of subpart 4, those provisions in and of themselves do not require additional controls of these precursors for an area that already qualifies for redesignation. Nor does EPA believe that requiring Ohio to address precursors differently than they have already would result in a substantively different outcome.

Although, as EPA has emphasized, its consideration here of precursor requirements under subpart 4 is in the context of a redesignation to attainment, EPA's existing interpretation of subpart 4 requirements with respect to precursors in attainment plans for PM_{10} contemplates that states may develop attainment plans that regulate only those precursors that are necessary for purposes of attainment in the area in question, i.e., states may determine that only certain precursors need be regulated for attainment and control purposes.[9] Courts have upheld this approach to the requirements of subpart 4 for PM_{10}.[10] EPA believes that application of this approach to $PM_{2.5}$ precursors under subpart 4 is reasonable. Because the Cleveland area has already attained the 1997 $PM_{2.5}$ NAAQS with its current approach to regulation of $PM_{2.5}$ precursors, EPA believes that it is reasonable to conclude in the context of this redesignation that there is no need to revisit the attainment control strategy with respect to the treatment of precursors. Even if the Court's decision is construed to impose an obligation, in evaluating these redesignation requests, to consider additional precursors under subpart 4, it would not affect EPA's approval here of Ohio's requests for redesignation of the Cleveland area. In the context of a redesignation, the area has shown that it has attained the standard. Moreover, the state has shown and EPA has proposed to determine that attainment in this area is due to permanent and enforceable emissions reductions on all precursors necessary to provide for continued attainment. It follows logically that no further control of additional precursors is necessary. Accordingly, EPA does not view the January 4, 2013, decision of the Court as precluding redesignation of the Cleveland area to attainment for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS at this time.

In sum, even if Ohio were required to address precursors for the Cleveland area under subpart 4 rather than under subpart 1, as interpreted in EPA's remanded $PM_{2.5}$ implementation rule, EPA would still conclude that the area had met all applicable requirements for purposes of redesignation in accordance with section 107(d)(3)(E)(ii) and (v).

(iv) Maintenance Plan and Evaluation of Precursors

A discussion of the impact of the Court's decision on the maintenance plan required under sections 175A and 107(d)(3)(E)(iv) can be found in section IV.A.4.d. below.

b. The Cleveland Area Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA

Upon final approval of Ohio's comprehensive 2005 and 2008 emissions inventories, EPA will have fully approved the Ohio SIP for the Cleveland area under section 110(k) of the CAA for all requirements applicable for purposes of redesignation. EPA may rely on prior SIP approvals in approving a redesignation request (See page 3 of the Calcagni memorandum; *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F.3d 984, 989–990 (6th Cir. 1998); *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001)) plus any additional measures it may approve in conjunction with a redesignation action. See 68 FR 25413, 25426 (May 12, 2003). Since the passage of the CAA of 1970, Ohio has adopted and submitted, and EPA has fully approved, provisions addressing various required SIP elements under particulate matter standards. In this action, EPA is proposing to approve Ohio's 2005 and 2008 emissions inventories for the Cleveland area as meeting the requirement of section 172(c)(3) of the CAA. No Cleveland area SIP provisions are currently disapproved, conditionally approved, or partially approved.

3. The Improvement in Air Quality Is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions. (Section 107(d)(3)(E)(iii))

EPA finds that Ohio has demonstrated that the observed air quality improvement in the Cleveland area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, Federal measures, and other state-adopted measures.

In making this showing, Ohio EPA has calculated the change in emissions between 2005, one of the years in the period during which the Cleveland area monitored nonattainment, and 2008, one of the years in the period during which the Cleveland area monitored attainment. The reduction in emissions and the corresponding improvement in air quality over this time period can be attributed to a number of regulatory control measures that the Cleveland area and upwind areas have implemented in recent years.

a. Permanent and Enforceable Controls Implemented

The following is a discussion of permanent and enforceable measures that have been implemented in the area:

i. Consent Decrees

Some of the emissions reductions resulting from the consent decrees occurred during the attainment period, while other reductions will aid in maintenance of the standards.

A March 18, 2005, consent decree with Ohio Edison Company required the Eastlake Power Plant, located in Eastlake, Ohio, to reduce NO_X emissions by 11,000 tpy beginning in 2007. Beginning in September 2011, the Eastlake plant was only be used for emergency power purposes. The facility is now scheduled to completely shut down in 2015.

A December 9, 2005, consent decree required Saint Gobain Performance Plastics Corporation to pay, in addition to a civil penalty, $12,000 to Ohio EPA's Clean Diesel School Bus Program Fund.

A September 30, 2011, consent agreement and final order requires Potters Industries, Inc. to retrofit a fleet, fleets, or portion thereof, of diesel buses or diesel vehicles contracted for public use, located within 50 miles of Cleveland. Potters Industries is required to spend a minimum of $50,000 and complete the project by May 18, 2012.

A May 11, 2012, consent order and final judgement between Ohio and Procex, Ltd. requires several actions by Procex, including implementing the following no later than November 30, 2012: (1) An air pollution capture system for the collection of particulate emissions from emissions units P003, P005, and P007, and associated operations; (2) ductwork and an exhaust fan to transfer the collected emissions from the air pollution capture system for all four emissions units to air pollution

[9] *See, e.g.,* ''Approval and Promulgation of Implementation Plans for California—San Joaquin Valley PM–10 Nonattainment Area; Serious Area Plan for Nonattainment of the 24-Hour and Annual PM–10 Standards,'' 69 FR 30006 (May 26, 2004) (approving a PM_{10} attainment plan that impose controls on direct PM_{10} and NO_X emissions and did not impose controls on SO_2, VOC, or ammonia emissions).

[10] *See, e.g., Assoc. of Irritated Residents* v. *EPA et al.,* 423 F.3d 989 (9th Cir. 2005).

control equipment; and, (3) air pollution control equipment that meets a total hourly particulate emissions limit of 1.65 pounds/hour. Procex is also required to contribute $2,000 to Ohio EPA's Clean Diesel School Bus Program Fund by April 30, 2014.

A September 28, 2012, consent agreement and final order order with Charter Manufacturing Company, Inc. requires the following which had already been completed by Charter Manufacturing: (1) By August 2010, modification of the existing canopy area to better contain and evacuate emissions; (2) by June 1, 2012, submission to EPA of a protocol to performance test the melt shop baghouse; (3) by July 1, 2012, performance testing of the melt shop baghouse; and, (4) by August 15, 2012, submission to EPA of a report of the performance testing results. In addition, Charter Manufacturing is required to: (1) Submit an application to Ohio EPA requesting the conditions and emission rates associated with stainless steel production be removed from title V and other air permits; (2) comply with the melt shop baghouse pressure drop operational and monitoring requirements specified in the administrative consent order; and, (3) keep the door at the west end of the melt shop closed, except for times when a scrap car needs to enter or exit the melt shop.

ii. Federal Emission Control Measures

Reductions in fine particle precursor emissions have occurred statewide and in upwind areas as a result of Federal emission control measures, with additional emission reductions expected to occur in the future. Federal emission control measures include the following:

Tier 2 Emission Standards for Vehicles and Gasoline Sulfur Standards. These emission control requirements result in lower VOC, NO_X, and SO_2 emissions from new cars and light duty trucks. The Federal rules were phased in between 2004 and 2009. The EPA has estimated that, by the time post-2009 vehicles have entirely replaced pre-2009 vehicles, the following vehicle NO_X emission reductions will have occurred nationwide: Passenger cars (light duty vehicles) (77 percent); light duty trucks, minivans, and sports utility vehicles (86 percent); and, larger sports utility vehicles, vans, and heavier trucks (69 to 95 percent). Some of the emissions reductions resulting from new vehicle standards occurred during the 2008–2010 attainment period; however additional reductions will continue to occur throughout the maintenance period as new vehicles replace older vehicles. The Tier 2 standards also reduced the sulfur content of gasoline to 30 parts per million (ppm) beginning in January 2006. Gasoline sold in the region including Ohio prior to implementation of the Tier 2 sulfur content limits had an average sulfur content of 276 ppm.[11]

Heavy-Duty Diesel Engine Rule. This rule, which EPA issued in July 2000, limited the sulfur content of diesel fuel beginning in 2004. A second phase took effect in 2007 which reduced fine particle emissions from heavy-duty highway engines and further reduced the highway diesel fuel sulfur content to 15 ppm. The total program is estimated to achieve a 90 percent reduction in primary $PM_{2.5}$ emissions and a 95 percent reduction in NO_X emissions for these new engines using low sulfur diesel, compared to existing engines using higher sulfur content diesel. The reductions in fuel sulfur content occurred by the 2008–2010 attainment period. Some of the emissions reductions resulting from new vehicle standards occurred during the 2008–2010 attainment period, however additional reductions will continue to occur throughout the maintenance period as the fleet of older heavy duty diesel engines turns over. The reduction in fuel sulfur content also yielded an immediate reduction in sulfate particle emissions from all diesel vehicles.

Nonroad Diesel Rule. In May 2004, EPA promulgated a new rule for large nonroad diesel engines, such as those used in construction, agriculture, and mining equipment, which established engine emission standards to be phased in between 2008 and 2014. The rule also required reductions to the sulfur content in nonroad diesel fuel by over 99 percent. Prior to 2006, nonroad diesel fuel averaged approximately 3,400 ppm sulfur. This rule limited nonroad diesel sulfur content to 500 ppm by 2006, with a further reduction to 15 ppm, by 2010. The combined engine and fuel rules will reduce NO_X and PM emissions from large nonroad diesel engines by over 90 percent, compared to current nonroad engines using higher sulfur content diesel. The reduction in fuel sulfur content yielded an immediate reduction in sulfate particle emissions from all diesel vehicles. In addition, some emissions reductions from the new engine emission standards were realized over the 2008–2010 time period, although most of the reductions will occur over the maintenance period as the fleet of older nonroad diesel engines turns over.

Nonroad Large Spark-Ignition Engine and Recreational Engine Standards. In November 2002, EPA promulgated emission standards for groups of previously unregulated nonroad engines. These engines include large spark-ignition engines such as those used in forklifts and airport ground-service equipment; recreational vehicles using spark-ignition engines such as off-highway motorcycles, all-terrain vehicles, and snowmobiles; and recreational marine diesel engines. Emission standards from large spark-ignition engines were implemented in two tiers, with Tier 1 starting in 2004 and Tier 2 in 2007. Recreational vehicle emission standards are being phased in from 2006 through 2012. Marine Diesel engine standards were phased in from 2006 through 2009. With full implementation of all of the nonroad spark-ignition engine and recreational engine standards, an overall 72 percent reduction in VOC, 80 percent reduction in NO_X and 56 percent reduction in carbon monoxide (CO) emissions are expected by 2020. Some of these emission reductions occurred by the 2008–2010 attainment period and additional emission reductions will occur during the maintenance period as the fleet turns over.

iii. Control Measures Implemented in Ohio and in Upwind Areas

Given the significance of sulfates and nitrates in the Cleveland area, the area's air quality is strongly affected by regulation of SO_2 and NO_X emissions from power plants.

NO_X SIP Call. On October 27, 1998 (63 FR 57356), EPA issued a NO_X SIP Call requiring the District of Columbia and 22 states to reduce emissions of NO_X. Affected states were required to comply with Phase I of the SIP Call beginning in 2004, and Phase II beginning in 2007. Emission reductions resulting from regulations developed in response to the NO_X SIP Call are permanent and enforceable.

CAIR and CSAPR. EPA promulgated CSAPR (76 FR 48208, August 8, 2011), to replace CAIR, which has been in place since 2005. *See* 76 FR 59517. CAIR requires significant reductions in emissions of SO_2 and NO_X from electric generating units to limit the interstate transport of these pollutants and the ozone and fine particulate matter they form in the atmosphere. *See* 76 FR 70093. The D.C. Circuit initially vacated CAIR, *North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008), but ultimately remanded the rule to EPA without vacatur to preserve the environmental

[11] See Regulatory Impact Analysis—Control of Air Pollution from New Motor Vehicles: Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements, December 1999, EPA420–R–99–023, p. IV–42.

benefits provided by CAIR, *North Carolina* v. *EPA,* 550 F.3d 1176, 1178 (D.C. Cir. 2008).

On December 30, 2011, the D.C. Circuit issued an order addressing the status of CSAPR and CAIR in response to motions filed by numerous parties seeking a stay of CSAPR pending judicial review. In that order, the Court stayed CSAPR pending resolution of the petitions for review of that rule in *EME Homer City Generation, L.P.* v. *EPA* (No. 11–1302 and consolidated cases). The Court also indicated that EPA was expected to continue to administer CAIR in the interim until judicial review of CSAPR was completed.

On August 21, 2012, the D.C. Circuit issued a decision to vacate CSAPR. In that decision, it also ordered EPA to continue administering CAIR ''pending the promulgation of a valid replacement.'' *EME Homer City,* 696 F.3d at 38. The D.C. Circuit denied all petitions for rehearing on January 24, 2013. EPA and other parties filed petitions for certiorari to the U.S. Supreme Court. On June 24, 2013, the Supreme Court granted certiorari and agreed to review the D.C. Circuit's decision in EME Homer City. The Supreme Court's grant of certiorari, by itself, does not alter the status of CAIR or CSAPR. At this time, CAIR remains in place.

In light of these unique circumstances and for the reasons explained below, to the extent that attainment is due to emission reductions associated with CAIR, EPA is here proposing to determine that those reductions are sufficiently permanent and enforceable for purposes of CAA sections 107(d)(3)(E)(iii) and 175A. EPA therefore proposes to approve the redesignation requests and the related SIP revisions for the Cleveland area, including Ohio's plan for maintaining attainment of the $PM_{2.5}$ standard.

As directed by the D.C. Circuit, CAIR remains in place and enforceable until substituted by a valid replacement rule. Ohio submitted a CAIR SIP which was approved by EPA on February 1, 2008 (73 FR 6034). On July 15, 2009 Ohio submitted revisions to its CAIR SIP, which EPA approved on September 25, 2009 (74 FR 48857). In its redesignation requests, Ohio notes that in 2008 and 2009 facilities began preparing for and implementing control programs to address CAIR and consent decrees. Thus, it is likely that some of the emissions reductions that lead to monitored attainment of the 1997 annual and 2006 24-hour $PM_{2.5}$ standards in the Cleveland area were due to sources beginning to comply with CAIR requirements. The quality-assured, certified monitoring data used to demonstrate the area's attainment of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS by the attainment deadline was also impacted by CAIR.

To the extent that Ohio is relying on CAIR in its maintenance plan, the directive from the D.C. Circuit in *EME Homer City* ensures that the reductions associated with CAIR will be permanent and enforceable for the necessary time period. EPA has been ordered by the Court to develop a new rule to address interstate transport to replace CSAPR, and the opinion makes clear that after promulgating that new rule EPA must provide states an opportunity to draft and submit SIPs to implement that rule. Thus, CAIR will remain in place until EPA has promulgated a final rule through a notice-and-comment rulemaking process, states have had an opportunity to draft and submit SIPs, EPA has reviewed the SIPs to determine if they can be approved, and EPA has taken action on the SIPs, including promulgating a FIP if appropriate. The Court's clear instruction to EPA that it must continue to administer CAIR until a valid replacement exists provides an additional backstop: By definition, any rule that replaces CAIR and meets the Court's direction would require upwind states to have SIPs that eliminate significant contributions to downwind nonattainment and prevent interference with maintenance in downwind areas.

Further, in vacating CSAPR and requiring EPA to continue administering CAIR, the D.C. Circuit emphasized that the consequences of vacating CAIR ''might be more severe now in light of the reliance interests accumulated over the intervening four years.'' *EME Homer City,* 696 F.3d at 38. The accumulated reliance interests include the interests of states who reasonably assumed they could rely on reductions associated with CAIR which brought certain nonattainment areas into attainment with the NAAQS. If EPA were prevented from relying on reductions associated with CAIR in redesignation actions, states would be forced to impose additional, redundant reductions on top of those achieved by CAIR. EPA believes this is precisely the type of irrational result the court sought to avoid by ordering EPA to continue administering CAIR. For these reasons also, EPA believes it is appropriate to allow states to rely on CAIR, and the existing emissions reductions achieved by CAIR, as sufficiently permanent and enforceable for purposes such as redesignation. Following promulgation of the replacement rule, EPA will review SIPs as appropriate to identify whether there are any issues that need to be addressed.

b. Emission Reductions

Ohio developed annual emissions inventories for NO_X, primary $PM_{2.5}$, and SO_2 for 2005, one of the years the Cleveland area monitored nonattainment of the 1997 annual and 2006 24-hour $PM_{2.5}$ standards, and 2008, one of the years the area monitored attainment of the standards.

The emission inventories submitted by Ohio EPA were developed with the assistance of the Lake Michigan Air Directors Consortium (LADCO). The main purpose of LADCO is to provide technical assessments for and assistance to its member states on problems of air quality. LADCO's primary geographic focus is the area encompassed by its member states (Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin) and any areas which affect air quality in its member states.

The 2005 nonattainment inventory was developed as described below. Point source emissions for 2005 were compiled by Ohio EPA using source specific data reported by facilities through the state's STARShip database program. The data are reported by facilities annually and include emissions, process rates, operating schedules, emissions control data and other relevant information. Ohio EPA quality assured the database files and submitted the data to LADCO for emissions processing through the Emissions Modeling System (EMS). LADCO used the Electric Generating Unit (EGU) inventory compiled by EPA's Acid Rain Program, based on facility reported emissions as measured by continuous emissions monitors.

Area source sector emissions were calculated using surrogate emissions factors based on energy usage, population, employment records, or other reliable data. Ohio EPA used Emission Inventory improvement Program methodologies or selected other methodologies which are shared by other states. The decision of which methodology to use was largely based on Ohio's data availability.

Nonroad source sector emissions estimates were generated using EPA's National Mobile Inventory Model (NMIM), with the following modifications: Emission factors were added for diesel tampers/rammers; the $PM_{2.5}$ ratios in the SCC table were revised to correctly calculate $PM_{2.5}$ diesel emissions; and, gasoline parameters, including Reid Vapor Pressure (RVP), Oxygenate content and sulfur content, were revised using updates provided by the state and E.H.

Pechan and Associates. Marine, aircraft and rail nonroad emissions were calculated separately. Contractors were employed by LADCO to estimate emissions for commercial marine vessels and railroads. Ohio developed aircraft emissions estimates using AP–42 emission factors and landing and take-off data provided by the Federal Aviation Administration.

Onroad mobile source emissions estimates were developed using the EPA's MOVES2010 model.

The 2008 attainment year inventory was developed as follows. Point source emissions for 2008 were compiled from Ohio's STARShip database. Onroad emissions projections were based on EPA's MOVES2010 model. Area and nonroad emissions were grown from the 2005 inventory using LADCO's growth factors.

NO_X, primary $PM_{2.5}$, and SO_2 emissions data are shown in Table 5 below.

TABLE 5—COMPARISON OF 2005 AND 2008 NO_X, PRIMARY $PM_{2.5}$, AND SO_2 EMISSION TOTALS BY SOURCE SECTOR IN TONS PER YEAR (TPY)

Sector	2005			2008			Net change 2005–2008		
	$PM_{2.5}$	NO_X	SO_2	$PM_{2.5}$	NO_X	SO_2	$PM_{2.5}$	NO_X	SO_2
Point	1,916	29,699	147,256	2,003	29,280	111,991	87	−419	−35,265
Area	2,380	10,419	954	2,433	10,527	945	53	108	−9
Nonroad	1,888	29,286	3,154	1,656	26,148	1,828	−233	−3,138	−1,326
Onroad	3,022	86,522	1,854	2,556	69,731	556	−466	−16,791	−1,299
Total	9,206	155,927	153,218	8,648	135,687	115,319	−558	−20,240	−37,899

Table 5 shows that the Cleveland area reduced primary $PM_{2.5}$, NO_X, and SO_2 emissions by 558 tpy, 20,240 tpy, and 37,899 tpy, respectively, between 2005 and 2008. Based on the information summarized above, Ohio has adequately demonstrated that the improvement in air quality is due to permanent and enforceable emissions reductions.

On April 30, 2013, Ohio submitted supplemental information regarding emissions of VOC and ammonia. This information is reviewed below. However, EPA believes that the improvement in air quality is attributable to the $PM_{2.5}$, NO_X, and SO_2 emission reductions described above and is not significantly affected by any changes in VOC or ammonia emissions.

4. The Area Has a Fully Approved Maintenance Plan Pursuant to Section 175A of the CAA (Section 107(d)(3)(E)(iv))

In conjunction with Ohio's requests to redesignate the Cleveland nonattainment area to attainment status, Ohio EPA submitted SIP revisions to provide for maintenance of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS in the area through 2022.

a. What is required in a maintenance plan?

Section 175A of the CAA sets forth the required elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after EPA approves a redesignation to attainment. Eight years after redesignation, the state must submit a revised maintenance plan which demonstrates that attainment will continue to be maintained for ten years following the initial ten year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures with a schedule for implementation as EPA deems necessary to assure prompt correction of any future $PM_{2.5}$ violations.

The September 4, 1992, John Calcagni memorandum provides additional guidance on the content of a maintenance plan. The memorandum states that a maintenance plan should address the following items: The attainment emissions inventories, a maintenance demonstration showing maintenance for the ten years of the maintenance period, a commitment to maintain the existing monitoring network, factors and procedures to be used for verification of continued attainment of the NAAQS, and a contingency plan to prevent or correct future violations of the NAAQS.

b. Attainment Inventory

The Ohio EPA developed annual emissions inventories for NO_X, direct $PM_{2.5}$, and SO_2 for 2008, one of the years the area monitored attainment of the 1997 annual and 2006 24-hour $PM_{2.5}$ standard, as described in section IV.A.3.b. The use of an annual inventory is appropriate for both the annual and 24-hour standard because 24-hour exceedances occur in all four quarters. The attainment level of emissions is summarized in Table 5, above.

c. Demonstration of Maintenance

Along with the redesignation requests, Ohio EPA submitted revisions to the Ohio $PM_{2.5}$ SIP to include maintenance plans for the Cleveland area, as required by section 175A of the CAA. Section 175A requires a state seeking redesignation to attainment to submit a SIP revision to provide for the maintenance of the NAAQS in the area ''for at least 10 years after the redesignation.'' EPA has interpreted this as a showing of maintenance ''for a period of ten years following redesignation.'' Calcagni Memorandum, p. 9. Where the emissions inventory method of showing maintenance is used, its purpose is to show that emissions during the maintenance period will not increase over the attainment year inventory. Calcagni Memorandum, pp. 9–10.

As discussed in detail in the section below, Ohio's maintenance plan submissions expressly document that the area's emissions inventories will remain below the attainment year inventories through 2022. In addition, for the reasons set forth below, EPA believes that the state's submissions, in conjunction with additional supporting information, further demonstrate that the area will continue to maintain the $PM_{2.5}$ standard at least through 2023. Thus, if EPA finalizes its proposed approval of the redesignation requests and maintenance plans in 2013, it is based on a showing, in accordance with section 175A, that the state's maintenance plans provide for maintenance for at least ten years after redesignation.

Ohio's plans demonstrate maintenance of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS through 2022 by showing that current and future emissions of NO_X, directly emitted $PM_{2.5}$ and SO_2 for the area remain at or below attainment year emission levels.

A maintenance demonstration need not be based on modeling. *See Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), *Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004). *See also* 66 FR 53094, 53099–53100 (October 19, 2001), 68 FR 25413, 25430–25432 (May 12, 2003). As discussed below, a comparison of current and future emissions inventories for VOC and ammonia show significant reductions in VOC emissions and relatively constant emissions of ammonia, which further support a finding that the area will continue to maintain the standard.

For NO_X, directly emitted $PM_{2.5}$, and SO_2, Ohio is using emissions inventory projections for the years 2015 and 2022 to demonstrate maintenance. The projected emissions were estimated by Ohio EPA, with assistance from LADCO, The Ohio Department of Transportation (ODOT) and the Northeast Ohio Areawide Coordinating Agency (NOACA).

LADCO has developed growth and control files for point, area and nonroad categories. These files were used along with LADCO's 2009 and 2018 emission inventories to develop the 2015 and 2022 emissions estimates. NOACA and ODOT developed onroad emissions projections using the MOVES model.

As discussed in section IV.3.a. above, many of the control programs that helped to bring the area into attainment of the standard will continue to achieve additional emission reductions over the maintenance period. These control programs include Tier 2 emission standards for vehicles and gasoline sulfur standards, the heavy-duty diesel engine rule, the nonroad diesel rule, and the nonroad large spark-ignition engine and recreation engine standards. In addition, implementation of CAIR was assumed in the projections. Emissions data for all sources by source sector are shown in Tables 6 through 8, below.

TABLE 6—COMPARISON OF 2008, 2015, AND 2022 NO_X EMISSION TOTALS BY SOURCE SECTOR (TPY) FOR THE CLEVELAND AREA

Sector	2008	2015	Net change 2008–2015	2022	Net change 2008–2022
Point	29,280	26,285	−2,995	24,921	−4,359
Area	10,527	10,612	84	10,705	178
Nonroad	26,148	17,479	−8,669	9,156	−16,992
Onroad	69,731	30,517	−39,214	15,012	−54,719
Total	135,687	84,892	−50,795	59,794	−75,893

TABLE 7—COMPARISON OF 2008, 2015, AND 2022 DIRECT $PM_{2.5}$ EMISSION TOTALS BY SOURCE SECTOR (TPY) FOR THE CLEVELAND AREA

	2008	2015	Net change 2008–2015	2022	Net change 2008–2022
Point	2,003	2,111	108	2,242	239
Area	2,433	2,421	−12	2,417	−16
Nonroad	1,656	1,187	−469	711	−944
Onroad	2,556	1,192	−1,364	766	−1,790
Total	8,648	6,911	−1,737	6,136	−2,512

TABLE 8—COMPARISON OF 2008, 2015, AND 2022 SO_2 EMISSION TOTALS BY SOURCE SECTOR (TPY) FOR THE CLEVELAND AREA

Sector	2008	2015	Net change 2008–2015	2022	Net change 2008–2022
Point	111,991	85,877	−26,114	57,024	−54,967
Area	945	916	−28	888	−56
Nonroad	1,828	887	−940	409	−1,419
Onroad	556	185	−371	164	−392
Total	115,319	87,866	−27,453	58,486	−56,834

Tables 6–8 show that emissions of NO_X, direct $PM_{2.5}$, and SO_2 are projected to decrease by 50,795 tpy, 1,737 tpy, and 27,453 tpy, respectively, between 2008 and 2015. In addition, Tables 6–8 show that emissions of NO_X, direct $PM_{2.5}$, and SO_2 are projected to decrease by 75,893 tpy, 2,512 tpy, and 56,834 tpy, respectively, between 2008 and 2022.

The rate of decline in emissions of $PM_{2.5}$, NO_X, and SO_2 from the attainment year 2008 through 2022 indicates that emissions inventory levels not only significantly decline between 2008 and 2022, but that the reductions will continue in 2023 and beyond. The average annual rate of decline is 7,256 tpy for NO_X, 179 tpy for direct $PM_{2.5}$, and 4,060 tpy for SO_2. These rates of decline are consistent with monitored and projected air quality trends, emissions reductions achieved through emissions controls and regulations that will remain in place beyond 2023. Furthermore, fleet turnover in onroad and nonroad vehicles that will continue to occur after 2022 will continue to provide additional significant emission reductions.

In addition, as Tables 2 and 4 demonstrate, monitored $PM_{2.5}$ design value concentrations in the Cleveland area are well below the NAAQS in the years beyond 2008, an attainment year for the area. Further, those values are

trending downward as time progresses. Based on the future projections of emissions in 2015 and 2022 showing significant emissions reductions in direct $PM_{2.5}$, NO_X, and SO_2, it is very unlikely that monitored $PM_{2.5}$ values in 2023 and beyond will show violations of the NAAQS. Additionally, the 2010–2012 design values of 13.0 and 30 μg/m³ (for the annual and the 24-hour standards, respectively) provide a sufficient margin in the unlikely event emissions rise slightly in the future.

Based on the information summarized above, Ohio has adequately demonstrated maintenance of the $PM_{2.5}$ standard for a period extending ten years from the date that EPA may be expected to complete rulemaking on the state's redesignation request.

d. Maintenance Plan and Evaluation of Precursors

After evaluating the effect of the Court's remand of EPA's implementation rule, a rule that included presumptions against consideration of VOC and ammonia as $PM_{2.5}$ precursors, EPA in this proposal is also considering the impact of the decision on the maintenance plans required under sections 175A and 107(d)(3)(E)(iv). To begin with, EPA notes that the area has attained the 1997 annual and 2006 24-hour $PM_{2.5}$ standards and that the state has shown that attainment of that standard is due to permanent and enforceable emission reductions.

Based on its review of Ohio's maintenance plan and related information, EPA believes that the primary influences on future air quality in the Cleveland area will be emissions of NO_X, directly emitted $PM_{2.5}$, and SO_2. EPA therefore proposes to determine that the state's maintenance plans show continued maintenance of the standards by tracking the levels of the pollutants whose control brought about attainment of the $PM_{2.5}$ standards in the Cleveland area. Nevertheless, pursuant to the Court's January 4, 2013, decision, EPA is further assessing the potential role of VOC and ammonia in achieving continued maintenance in this area. As explained below, based upon documentation provided by the state and supporting information, EPA believes that the prospective trends in emissions of VOC and ammonia are consistent with a finding of continued maintenance of the standards in the Cleveland area.

First, as noted above in EPA's discussion of section 189(e), VOC emission levels in this area have historically been well-controlled under SIP requirements related to ozone and other pollutants. Second, total ammonia emissions throughout the Cleveland area are relatively low, estimated to be less than 13,200 tons per year. *See* Table 9 below. This amount of ammonia emissions is small in comparison to the total amounts of SO_2, NO_X, and even direct $PM_{2.5}$ emissions from sources in the area. Third, as described below, NO_X, SO_2, direct $PM_{2.5}$ and VOC emissions are expected to decrease over the maintenance period, and ammonia emissions are projected to increase only slightly. Thus, future emissions levels are not expected to interfere with or undermine the state's maintenance demonstrations.

Ohio's maintenance plans show that emissions of NO_X, direct $PM_{2.5}$, and SO_2 are projected to decrease by 75,893 tpy, 2,512 tpy, and 56,834 tpy, respectively, over the maintenance period. *See* Tables 6–8 above. In addition, emissions inventories used in the regulatory impact analysis (RIA) for the 2012 $PM_{2.5}$ NAAQS show that VOC emissions are projected to decrease by 32,376 tpy, with ammonia emissions increasing by only 93 tpy. While the RIA emissions inventories are only projected out to 2020, there is no reason to believe that these trends would not continue through 2023.

Given that the Cleveland area is already attaining the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS, even with the current level of emissions from sources in the area, the overall downward trend in emissions would be consistent with continued attainment. Indeed, projected emissions reductions for the precursors that the state is addressing for purposes of the $PM_{2.5}$ NAAQS indicate that the area should continue to attain the NAAQS following the precursor control strategy that the state has already elected to pursue. Even if VOC and ammonia emissions were to increase unexpectedly between 2020 and 2025, the overall emissions reductions projected in direct $PM_{2.5}$, SO_2, and NO_X would be sufficient to offset any increases. For these reasons, EPA believes that local emissions of all of the potential $PM_{2.5}$ precursors will not increase to the extent that they will cause monitored $PM_{2.5}$ levels to violate the 1997 annual or 2006 24-hour $PM_{2.5}$ standards during the maintenance period.

TABLE 9—COMPARISON OF 2007 AND 2020 VOC AND AMMONIA EMISSION TOTALS BY SOURCE SECTOR (TPY) FOR THE CLEVELAND AREA [12]

Sector	VOC			Ammonia		
	2007	2020	Net change 2007–2020	2007	2020	Net change 2007–2020
Point	7,205	7,122	−83	31	165	134
Area	35,944	36,222	278	11,803	12,336	533
Nonroad	28,017	13,362	−14,655	23	25	3
Onroad	29,558	11,642	−17,917	1,234	657	−576
Total	100,724	68,348	−32,376	13,090	13,184	93

In addition, available air quality modeling analyses show continued maintenance of the 1997 annual standard during the maintenance period. Based on 2010–2012 air quality data, the current design values for the area is 13.0 μg/m³, which is well below the 1997 annual $PM_{2.5}$ NAAQS of 15 μg/m³. Moreover, the modeling analysis conducted for the RIA for the 2012 $PM_{2.5}$ NAAQS indicates that the annual design value for this area is expected to continue to decline through 2020. In the RIA analysis, the 2020 modeled annual design value for the Cleveland area is 10.7 μg/m³. Given that overall precursor emissions are projected to decrease through 2022, it is reasonable to conclude that monitored $PM_{2.5}$ levels in this area will also continue to decrease through the maintenance period.

Thus, EPA believes that there is ample justification to conclude that the Cleveland area maintenance plans

[12] These emissions estimates were taken from the emissions inventories developed for the RIA for the 2012 $PM_{2.5}$ NAAQS.

should be approved, even taking into consideration the emissions of other precursors potentially relevant to $PM_{2.5}$. After consideration of the D.C. Circuit's January 4, 2013, decision, and for the reasons set forth in this notice, EPA proposes to approve the state's maintenance plans.

e. Monitoring Network

Ohio currently operates twelve monitors for purposes of determining attainment with the 1997 annual and 2006 24-hour $PM_{2.5}$ standard in the Cleveland area. Ohio EPA has committed to continue to operate and maintain these monitors and will consult with EPA prior to making any changes to the existing monitoring network. Ohio EPA remains obligated to continue to quality assure monitoring data in accordance with 40 CFR part 58 and enter all data into the AQS in accordance with Federal guidelines.

f. Verification of Continued Attainment

Continued attainment of the $PM_{2.5}$ NAAQS in the Cleveland area depends, in part, on the state's efforts toward tracking indicators of continued attainment during the maintenance period. Ohio's plans for verifying continued attainment of the 1997 annual and 24-hour $PM_{2.5}$ standards in the Cleveland area consists of continued ambient $PM_{2.5}$ monitoring in accordance with the requirements of 40 CFR part 58. Ohio EPA will also continue to develop and submit periodic emission inventories as required by the Federal Consolidated Emissions Reporting Rule (codified at 40 CFR part 51 Subpart A) to track future levels of emissions.

g. Contingency Plan

The contingency plan provisions are designed to promptly correct or prevent a violation of the NAAQS that might occur after redesignation of an area to attainment. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to ensure that the state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the contingency measures to be adopted, a schedule and procedure for adoption and implementation of the contingency measures, and a time limit for action by the state. The state should also identify specific indicators to be used to determine when the contingency measures need to be adopted and implemented. The maintenance plan must include a requirement that the state will implement all measures with respect to control of the pollutant(s) that were contained in the SIP before redesignation of the area to attainment. See section 175A(d) of the CAA.

As required by section 175A of the CAA, Ohio has adopted contingency plans for the Cleveland area to address possible future 1997 annual and 2006 24-hour $PM_{2.5}$ air quality problems. Ohio's contingency plans include Warning Level Responses and Action Level Responses. An initial Warning Level Response is triggered when either 1) the weighted annual mean is equal to or greater than 15.5 $\mu g/m^3$ within the maintenance area in a single calendar year or 2) a 98th percentile 24-hour $PM_{2.5}$ concentration of 35.5 $\mu g/m^3$ or greater occurs within a single year in the maintenance area. If a Warning Level Response is triggered, a study will be conducted to determine whether emissions appear to be increasing; whether the trend, if any, is likely to continue; and, if so what control measures are necessary to reverse the trend. Should it be determined through the warning level study that action is necessary to reverse the noted trend, Ohio will follow the same procedures for control selection and implementation as for an Action Level Response.

An Action Level Response will be prompted by any one of the following: A two year average of the weighted annual means of 15.0 $\mu g/m^3$ or greater; a violation of the 1997 annual $PM_{2.5}$ standard; a two year average of the 98th percentile 24-hour $PM_{2.5}$ concentration of 35.0 $\mu g/m^3$ or greater; or, a violation of the 24-hour $PM_{2.5}$ standard. If an Action Level Response is triggered, Ohio EPA will determine what additional control measures are needed to assure future attainment of the $PM_{2.5}$ standards. Selected measures are to be in place within 18 months from the close of the calendar year that prompted the action level. Ohio EPA will determine if significant new regulations not currently included as part of the maintenance provisions will be implemented in a timely manner so as to constitute the state's response. If such a determination is made, Ohio will submit to EPA an analysis to demonstrate the proposed measures are adequate to return the area to attainment. Ohio EPA included the following list of potential contingency measures:

i. Diesel reduction emission strategies;

ii. Alternative fuel (e.g., liquid propane and compressed natural gas) and diesel retrofit programs for fleet vehicle operations;

iii. Tighter NO_X, SO_2, or $PM_{2.5}$ emissions offsets for new and modified major sources;

iv. Impact crushers located at recycle scrap yards—upgrade wet suppression;

v. Concrete manufacturing—upgrade wet suppression; and,

vi. Additional NO_X RACT statewide.

EPA believes that Ohio's contingency plan satisfies the pertinent requirements of section 175A(d).

h. Provisions for Future Updates of the Annual $PM_{2.5}$ Maintenance Plan

As required by section 175A(b) of the CAA, Ohio commits to submit to EPA updated maintenance plans eight years after redesignation of the Cleveland area to attainment of the 1997 annual and 2006 24-hour $PM_{2.5}$ standards to cover an additional ten-year period beyond the initial ten year maintenance period. As required by section 175A of the CAA, Ohio has committed to retain the control measures contained in the SIP prior to redesignation, and to submit to EPA for approval as a SIP revision, any changes to its rules or emission limits applicable to SO_2, NO_X, or direct $PM_{2.5}$ sources as required for maintenance of the 1997 annual and 2006 24-hour $PM_{2.5}$ standard in the Cleveland area.

EPA has concluded that the maintenance plan adequately addresses the five basic components of a maintenance plan: Attainment inventory, maintenance demonstration, monitoring network, verification of continued attainment, and a contingency plan.

B. Comprehensive Emissions Inventories

As discussed above in section IV.A.2.a.ii., section 173(c)(3) of the CAA requires areas to submit a comprehensive, accurate and current emissions inventory. As part of the redesignation request, Ohio submitted 2005 and 2008 emissions inventories for NO_X, primary $PM_{2.5}$, and SO_2. These emissions inventories are discussed in section IV.A.3.b., above, and the data are shown in Table 5.

On April 30, 2013, Ohio submitted 2007/2008 ammonia and VOC emissions inventories to supplement the comprehensive emissions inventories submitted as part of the redesignation requests. These emissions inventories were developed by LADCO, in conjunction with its member states, as described below.

To generate point source emissions estimates, LADCO ran the EMS model using STARShip data provided by Ohio. For area sources, LADCO ran the EMS model using the 2008 National Emissions Inventory (NEI) data provided by Ohio. LADCO followed Eastern Regional Technical Advisory Committee (ERTAC) recommendations on area sources when preparing the data. Agricultural ammonia emissions were not taken from NEI; instead

emissions were based on Carnegie Mellon University's Ammonia Emission Inventory for the Continental United States (CMU). Specifically, the CMU 2002 annual emissions were grown to reflect 2007 conditions. A process-based ammonia emissions model developed for LADCO was then used to develop temporal factors to reflect the impact of average meteorology on livestock emissions.

Onroad mobile source emissions were generated using EPA's MOVES2010a emissions model. Nonroad mobile source emissions were generated using the NMIM2008 emissions model. LADCO also accounted for three other nonroad categories not covered by the NMIM model: Commercial marine vessels, aircraft, and railroads. Marine emissions were based on reports prepared by Environ entitled ''LADCO Nonroad Emissions Inventory Project for Locomotive, Commercial Marine, and Recreational Marine Emission Sources, Final Report, December 2004'' and ''LADCO 2005 Commercial Marine Emissions, Draft, March 2, 2007.'' Aircraft emissions were provided by Ohio and calculated using AP–42 emission factors and landing and take-off data provided by the Federal Aviation Administration. Rail emissions were based on the 2008 inventory developed by ERTAC.

EPA notes that the emissions inventory developed by LADCO is documented in ''Regional Air Quality Analyses for Ozone, $PM_{2.5}$, and Regional Haze: Base C Emissions Inventory'' (September 12, 2011). Ammonia and VOC emissions data are shown in Table 10 below.

TABLE 10—2007/2008 VOC AND AMMONIA EMISSION TOTALS FOR THE CLEVELAND AREA BY SOURCE SECTOR

[tpy]

Sector	Ammonia	VOC
Point	65	6,627
Area	13,329	36,530
Nonroad	23	27,721
Onroad	1,384	29,285
Total	14,801	100,163

EPA has concluded that the emissions inventories provided by the state are complete and as accurate as possible given the input data available for the relevant source categories. EPA also believes that these inventories provide information about VOC and ammonia as $PM_{2.5}$ precursors in the context of evaluating redesignation of the Cleveland area under subpart 4. Therefore, we are proposing to approve the 2007/2008 ammonia and VOC emissions inventories submitted by the state, in conjunction with the 2005 and 2008 NO_X, direct $PM_{2.5}$, and SO_2 emissions inventories, as fully meeting the comprehensive inventory requirement of section 172(c)(3) of the CAA for the Cleveland area for the 1997 annual and 2006 24-hour $PM_{2.5}$ standards.

C. Ohio's MVEBs

1. How are MVEBs developed?

Under the CAA, states are required to submit, at various times, control strategy SIP revisions and maintenance plans for $PM_{2.5}$ nonattainment areas and for areas seeking redesignations to attainment of the $PM_{2.5}$ standard. These emission control strategy SIP revisions (*e.g.,* RFP and attainment demonstration SIP revisions) and maintenance plans create MVEBs based on onroad mobile source emissions for criteria pollutants and/or their precursors to address pollution from onroad transportation sources. The MVEBs are the portions of the total allowable emissions that are allocated to highway and transit vehicle use that, together with emissions from other sources in the area, will provide for attainment, RFP or maintenance, as applicable.

Under 40 CFR part 93, a MVEB for an area seeking a redesignation to attainment is established for the last year of the maintenance plan. The MVEB serves as a ceiling on emissions from an area's planned transportation system. The MVEB concept is further explained in the preamble to the November 24, 1993, transportation conformity rule (58 FR 62188).

Under section 176(c) of the CAA, transportation plans and transportation improvement programs (TIPs) must be evaluated to determine if they conform with the area's SIP. Conformity to the SIP means that transportation activities will not cause new air quality violations, worsen existing air quality violations, or delay timely attainment of the NAAQS or any required interim milestone. If a transportation plan or TIP does not conform, most new transportation projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and assuring conformity of such transportation activities to a SIP.

When reviewing SIP revisions containing MVEBs, including attainment strategies, rate-of-progress plans, and maintenance plans, EPA must affirmatively find ''adequate'' or approve for use in determining transportation conformity before the MVEBs can be used. Once EPA affirmatively approves or finds the submitted MVEBs to be adequate for transportation conformity purposes, the MVEBs must be used by state and Federal agencies in determining whether transportation plans and TIPs conform to the SIP as required by section 176(c) of the CAA. EPA's substantive criteria for determining the adequacy of MVEBs are set out in 40 CFR 93.118(e)(4). Additionally, to approve a motor vehicle emissions budget EPA must complete a thorough review of the SIP, in this case the $PM_{2.5}$ maintenance plan, and conclude that the SIP will achieve its overall purpose, in this case providing for maintenance of the 1997 annual $PM_{2.5}$ standard.

EPA's process for determining adequacy of a MVEB consists of three basic steps: (1) Providing public notification of a SIP submission; (2) providing the public the opportunity to comment on the MVEB during a public comment period; and, (3) EPA taking action on the MVEB. The process for determining the adequacy of submitted SIP MVEBs is codified at 40 CFR 93.118.

2. What is a safety margin?

A ''safety margin'' is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan. As shown in Table 6, NO_X emissions in the Cleveland area are projected to have safety margins of 50,795 tpy and 75,893 tpy in 2015 and 2022, respectively (the difference between the attainment year, 2008, emissions and the projected 2015 and 2022 emissions for all sources in the Cleveland area). Table 7 shows direct $PM_{2.5}$ emissions in the Cleveland area are projected to have safety margins of 1,737 tpy and 2,512 tpy in 2015 and 2022, respectively. Even if emissions reached the full level of the safety margin, the area would still demonstrate maintenance since emission levels would equal those in the attainment year.

The transportation conformity rule allows areas to allocate all or a portion of a ''safety margin'' to the area's motor vehicle emissions budgets. (40 CFR 93.124(a))

3. What are the MVEBs for the Cleveland area?

The maintenance plans submitted by Ohio for the Cleveland area contain primary $PM_{2.5}$ and NO_X MVEBs for the area for the years 2015 and 2022. Ohio EPA has determined the 2015 MVEBs for the Cleveland area to be 1,371.35 tpy

for primary $PM_{2.5}$ and 35,094.70 tpy for NO_X. Ohio EPA has determined the 2022 MVEBs for the Cleveland area to be 880.89 tpy for primary $PM_{2.5}$ and 17,263.65 tpy for NO_X. Ohio EPA allocated 178.87 tpy and 4,477.57 tpy to the 2015 primary $PM_{2.5}$ and NO_X MVEBs, respectively, to provide for mobile source growth. Similarly, Ohio EPA allocated 114.90 tpy and 2,251.78 tpy to the 2022 primary $PM_{2.5}$ and NO_X MVEBs, respectively.

The transportation conformity rule allows areas to allocate all or a portion of a ''safety margin'' to the area's motor vehicle emissions budgets. (40 CFR 93.124(a)) The state is not requesting allocation to the MVEBs of the entire available safety margins reflected in the demonstration of maintenance. Therefore, even though the state has submitted MVEBs that exceed the projected onroad mobile source emissions for 2015 and 2022 contained in the demonstration of maintenance, the increase in onroad mobile source emissions that can be considered for transportation conformity purposes is well within the safety margins of the $PM_{2.5}$ maintenance demonstration. Further, once allocated to mobile sources, these safety margins will not be available for use by other sources.

Ohio did not provide emission budgets for SO_2, VOCs, and ammonia because it concluded, consistent with the presumptions regarding these precursors in the conformity rule at 40 CFR 93.102(b)(2)(v), which predated and was not disturbed by the litigation on the $PM_{2.5}$ implementation rule, that emissions of these precursors from motor vehicles are not significant contributors to the area's $PM_{2.5}$ air quality problem.

EPA issued conformity regulations to implement the 1997 $PM_{2.5}$ NAAQS in July 2004 and May 2005 (69 FR 40004, July 1, 2004 and 70 FR 24280, May 6, 2005, respectively). Those actions were not part of the final rule recently remanded to EPA by the Court of Appeals for the District of Columbia in *NRDC* v. *EPA,* No. 08–1250 (Jan. 4, 2013), in which the Court remanded to EPA the implementation rule for the $PM_{2.5}$ NAAQS because it concluded that EPA must implement that NAAQS pursuant to the PM-specific implementation provisions of subpart 4 of part D of title I of the CAA, rather than solely under the general provisions of subpart 1. That decision does not affect EPA's proposed approval of the Cleveland area MVEBs.

First, as noted above, EPA's conformity rule implementing the 1997 $PM_{2.5}$ NAAQS was a separate action from the overall $PM_{2.5}$ implementation rule addressed by the Court and was not considered or disturbed by the decision. Therefore, the conformity regulations were not at issue in *NRDC* v. *EPA.*[13] In addition, as discussed in section III.B., the Cleveland area is attaining the 1997 annual and 2006 24-hour standards for $PM_{2.5}$ with 2010–2012 design values of 13.0 μg/m³ and 30 μg/m³, respectively, which are well below the 1997 annual $PM_{2.5}$ NAAQS of 15 μg/m³ and the 2006 24-hour $PM_{2.5}$ NAAQS of 35 μg/m³. The modeling analysis conducted for the RIA for the 2012 PM NAAQS indicates that the design value for this area is expected to continue to decline through 2020. Further, the state's maintenance plan shows continued maintenance through 2022 by demonstrating that NO_X, SO_2, and direct $PM_{2.5}$ emissions continue to decrease through the maintenance period. For VOC and ammonia, RIA inventories for 2007 and 2020 show that both onroad and total emissions for these pollutants are expected to decrease, supporting the state's conclusion, consistent with the presumptions regarding these precursors in the conformity rule, that emissions of these precursors from motor vehicles are not significant contributors to the area's $PM_{2.5}$ air quality problem and the MVEBs for these precursors are unnecessary. With regard to SO_2, the 2005 final conformity rule (70 FR 24280) based its presumption concerning onroad SO_2 motor vehicle emissions budgets on emissions inventories that show that SO_2 emissions from onroad sources constitute a ''de minimis'' portion of total SO_2 emissions. As can be seen from the data presented in Table 8, onroad emissions in 2022 are less than 0.3% of total SO_2 emissions in the area. In addition, onroad SO_2 emissions decrease throughout the maintenance period.

The availability of the SIP submissions with these 2015 and 2022 MVEBs was announced for public comment on EPA's Adequacy Web site on October 6, 2011, for the 1997 annual $PM_{2.5}$ standard and August 9, 2012, for the 2006 24-hour $PM_{2.5}$ standard, at: *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm.* The EPA public comment periods on adequacy of the 2015 and 2022 MVEBs for the Cleveland area closed on November 7, 2011, and September 10, 2012, for the 1997 annual and 2006 24-hour $PM_{2.5}$ standards, respectively. No adverse comments on the submittals were received during the adequacy comment period.

EPA has reviewed the submitted budgets for 2015 and 2022, including the added safety margins using the conformity rule's adequacy criteria found at 40 CFR 93.118(e)(4) and the conformity rule's requirements for safety margins found at 40 CFR 93.124(a). EPA has determined that the area can maintain attainment of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS for the relevant maintenance period with onroad mobile source emissions at the levels of the MVEBs since total emissions will still remain under attainment year emission levels. EPA is therefore finding adequate and proposing to approve the MVEBs submitted by Ohio EPA for use in determining transportation conformity in the Cleveland area.

V. Summary of Proposed Actions

EPA is proposing to determine that the Cleveland area is attaining the 1997 annual and 2006 24-hour $PM_{2.5}$ standards and that the area has met the requirements for redesignation under section 107(d)(3)(E) of the CAA. EPA is thus proposing to approve the requests from Ohio EPA to change the legal designations of the Cleveland area from nonattainment to attainment for the 1997 annual and 2006 24-hour $PM_{2.5}$ standards. EPA is proposing to approve Ohio's $PM_{2.5}$ maintenance plans for the Cleveland area as revisions to the Ohio SIP because the plans meet the requirements of section 175A of the CAA. EPA is proposing to approve 2005 and 2008 emissions inventories for primary $PM_{2.5}$, NO_X, and SO_2, and 2007/2008 emissions inventories for VOC and ammonia as satisfying the requirement in section 172(c)(3) of the CAA for a comprehensive, current emission inventory. Finally, EPA finds adequate and is proposing to approve 2015 and 2022 primary $PM_{2.5}$ and NO_X MVEBs for the Cleveland area. These MVEBs will be used in future transportation conformity analyses for the area.

VI. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those

[13] The 2004 rulemaking addressed most of the transportation conformity requirements that apply in $PM_{2.5}$ nonattainment and maintenance areas. The 2005 conformity rule included provisions addressing treatment of $PM_{2.5}$ precursors in MVEBs. *See* 40 CFR 93.102(b)(2). While none of these provisions were challenged in the NRDC case, EPA also notes that the Court declined to address challenges to EPA's presumptions regarding $PM_{2.5}$ precursors in the $PM_{2.5}$ implementation rule. *NRDC* v. *EPA,* at 27, n. 10.

imposed by state law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, these proposed actions do not impose additional requirements beyond those imposed by state law and the CAA. For that reason, these proposed actions:

- Are not ''significant regulatory actions'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- are 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.*);
- do 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);
- do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because a determination of attainment is an action that affects the status of a geographical area and does not impose any new regulatory requirements on tribes, impact any existing sources of air pollution on tribal lands, nor impair the maintenance of ozone national ambient air quality standards in tribal lands.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: July 12, 2013.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2013–18028 Filed 7–25–13; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R05–OAR–2011–0596; FRL–9837–9]

Approval and Promulgation of Air Quality Implementation Plans; Ohio; Redesignation of the Dayton-Springfield Area to Attainment of the 1997 Annual Standard for Fine Particulate Matter

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the State of Ohio's request to redesignate the Dayton-Springfield nonattainment area (Dayton) to attainment for the 1997 annual National Ambient Air Quality Standards (NAAQS or standard) for fine particulate matter ($PM_{2.5}$). EPA is also proposing to approve the related elements including emissions inventories, maintenance plans, and the accompanying motor vehicle budgets. EPA is proposing to approve a comprehensive emissions inventory that meets the Clean Air Act (CAA) requirement. EPA is proposing that the inventories for nitrogen oxides (NO_X), direct $PM_{2.5}$, sulfur dioxide (SO_2), ammonia, and volatile organic compounds (VOC) meet the CAA emissions inventory requirement. In the course of proposing to approve Ohio's request to redesignate the Dayton area, EPA addresses a number of additional issues, including the effects of two decisions of the United States Court of Appeals for the District of Columbia (D.C. Circuit or Court): (1) The Court's August 21, 2012, decision to vacate and remand to EPA the Cross-State Air Pollution Control Rule (CSAPR) and (2) the Court's January 4, 2013, decision to remand to EPA two final rules implementing the 1997 $PM_{2.5}$ standard.

DATES: Comments must be received on or before August 26, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2011–0596, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: blakley.pamela@epa.gov.*
3. *Fax:* (312) 692–2450.
4. *Mail:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand delivery:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2011–0596. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your

comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of this document, ''What Should I Consider as I Prepare My Comments for EPA?''

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Matt Rau, Environmental Engineer, at (312) 886–6524 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Matt Rau, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6524, *rau.matthew@epa.gov.*

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

I. What should I consider as I prepare my comments for EPA?
II. What is the background for the proposal?
III. What are the criteria for redesignation to attainment?
IV. What is EPA's analysis of Ohio's request?
A. Attainment Determination and Redesignation
B. Comprehensive Emissions Inventories
C. Motor Vehicle Emission Budgets (MVEBs)
V. Summary of Proposed Actions
VI. Statutory and Executive Order Reviews

I. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date, and page number).

2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

4. Describe any assumptions and provide any technical information and/or data that you used.

5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

6. Provide specific examples to illustrate your concerns, and suggest alternatives.

7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

8. Make sure to submit your comments by the comment period deadline identified.

II. What is the background for the proposal?

On June 1, 2011, Ohio submitted a request for EPA to redesignate the Dayton-Springfield, Ohio nonattainment area to attainment of the 1997 annual $PM_{2.5}$ NAAQS. Ohio also requested EPA approval of the state implementation plan (SIP) revision containing an emissions inventory and a maintenance plan for the area.

In a supplemental submission to EPA on April 30, 2013, Ohio submitted ammonia and VOC emissions inventories to supplement the emissions inventories for $PM_{2.5}$, NO_X, and SO_2 that were submitted on June 1, 2011.

Air quality standards for $PM_{2.5}$ were promulgated on July 18, 1997, at 62 FR 38652. EPA promulgated an annual standard at a level of 15 micrograms per cubic meter (μg/m³), based on a three-year average of annual mean $PM_{2.5}$ concentrations. In the same rulemaking, EPA set a 24-hour standard of 65 μg/m³, based on a three-year average of the 98th percentile of 24-hour concentrations.

On January 5, 2005, at 70 FR 944, EPA designated the Dayton area as nonattainment for the 1997 $PM_{2.5}$ air quality standards. EPA defined the Dayton-Springfield nonattainment area to include Clark, Greene, and Montgomery Counties in Ohio.

On October 17, 2006, at 71 FR 61144, EPA retained the annual average standard at 15 μg/m³, but revised the 24-hour standard to 35 μg/m³, based again on the three-year average of the 98th percentile of 24-hour concentrations.

In response to legal challenges of the annual standard promulgated in 2006, the DC Circuit remanded the standard to EPA for further consideration. See *American Farm Bureau Federation and National Pork Producers Council, et al.* v. *EPA,* 559 F.3d 512 (DC Cir. 2009). On December 14, 2012, EPA finalized a rule revising the $PM_{2.5}$ annual standard to 12 μg/m³ based on current scientific evidence regarding the protection of public health. EPA is not addressing the 2012 annual $PM_{2.5}$ standard in this proposal.

On September 14, 2011, at 76 FR 56641, EPA issued a final determination that the Dayton area attained the 1997 annual $PM_{2.5}$ standard by the applicable attainment date of April 5, 2010, based on certified ambient monitoring data for the 2007–2009 monitoring period.

Fine particle pollution can be emitted directly or formed secondarily through chemical reactions in the atmosphere. Sulfates are a type of secondary particle formed from SO_2 emissions from power plants and industrial facilities. Nitrates, another common type of secondary particle, are formed from emissions of NO_X from power plants, automobiles, and other combustion sources.

Given the significance of sulfates and nitrates in the Dayton area, the area's air quality is strongly affected by regulations of SO_2 and NO_X emissions from power plants. EPA proposed the Clean Air Interstate Rule (CAIR) on January 30, 2004, at 69 FR 4566, promulgated CAIR on May 12, 2005, at 70 FR 25162, and promulgated associated Federal implementation plans (FIPs) on April 28, 2006, at 71 FR 25328, in order to reduce SO_2 and NO_X emissions and improve air quality in many areas in the Eastern and Midwestern United States. However, on July 11, 2008, the D.C. Circuit issued a decision to vacate and remand both CAIR and the associated CAIR FIPs in their entirety (*North Carolina* v. *EPA,* 531 F.3d 836 (D.C. Cir. 2008)). EPA petitioned for rehearing, and the Court issued an order remanding CAIR and the CAIR FIPs to EPA without vacatur (*North Carolina* v. *EPA,* 550 F.3d 1176 (D.C. Cir. 2008)). The Court, thereby, left CAIR in place in order to ''temporarily preserve the environmental values covered by CAIR'' until EPA replaces it with a rule consistent with the Court's opinion. *Id.* at 1178. The Court directed EPA to ''remedy CAIR's flaws'' consistent with its July 11, 2008, opinion, but declined to impose a schedule on EPA for completing that action.

EPA issued CSAPR on August 8, 2011, at 76 FR 48208. CSAPR addresses interstate transport of emissions with respect to the 1997 ozone and the 1997 and 2006 $PM_{2.5}$ NAAQS, and thus replaces CAIR. CSAPR requires substantial reductions of SO_2 and NO_X

emissions from electric generating units (EGUs) across most of the Eastern and Midwestern United States. CSAPR established permanent and enforceable limits on EGU emissions across 28 states.

In this proposed redesignation, EPA takes into account two recent decisions of the D.C. Circuit. In the first of the two Court decisions, the D.C. Circuit, on August 21, 2012, issued *EME Homer City Generation, L.P.* v. *EPA,* 696 F.3d 7 (D.C. Cir. 2012), which vacated and remanded CSAPR and ordered EPA to continue administering CAIR ''pending . . . development of a valid replacement.'' *EME Homer City* at 38. The D.C. Circuit denied all petitions for rehearing on January 24, 2013. In the second decision, on January 4, 2013, in *Natural Resources Defense Council* v. *EPA,* the D.C. Circuit remanded to EPA the ''Final Clean Air Fine Particle Implementation Rule'' (72 FR 20586, April 25, 2007) and the ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$)'' final rule (73 FR 28321, May 16, 2008). 706 F.3d 428 (D.C. Cir. 2013).

III. What are the criteria for redesignation to attainment?

The requirements for redesignating an area from nonattainment to attainment are found in CAA section 107(d)(3)(E). There are five criteria for redesignating an area. First, the Administrator must determine that an area has attained the applicable NAAQS based on current air quality data. Second, the Administrator has fully approved the applicable SIP for the area under CAA section 110(k). The third criterion is for the Administrator to determine that the air quality improvement is the result of permanent and enforceable emission reductions. Emission reductions resulting from requirements approved into the SIP and from Federal air pollution control requirements are considered permanent and enforceable. Fourth, the Administrator has fully approved a maintenance plan meeting the CAA section 175A requirements. The fifth criterion is that the state has met all the redesignation requirements of CAA section 110 and part D.

IV. What is EPA's analysis of Ohio's request?

A. Attainment Determination and Redesignation

EPA is proposing to determine that the Dayton area continues to attain the $PM_{2.5}$ annual standard. EPA is also proposing to approve Ohio's maintenance plans for the area and to determine that the area has met all other applicable redesignation criteria under CAA section 107(d)(3)(E). The basis for EPA's proposed approval of the redesignation requests is as follows:

1. The Area Has Attained the 1997 Annual $PM_{2.5}$ NAAQS

EPA examined monitoring data to determine if the area currently meets the $PM_{2.5}$ annual standard, as determined in accordance with 40 CFR 50.7 and part 50, appendix N, based on three complete consecutive calendar years of quality-assured air quality monitoring data. EPA is proposing to find that the Dayton area is continuing to meet the annual $PM_{2.5}$ standard. The monitoring data for the Dayton area are found on Table 1.

TABLE 1—DAYTON AREA ANNUAL $PM_{2.5}$ MONITORING DATA

[μg/m³]

County	2008–2010	2009–2011	2010–2012
Clark	12.7	12.6	11.9
Greene	12.1	12.0	11.4
Montgomery	13.2	12.9	12.3

EPA makes the determination of whether an area's air quality is meeting the $PM_{2.5}$ NAAQS primarily based upon data gathered from the air quality monitoring sites that have been entered into EPA's Air Quality System (AQS) database. To show attainment of the annual standard for $PM_{2.5}$, the most recent three consecutive years of data prior to the area's attainment date must show that $PM_{2.5}$ concentrations over a three-year period are at or below the level of the standard, 15.0 μg/m³.

Ohio submitted its requests based on 2008 to 2010 monitoring data showing that the Dayton area continues to attain the $PM_{2.5}$ standard. Monitoring data for 2011 and 2012 became available from AQS since Ohio submitted its request. The 2010 to 2012 design values above reflect preliminary calculations of design value based on quality assured, certified air quality data. Thus, EPA also examined the 2009 to 2011 and 2010 to 2012 averages for each monitoring site in the Dayton area. This current monitoring data as presented on Table 1 shows that the area continues to attain the annual standard.

Greene County has a single $PM_{2.5}$ monitor, site 39–057–0005, located in Yellow Springs. This site has operated since October 2003, but it had just a 45 percent data capture in the third quarter of 2010. EPA's completeness criterion is 75 percent data capture for every quarter. Thus, the 2010 data are incomplete, as are all three-year periods that include 2010 data. Ohio explained in its submission that the Greene County monitor was down from August 12 to September 29, 2010, due to repairs to the roof of the building hosting the monitoring site. EPA data shows that this monitor had at least 93 percent data capture in the other 11 quarters in the 2009 to 2011 period. The 2012 monitoring data indicates all four quarters of data are complete and thus EPA finds the Greene County monitor to have 11 complete quarters of data for the 2010 to 2012 period.

EPA examined air quality in Greene County in several ways. First, EPA examined data for the most recent complete three years of data at this site. The most recent three-year period with complete data is 2007 to 2009, during which Greene County recorded a design value of 12.1 μg/m³, which is well below the standard. These data, in combination with the subsequent incomplete data suggesting continued attainment, provide adequate evidence that this location is attaining the standard.

Second, Ohio performed an analysis of the missing data for the Greene County monitoring site. Ohio substituted data from the other monitors in the Dayton area for the 17 missing values from August and September 2010. There are two other monitors in the area, one each in Clark and Montgomery Counties. The state determined that the Clark County monitor data had a 0.9236 correlation with the Greene County data. The substitute values in the third quarter actually lower the 2010 average from 13.2 to 12.2 μg/m³.

Third, EPA examined the monitoring data history for Greene County. The site

recorded an average of 17.24 μg/m³ for the third quarter of 2010, which compares to the average of 14.43 μg/m³ for Clark County and 14.84 μg/m³ for Montgomery County. The 2010 average for the sites are closer with Greene County having a 13.2 μg/m³ annual average, Clark County was at 13.1 μg/m³, and 14.0 μg/m³ for Montgomery County.

Looking back further, Greene County has recorded annual design values of 13.6 μg/m³ in 2005 to 2007, 12.3 μg/m³ in 2006 to 2008, and 12.1 μg/m³ in 2007 to 2009. The annual design values for Clark County are 14.8 μg/m³ in 2005 to 2007, 13.5 μg/m³ in 2006 to 2008, and 13.3 μg/m³ in 2007 to 2009. The Montgomery County annual design values are 15.5 μg/m³ in 2005 to 2007, 14.2 μg/m³ in 2006 to 2008, and 13.8 μg/m³ in 2007 to 2009. The design value history shows that the ambient air quality in Greene County has consistently had the lowest design value in the Dayton area, while Montgomery County recorded the area's highest design values. The 2010 design value for Greene County was similar to the Clark County value, while remaining lower than the Montgomery County value. This can be attributed to uncharacteristically high 2010 third quarter average that had 17 missing values. Ohio analysis showed that adding typical values for the missing data would have lowered the 2010 average. The 2008 to 2010, 2009 to 2011, and the preliminary 2010 to 2012 Greene County design values are well below the $PM_{2.5}$ standard. The other two monitors recorded values moderately below the standard during 2010's third quarter. Thus, it is likely that the 2008 to 2010, 2009 to 2011, and 2010 to 2012 Greene County design values would not have been any higher had site 39–057–0005 recorded complete data for the third quarter of 2010.

For all these reasons, EPA believes that the Dayton area continues to attain the annual $PM_{2.5}$ standard based on current data.

2. The Area Has Met All Applicable Requirements Under Section 110 and Part D; and the Area Has a Fully Approved SIP Under Section 110(k)

The requirements for a state to have a fully approved SIP meeting all relevant requirements are specified in CAA sections 107(d)(3)(E)(ii) and 107(d)(3)(E)(v).

EPA has determined that Ohio has met all currently applicable SIP requirements for purposes of redesignation for the Dayton area under CAA section 110, general SIP requirements. EPA has also determined that the Ohio SIP meets all SIP requirements currently applicable for purposes of redesignation in accordance with section 107(d)(3)(E)(v). In addition, with the exception of the emissions inventory under section 172(c)(3), we have approved all applicable requirements of the Ohio SIP for purposes of redesignation, in accordance with section 107(d)(3)(E)(ii). As discussed below, in this action EPA is proposing to approve Ohio's 2005 and 2008 emissions inventories as meeting the section 172(c)(3) comprehensive emissions inventory requirement.

In making these determinations, EPA ascertained what SIP requirements are applicable to the area for purposes of this redesignation and determined that the portions of the SIP meeting these requirements are fully approved under section 110(k) of the CAA. SIPs must be fully approved only with respect to currently applicable requirements of the CAA.

a. The Dayton Area Has Met All Applicable Requirements for Purposes of Redesignation Under Section 110 and Part D of the CAA

i. Section 110(a) General SIP Requirements

Section 110(a) of title I of the CAA contains the general requirements for a SIP. Section 110(a)(2) provides that the implementation plan submitted by a state must have been adopted by the state after reasonable public notice and hearing, and, among other things, must: Include enforceable emission limitations and other control measures, means or techniques necessary to meet the requirements of the CAA; provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor ambient air quality; provide for implementation of a source permit program to regulate the modification and construction of any stationary source within the areas covered by the plan; include provisions for the implementation of part C, Prevention of Significant Deterioration (PSD) and part D, NSR permit programs; include criteria for stationary source emission control measures, monitoring, and reporting; include provisions for air quality modeling; and provide for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) of the CAA requires that SIPs contain measures to prevent sources in a state from significantly contributing to air quality problems in another state. EPA holds that the requirements linked with a particular nonattainment area's designation are the relevant measures to evaluate in reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. Thus, we conclude that these requirements should not be construed to be applicable requirements for purposes of redesignation.

EPA believes that section 110 elements not connected with nonattainment plan submissions and not linked to an area's nonattainment status are not applicable requirements for redesignations. EPA reviews the state's request to redesignate an area to attainment based on the CAA requirements.

This approach is consistent with EPA's existing policy on applicability of conformity and oxygenated fuels requirements for redesignation purposes, as well as with section 184 ozone transport requirements. See Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176, October 10, 1996) and (62 FR 24826, May 7, 1997); Cleveland-Akron-Lorain, Ohio, final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida, final rulemaking (60 FR 62748, December 7, 1995). See also the discussion on this issue in the Cincinnati, Ohio 1-hour ozone redesignation (65 FR 37890, June 19, 2000), and in the Pittsburgh, Pennsylvania 1-hour ozone redesignation (66 FR 50399, October 19, 2001).

We have reviewed the Ohio SIP and have concluded that it meets the general SIP requirements under section 110 of the CAA to the extent they are applicable for purposes of redesignation. EPA has previously approved provisions of Ohio's SIP addressing section 110 requirements, including provisions addressing particulate matter, at 40 CFR 52.1870. On December 5, 2007, and September 4, 2009, Ohio made submittals addressing ''infrastructure SIP'' elements required by section 110(a)(2) of the CAA. EPA approved elements of Ohio's submittals on July 13, 2011, at 76 FR 41075. The requirements of section 110(a)(2), however, are statewide requirements that are not linked to the $PM_{2.5}$ nonattainment status of the Dayton area. Therefore, EPA believes that these SIP elements are not applicable requirements for purposes of review of the Ohio $PM_{2.5}$ redesignation requests.

ii. Part D Requirements

EPA is proposing to determine that, upon approval of the base year emissions inventories discussed in

section IV.B., the Ohio SIP will meet the applicable SIP requirements for the Dayton area applicable for purposes of redesignation under part D of the CAA. Subpart 1 of part D, found in sections 172–176 of the CAA, sets forth the basic nonattainment requirements applicable to all nonattainment areas. Subpart 4 of part D, found in sections 185–190 of the CAA, provides more specific requirements for particulate matter nonattainment areas.

(1) Subpart 1

(a) Section 172 Requirements

For purposes of evaluating these redesignation requests, the applicable section 172 SIP requirements for the Dayton area are contained in sections 172(c)(1)–(9). A thorough discussion of the requirements contained in section 172 can be found in the General Preamble for Implementation of Title I (57 FR 13498, April 16, 1992).

Section 172(c)(1) requires the plans for all nonattainment areas to provide for the implementation of all Reasonably Available Control Measures (RACM) as expeditiously as practicable and to provide for attainment of the primary NAAQS. EPA interprets this requirement to impose a duty on all nonattainment areas to consider all available control measures and to adopt and implement such measures as are reasonably available for implementation in each area as components of the area's attainment demonstration. Since attainment has been reached, no additional measures are needed to provide for attainment, and section 172(c)(1) requirements are no longer considered to be applicable as long as the area continues to attain the standard until redesignation. See 40 CFR 51.1004(c). The Reasonable Further Progress (RFP) requirement under section 172(c)(2) is defined as progress that must be made toward attainment. This requirement is not relevant for purposes of this redesignation because the Dayton area is monitoring attainment of the 1997 annual $PM_{2.5}$ NAAQS. The requirement to submit the section 172(c)(9) contingency measures is similarly not applicable for purposes of this redesignation.

Section 172(c)(3) requires submission and approval of a comprehensive, accurate, and current inventory of actual emissions. Ohio submitted 2005 and 2008 emissions inventories along with their redesignation request and supplemented the inventories on April 30, 2013. As discussed in section IV.B., EPA is proposing to approve the 2005 and 2008 emission inventories as meeting the section 172(c)(3) emissions inventory requirement for the Dayton area.

Section 172(c)(4) requires the identification and quantification of allowable emissions for major new and modified stationary sources in an area, and section 172(c)(5) requires source permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA approved Ohio's current NSR program on January 10, 2003 (68 FR 1366). Nonetheless, since PSD requirements will apply after redesignation, the area does not need to have a fully-approved NSR program for purposes of redesignation, provided that the area demonstrates maintenance of the NAAQS without part D NSR. A detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment'' (Nichols memorandum). Ohio has demonstrated that the Dayton area will be able to maintain the standard without part D NSR in effect; therefore, the state does not need to have a fully approved part D NSR program prior to approval of the redesignation request. Ohio's PSD program will become effective in the Dayton area upon redesignation to attainment. See rulemakings for Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); and Grand Rapids, Michigan (61 FR 31834–31837, June 21, 1996).

Section 172(c)(6) requires the SIP to contain control measures necessary to provide for attainment of the standard. As attainment has been reached, no additional measures are needed to provide for attainment.

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As noted, EPA finds that the Ohio SIP meets the section 110(a)(2) requirements applicable for purposes of redesignation.

(b) Section 176 Conformity Requirements

Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that Federally-supported or funded activities, including highway projects, conform to the air quality planning goals in the applicable SIPs. The requirement to determine conformity applies to transportation plans, programs, and projects developed, funded, or approved under title 23 of the U.S. Code and the Federal Transit Act (transportation conformity) as well as to all other Federally-supported or funded projects (general conformity).

Section 176(c) of the CAA was amended by provisions contained in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), which was signed into law on August 10, 2005 (Pub. L. 109–59). Among the changes Congress made to this section of the CAA were streamlined requirements for state transportation conformity SIPs. State transportation conformity regulations must be consistent with Federal conformity regulations and address three specific requirements related to consultation, enforcement, and enforceability. EPA believes that it is reasonable to interpret the transportation conformity SIP requirements as not applying for purposes of evaluating the redesignation request under section 107(d) for two reasons.

First, the requirement to submit SIP revisions to comply with the transportation conformity provisions of the CAA continues to apply to areas after redesignation to attainment since such areas would be subject to a section 175A maintenance plan. Second, EPA's Federal conformity rules require the performance of conformity analyses in the absence of Federally-approved state rules. Therefore, because areas are subject to the transportation conformity requirements regardless of whether they are redesignated to attainment and, because they must implement conformity under Federal rules if state rules are not yet approved, EPA believes it is reasonable to view these requirements as not applying for purposes of evaluating a redesignation request. *See Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), upholding this interpretation. *See* also 60 FR 62748, 62749–62750 (Dec. 7, 1995) (Tampa, Florida).

EPA approved Ohio's general conformity SIP on March 11, 1996 (61 FR 9646), and Ohio's transportation conformity SIP on May 30, 2000 (65 FR 34395), and April 27, 2007 (72 FR 20945). Ohio is in the process of updating its approved transportation conformity SIP, and EPA will review its provisions when they are submitted. Ohio also submitted onroad motor vehicle emission budgets for transportation conformity purposes, which EPA reviews in section IV.C below.

(2) Effect of the January 4, 2013, D.C. Circuit Decision Regarding $PM_{2.5}$ Implementation Under Subpart 4

(a) Background

As discussed above, on January 4, 2013, in *Natural Resources Defense Council* v. *EPA,* the D.C. Circuit remanded to EPA the ''Final Clean Air Fine Particle Implementation Rule'' (72 FR 20586, April 25, 2007) and the ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$)'' final rule (73 FR 28321, May 16, 2008) (collectively, ''1997 $PM_{2.5}$ Implementation Rule''). 706 F.3d 428 (D.C. Cir. 2013). The Court found that EPA erred in implementing the 1997 $PM_{2.5}$ NAAQS pursuant to the general implementation provisions of subpart 1 of part D of title I of the CAA, rather than the particulate-matter-specific provisions of subpart 4 of part D of title I.

2. Proposal on This Issue

EPA is proposing to determine that the Court's January 4, 2013, decision does not prevent EPA from redesignating the Dayton area to attainment. Even in light of the Court's decision, redesignation for this area is appropriate under the CAA and EPA's longstanding interpretations of the CAA's provisions regarding redesignation.

i. Applicable Requirements for Purposes of Evaluating the Redesignation Request

With respect to the 1997 $PM_{2.5}$ Implementation Rule, the D.C. Circuit's January 4, 2013, ruling rejected EPA's reasons for implementing the $PM_{2.5}$ NAAQS solely in accordance with the provisions of subpart 1, and remanded that matter to EPA, so that it could address implementation of the 1997 $PM_{2.5}$ NAAQS under subpart 4 of part D of the CAA, in addition to subpart 1. For the purposes of evaluating Ohio's redesignation request for the area, to the extent that implementation under subpart 4 would impose additional requirements for areas designated nonattainment, EPA believes that those requirements are not ''applicable'' for the purposes of CAA section 107(d)(3)(E), and thus EPA is not required to consider subpart 4 requirements for the Dayton redesignation. Under its longstanding interpretation of the CAA, EPA has interpreted section 107(d)(3)(E) to mean, as a threshold matter, that the part D provisions which are ''applicable'' and which must be approved in order for EPA to redesignate an area include only those which came due prior to a State's submission of a complete redesignation request. *See* ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (Calcagni memorandum). *See also* ''State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) on or after November 15, 1992,'' Memorandum from Michael Shapiro, Acting Assistant Administrator, Air and Radiation, September 17, 1993 (Shapiro memorandum); Final Redesignation of Detroit-Ann Arbor, (60 FR 12459, 12465–66, March 7, 1995); Final Redesignation of St. Louis, Missouri, (68 FR 25418, 25424–27, May 12, 2003); *Sierra Club* v. *EPA,* 375 F.3d 537, 541 (7th Cir. 2004) (upholding EPA's redesignation rulemaking applying this interpretation and expressly rejecting Sierra Club's view that the meaning of ''applicable'' under the statute is ''whatever should have been in the plan at the time of attainment rather than whatever actually was in the plan and already implemented or due at the time of attainment'').[1] In this case, at the time that Ohio submitted its redesignation request, requirements under subpart 4 were not due, and indeed, were not yet known to apply.

EPA's view that, for purposes of evaluating the Dayton redesignation, the subpart 4 requirements were not due at the time the state submitted the redesignation request is in keeping with the EPA's interpretation of subpart 2 requirements for subpart 1 ozone areas redesignated subsequent to the D.C. Circuit's decision in *South Coast Air Quality Mgmt. Dist.* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006). In *South Coast,* the Court found that EPA was not permitted to implement the 1997 8-hour ozone standard solely under subpart 1, and held that EPA was required under the statute to implement the standard under the ozone-specific requirements of subpart 2 as well. Subsequent to the *South Coast* decision, in evaluating and acting upon redesignation requests for the 1997 8-hour ozone standard that were submitted to EPA for areas under subpart 1, EPA applied its longstanding interpretation of the CAA that ''applicable requirements'', for purposes of evaluating a redesignation, are those that had been due at the time the redesignation request was submitted. *See, e.g.,* Proposed Redesignation of Manitowoc County and Door County Nonattainment Areas (75 FR 22047, 22050, April 27, 2010). In those actions, EPA therefore did not consider subpart 2 requirements to be ''applicable'' for the purposes of evaluating whether the area should be redesignated under section 107(d)(3)(E).

EPA's interpretation derives from the provisions of CAA section 107(d)(3). Section 107(d)(3)(E)(v) states that, for an area to be redesignated, a state must meet ''all requirements 'applicable' to the area under section 110 and part D.'' Section 107(d)(3)(E)(ii) provides that the EPA must have fully approved the ''applicable'' SIP for the area seeking redesignation. These two sections read together support EPA's interpretation of ''applicable'' as only those requirements that came due prior to submission of a complete redesignation request. First, holding states to an ongoing obligation to adopt new CAA requirements that arose after the state submitted its redesignation request, in order to be redesignated, would make it problematic or impossible for EPA to act on redesignation requests in accordance with the 18-month deadline Congress set for EPA action in section 107(d)(3)(D). If ''applicable requirements'' were interpreted to be a continuing flow of requirements with no reasonable limitation, states, after submitting a redesignation request, would be forced continuously to make additional SIP submissions that in turn would require EPA to undertake further notice-and-comment rulemaking actions to act on those submissions. This would create a regime of unceasing rulemaking that would delay action on the redesignation request beyond the 18-month timeframe provided by the CAA for this purpose.

Second, a fundamental premise for redesignating a nonattainment area to attainment is that the area has attained the relevant NAAQS due to emission reductions from existing controls. Thus, an area for which a redesignation request has been submitted would have already attained the NAAQS as a result of satisfying statutory requirements that came due prior to the submission of the request. Absent a showing that unadopted and unimplemented requirements are necessary for future maintenance, it is reasonable to view the requirements applicable for purposes of evaluating the redesignation request as including only those SIP requirements that have already come due. These are the requirements that led to attainment of the NAAQS. To require,

[1] Applicable requirements of the CAA that come due subsequent to the area's submittal of a complete redesignation request remain applicable until a redesignation is approved, but are not required as a prerequisite to redesignation. Section 175A(c) of the CAA.

for redesignation approval, that a state also satisfy additional SIP requirements coming due after the state submits its complete redesignation request, and while EPA is reviewing it, would compel the state to do more than is necessary to attain the NAAQS, without a showing that the additional requirements are necessary for maintenance.

In the context of this redesignation, the timing and nature of the Court's January 4, 2013, decision in *NRDC* v. *EPA* compound the consequences of imposing requirements that come due after the redesignation request is submitted. The state submitted its redesignation request on June 1, 2011, but the Court did not issue its decision remanding EPA's 1997 $PM_{2.5}$ implementation rule concerning the applicability of the provisions of subpart 4 until January 2013.

To require the state's fully-completed and pending redesignation request to comply now with requirements of subpart 4 that the Court announced only in January, 2013, would be to give retroactive effect to such requirements when the state had no notice that it was required to meet them. The D.C. Circuit recognized the inequity of this type of retroactive impact in *Sierra Club* v. *Whitman,* 285 F.3d 63 (D.C. Cir. 2002),[2] where it upheld the District Court's ruling refusing to make retroactive EPA's determination that the St. Louis area did not meet its attainment deadline. In that case, petitioners urged the Court to make EPA's nonattainment determination effective as of the date that the statute required, rather than the later date on which EPA actually made the determination. The Court rejected this view, stating that applying it ''would likely impose large costs on states, which would face fines and suits for not implementing air pollution prevention plans . . . even though they were not on notice at the time.'' *Id.* at 68. Similarly, it would be unreasonable to penalize Ohio by rejecting its redesignation request for an area that is already attaining the 1997 $PM_{2.5}$ standard and that met all applicable requirements known to be in effect at the time of the request. For EPA now to reject the redesignation request solely because the state did not expressly address subpart 4 requirements of which it had no notice, would inflict the same unfairness condemned by the Court in *Sierra Club* v. *Whitman.*

ii. Subpart 4 Requirements and Ohio's Redesignation Request

Even if EPA were to take the view that the Court's January 4, 2013, decision requires that, in the context of pending redesignations, subpart 4 requirements were due and in effect at the time the State submitted its redesignation request, EPA proposes to determine that the Dayton area still qualifies for redesignation to attainment. As explained below, EPA believes that the redesignation request for the Dayton area, though not expressed in terms of subpart 4 requirements, substantively meets the requirements of that subpart for purposes of redesignating the area to attainment.

With respect to evaluating the relevant substantive requirements of subpart 4 for purposes of redesignating the Dayton area, EPA notes that subpart 4 incorporates components of subpart 1 of part D, which contains general air quality planning requirements for areas designated as nonattainment. *See* Section 172(c). Subpart 4 itself contains specific planning and scheduling requirements for PM_{10}[3] nonattainment areas, and under the Court's January 4, 2013, decision in *NRDC* v. *EPA,* these same statutory requirements also apply for $PM_{2.5}$ nonattainment areas. EPA has longstanding general guidance that interprets the 1990 amendments to the CAA, making recommendations to states for meeting the statutory requirements for SIPs for nonattainment areas. *See,* ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clear Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992) (the ''General Preamble''). In the General Preamble, EPA discussed the relationship of subpart 1 and subpart 4 SIP requirements, and pointed out that subpart 1 requirements were to an extent ''subsumed by, or integrally related to, the more specific PM–10 requirements.'' 57 FR 13538 (April 16, 1992). The subpart 1 requirements include, among other things, provisions for attainment demonstrations, RACM, RFP, emissions inventories, and contingency measures.

For the purposes of this redesignation, in order to identify any additional requirements which would apply under subpart 4, we are considering the Dayton area to be a ''moderate'' $PM_{2.5}$ nonattainment area. Under section 188 of the CAA, all areas designated nonattainment areas under subpart 4 would initially be classified by operation of law as ''moderate'' nonattainment areas, and would remain moderate nonattainment areas unless and until EPA reclassifies the area as a ''serious'' nonattainment area. Accordingly, EPA believes that it is appropriate to limit the evaluation of the potential impact of subpart 4 requirements to those that would be applicable to moderate nonattainment areas. Sections 189(a) and (c) of subpart 4 apply to moderate nonattainment areas and include the following: (1) An approved permit program for construction of new and modified major stationary sources (section 189(a)(1)(A)); (2) an attainment demonstration (section 189(a)(1)(B)); (3) provisions for RACM (section 189(a)(1)(C)); and (4) quantitative milestones demonstrating RFP toward attainment by the applicable attainment date (section 189(c)).

The permit requirements of subpart 4, as contained in section 189(a)(1)(A), refer to and apply the subpart 1 permit provisions requirements of sections 172 and 173 to PM_{10}, without adding to them. Consequently, EPA believes that section 189(a)(1)(A) does not itself impose for redesignation purposes any additional requirements for moderate areas beyond those contained in subpart 1.[4] In any event, in the context of redesignation, EPA has long relied on the interpretation that a fully approved nonattainment NSR program is not considered an applicable requirement for redesignation, provided the area can maintain the standard with a PSD program after redesignation. A detailed rationale for this view is described in the October 14, 1994, Nichols memorandum. *See also* rulemakings for Detroit, Michigan (60 FR 12467–12468, March 7, 1995); Cleveland-Akron-Lorain, Ohio (61 FR 20458, 20469–20470, May 7, 1996); Louisville, Kentucky (66 FR 53665, October 23, 2001); and Grand Rapids, Michigan (61 FR 31834–31837, June 21, 1996).

With respect to the specific attainment planning requirements under subpart 4,[5] when EPA evaluates a redesignation request under either subpart 1 and/or 4, any area that is attaining the $PM_{2.5}$ standard is viewed as having satisfied the attainment planning requirements for these subparts. For redesignations, EPA has for many years interpreted attainment-

[2] *Sierra Club* v. *Whitman* was discussed and distinguished in a recent D.C. Circuit decision that addressed retroactivity in a quite different context, where, unlike the situation here, EPA sought to give its regulations retroactive effect. *National Petrochemical and Refiners Ass'n* v. *EPA.* 630 F.3d 145, 163 (D.C. Cir. 2010), rehearing denied 643 F.3d 958 (D.C. Cir. 2011), cert denied 132 S. Ct. 571 (2011).

[3] PM_{10} refers to particulates nominally 10 micrometers in diameter or smaller.

[4] The potential effect of section 189(e) on section 189(a)(1)(A) for purposes of evaluating this redesignation is discussed below.

[5] I.e., attainment demonstration, RFP, RACM, milestone requirements, contingency measures.

linked requirements as not applicable for areas attaining the standard. In the General Preamble, EPA stated that:

> The requirements for RFP will not apply in evaluating a request for redesignation to attainment since, at a minimum, the air quality data for the area must show that the area has already attained. Showing that the State will make RFP towards attainment will, therefore, have no meaning at that point.

''General Preamble for the Interpretation of Title I of the Clean Air Act Amendments of 1990''; (57 FR 13498, 13564, April 16, 1992).

The General Preamble also explained that

> [t]he section 172(c)(9) requirements are directed at ensuring RFP and attainment by the applicable date. These requirements no longer apply when an area has attained the standard and is eligible for redesignation. Furthermore, section 175A for maintenance plans . . . provides specific requirements for contingency measures that effectively supersede the requirements of section 172(c)(9) for these areas.

Id.

EPA similarly stated in its 1992 Calcagni memorandum that, ''The requirements for reasonable further progress and other measures needed for attainment will not apply for redesignations because they only have meaning for areas not attaining the standard.''

It is evident that even if we were to consider the Court's January 4, 2013, decision in *NRDC* v. *EPA* to mean that attainment-related requirements specific to subpart 4 should be imposed retroactively [6] and thus are now past due, those requirements do not apply to an area that is attaining the 1997 $PM_{2.5}$ standard, for the purpose of evaluating a pending request to redesignate the area to attainment. EPA has consistently enunciated this interpretation of applicable requirements under section 107(d)(3)(E) since the General Preamble was published more than twenty years ago. Courts have recognized the scope of EPA's authority to interpret ''applicable requirements'' in the redesignation context. *See Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004).

Moreover, even outside the context of redesignations, EPA has viewed the obligations to submit attainment-related SIP planning requirements of subpart 4 as inapplicable for areas that EPA determines are attaining the standard. EPA's prior ''Clean Data Policy'' rulemakings for the PM_{10} NAAQS, also governed by the requirements of subpart 4, explain EPA's reasoning. They describe the effects of a determination of attainment on the attainment-related SIP planning requirements of subpart 4. *See* ''Determination of Attainment for Coso Junction Nonattainment Area,'' (75 FR 27944, May 19, 2010). *See also* Coso Junction proposed PM_{10} redesignation, (75 FR 36023, 36027, June 24, 2010); Proposed and Final Determinations of Attainment for San Joaquin Nonattainment Area (71 FR 40952, 40954–55, July 19, 2006; and 71 FR 63641, 63643–47 October 30, 2006). In short, EPA in this context has also long concluded that to require states to meet superfluous SIP planning requirements is not necessary and not required by the CAA, so long as those areas continue to attain the relevant NAAQS.

EPA proposes to determine that the area has attained the 1997 $PM_{2.5}$ standard. Under its longstanding interpretation, EPA is proposing to determine here that the area meets the attainment-related plan requirements of subparts 1 and 4.

Thus, EPA is proposing to conclude that the requirements to submit an attainment demonstration under 189(a)(1)(B), a RACM determination under section 172(c)d section 189(a)(1)(c), a RFP demonstration under 189(c)(1), and contingency measure requirements under section 172(c)(9) are satisfied for purposes of evaluating the redesignation request.

iii. Subpart 4 and Control of $PM_{2.5}$ Precursors

The D.C. Circuit in *NRDC* v. *EPA* remanded to EPA the two rules at issue in the case with instructions to EPA to re-promulgate them consistent with the requirements of subpart 4. EPA in this section addresses the Court's opinion with respect to $PM_{2.5}$ precursors. While past implementation of subpart 4 for PM_{10} has allowed for control of PM_{10} precursors such as NO_X from major stationary, mobile, and area sources in order to attain the standard as expeditiously as practicable, CAA section 189(e) specifically provides that control requirements for major stationary sources of direct PM_{10} shall also apply to PM_{10} precursors from those sources, except where EPA determines that major stationary sources of such precursors ''do not contribute significantly to PM_{10} levels which exceed the standard in the area.''

EPA's 1997 $PM_{2.5}$ implementation rule, remanded by the D.C. Circuit, contained rebuttable presumptions concerning certain $PM_{2.5}$ precursors applicable to attainment plans and control measures related to those plans. Specifically, in 40 CFR 51.1002, EPA provided, among other things, that a state was ''not required to address VOC [and ammonia] as . . . $PM_{2.5}$ attainment plan precursor[s] and to evaluate sources of VOC [and ammonia] emissions in the State for control measures.'' EPA intended these to be rebuttable presumptions. EPA established these presumptions at the time because of uncertainties regarding the emission inventories for these pollutants and the effectiveness of specific control measures in various regions of the country in reducing $PM_{2.5}$ concentrations. EPA also left open the possibility for such regulation of VOC and ammonia in specific areas where that was necessary.

The Court in its January 4, 2013, decision made reference to both section 189(e) and 40 CFR 51.1002, and stated that, ''In light of our disposition, we need not address the petitioners' challenge to the presumptions in [40 CFR 51.1002] that volatile organic compounds and ammonia are not $PM_{2.5}$ precursors, as subpart 4 expressly governs precursor presumptions.'' *NRDC* v. *EPA,* at 27, n.10.

Elsewhere in the Court's opinion, however, the Court observed:

> Ammonia is a precursor to fine particulate matter, making it a precursor to both $PM_{2.5}$ and PM_{10}. For a PM_{10} nonattainment area governed by subpart 4, a precursor is presumptively regulated. See 42 U.S.C. 7513a(e) [section 189(e)]. *Id.* at 21, n.7.

For a number of reasons, EPA believes that its proposed redesignation of Dayton area is consistent with the Court's decision on this aspect of subpart 4. First, while the Court, citing section 189(e), stated that ''for a PM_{10} area governed by subpart 4, a precursor is 'presumptively regulated,' '' the Court expressly declined to decide the specific challenge to EPA's 1997 $PM_{2.5}$ implementation rule provisions regarding ammonia and VOC as precursors. The Court had no occasion to reach whether and how it was substantively necessary to regulate any specific precursor in a particular $PM_{2.5}$ nonattainment area, and did not address what might be necessary for purposes of acting upon a redesignation request.

However, even if EPA takes the view that the requirements of subpart 4 were deemed applicable at the time the state submitted the redesignation request, and disregards the implementation rule's rebuttable presumptions regarding ammonia and VOC as $PM_{2.5}$ precursors, the regulatory consequence would be to consider the need for regulation of all precursors from any sources in the area to demonstrate attainment and to apply the section 189(e) provisions to major

[6] As EPA has explained above, we do not believe that the Court's January 4, 2013 decision should be interpreted so as to impose these requirements on the states retroactively. *Sierra Club* v. *Whitman, supra.*

stationary sources of precursors. In the case of the Dayton area, EPA believes that doing so is consistent with proposing redesignation of the area for the 1997 $PM_{2.5}$ standard. The Dayton area has attained the standard without any specific additional controls of VOC and ammonia emissions from any sources in the area.

Precursors in subpart 4 are specifically regulated under the provisions of section 189(e), which requires, with important exceptions, control requirements for major stationary sources of PM_{10} precursors.[7] Under subpart 1 and EPA's prior implementation rule, all major stationary sources of $PM_{2.5}$ precursors were subject to regulation, with the exception of ammonia and VOC. Thus we must address here whether additional controls of ammonia and VOC from major stationary sources are required under section 189(e) of subpart 4 in order to redesignate the area for the 1997 $PM_{2.5}$ standard. As explained below, we do not believe that any additional controls of ammonia and VOC are required in the context of this redesignation.

In the General Preamble, EPA discusses its approach to implementing section 189(e). *See* 57 FR 13538–13542. With regard to precursor regulation under section 189(e), the General Preamble explicitly stated that control of VOCs under other CAA requirements may suffice to relieve a state from the need to adopt precursor controls under section 189(e). 57 FR 13542. EPA in this proposal proposes to determine that the SIP has met the provisions of section 189(e) with respect to ammonia and VOCs as precursors. This proposed supplemental determination is based on our findings that (1) the Dayton area contains no major stationary sources of ammonia, and (2) existing major stationary sources of VOC are adequately controlled under other provisions of the CAA regulating the ozone NAAQS.[8] In the alternative, EPA proposes to determine that, under the express exception provisions of section 189(e), and in the context of the redesignation of the area, which is attaining the 1997 annual $PM_{2.5}$ standard, at present ammonia and VOC precursors from major stationary sources do not contribute significantly to levels exceeding the 1997 $PM_{2.5}$ standard in the Dayton area. *See* 57 FR 13539–42.

EPA notes that its 1997 $PM_{2.5}$ implementation rule provisions in 40 CFR 51.1002 were not directed at evaluation of $PM_{2.5}$ precursors in the context of redesignation, but at SIP plans and control measures required to bring a nonattainment area into attainment of the 1997 $PM_{2.5}$ NAAQS. By contrast, redesignation to attainment primarily requires the area to have already attained due to permanent and enforceable emission reductions, and to demonstrate that controls in place can continue to maintain the standard. Thus, even if we regard the Court's January 4, 2013, decision as calling for ''presumptive regulation'' of ammonia and VOC for $PM_{2.5}$ under the attainment planning provisions of subpart 4, those provisions in and of themselves do not require additional controls of these precursors for an area that already qualifies for redesignation. Nor does EPA believe that requiring Ohio to address precursors differently than they have already would result in a substantively different outcome.

Although, as EPA has emphasized, its consideration here of precursor requirements under subpart 4 is in the context of a redesignation to attainment, EPA's existing interpretation of subpart 4 requirements with respect to precursors in attainment plans for PM_{10} contemplates that states may develop attainment plans that regulate only those precursors that are necessary for purposes of attainment in the area in question, i.e., states may determine that only certain precursors need be regulated for attainment and control purposes.[9] Courts have upheld this approach to the requirements of subpart 4 for PM_{10}.[10] EPA believes that application of this approach to $PM_{2.5}$ precursors under subpart 4 is reasonable. Because the Dayton area has already attained the 1997 $PM_{2.5}$ NAAQS with its current approach to regulation of $PM_{2.5}$ precursors, EPA believes that it is reasonable to conclude in the context of this redesignation that there is no need to revisit the attainment control strategy with respect to the treatment of precursors. Even if the Court's decision is construed to impose an obligation, in evaluating this redesignation request, to consider additional precursors under subpart 4, it would not affect EPA's approval here of Ohio's request for redesignation of the Dayton area. In the context of a redesignation, the area has shown that it has attained the standard. Moreover, the state has shown and EPA is proposing that attainment in this area is due to permanent and enforceable emissions reductions on all precursors necessary to provide for continued attainment. It follows logically that no further control of additional precursors is necessary. Accordingly, EPA does not view the January 4, 2013, decision of the Court as precluding redesignation of the Dayton area to attainment for the 1997 $PM_{2.5}$ NAAQS at this time.

In sum, even if Ohio were required to address precursors for the Dayton area under subpart 4 rather than under subpart 1, as interpreted in EPA's remanded $PM_{2.5}$ implementation rule, EPA would still conclude that the area had met all applicable requirements for purposes of redesignation in accordance with section 107(d)(3)(E)(ii) and (v).

iv. Maintenance Plan and Evaluation of Precursors

A discussion of the impact of the Court's decision on the maintenance plan required under sections 175A and 107(d)(3)(E)(iv) can be found in section IV.A.4.d.

b. The Dayton Area Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA

Upon final approval of Ohio's comprehensive 2005 and 2008 emissions inventories, EPA will have fully approved the Ohio SIP for the Dayton area under section 110(k) of the CAA for all requirements applicable for purposes of redesignation. EPA may rely on prior SIP approvals in approving a redesignation request (See page 3 of the Calcagni memorandum; *Southwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F.3d 984, 989–990 (6th Cir. 1998); *Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001)) plus any additional measures it may approve in conjunction with a redesignation action. See 68 FR 25413, 25426 (May 12, 2003). Since the passage of the CAA of 1970, Ohio has adopted and submitted, and EPA has fully approved, provisions addressing various required SIP elements under particulate matter standards. EPA is proposing to approve Ohio's 2005 and 2008 emissions inventories for the Dayton area as meeting the requirement of section 172(c)(3) of the CAA. No Dayton area SIP provisions are currently

[7] Under either subpart 1 or subpart 4, for purposes of demonstrating attainment as expeditiously as practicable, a state is required to evaluate all economically and technologically feasible control measures for direct PM emissions and precursor emissions, and adopt those measures that are deemed reasonably available.

[8] The Dayton area has reduced VOC emissions through the implementation of various control programs including VOC Reasonably Available Control Technology regulations and various on-road and non-road motor vehicle control programs.

[9] *See, e.g.,* ''Approval and Promulgation of Implementation Plans for California—San Joaquin Valley PM–10 Nonattainment Area; Serious Area Plan for Nonattainment of the 24-Hour and Annual PM–10 Standards,'' 69 FR 30006 (May 26, 2004) (approving a PM_{10} attainment plan that impose controls on direct PM_{10} and NO_X emissions and did not impose controls on SO_2, VOC, or ammonia emissions).

[10] *See, e.g., Assoc. of Irritated Residents* v. *EPA et al.,* 423 F.3d 989 (9th Cir. 2005).

disapproved, conditionally approved, or partially approved.

3. The Improvement in Air Quality Is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions

EPA finds that Ohio has demonstrated that the observed air quality improvement in the Dayton area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, Federal measures, and other state-adopted measures.

In making this showing, Ohio EPA has calculated the change in emissions between 2005, one of the years in the period during which the Dayton area monitored nonattainment, and 2008, one of the years in the period during which the Dayton area monitored attainment. The reduction in emissions and the corresponding improvement in air quality over this time period can be attributed to a number of regulatory control measures that the Dayton area and upwind areas have implemented in recent years.

a. Permanent and Enforceable Controls Implemented

The following is a discussion of permanent and enforceable measures that have been implemented in the area:

i. Federal Emission Control Measures

Reductions in fine particle precursor emissions have occurred statewide and in upwind areas as a result of Federal emission control measures, with additional emission reductions expected to occur in the future. Federal emission control measures include the following:

Tier 2 Emission Standards for Vehicles and Gasoline Sulfur Standards. These emission control requirements result in lower VOC, NO_X, and SO_2 emissions from new cars and light duty trucks, including sport utility vehicles. The Federal rules were phased in between 2004 and 2009. The EPA has estimated that, by the time post-2009 vehicles have entirely replaced pre-2009 vehicles, the following vehicle NO_X emission reductions will have occurred nationwide: Passenger cars (light duty vehicles) (77 percent); light duty trucks, minivans, and sports utility vehicles (86 percent); and, larger sports utility vehicles, vans, and heavier trucks (69 to 95 percent). Some of the emissions reductions resulting from new vehicle standards occurred during the 2008–2010 attainment period; however additional reductions will continue to occur throughout the maintenance period as new vehicles replace older vehicles. The Tier 2 standards also reduced the sulfur content of gasoline to 30 parts per million (ppm) beginning in January 2006. Gasoline sold in the region including Ohio prior to implementation of the Tier 2 sulfur content limits had an average sulfur content of 276 ppm.[11]

Heavy-Duty Diesel Engine Rule. This rule, which EPA issued in July 2000, limited the sulfur content of diesel fuel beginning in 2004. A second phase took effect in 2007 which reduced fine particle emissions from heavy-duty highway engines and further reduced the highway diesel fuel sulfur content to 15 ppm. The total program is estimated to achieve a 90 percent reduction in primary $PM_{2.5}$ emissions and a 95 percent reduction in NO_X emissions for these new engines using low sulfur diesel, compared to existing engines using higher sulfur content diesel. The reductions in fuel sulfur content occurred by the 2008–2010 attainment period. Some of the emissions reductions resulting from new vehicle standards occurred during the 2008–2010 attainment period, however additional reductions will continue to occur throughout the maintenance period as the fleet of older heavy duty diesel engines turns over. The reduction in fuel sulfur content also yielded an immediate reduction in sulfate particle emissions from all diesel vehicles.

Nonroad Diesel Rule. In May 2004, EPA promulgated a new rule for large nonroad diesel engines, such as those used in construction, agriculture, and mining equipment, which established engine emission standards to be phased in between 2008 and 2014. The rule also required reductions to the sulfur content in nonroad diesel fuel by over 99 percent. Prior to 2006, nonroad diesel fuel averaged approximately 3,400 ppm sulfur. This rule limited nonroad diesel sulfur content to 500 ppm by 2006, with a further reduction to 15 ppm, by 2010. The combined engine and fuel rules will reduce NO_X and PM emissions from large nonroad diesel engines by over 90 percent, compared to current nonroad engines using higher sulfur content diesel. The reduction in fuel sulfur content yielded an immediate reduction in sulfate particle emissions from all diesel vehicles. In addition, some emissions reductions from the new engine emission standards were realized over the 2008–2010 time period, although most of the reductions will occur over the maintenance period as the fleet of older nonroad diesel engines turns over.

Nonroad Large Spark-Ignition Engine and Recreational Engine Standards. In November 2002, EPA promulgated emission standards for groups of previously unregulated nonroad engines. These engines include large spark-ignition engines such as those used in forklifts and airport ground-service equipment; recreational vehicles using spark-ignition engines such as off-highway motorcycles, all-terrain vehicles, and snowmobiles; and recreational marine diesel engines. Emission standards from large spark-ignition engines were implemented in two tiers, with Tier 1 starting in 2004 and Tier 2 in 2007. Recreational vehicle emission standards are being phased in from 2006 through 2012. Marine Diesel engine standards were phased in from 2006 through 2009. With full implementation of all of the nonroad spark-ignition engine and recreational engine standards, an overall 72 percent reduction in VOC, 80 percent reduction in NO_X and 56 percent reduction in carbon monoxide (CO) emissions are expected by 2020. Some of these emission reductions occurred by the 2008–2010 attainment period and additional emission reductions will occur during the maintenance period as the fleet turns over.

ii. Control Measures Implemented in Ohio and in Upwind Areas

Given the significance of sulfates and nitrates in the Dayton area, the area's air quality is strongly affected by regulation of SO_2 and NO_X emissions from power plants.

NO_X SIP Call. On October 27, 1998 (63 FR 57356), EPA issued a NO_X SIP Call requiring the District of Columbia and 22 states to reduce emissions of NO_X. Affected states were required to comply with Phase I of the SIP Call beginning in 2004, and Phase II beginning in 2007. Emission reductions resulting from regulations developed in response to the NO_X SIP Call are permanent and enforceable.

CAIR and CSAPR. EPA promulgated CSAPR (76 FR 48208, August 8, 2011), to replace CAIR, which has been in place since 2005. *See* 76 FR 59517. CAIR requires significant reductions in emissions of SO_2 and NO_X from electric generating units to limit the interstate transport of these pollutants and the ozone and fine particulate matter they form in the atmosphere. *See* 76 FR 70093. The D.C. Circuit initially vacated CAIR, *North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008), but ultimately

[11] See Regulatory Impact Analysis—Control of Air Pollution from New Motor Vehicles: Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements, December 1999, EPA420–R–99–023, p. IV–42.

remanded that rule to EPA without vacatur to preserve the environmental benefits provided by CAIR, *North Carolina* v. *EPA,* 550 F.3d 1176, 1178 (D.C. Cir. 2008).

On December 30, 2011, the D.C. Circuit issued an order addressing the status of CSAPR and CAIR in response to motions filed by numerous parties seeking a stay of CSAPR pending judicial review. In that order, the Court stayed CSAPR pending resolution of the petitions for review of that rule in *EME Homer City Generation, L.P.* v. *EPA* (No. 11–1302 and consolidated cases). The Court also indicated that EPA was expected to continue to administer CAIR in the interim until judicial review of CSAPR was completed.

As noted above, on August 21, 2012, the D.C. Circuit issued the decision in *EME Homer City* to vacate and remand CSAPR and ordered EPA to continue administering CAIR ''pending . . . development of a valid replacement.'' *EME Homer City* at 38. The D.C. Circuit denied all petitions for rehearing on January 24, 2013. EPA and other parties have filed petitions for certiorari to the U.S. Supreme Court. On June 24, 2013, the Supreme Court granted certiorari and agreed to review the D.C. Circuit's decision in EME Homer City. The Supreme Court's grant of certiorari, by itself, does not alter the status of CAIR or CSAPR. At this time, CAIR remains in place.

In light of these unique circumstances and for the reasons explained below, to the extent that attainment is due to emission reductions associated with CAIR, EPA is here determining that those reductions are sufficiently permanent and enforceable for purposes of CAA sections 107(d)(3)(E)(iii) and 175A.

As directed by the D.C. Circuit, CAIR remains in place and enforceable until EPA promulgates a valid replacement rule to substitute for CAIR. The Dayton SIP revision lists CAIR as a control measure that was adopted by the State in 2006 and required compliance by January 1, 2009. CAIR was thus in place and getting emission reductions when Dayton monitored attainment of the 1997 annual $PM_{2.5}$ standard during the 2006–2008 time period. The quality-assured, certified monitoring data continues to show the area in attainment of the 1997 $PM_{2.5}$ standard through 2012.

To the extent Ohio is relying on CAIR in its maintenance plan to support continued attainment into the future, the directive from the D.C. Circuit in *EME Homer City* ensures that the reductions associated with CAIR will be permanent and enforceable for the necessary time period. EPA has been ordered by the Court to develop a new rule to address interstate transport to replace CSAPR, and the opinion makes clear that after promulgating that new rule EPA must provide states an opportunity to draft and submit SIPs to implement that rule. Thus, CAIR will remain in place until EPA has promulgated a final rule through a notice-and-comment rulemaking process, states have had an opportunity to draft and submit SIPs in response to it, EPA has reviewed the SIPs to determine if they can be approved, and EPA has taken action on the SIPs, including promulgating a FIP if appropriate. The Court's clear instruction to EPA is that it must continue to administer CAIR until a valid replacement exists, and thus EPA believes that CAIR emission reductions may be relied upon until the necessary actions are taken by EPA and states to administer CAIR's replacement. Furthermore, the Court's instruction provides an additional backstop: By definition, any rule that replaces CAIR and meets the Court's direction would require upwind states to have SIPs that eliminate any significant contributions to downwind nonattainment and prevent interference with maintenance in downwind areas.

Further, in vacating CSAPR and requiring EPA to continue administering CAIR, the D.C. Circuit emphasized that the consequences of vacating CAIR ''might be more severe now in light of the reliance interests accumulated over the intervening four years.'' *EME Homer City,* 696 F.3d at 38. The accumulated reliance interests include the interests of states that reasonably assumed they could rely on reductions associated with CAIR which brought certain nonattainment areas into attainment with the NAAQS. If EPA were prevented from relying on reductions associated with CAIR in redesignation actions, states would be forced to impose additional, redundant reductions on top of those achieved by CAIR. EPA believes this is precisely the type of irrational result the Court sought to avoid by ordering EPA to continue administering CAIR. For these reasons also, EPA believes it is appropriate to allow states to rely on CAIR, and the existing emissions reductions achieved by CAIR, as sufficiently permanent and enforceable for regulatory purposes such as redesignations. Following promulgation of the replacement rule for CSAPR, EPA will review existing SIPs as appropriate to identify whether there are any issues that need to be addressed.

b. Emission Reductions

Ohio developed emissions inventories for NO_X, primary $PM_{2.5}$, and SO_2 for 2005, a year that the Dayton area monitored nonattainment of the 1997 annual $PM_{2.5}$ standard, and 2008, a year the area monitored attainment of the standard. The emission inventories were developed with the assistance of the Lake Michigan Air Directors Consortium (LADCO). The 2005 nonattainment inventory was developed as described below. Point source emissions for 2005 were compiled by Ohio EPA using source specific data reported by facilities through the State's STARShip database program. The data are reported by facilities annually and include emissions, process rates, operating schedules, emissions control data and other relevant information. Ohio EPA quality assured the database files and submitted the data to LADCO for emissions processing through the Emissions Modeling System (EMS). LADCO used the EGU inventory compiled by EPA's Acid Rain Program, based on facility reported emissions as measured by continuous emissions monitors.

Area source sector emissions were calculated using surrogate emissions factors based on energy usage, population, employment records, or other reliable data. Ohio EPA used Emission Inventory improvement Program methodologies or selected other methodologies which are shared by other states. The decision of which methodology to use was largely based on Ohio's data availability.

Nonroad source sector emissions estimates were generated using EPA's National Mobile Inventory Model (NMIM), with the following modifications: Emission factors were added for diesel tampers/rammers; the $PM_{2.5}$ ratios in the SCC table were revised to correctly calculate $PM_{2.5}$ diesel emissions; and, gasoline parameters, including Reid Vapor Pressure (RVP), Oxygenate content and sulfur content, were revised using updates provided by the state and E.H. Pechan and Associates. Marine, aircraft and rail nonroad emissions were calculated separately. Contractors were employed by LADCO to estimate emissions for commercial marine vessels and railroads. Ohio developed aircraft emissions estimates using AP–42 emission factors and landing and take-off data provided by the Federal Aviation Administration.

Onroad mobile source emissions estimates were developed using the EPA's MOVES2010 model. The 2008 attainment year inventory was

developed as follows. Point source emissions for 2008 were compiled from Ohio's STARShip database. Onroad emissions projections were based on EPA's MOVES2010 model. Area and nonroad emissions were grown from the 2005 inventory using LADCO's growth factors.

The state aggregated the emission inventories to obtain the total emissions for each category and the grand total emissions for the Dayton area. The emission inventories for the Dayton area by pollutant are presented in Tables 2 to 4. The data in Table 2 indicates $PM_{2.5}$ emission decreased by 170 tons per year (tpy) between 2005 and 2008. Similarly, the Table 3 data indicates a 7,022 tpy reduction in NO_X emissions and Table 4 shows a 1,415 tpy decrease in SO_2 emission from 2005 to 2008.

4. The Area Has a Fully Approved Maintenance Plan Pursuant to Section 175A of the CAA.

In conjunction with Ohio's requests to redesignate the Dayton nonattainment area to attainment status, Ohio EPA submitted SIP revisions to provide for maintenance of the 1997 annual $PM_{2.5}$ NAAQS in the area through 2022.

a. What is required in a maintenance plan?

Section 175A of the CAA sets forth the required elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least ten years after EPA approves a redesignation to attainment. Eight years after redesignation, the state must submit a revised maintenance plan which demonstrates that attainment will continue to be maintained for ten years following the initial ten year maintenance period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures with a schedule for implementation as EPA deems necessary to assure prompt correction of any future $PM_{2.5}$ violations.

The September 4, 1992, John Calcagni memorandum provides additional guidance on the content of a maintenance plan. The memorandum states that a maintenance plan should address the following items: The attainment emissions inventories, a maintenance demonstration showing maintenance for the ten years of the maintenance period, a commitment to maintain the existing monitoring network, factors and procedures to be used for verification of continued attainment of the NAAQS, and a contingency plan to prevent or correct future violations of the NAAQS.

b. Attainment Inventory

Ohio developed emissions inventories for NO_X, $PM_{2.5}$, and SO_2 for 2008, a year the area monitored attainment of the 1997 annual $PM_{2.5}$ standard, as described in section IV.A.3.b. The attainment level of emissions is summarized in Tables 2 to 4.

c. Demonstration of Maintenance

Along with the redesignation requests, Ohio EPA submitted revisions to the Ohio $PM_{2.5}$ SIP to include maintenance plans for the Dayton area, as required by section 175A of the CAA. Section 175A requires a state seeking redesignation to attainment to submit a SIP revision to provide for the maintenance of the NAAQS in the area ''for at least 10 years after the redesignation.'' EPA has interpreted this as a showing of maintenance ''for a period of ten years following redesignation'' in the Calcagni Memorandum, p. 9. Where the emissions inventory method of showing maintenance is used, its purpose is to show that emissions during the maintenance period will not increase over the attainment year inventory. Calcagni Memorandum, pp. 9–10.

Ohio's maintenance plan submissions expressly document that the Dayton area's emissions inventories will remain below the attainment year inventories through 2022. In addition, for the reasons set forth below, EPA believes that Ohio's submission, in conjunction with additional supporting information, further demonstrating that the area will continue to maintain the $PM_{2.5}$ standard at least through 2023. Thus, if EPA finalizes its proposed approval of the redesignation requests and maintenance plans in 2013, it will be based on a showing, in accordance with section 175A, that Ohio's maintenance plans provide for maintenance for at least ten years after redesignation.

Ohio's plans demonstrate maintenance of the $PM_{2.5}$ NAAQS through 2022 by showing that current and future emissions of NO_X, $PM_{2.5}$, and SO_2 for the Dayton area remain at or below attainment year emission levels. A maintenance demonstration need not be based on modeling. *See Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001), *Sierra Club* v. *EPA,* 375 F. 3d 537 (7th Cir. 2004). *See also* 66 FR 53094, 53099–53100 (October 19, 2001), 68 FR 25413, 25430–25432 (May 12, 2003). As discussed below, a comparison of current and future VOC and ammonia emissions show ammonia emissions are expected to remain relatively constant. In contrast, VOC emissions are projected to decline significantly. The VOC and ammonia emission projections further support a finding that the Dayton area will continue to maintain the standard.

Ohio is using $PM_{2.5}$, NO_X, and SO_2 emissions inventory projections for the years 2015 and 2022 to demonstrate maintenance. The projected emissions were estimated by Ohio with assistance from LADCO.

LADCO has developed growth and control files for point, area, and nonroad categories. These files were used along with LADCO's 2009 and 2018 emission inventories to develop the 2015 and 2022 emissions estimates. Onroad emissions projections were made by using the MOVES model.

As discussed in section IV.3.a., many of the control programs that helped to bring the area into attainment of the standard will continue to achieve additional emission reductions over the maintenance period. These control programs include Tier 2 emission standards for vehicles and gasoline sulfur standards, the heavy-duty diesel engine rule, the nonroad diesel rule, and the nonroad large spark-ignition engine and recreation engine standards. In addition, implementation of CAIR was assumed in the projections. The state then aggregated the emission inventories to obtain the total emissions for each category and the grand total emissions for the Dayton area. The emission inventories for the Dayton area by pollutant are presented in Tables 2 to 4.

TABLE 2—COMPARISON OF 2005, 2008, 2015, AND 2022 DIRECT $PM_{2.5}$ EMISSION TOTALS BY COUNTY (TPY) FOR THE DAYTON AREA

County	Direct $PM_{2.5}$				
	2005 Base	2008 Attainment	2015	2022 Maintenance	Net change 2008–2022
Clark	377.44	340.97	248.54	198.10	−142.87

TABLE 2—COMPARISON OF 2005, 2008, 2015, AND 2022 DIRECT $PM_{2.5}$ EMISSION TOTALS BY COUNTY (TPY) FOR THE DAYTON AREA—Continued

County	Direct $PM_{2.5}$				
	2005 Base	2008 Attainment	2015	2022 Maintenance	Net change 2008–2022
Greene	491.15	458.91	372.82	336.44	−122.47
Montgomery	1,516.57	1,415.40	1,115.14	968.50	−446.90
Total	2,385	2,215	1,737	1,503	−712

TABLE 3—COMPARISON OF 2005, 2008, 2015, AND 2022 NO_X EMISSION TOTALS BY COUNTY (TPY) FOR THE DAYTON AREA

County	NO_X				
	2005 Base	2008 Attainment	2015	2022 Maintenance	Net change 2008–2022
Clark	7,327.18	6,159.66	3,630.30	2,080.20	−4,079.46
Greene	9,448.97	8,459.44	6,140.94	5,014.57	−3,444.87
Montgomery	27,364.92	22,499.86	14,004.55	8,762.54	−13,737.3
Total	44,141	37,119	23,776	15,857	−21,262

TABLE 4—COMPARISON OF 2005, 2008, 2015, AND 2022 SO_2 EMISSION TOTALS BY COUNTY (TPY) FOR THE DAYTON AREA

County	SO_2				
	2005 Base	2008 Attainment	2015	2022 Maintenance	Net change 2008–2022
Clark	278.81	168.87	121.64	109.97	−58.90
Greene	2,344.19	2,278.89	2,352.21	2,397.31	+118.42
Montgomery	8,653.40	7,413.46	7,360.15	7,053.08	−360.38
Total	11,276	9,861	9,834	9,560	−301

The 2015 and 2022 emission inventories indicate that the emission reductions are expected to continue. A 712 tpy, or 32 percent, reduction in $PM_{2.5}$ emissions between 2008 and 2022 is expected. The 21,262 tpy NO_X emission decrease is a 57 percent reduction, while the 301 tpy SO_2 decrease equates to a 3 percent reduction, again between 2008 and 2022. These rates of decline are consistent with monitored and projected air quality trends, emissions reductions achieved through emissions controls and regulations that will remain in place beyond 2023. Furthermore, fleet turnover in onroad and nonroad vehicles that will continue to occur after 2022 will continue to provide additional significant emission reductions.

In addition, available air quality modeling analyses show continued maintenance of the standard during the maintenance period. The current air quality design value for the Dayton area is 12.3 μg/m³ based on 2010 to 2012 air quality data, which is well below the 1997 annual $PM_{2.5}$ NAAQS of 15 μg/m³. Moreover, the modeling analysis conducted for EPA's regulatory impact analysis (RIA) for the 2012 $PM_{2.5}$ NAAQS indicates that the design value for this area is expected to continue through 2020. In the RIA analysis, the 2020 modeled design value for the Dayton area is 9.5 μg/m³. Given that precursor emissions are projected to decrease through 2022, it is reasonable to conclude that monitored $PM_{2.5}$ levels in this area will also continue to decrease through 2022.

Based on the information summarized above, Ohio has adequately demonstrated maintenance of the $PM_{2.5}$ standard for a period extending ten years from the date that EPA may be expected to complete rulemaking on the State's redesignation request.

d. Maintenance Plan and Evaluation of Precursors

After evaluating the effect of the Court's remand of EPA's implementation rule, a rule that included presumptions against consideration of VOC and ammonia as $PM_{2.5}$ precursors, EPA in this proposal is also considering the impact of the decision on the maintenance plan required under sections 175A and 107(d)(3)(E)(iv). To begin with, EPA notes that the area has attained the 1997 $PM_{2.5}$ standard and that the state has shown that attainment of that standard is due to permanent and enforceable emission reductions.

Based on its review of Ohio's maintenance plan and related information, EPA believes that the primary influences on future air quality in the Dayton area will be emissions of NO_X, directly emitted $PM_{2.5}$, and SO_2. EPA therefore proposes to determine that Ohio's maintenance plan shows continued maintenance of the standard by tracking the levels of the precursors whose control brought about attainment of the 1997 $PM_{2.5}$ standard in the Dayton area. Nevertheless, pursuant to the Court's January 4, 2013, decision, EPA is further assessing the potential role of VOC and ammonia in achieving continued maintenance in this area. As explained below, based upon documentation provided by the State

and supporting information, EPA believes that the prospective trends in emissions of VOC and ammonia are consistent with a finding of continued maintenance of the standard in the Dayton area.

First, as noted above in EPA's discussion of section 189(e), VOC emission levels in this area have historically been well controlled under SIP requirements related to ozone and other pollutants. Second, total ammonia emissions throughout the Dayton area are modest, estimated to be about 27,250 tpy. *See* Table 5. Third, as described below, available information shows that no precursor, including VOC and ammonia, is expected to increase over the maintenance period so as to interfere with or undermine the Ohio's maintenance demonstration.

Ohio's maintenance plan shows that emissions of direct $PM_{2.5}$, SO_2, and NO_X are projected to decrease by 712 tpy, 301 tpy, and 21,262 tpy, respectively, over the maintenance period. *See* Tables 2 to 4. In addition, emissions inventories used in the RIA for the 2012 $PM_{2.5}$ NAAQS show that VOC and ammonia emissions are projected to decrease by 124 tpy and 8,778 tpy, respectively between 2007 and 2020 as shown on Table 5. While the RIA emissions inventories are only projected out to 2020, there is no reason to believe that this downward trend would not continue through 2023. Given that the Dayton area is already attaining the 1997 $PM_{2.5}$ NAAQS even with the current level of emissions from sources in the area, the downward trend of emissions inventories would be consistent with continued attainment. Indeed, projected emissions reductions for the precursors that Ohio is addressing for purposes of the 1997 $PM_{2.5}$ NAAQS indicate that the area should continue to attain the NAAQS following the control strategy that the state has already elected to pursue. Even if VOC and ammonia emissions were to increase unexpectedly between 2020 and 2022, the overall emissions reductions projected in direct $PM_{2.5}$, SO_2, and NO_X would be sufficient to offset any increases. For these reasons, EPA believes that local emissions of all of the potential $PM_{2.5}$ precursors will not increase to the extent that they will cause monitored $PM_{2.5}$ levels to violate the 1997 $PM_{2.5}$ standard during the maintenance period.

TABLE 5—COMPARISON OF 2007 AND 2020 VOC AND AMMONIA EMISSION TOTALS BY COUNTY (TPY) FOR THE DAYTON AREA [12]

County	Ammonia			VOC		
	2007	2020	Net change 2007–2020	2007	2020	Net change 2007–2020
Clark	808	793	−15	4,771	3,142	−1,629
Greene	537	525	−13	4,052	2,749	−1,303
Montgomery	748	651	−96	18,421	12,574	−5,846
Total	2,093	1,969	−124	27,244	18,465	−8,778

Thus, EPA believes that there is ample justification to conclude that the Dayton area should be redesignated, even taking into consideration the emissions of other precursors potentially relevant to $PM_{2.5}$. After consideration of the D.C. Circuit's January 4, 2013, decision, and for the reasons set forth in this notice, EPA proposes to approve Ohio's maintenance plan.

e. Monitoring Network

Ohio currently operates three monitors for purposes of determining attainment with the $PM_{2.5}$ standards in the Dayton area. Ohio EPA has committed to continue to operate and maintain these monitors and will consult with EPA prior to making any changes to the existing monitoring network. Ohio EPA remains obligated to continue to quality assure monitoring data in accordance with 40 CFR part 58 and enter all data into the AQS in accordance with Federal guidelines.

f. Verification of Continued Attainment

Continued attainment of the $PM_{2.5}$ NAAQS in the Dayton area depends, in part, on Ohio's efforts toward tracking indicators of continued attainment during the maintenance period. Ohio's plans for verifying continued attainment of the 1997 annual $PM_{2.5}$ standard in the Dayton area consists of continued ambient $PM_{2.5}$ monitoring in accordance with the requirements of 40 CFR part 58. Ohio will also continue to develop and submit periodic emission inventories as required by the Federal Consolidated Emissions Reporting Rule (codified at 40 CFR 51 subpart A) to track future levels of emissions.

g. Contingency Plan

The contingency plan provisions are designed to promptly correct or prevent a violation of the NAAQS that might occur after redesignation of an area to attainment. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to ensure that the state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the contingency measures to be adopted, a schedule and procedure for adoption and implementation of the contingency measures, and a time limit for action by the state. The state should also identify specific indicators to be used to determine when the contingency measures need to be adopted and implemented. The maintenance plan must include a requirement that the state will implement all measures with respect to control of the pollutant(s) that were contained in the SIP before redesignation of the area to attainment. See section 175A(d) of the CAA.

As required by section 175A of the CAA, Ohio has adopted contingency plans for the Dayton area to address possible future $PM_{2.5}$ air quality problems. Contingency provisions are measures that can be implemented to prevent or promptly correct a violation of the standard. The state set a ''warning level'' for when an annual mean of 15.5 $\mu g/m^3$ or greater occurs. This level requires analyzing the ambient concentration trend within 12 months of the warning level triggering calendar year's end.

If the annual value trend is rising, control measures to reverse the rising trend are implemented. An ''action level'' response is triggered whenever the two year average is 15.0 $\mu g/m^3$ or

[12] These emissions estimates were taken from the emissions inventories developed for the RIA for the 2012 $PM_{2.5}$ NAAQS. Values were rounded on the table following making the calculations.

greater and whenever a violation occurs. This level response requires the state, along with the Regional Air Pollution Control Agency, to determine the additional control measures to assure future attainment. The controls measures are to be in place within 18 months from the end of the calendar year prompting the action level.

Ohio provided a list of potential contingency provisions in its maintenance plan. It listed diesel emission reductions, alternative fuels, fleet diesel retrofit programs, tighter $PM_{2.5}$, SO_2, and NO_X emission offsets for new and modified major sources, upgraded wet suppression at scrap yards and at concrete manufacturing facilities, and additional NO_X RACT measures. Other controls measures may also be implemented. If necessary, Ohio will select control measures to ensure the ambient $PM_{2.5}$ concentrations remain in attainment with the standard.

h. Provisions for Future Updates of the Annual $PM_{2.5}$ Maintenance Plan

As required by section 175A(b) of the CAA, Ohio commits to submit to EPA updated maintenance plans eight years after redesignation of the Dayton area to attainment of the 1997 annual $PM_{2.5}$ standard to cover an additional ten year period beyond the initial ten year maintenance period. As required by section 175A of the CAA, Ohio has committed to retain the control measures contained in the SIP prior to redesignation, and to submit to EPA for approval as a SIP revision, any changes to its rules or emission limits applicable to SO_2, NO_X, or direct $PM_{2.5}$ sources as required for maintenance of the 1997 annual $PM_{2.5}$ standard in the Dayton area.

EPA has concluded that the maintenance plan adequately addresses the five basic components of a maintenance plan: Attainment inventory, maintenance demonstration, monitoring network, verification of continued attainment, and a contingency plan.

B. Comprehensive Emissions Inventories

Section 173(c)(3) of the CAA requires areas to submit a comprehensive, accurate and current emissions inventory. As part of the redesignation request, Ohio submitted 2005 and 2008 emissions inventories for NO_X, primary $PM_{2.5}$, and SO_2 on June 1, 2011. These emission inventories are discussed in section IV.A.4.c. and the data are shown in Tables 2 to 4.

On April 30, 2013, Ohio supplemented its emissions inventory information for direct $PM_{2.5}$, NO_X, and SO_2 with 2007/2008 emissions inventories for ammonia and VOC. The additional emissions inventory information provided by Ohio addresses emissions of VOC and ammonia from the general source categories of point sources, area sources, onroad mobile sources, and nonroad mobile sources. The emissions inventories were based upon information generated by LADCO in conjunction with its member states.

As with its inventories for NO_X, directly emitted $PM_{2.5}$, and SO_2, Ohio's inventories for point source emissions of VOC and ammonia were based largely on LADCO runs with the EMS model using data provided by the State of Ohio. The point source data supplied by the State was obtained from facility emissions reporting.

For area sources inventories for VOC and ammonia, again as with the inventories for NO_X, $PM_{2.5}$, and SO_2, LADCO ran the EMS model using the 2008 National Emissions Inventory (NEI) data provided by Ohio. LADCO followed Eastern Regional Technical Advisory Committee (ERTAC) recommendations on area sources when preparing the data. Agricultural ammonia emissions were not taken from NEI; instead emissions were based on Carnegie Mellon University's Ammonia Emission Inventory for the Continental United States (CMU). Specifically, the CMU 2002 annual emissions were grown to reflect 2007 conditions. A process-based ammonia emissions model developed for LADCO was then used to develop temporal factors to reflect the impact of average meteorology on livestock emissions.

Non-road mobile source emissions of VOC and ammonia, similar to the other pollutants, were estimated using the NMIM2008 emissions model. LADCO also accounted for three other non-road categories not covered by the NMIM model: Commercial marine vessels, aircraft, and railroads. Marine emissions were based on reports prepared by Environ entitled ''LADCO Nonroad Emissions Inventory Project for Locomotive, Commercial Marine, and Recreational Marine Emission Sources, Final Report, December 2004'' and ''LADCO 2005 Commercial Marine Emissions, Draft, March, 2, 2007.'' Aircraft emissions were provided by Ohio and calculated using AP–42 emission factors and landing and take-off data provided by the Federal Aviation Administration. Rail emissions were based on the 2008 inventory developed by ERTAC. On-road mobile source emissions were generated using EPA's MOVES2010a emissions model.

EPA notes that the emissions inventory developed by LADCO is documented in ''Regional Air Quality Analyses for Ozone, $PM_{2.5}$, and Regional Haze: Base C Emissions Inventory'' (September 12, 2011). EPA has concluded that the 2007/2008 ammonia and VOC emissions inventories provided by Ohio are complete and as accurate as possible given the input data available for the relevant source categories. Ohio submitted an 2007/2008 ammonia inventory of 2,286 tpy and a 25,881 tpy VOC 2007/2008 inventory.[13] EPA also believes that these inventories provide information about VOC and ammonia as $PM_{2.5}$ precursors in the context of evaluating redesignation of the Dayton area under subpart 4.

Therefore, we are proposing to approve the ammonia and VOC emissions inventories submitted by Ohio in April 2013, in conjunction with the NO_X, direct $PM_{2.5}$, and SO_2 emissions inventories submitted in June 2011, as fully meeting the comprehensive inventory requirement of section 172(c)(3) of the CAA for the Dayton area for the 1997 annual $PM_{2.5}$ standard.

C. Motor Vehicle Emission Budgets (MVEBs)

1. How are MVEBs developed?

Under the CAA, states are required to submit, at various times, control strategy SIP revisions and maintenance plans for nonattainment areas and for areas seeking redesignation to attainment for a given NAAQS. These emission control strategy SIP revisions (*e.g.,* RFP and attainment demonstration SIP revisions) and maintenance plans create MVEBs based on onroad mobile source emissions for the relevant criteria pollutants and/or their precursors, where appropriate, to address pollution from onroad transportation sources. The MVEBs are the portions of the total allowable emissions that are allocated to onroad vehicle use that, together with emissions from all other sources in the area, will provide for attainment, RFP, or maintenance, as applicable. The budget serves as a ceiling on emissions from an area's planned transportation system. Under 40 CFR part 93, a MVEB for an area seeking a redesignation to attainment is established for the last year of the maintenance plan. See the September 27, 2011, notice of direct final approval for a more complete discussion of MVEBs. (76 FR 59512).

Under section 176(c) of the CAA, transportation plans and transportation improvement programs (TIPs) must be

[13] These ammonia and VOC emissions inventories vary from the inventories presented on Table 5 in section IV.A.4.d. because cover different time periods, only 2007 versus 2007 and 2008.

evaluated to determine if they conform with the area's SIP. Conformity to the SIP means that transportation activities will not cause new air quality violations, worsen existing air quality violations, or delay timely attainment of the NAAQS or any required interim milestone. If a transportation plan or TIP does not conform, most new transportation projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and assuring conformity of such transportation activities to a SIP.

When reviewing SIP revisions containing MVEBs, including attainment strategies, rate-of-progress plans, and maintenance plans, EPA must affirmatively find ''adequate'' or approve for use in determining transportation conformity before the MVEBs can be used. Once EPA affirmatively approves or finds the submitted MVEBs to be adequate for transportation conformity purposes, the MVEBs must be used by state and Federal agencies in determining whether transportation plans and TIPs conform to the SIP as required by section 176(c) of the CAA. EPA's substantive criteria for determining the adequacy of MVEBs are set out in 40 CFR 93.118(e)(4). Additionally, to approve a motor vehicle emissions budget EPA must complete a thorough review of the SIP, in this case the $PM_{2.5}$ maintenance plan, and conclude that the SIP will achieve its overall purpose, in this case providing for maintenance of the 1997 annual $PM_{2.5}$ standard.

EPA's process for determining adequacy of a MVEB consists of three basic steps: (1) Providing public notification of a SIP submission; (2) providing the public the opportunity to comment on the MVEB during a public comment period; and, (3) EPA taking action on the MVEB. The process for determining the adequacy of submitted SIP MVEBs is codified at 40 CFR 93.118.

2. What are safety margins?

A ''safety margin'' is the difference between the attainment level of emissions from all sources and the projected level of emissions from all sources in the maintenance plan. As shown in Table 3, NO_X emissions in the Dayton area are projected to have safety margins of 13,343 tpy and 21,262 tpy in 2015 and 2022, respectively (the difference between the attainment year, 2008, emissions and the projected 2015 and 2022 emissions for all sources in the Dayton area). Table 2 shows direct $PM_{2.5}$ emissions in the Dayton area are projected to have a safety margin of 4479 tpy and 712 tpy in 2015 and 2022, respectively. While, SO_2 emissions as shown on Table 4 are projected to decrease and produce safety margins of 27 tpy in 2015 and 301 tpy in 2022. Even if emissions reached the full level of the safety margin, the area would still demonstrate maintenance since emission levels would equal those in the attainment year.

The transportation conformity rule allows areas to allocate all or a portion of a ''safety margin'' to the area's motor vehicle emissions budgets (40 CFR 92.124(a)).

3. What are the MVEBs for the Dayton area?

The maintenance plan revision submitted by Ohio for the Dayton area contains primary $PM_{2.5}$ and NO_X MVEBs for the area for the years 2015 and 2022.

Ohio developed estimates for onroad mobile sources for the three counties in the Dayton area for 2005, 2008, 2015, and 2022. Ohio then summed the emissions for the Dayton area as shown on Table 6.

TABLE 6—ONROAD MOBILE SOURCE EMISSIONS FOR THE DAYTON AREA

[tpy]

	2005	2008	2015	2022
$PM_{2.5}$	871.08	724.75	351.68	227.24
NO_X	28,056.27	22,653.69	11,187.43	5,452.73
SO_2	423.66	131.47	54.96	54.13

The transportation conformity rule allows areas to allocate all or a portion of a ''safety margin'' to the area's motor vehicle emissions budgets (40 CFR 93.124(a)). Ohio is not requesting allocation to the MVEBs of the entire available safety margins reflected in the demonstration of maintenance. Therefore, even though the State has submitted MVEBs that exceed the projected onroad mobile source emissions for 2015 and 2022 contained in the demonstration of maintenance, the increase in onroad mobile source emissions that can be considered for transportation conformity purposes is well within the safety margins of the $PM_{2.5}$ maintenance demonstration. Further, once allocated to mobile sources, these safety margins will not be available for use by other sources.

Ohio did not provide emission budgets for SO_2, VOCs, and ammonia because it concluded, consistent with the presumptions regarding these precursors in the conformity rule at 40 CFR 93.102(b)(2)(v), which predated and was not disturbed by the litigation on the $PM_{2.5}$ implementation rule, that emissions of these precursors from motor vehicles are not significant contributors to the area's $PM_{2.5}$ air quality problem.

EPA issued conformity regulations to implement the 1997 $PM_{2.5}$ NAAQS in July 2004 and May 2005 (69 FR 40004, July 1, 2004 and 70 FR 24280, May 6, 2005, respectively). Those actions were not part of the final rule recently remanded to EPA by the Court of Appeals for the District of Columbia in *NRDC* v. *EPA,* No. 08–1250 (Jan. 4, 2013), in which the Court remanded to EPA the implementation rule for the $PM_{2.5}$ NAAQS because it concluded that EPA must implement that NAAQS pursuant to the PM-specific implementation provisions of subpart 4 of part D of title I of the CAA, rather than solely under the general provisions of subpart 1. That decision does not affect EPA's proposed approval of the Dayton MVEBs.

First, as noted above, EPA's conformity rule implementing the 1997 $PM_{2.5}$ NAAQS was a separate action from the overall $PM_{2.5}$ implementation rule addressed by the Court and was not considered or disturbed by the decision. Therefore, the conformity regulations were not at issue in *NRDC* v. *EPA.*[14] In addition, as discussed in section III.B., the Dayton area is attaining the 1997 annual standard for $PM_{2.5}$ with a 2009–2011 design value of 12.9 μg/m³, which

[14] The 2004 rulemaking addressed most of the transportation conformity requirements that apply in $PM_{2.5}$ nonattainment and maintenance areas. The 2005 conformity rule included provisions addressing treatment of $PM_{2.5}$ precursors in MVEBs. *See* 40 CFR 93.102(b)(2). While none of these provisions were challenged in the NRDC case, EPA also notes that the Court declined to address challenges to EPA's presumptions regarding $PM_{2.5}$ precursors in the $PM_{2.5}$ implementation rule. *NRDC* v. *EPA,* at 27, n. 10.

is well below the annual $PM_{2.5}$ NAAQS of 15 μg/m³. The modeling analysis conducted for the RIA for the 2012 PM NAAQS indicates that the design value for this area is expected to continue to decline through 2020. Further, Ohio's maintenance plan shows continued maintenance through 2022 by demonstrating that NO_X, SO_2, and direct $PM_{2.5}$ emissions continue to decrease through the maintenance period. For VOC and ammonia, RIA inventories for 2007 and 2020 show that both onroad and total emissions for these pollutants are expected to decrease, supporting the State's conclusion, consistent with the presumptions regarding these precursors in the conformity rule, that emissions of these precursors from motor vehicles are not significant contributors to the area's $PM_{2.5}$ air quality problem and the MVEBs for these precursors are unnecessary. The onroad VOC emissions are expected to go from 11,156 to 4,598 tpy and ammonia emissions are projected to decline from 430 to 240 tpy. With regard to SO_2, the 2005 final conformity rule (70 FR 24280) based its presumption concerning onroad SO_2 motor vehicle emissions budgets on emissions inventories that show that SO_2 emissions from onroad sources constitute a ''de minimis'' portion of total SO_2 emissions. As the emissions data on Tables 4 and 6 show, onroad emissions in 2022 are less than 0.6 percent of total SO_2 emissions in the area.

The availability of the SIP submissions with these 2015 and 2022 MVEBs was announced for public comment on EPA's Adequacy Web site on October 6, 2011, for the 1997 annual $PM_{2.5}$ standard at: *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm*. The EPA public comment periods on adequacy of the 2015 and 2022 MVEBs for the Dayton area closed on November 7, 2011. No adverse comments on the submission were received during the adequacy comment period.

EPA has reviewed the submitted budgets for 2015 and 2022, including the added safety margins using the conformity rule's adequacy criteria found at 40 CFR 93.118(e)(4) and the conformity rule's requirements for safety margins found at 40 CFR 93.124(a). EPA has determined that the area can maintain attainment of the 1997 annual $PM_{2.5}$ NAAQS for the relevant maintenance period with onroad mobile source emissions at the levels of the MVEBs since total emissions will still remain under attainment year emission levels. EPA is therefore proposing to approve the MVEBs submitted by Ohio for use in determining transportation conformity in the Dayton area.

V. Summary of Proposed Actions

EPA is proposing to determine that the Dayton area is attaining the 1997 annual $PM_{2.5}$ NAAQS and that the area has met the requirements for redesignation under section 107(d)(3)(E) of the CAA. EPA is thus proposing to approve the requests from Ohio EPA to change the legal designations of the Dayton area from nonattainment to attainment for the 1997 annual $PM_{2.5}$ standard. EPA is proposing to approve Ohio's $PM_{2.5}$ maintenance plan for the Dayton area as a revision to the Ohio SIP because the plan meets the requirements of section 175A of the CAA. EPA is proposing to approve the 2005 and 2008 NO_X, direct $PM_{2.5}$, SO_2 emission inventories along with the 2007/2008 ammonia and VOC emissions inventories as meeting the comprehensive emissions inventory requirements of section 172(c)(3) of the CAA. EPA is also proposing to find adequate and approve the MOVES-based NO_X and direct $PM_{2.5}$ 2015 and 2022 MVEBs for the Dayton area for transportation conformity purposes. These MVEBs will be used in future transportation conformity analyses for the area.

VI. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by state law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, these proposed actions do not impose additional requirements beyond those imposed by state law and the CAA. For that reason, these proposed actions:

- Are not ''significant regulatory actions'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- are 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.*);
- do 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);
- do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- are not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because a determination of attainment is an action that affects the status of a geographical area and does not impose any new regulatory requirements on tribes, impact any existing sources of air pollution on tribal lands, nor impair the maintenance of ozone national ambient air quality standards in tribal lands.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter.

40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: July 12, 2013.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2013–18026 Filed 7–25–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R04–OAR–2013–0129; FRL–9835–8]

Approval and Promulgation of Implementation Plans and Designation of Areas; North Carolina; Redesignation of the Charlotte-Gastonia-Rock Hill, 1997 8-Hour Ozone Moderate Nonattainment Area to Attainment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On November 2, 2011, and supplemented on March 28, 2013, the State of North Carolina, through the North Carolina Department of Environment and Natural Resources, Department of Air Quality (NC DAQ), submitted a request for EPA to redesignate the portion of North Carolina that is within the bi-state Charlotte-Gastonia-Rock Hill, North Carolina-South Carolina 8-hour ozone nonattainment area (hereafter referred to as the ''bi-state Charlotte Area,'' ''Area,'' or ''Metrolina nonattainment area'') to attainment for the 1997 8-hour ozone National Ambient Air Quality Standards (NAAQS); and to approve a State Implementation Plan (SIP) revision containing a maintenance plan for the Area. EPA is proposing to approve the redesignation request for the Area, along with the related SIP revisions, including North Carolina's plan for maintaining attainment of the 1997 8-hour ozone standard in the Area. EPA is also proposing to approve a supplemental SIP revision, submitted to EPA on March 28, 2013, extending the maintenance plan to the year 2025 and updating motor vehicle emission budgets (MVEBs) for nitrogen oxides (NO_X) and volatile organic compounds (VOC) for the years 2013 and 2025 for the North Carolina portion of the Area. These actions are being proposed pursuant to the Clean Air Act (CAA or Act) and its implementing regulations. EPA finalized action to redesignate the South Carolina portion of the Area, including approval of South Carolina's maintenance plan for the 1997 8-hour ozone NAAQS, in a separate action.

DATES: Comments must be received on or before August 26, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2013–0129, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: R4-RDS@epa.gov.*
3. *Fax:* (404) 562–9019.
4. *Mail:* EPA–R04–OAR–2013–0129, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960.
5. *Hand Delivery or Courier:* Ms. Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R04–OAR–2013–0129. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *www.regulations.gov* or email, information that you consider to be CBI or otherwise protected. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jane Spann or Sara Waterson of the Regulatory Development Section, in the Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Ms. Spann may be reached by phone at (404) 562–9029, or via electronic mail at *spann.jane@epa.gov.* Ms. Waterson may be reached by phone at (404) 562–9061, or via electronic mail at *waterson.sara@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. What are the actions EPA is proposing to take?

EPA is proposing to take the following two separate but related actions, one of which involves multiple elements: (1) To redesignate the North Carolina portion of the bi-state Charlotte Area to attainment for the 1997 8-hour ozone NAAQS; and (2) to approve into the North Carolina SIP, under section 175A of the CAA, North Carolina's plan for maintaining the 1997 8-hour ozone NAAQS (1997 ozone NAAQS maintenance plan). EPA's proposed action for the maintenance plan also includes proposed approval of the associated MVEBs. Through today's rulemaking, EPA is also notifying the public of the status of EPA's adequacy determination for the MVEBs for the North Carolina portion of the bi-state Charlotte Area. The bi-state Charlotte Area consists of Cabarrus, Gaston, Lincoln, Mecklenburg, Rowan, Union and a portion of Iredell County (Davidson and Coddle Creek Townships), North Carolina; and a portion of York County, South Carolina. These actions are summarized below and described in greater detail throughout this notice of proposed rulemaking.

First, EPA proposes to determine that the North Carolina portion of the bi-state Charlotte Area has met the requirements for redesignation under section 107(d)(3)(E) of the CAA. Accordingly, in this action, EPA is proposing to approve a request to change the legal designation of Cabarrus, Gaston, Iredell, Lincoln, Mecklenburg, Rowan and Union Counties in their entireties, and a portion of Iredell County (Davidson and Coddle Creek Townships) in North Carolina from nonattainment to attainment for the 1997 8-hour ozone NAAQS.

Second, EPA is proposing to approve North Carolina's November 2, 2011, SIP revision (as supplemented by a March 28, 2013, SIP submittal) for the 1997 8-hour ozone NAAQS maintenance plan for the North Carolina portion of the bi-state Charlotte Area as meeting the requirements of section 175A (such approval being one of the CAA criteria for redesignation to attainment status). The maintenance plan is designed to help keep the bi-state Charlotte Area in attainment of the 1997 8-hour ozone NAAQS through 2025. Consistent with the CAA, EPA is proposing to take action to approve the 2013 and 2025 MVEBs in North Carolina's March 28, 2013, SIP revision.

EPA is also notifying the public of the status of EPA's adequacy process for the newly-established NO_X and VOC MVEBs for 2013 and 2025 for the North Carolina portion of the bi-state Charlotte Area. The Adequacy comment period for the 2013 and 2025 MVEBs for the North Carolina portion of the bi-state Charlotte Area began on February 21, 2013, with EPA's posting of the availability of North Carolina's submissions on EPA's Adequacy Web site (*http://www.epa.gov/otaq/stateresources/transconf/currsips.htm#charlotte1111*). The Adequacy comment period for these MVEBs closed on March 25, 2013. Please see section VII of this proposed rulemaking for further explanation of this process and for more details on the MVEBs.

Today's notice of proposed rulemaking is in response to North Carolina's November 2, 2011, SIP revision (as supplemented by a March 28, 2013, SIP submission). These SIP revisions address the specific issues summarized above and the necessary elements described in section 107(d)(3)(E) of the CAA for redesignation of the North Carolina portion of the bi-state Charlotte Area to attainment of the 1997 8-hour ozone NAAQS.

II. What is the background for EPA's proposed actions?

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

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

On November 12, 2009,[1] North Carolina submitted an attainment demonstration and associated reasonably available control measures (RACM), a reasonable further progress (RFP) plan, [2] contingency measures, a 2002 base year emissions inventory, and other planning SIP revisions related to attainment of the 1997 8-hour ozone NAAQS in the North Carolina portion of the Area. North Carolina submitted a supplement to the attainment demonstration on April 5, 2010, which provided supplemental information including the 2009 ambient air quality data (showing that the area qualified for a one-year extension to the attainment date).

The bi-state Charlotte Area did not attain the 1997 8-hour ozone NAAQS by June 15, 2010 (the applicable attainment date for moderate nonattainment areas); however, the Area qualified for an extension of the attainment date. Under certain circumstances, the CAA allows for extensions of the attainment dates prescribed at the time of the original nonattainment designation. In accordance with CAA section 181(a)(5), EPA may grant up to two one-year extensions of the attainment date under specified conditions. On May 31, 2011,

[1] North Carolina withdrew a June 15, 2007, attainment demonstration SIP for its portion of the Charlotte-Gastonia-Rock Hill 1997 8-hour ozone area on December 19, 2008, and committed to submit a revised SIP by November 30, 2009. On November 12, 2009, North Carolina resubmitted the attainment demonstration SIP for the North Carolina portion of the Charlotte-Gastonia-Rock Hill 1997 8-hour ozone area.

[2] A supplement to the RFP was submitted on November 30, 2009.

EPA determined that the bi-state Charlotte Area met the CAA requirements to obtain a one-year extension of the attainment date for the 1997 8-hour ozone NAAQS. *See* 76 FR 31245. As a result, EPA extended the bi-state Charlotte Area's attainment date from June 15, 2010, to June 15, 2011, for the 1997 8-hour ozone NAAQS.

On November 2, 2011, North Carolina requested redesignation of the North Carolina portion of the bi-state Charlotte Area to attainment for the 1997 8-hour ozone NAAQS. The redesignation request included three years of complete, quality-assured ambient air quality data for the 1997 8-hour ozone NAAQS for 2008–2010, indicating that the 1997 8-hour ozone NAAQS had been achieved for the Area. Under the CAA, nonattainment areas may be redesignated to attainment if sufficient, complete, quality-assured data is available for the Administrator to determine that the area has attained the standard and the area meets the other CAA redesignation requirements in section 107(d)(3)(E).

Subsequently, on November 15, 2011 (76 FR 70656), EPA determined that the bi-state Charlotte Area attained the 1997 8-hour ozone NAAQS. The determination of attaining data was based upon complete, quality-assured and certified ambient air monitoring data for the 2008–2010 period, showing that the Area had monitored attainment of the 1997 8-hour ozone NAAQS. The requirements for the Area to submit an attainment demonstration and associated RACM, RFP plan, contingency measures, and other planning SIP revisions related to attainment of the standard were suspended as a result of the determination of attainment, so long as the Area continues to attain the 1997 8-hour ozone NAAQS. *See* 40 CFR 51.918 and 52.2125(a). The Area attained the 1997 8-hour ozone NAAQS with 2009–2011 data, and preliminary data indicate that the Area continues to attain with 2010–2012 data.

On January 12, 2012, North Carolina withdrew the North Carolina portion of the Area's attainment demonstration (except RFP, emissions statements, and the emissions inventory) as allowed by 40 CFR 51.918. Therefore, EPA was not required to take action on the aforementioned portion of the attainment demonstration. EPA approved the emissions statements portion of the attainment demonstration SIP revision on April 24, 2012 (77 FR 24382). Additionally, EPA approved the baseline emissions inventory portion of the attainment demonstration SIP revision on May 4, 2012 (77 FR 26441). EPA approved the RFP portion on October 12, 2012 (77 FR 62159).

The March 28, 2013, supplemental SIP revision extends the final year of the maintenance plan to 2025. Specifically, this revision updates emissions data, emissions projections, MVEBs, and safety margins to 2025. Additionally, it provides updated ozone design values for the bi-state Charlotte Area.

III. What are the criteria for redesignation?

The CAA provides the requirements for redesignating a nonattainment area to attainment. Specifically, section 107(d)(3)(E) of the CAA allows for redesignation providing that: (1) The Administrator determines that the area has attained the applicable NAAQS; (2) the Administrator has fully approved the applicable implementation plan for the area under section 110(k); (3) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable SIP and applicable Federal air pollutant control regulations and other permanent and enforceable reductions; (4) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 175A; and, (5) the state containing such area has met all requirements applicable to the area for purposes of redesignation under section 110 and part D of the CAA.

On April 16, 1992, EPA provided guidance on redesignation in the General Preamble for the Implementation of title I of the CAA Amendments of 1990 (57 FR 13498), and supplemented this guidance on April 28, 1992 (57 FR 18070). EPA has provided further guidance on processing redesignation requests in the following documents:

1. ''Ozone and Carbon Monoxide Design Value Calculations,'' Memorandum from Bill Laxton, Director, Technical Support Division, June 18, 1990;
2. ''Maintenance Plans for Redesignation of Ozone and Carbon Monoxide Nonattainment Areas,'' Memorandum from G. T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, April 30, 1992;
3. ''Contingency Measures for Ozone and Carbon Monoxide (CO) Redesignations,'' Memorandum from G. T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, June 1, 1992;
4. ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' Memorandum from John Calcagni, Director, Air Quality Management Division, September 4, 1992 (hereafter referred to as the ''Calcagni Memorandum'');
5. ''State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (CAA) Deadlines,'' Memorandum from John Calcagni, Director, Air Quality Management Division, October 28, 1992;
6. ''Technical Support Documents (TSDs) for Redesignation of Ozone and Carbon Monoxide (CO) Nonattainment Areas,'' Memorandum from G. T. Helms, Chief, Ozone/Carbon Monoxide Programs Branch, August 17, 1993;
7. ''State Implementation Plan (SIP) Requirements for Areas Submitting Requests for Redesignation to Attainment of the Ozone and Carbon Monoxide (CO) National Ambient Air Quality Standards (NAAQS) On or After November 15, 1992,'' Memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation, September 17, 1993;
8. ''Use of Actual Emissions in Maintenance Demonstrations for Ozone and CO Nonattainment Areas,'' Memorandum from D. Kent Berry, Acting Director, Air Quality Management Division, November 30, 1993;
9. ''Part D New Source Review (Part D NSR) Requirements for Areas Requesting Redesignation to Attainment,'' Memorandum from Mary D. Nichols, Assistant Administrator for Air and Radiation, October 14, 1994;
10. ''Reasonable Further Progress, Attainment Demonstration, and Related Requirements for Ozone Nonattainment Areas Meeting the Ozone National Ambient Air Quality Standard,'' Memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, May 10, 1995; and
11. ''Next Steps for Pending Redesignation Requests and State Implementation Plan Actions Affected by the Recent Court Decision Vacating the 2011 Cross-State Air Pollution Rule,'' Memorandum from Gina McCarthy, Assistant Administrator, November 19, 2012.

IV. Why is EPA proposing these actions?

On November 2, 2011, and later supplemented on March 28, 2013, the State of North Carolina, through NC DAQ, requested the redesignation of the North Carolina portion of the bi-state Charlotte Area to attainment for the 1997 8-hour ozone NAAQS. EPA's evaluation indicates that the entire bi-state Charlotte Area has attained the 1997 8-hour ozone NAAQS, and that North Carolina meets the requirements for redesignation for its portion of the bi-state Charlotte Area as set forth in section 107(d)(3)(E), including the maintenance plan requirements under section 175A of the CAA. As a result, EPA is proposing to take the two related actions summarized in section I of this notice.

V. What is EPA's analysis of the request?

As stated above, in accordance with the CAA, EPA proposes in today's action to: (1) Redesignate the North Carolina portion of the bi-state Charlotte Area to attainment for the 1997 8-hour ozone NAAQS; and (2) approve the North Carolina portion of the bi-state Charlotte Area's 1997 8-hour ozone NAAQS maintenance plan, including the associated MVEBs, into the North Carolina SIP. These actions are based upon EPA's determination that the entire bi-state Charlotte Area continues to attain the 1997 8-hour ozone NAAQS, and that all other redesignation criteria have been met for the North Carolina portion of the bi-state Charlotte Area. The five redesignation criteria provided under CAA section 107(d)(3)(E) are discussed in greater detail for the Area in the following paragraphs of this section.

Criteria (1)—The Bi-ustate Charlotte Area Has Attained the 1997 8-Hour Ozone NAAQS

For ozone, an area may be considered to be attaining the 1997 8-hour ozone NAAQS if it meets the 1997 8-hour ozone standard, as determined in accordance with 40 CFR 50.10 and Appendix I of part 50, based on three complete, consecutive calendar years of quality-assured air quality monitoring data. To attain these NAAQS, the 3-year average of the fourth-highest daily maximum 8-hour average ozone concentrations measured at each monitor within an area over each year must not exceed 0.08 ppm. Based on the data handling and reporting convention described in 40 CFR part 50, Appendix I, the NAAQS are attained if the design value is 0.084 ppm or below. The data must be collected and quality-assured in accordance with 40 CFR part 58, and recorded in the EPA Air Quality System (AQS) database. The monitors generally should have remained at the same location for the duration of the monitoring period required for demonstrating attainment.

As mentioned above, on November 15, 2011 (76 FR 70656), EPA determined that the bi-state Charlotte Area was attaining the 1997 8-hour ozone NAAQS. For that action, EPA reviewed ozone monitoring data from monitoring stations in the bi-state Charlotte Area for the 1997 8-hour ozone NAAQS for 2008–2010. These data have been quality-assured and are recorded in AQS. EPA has reviewed the 2009–2011 certified and 2010–2012 preliminary data which indicate that the Area continues to attain the 1997 8-hour ozone NAAQS beyond the submitted 3-year attainment period of 2008–2010. The fourth-highest 8-hour ozone average for 2008, 2009 and 2010, and the 3-year average of these values (i.e., design values), are summarized in the following Table 1 of this proposed rulemaking.

TABLE 1—2008–2010 DESIGN VALUE CONCENTRATIONS FOR THE BI-STATE CHARLOTTE 1997 8-HOUR OZONE AREA *

[Parts per million]

Location	County	Monitor ID	Annual arithmetic mean concentrations (ppm)			3-year design values (ppm)
			2008	2009	2010	2008–2010
Lincoln County Replacing Iron Station.	Lincoln	37–109–0004	0.079	0.065	0.072	0.072
Garinger High School	Mecklenburg	37–119–0041	0.085	0.069	0.082	0.078
Westinghouse Blvd	Mecklenburg	37–119–1005	0.073	0.068	0.078	0.073
29 N at Mecklenburg Cab Co.	Mecklenburg	37–119–1009	0.093	0.071	0.082	0.082
Rockwell	Rowan	37–159–0021	0.084	0.071	0.077	0.077
Enochville School	Rowan	37–159–0022	0.082	0.073	0.078	0.077
Monroe Middle School	Union	37–179–0003	0.08	0.067	0.071	0.072

* An ozone monitor is located in York County, SC; however, it is outside of the nonattainment area. This monitor is monitoring attainment of the 1997 8-hour ozone NAAQS.

TABLE 2—2009–2011 DESIGN VALUE CONCENTRATIONS FOR THE BI-STATE CHARLOTTE 1997 8-HOUR OZONE AREA *

[Parts per million]

Location	County	Monitor ID	4th Highest 8-hour ozone value			3-year design values
			2009	2010	2011	2009–2011
Lincoln County Replacing Iron Station.	Lincoln	37–109–0004	0.065	0.072	0.077	0.071
Garinger High School	Mecklenburg	37–119–0041	0.069	0.082	0.088	0.079
Westinghouse Blvd	Mecklenburg	37–119–1005	0.068	0.078	0.082	0.076
29 N at Mecklenburg Cab Co.	Mecklenburg	37–119–1009	0.071	0.082	0.083	0.078
Rockwell	Rowan	37–159–0021	0.071	0.077	0.077	0.075
Enochville School	Rowan	37–159–0022	0.073	0.078	0.078	0.076
Monroe Middle School	Union	37–179–0003	0.067	0.071	0.073	0.07

* An ozone monitor is located in York County, SC; however, it is outside of the nonattainment area. This monitor is monitoring attainment of the 1997 8-hour ozone NAAQS.

TABLE 3—2010–2012 DESIGN VALUE CONCENTRATIONS FOR THE BI-STATE CHARLOTTE 1997 8-HOUR OZONE AREA *

[Parts per million]

Location	County	Monitor ID	4th Highest 8-hour ozone value			3-year design values
			2010	2011	2012	2010–2012
Lincoln County Replacing Iron Station.	Lincoln	37–109–0004	0.072	0.077	0.076	0.075
Garinger High School	Mecklenburg	37–119–0041	0.082	0.088	0.080	0.083
Westinghouse Blvd	Mecklenburg	37–119–1005	0.078	0.082	0.073	0.077
29 N at Mecklenburg Cab Co.	Mecklenburg	37–119–1009	0.082	0.083	0.085	0.083
Rockwell	Rowan	37–159–0021	0.077	0.077	0.080	0.078
Enochville School	Rowan	37–159–0022	0.078	0.078	0.077	0.077
Monroe Middle School	Union	37–179–0003	0.071	0.073	0.075	0.073

* An ozone monitor is located in York County, SC; however, it is outside of the nonattainment area. This monitor is monitoring attainment of the 1997 8-hour ozone NAAQS.

The 3-year design value for 2008–2010 submitted by North Carolina for redesignation of its portion of the bi-state Charlotte Area is 0.082 ppm at the 29 N at Mecklenburg Cab Co. monitor,[3] which meets the NAAQS as described above. As mentioned above, on November 15, 2011 (76 FR 70656), EPA published a clean data determination for the bi-state Charlotte Area for the 1997 8-hour ozone NAAQS. The 2009–2011 certified data show that the bi-state Charlotte Area continues to attain the 1997 8-hour ozone NAAQS with a design value of 0.079 ppm at the Garinger High School monitor. After review of the certified 2010–2012 data, the Area continues to attain the 1997 8-hour ozone NAAQS with a design value of 0.083 ppm at the Garinger High School and 29 N at Mecklenburg Cab Co. monitors. In today's action, EPA is proposing to determine that the bi-state Charlotte Area is attaining the 1997 8-hour ozone NAAQS. EPA will not go forward with the redesignation if the bi-state Charlotte Area does not continue to attain the NAAQS until the time that EPA finalizes the redesignation. As discussed in more detail below, the State of North Carolina has committed to continue monitoring in this Area in accordance with 40 CFR part 58.

Criteria (2)—North Carolina Has a Fully Approved SIP Under Section 110(k) for the North Carolina Portion of the Charlotte Area; and Criteria (5)—North Carolina Has Met All Applicable Requirements Under Section 110 and Part D of Title I of the CAA

For redesignating a nonattainment area to attainment, the CAA requires EPA to determine that the state has met all applicable requirements under section 110 and part D of title I of the CAA (CAA section 107(d)(3)(E)(v)) and that the state has a fully approved SIP under section 110(k) for the area (CAA section 107(d)(3)(E)(ii)). EPA proposes to find that North Carolina has met all applicable SIP requirements for the North Carolina portion of the Area under section 110 of the CAA (general SIP requirements) for purposes of redesignation. Additionally, EPA proposes to find that the North Carolina SIP satisfies the criterion that it meets applicable SIP requirements for purposes of redesignation under part D of title I of the CAA (requirements specific to 1997 8-hour ozone nonattainment areas) in accordance with section 107(d)(3)(E)(v). Further, EPA proposes to determine that the SIP is fully approved with respect to all requirements applicable for purposes of redesignation in accordance with section 107(d)(3)(E)(ii). In making these determinations, EPA ascertained which requirements are applicable to the Area and, if applicable, that they are fully approved under section 110(k). SIPs must be fully approved only with respect to requirements that were applicable prior to submittal of the complete redesignation request.

a. The North Carolina Portion of the Charlotte Area Has Met All Applicable Requirements Under Section 110 and Part D of the CAA

General SIP requirements. General SIP elements and requirements are delineated in section 110(a)(2) of title I, part A of the CAA. These requirements include, but are not limited to, the following: Submittal of a SIP that has been adopted by the state after reasonable public notice and hearing; provisions for establishment and operation of appropriate procedures needed to monitor ambient air quality; implementation of a source permit program; provisions for the implementation of part C requirements (Prevention of Significant Deterioration (PSD)) and provisions for the implementation of part D requirements (New Source Review (NSR) permit programs); provisions for air pollution modeling; and provisions for public and local agency participation in planning and emission control rule development.

Section 110(a)(2)(D) requires that SIPs contain certain measures to prevent sources in a state from significantly contributing to air quality problems in another state. To implement this provision, EPA has required certain states to establish programs to address the interstate transport of air pollutants (e.g., NO_X SIP Call[4] and the Clean Air Interstate Rule (CAIR)[5]). The section

[3] The monitor with the highest 3 year design value is considered the design value for the area.

[4] On October 27, 1998 (63 FR 57356), EPA issued a NO_X SIP Call requiring the District of Columbia and 22 states to reduce emissions of NO_X in order to reduce the transport of ozone and ozone precursors. In compliance with EPA's NO_X SIP Call, North Carolina developed rules governing the control of NO_X emissions from electric generating units (EGUs), major non-EGU industrial boilers, major cement kilns, and internal combustion engines. On October 5, 2007, EPA approved North Carolina's rules as fulfilling Phase I of the NO_X SIP Call (72 FR 56914).

[5] On May 12, 2005, EPA published the Clean Air Interstate Rule (CAIR), which requires significant reductions in emissions of sulfur dioxide (SO_2) and NO_X from certain electric generating units in the eastern United States to limit the interstate transport of these pollutants and the ozone and fine particulate matter they form in the atmosphere. *See* 76 FR 70093. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) initially vacated CAIR in *North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008), but ultimately remanded the rule to EPA without vacatur in *North Carolina* v. *EPA,* 550 F.3d 1176, 1178 (D.C. Cir. 2008) to preserve the environmental benefits provided by CAIR. In response to the court's decision, EPA issued the Cross-State Air Pollution Rule (CSAPR) to address interstate transport of NO_X and SO_2 in the eastern United States. *See* 76 FR 48208 (August 8, 2011). On August 21, 2012, the D.C. Circuit issued a decision to vacate CSAPR. *EME Homer City Generation, L.P.* v. *EPA,* 696 F.3d. 7 (D.C. Cir., 2012). In that decision, the court also ordered EPA to continue administering CAIR ''pending the promulgation of a valid replacement.''

110(a)(2)(D) requirements for a state are not linked with a particular nonattainment area's designation and classification in that state. EPA believes that the requirements linked with a particular nonattainment area's designation and classifications are the relevant measures to evaluate in reviewing a redesignation request. The transport SIP submittal requirements, where applicable, continue to apply to a state regardless of the designation of any one particular area in the state. Thus, EPA does not believe that the CAA's interstate transport requirements should be construed to be applicable requirements for purposes of redesignation. However, as discussed later in this notice, addressing pollutant transport from other states is an important part of the maintenance demonstration for the bi-state Charlotte Area.

In addition, EPA believes that other section 110 elements that are neither connected with nonattainment plan submissions nor linked with an area's attainment status are not applicable requirements for purposes of redesignation. The area will still be subject to these requirements after the area is redesignated. The section 110 and part D requirements that are linked with a particular area's designation and classification are the relevant measures to evaluate in reviewing a redesignation request. This approach is consistent with EPA's existing policy on applicability (i.e., for redesignations) of conformity and oxygenated fuels requirements, as well as with section 184 ozone transport requirements. *See* Reading, Pennsylvania, proposed and final rulemakings (61 FR 53174–53176, October 10, 1996), (62 FR 24826, May 7, 1997); Cleveland-Akron-Loraine, Ohio, final rulemaking (61 FR 20458, May 7, 1996); and Tampa, Florida, final rulemaking at (60 FR 62748, December 7, 1995). *See also* the discussion on this issue in the Cincinnati, Ohio, redesignation (65 FR 37890, June 19, 2000), and in the Pittsburgh, Pennsylvania, redesignation (66 FR 50399, October 19, 2001).

EPA completed rulemaking on a December 12, 2007, submittal and a clarification in a June 20, 2008, submission addressing ''infrastructure SIP'' elements required under CAA section 110(a)(2) on February 6, 2012. *See* 77 FR 5703. However, these are statewide requirements that are not a consequence of the nonattainment status of the North Carolina portion of the Area. As stated above, EPA believes that section 110 elements not linked to an area's nonattainment status are not applicable for purposes of redesignation. Therefore, EPA believes it has approved all SIP elements under section 110 that must be approved as a prerequisite for redesignating the North Carolina portion of the Area to attainment.

Title I, Part D, subpart 1 applicable SIP requirements. Sections 172(c)(1) through (9) and section 176 of subpart 1, part D of the CAA, set forth the basic nonattainment requirements applicable to all nonattainment areas. A thorough discussion of the requirements contained in section 172 can be found in the General Preamble for Implementation of title I (57 FR 13498, April 16, 1992). Subpart 2 of part D, which includes section 182 of the CAA, establishes additional specific requirements depending on the area's ozone nonattainment classification. A thorough discussion of the requirements contained in section 182 can be found in the General Preamble for Implementation of Title I (57 FR 13498).

Part D Subpart 1 Section 172 Requirements and Part D, Subpart 2 Section 182 Requirements. Section 172(c)(1) requires the plans for all nonattainment areas to provide for the implementation of all RACM as expeditiously as practicable and to provide for attainment of the national primary ambient air quality standards. EPA interprets this requirement to impose a duty on all nonattainment areas to consider all available control measures and to adopt and implement such measures as are reasonably available for implementation in each area as components of the area's attainment demonstration. Under section 172, states with nonattainment areas must submit plans providing for timely attainment and meeting a variety of other requirements. Section 182 of the CAA, found in subpart 2 of part D, establishes additional specific requirements depending on the area's ozone nonattainment classification. For purposes of evaluating this redesignation request, the applicable part D, subpart 2 SIP requirements for all moderate nonattainment areas are contained in sections 182(b)(1)–(5). However, pursuant to 40 CFR 51.918, EPA's November 15, 2011, determination that the bi-state Charlotte Area was attaining the 1997 8-hour ozone NAAQS suspended North Carolina's obligation to submit most of the attainment planning requirements that would otherwise apply. Specifically, the determination of attainment suspended North Carolina's obligation to submit an attainment demonstration and planning SIPs to provide for RACM under section 172(c)(1), contingency measures under section 172(c)(9) and RFP under section 182(b)(1) of the CAA.

The General Preamble for Implementation of Title I (57 FR 13498, April 16, 1992) also discusses the evaluation of the section 172 and 182 requirements in the context of EPA's consideration of a redesignation request. The General Preamble sets forth EPA's view of applicable requirements for purposes of evaluating redesignation requests when an area is attaining a standard (General Preamble for Implementation of Title I (57 FR 13498, April 16, 1992)).

Because attainment has been reached in the bi-state Charlotte Area, no additional measures are needed to provide for attainment, and section 172(c)(1) requirements for an attainment demonstration and RACM are no longer considered to be applicable for purposes of redesignation as long as the Area continues to attain the standard until redesignation. *See also* 40 CFR 51.918.

Pursuant to sections 172(c)(2) and 182(b)(1), nonattainment plans for areas classified as moderate and above for ozone must contain provisions that require reasonable further progress toward attainment. These requirements are not relevant for purposes of redesignation because EPA has determined that the bi-state Charlotte Area has monitored attainment of the 1997 8-hour ozone NAAQS. *See* General Preamble, 57 FR 13564. *See* also 40 CFR 51.918. While it is not a requirement for redesignation, EPA took action to approve North Carolina's RFP for the 1997 8-hour ozone NAAQS for the State's portion of the bi-state Charlotte Area on October 12, 2012. *See* 77 FR 62159.

Section 172(c)(3) and section 182(b) require submission and approval of a comprehensive, accurate, and current inventory of actual emissions. Section 182(b) references section 182(a) of the CAA which requires, in part, for states to submit a current inventory of actual emissions (182(a)(1)). As part of North Carolina's attainment demonstration for the North Carolina portion of the Area, NC DAQ submitted a 2002 base year emissions inventory. EPA approved the 2002 base year inventory submitted with the attainment demonstration on May 4, 2012, as meeting the section 172(c)(3) and section 182(b) (182(a)(1))

EPA filed a petition for a writ of certiorari with the U.S. Supreme Court on March 29, 2013, to review the D.C. Circuit's decision in *EME Homer City*. On June 24, 2013, the U.S. Supreme Court granted the United States' petition asking the Court to review the D.C. Circuit Court's decision on CSAPR. However,the Agency will continue to act in accordance with *EME Homer City* pending final resolution of the CSAPR litigation.

emissions inventory requirement. *See* 77 FR 26441.

Section 172(c)(4) requires the identification and quantification of allowed emissions from major new and modified stationary sources in an area, and section 172(c)(5) and section 182(b) that require permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. EPA has determined that, because PSD requirements will apply after redesignation, areas being redesignated need not comply with the requirement that a NSR program be approved prior to redesignation, provided that the area demonstrates maintenance of the NAAQS without part D NSR. A more detailed rationale for this view is described in a memorandum from Mary Nichols, Assistant Administrator for Air and Radiation, dated October 14, 1994, entitled, ''Part D New Source Review Requirements for Areas Requesting Redesignation to Attainment.'' North Carolina has demonstrated that the North Carolina portion of the bi-state Charlotte Area will be able to maintain the NAAQS without part D NSR in effect, and therefore North Carolina need not have fully approved part D NSR programs prior to approval of the redesignation request. Nonetheless, North Carolina currently has an approved part D NSR program in place. North Carolina's PSD program will become applicable in the North Carolina portion of the bi-state Charlotte Area upon redesignation to attainment. Section 172(c)(6) requires the SIP to contain control measures necessary to provide for attainment of the NAAQS. Because attainment has been reached, no additional measures are needed to provide for attainment.

Section 172(c)(7) requires the SIP to meet the applicable provisions of section 110(a)(2). As noted above, EPA believes the North Carolina SIP meets the requirements of section 110(a)(2) applicable for purposes of redesignation.

Section 182(b) references, in part, section 182(a)(3), which requires states to submit periodic inventories and emissions statements. Section 182(a)(3)(A) of the CAA requires states to submit a periodic inventory every three years. The periodic emissions inventory is discussed in more detail in Criteria (4)(e), *Verification of Continued Attainment.*

Section 182(a)(3)(B) of the CAA requires states with areas designated nonattainment for the ozone NAAQS to submit a SIP revision to require emissions statements to be submitted to the state by sources within that nonattainment area. EPA approved North Carolina's emissions statements requirement on August 1, 1997, and approved the updated counties on April 24, 2012. *See* 64 FR 41277 and 77 FR 24382, respectively. EPA believes the North Carolina SIP meets the requirements of section 182(a)(3)(B) applicable for purposes of redesignation.

Section 182(b)(2) of the CAA requires states with areas designated nonattainment for the ozone NAAQS to submit a SIP revision to require reasonably available control technology (RACT) for all major VOC and NO_X sources and for each category of VOC sources in the Area covered by a Control Techniques Guidelines (CTG) document.[6]

The CTGs established by EPA are guidance to the states and provide recommendations only. A state can develop its own strategy for what constitutes RACT for the various CTG categories, and EPA will review that strategy in the context of the SIP process and determine whether it meets the RACT requirements of the CAA and its implementing regulations. If no major sources of VOC or NO_X emissions (which should be considered separately) or no sources in a particular source category exist in an applicable nonattainment area, a state may submit a negative declaration for that category.

North Carolina did a RACT analysis for major VOC and NO_X sources in the Area and determined that these sources in the bi-state Charlotte Area meet RACT. In addition, EPA did a NO_X RACT analysis of the North Carolina portion of the Charlotte Area major sources and determined that these sources meet RACT. North Carolina also made a negative declaration for CTG category sources in the June 15, 2007, SIP submittal. On May 9, 2013, EPA approved a number of North Carolina NO_X RACT SIP revisions and approved in part and conditionally approved in part a number of VOC RACT SIP revisions. *See* 78 FR 27065.

North Carolina submitted a SIP revision on May 1, 2013, to EPA to address the requirements of the conditional approval to correct the deficiencies for which EPA proposed conditional approval related to North Carolina's RACT submission. On June 7, 2013, EPA proposed to approve portions of North Carolina's May 1, 2013, SIP revision which included changes to the State's RACT rules to correct deficiencies and add new changes. *See* 78 FR 34306. EPA did not receive any comments, adverse or otherwise, on the June 7, 2013, proposed rulemaking related to North Carolina's May 1, 2013, SIP revision. On July 12, 2013, the Acting Regional Administrator for EPA Region 4 signed a final rulemaking approving North Carolina's May 1, 2013, SIP revision to correct deficiencies for North Carolina RACT requirements. EPA has preliminarily determined that North Carolina's SIP meets the section 182(b)(2) requirements applicable for purposes of redesignation.[7]

Under section 202(a)(6) of the CAA, 42 U.S.C. 7521(a)(6), the requirements of section 182(b)(3) do not apply in moderate ozone nonattainment areas after EPA promulgated the onboard refueling vapor recovery (ORVR) standards on April 6, 1994 (59 FR 16262), codified at 40 CFR parts 86 (including 86.098–8), 88 and 600. As mentioned above, the bi-state Charlotte Area was designated as a moderate area for the 1997 8-hour ozone NAAQS and therefore was not subject to the Stage II requirements as set forth in section 182(b)(3).

Section 182(b)(4) of the CAA requires states with areas designated nonattainment with moderate or above classification for the ozone NAAQS to submit SIPs requiring inspection and maintenance of vehicles (I/M). North Carolina's I/M rule for the North Carolina portion of the nonattainment area, called the Clean Air Bill, was submitted to EPA on August 7, 2002, and approved by EPA on October 30, 2002 (67 FR 66056), effective December 30, 2002. EPA believes that the North Carolina SIP meets the requirements of section 182(b)(4) applicable for purposes of redesignation.

Section 182(b)(5) of the CAA requires that for purposes of satisfying the emission offset requirements of Part D, the ratio of total emission reductions of VOCs to total increase emissions of VOCs must be at least 1.15 to 1. North Carolina currently requires these offsets. *See* 40 CFR 52.1770. EPA therefore believes that the North Carolina SIP meets the requirements of section 182(b)(5) applicable for purposes of redesignation.

Section 176 Conformity Requirements. Section 176(c) of the CAA requires states to establish criteria and procedures to ensure that federally supported or funded projects conform to

[6] 40 CFR 51.912 identifies the requirements that apply for RACT under the 8-hour ozone NAAQS.

[7] EPA approved South Carolina's RACT SIP revisions and concluded that the South Carolina portion of the Area has met all the statutory and regulatory requirements for making a negative declaration regarding Groups I, II, III, and IV CTG and meets the requirements of section 182(b)(2) applicable for purposes of redesignation. *See* 76 FR 72844.

the air quality planning goals in the applicable SIP. The requirement to determine conformity applies to transportation plans, programs, and projects that are developed, funded, or approved under title 23 of the United States Code (U.S.C.) and the Federal Transit Act (transportation conformity) as well as to all other federally supported or funded projects (general conformity). State transportation conformity SIP revisions must be consistent with Federal conformity regulations relating to consultation, enforcement, and enforceability that EPA promulgated pursuant to its authority under the CAA.

EPA interprets the conformity SIP requirements [8] as not applying for purposes of evaluating a redesignation request under section 107(d) because state conformity rules are still required after redesignation and Federal conformity rules apply where state rules have not been approved. *See Wall* v. *EPA,* 265 F.3d 426 (6th Cir. 2001) (upholding this interpretation); *see also* 60 FR 62748 (December 7, 1995) (redesignation of Tampa, Florida).

For all of the reasons discussed above, the North Carolina portion of the bi-state Charlotte Area has satisfied all applicable requirements for purposes of redesignation under section 110 and part D of title I of the CAA.

b. The North Carolina Portion of the Bi-State Charlotte Area Has a Fully Approved Applicable SIP Under Section 110(k) of the CAA

EPA may rely on prior SIP approvals in approving a redesignation request (*see* Calcagni Memorandum at p. 3; *Northwestern Pennsylvania Growth Alliance* v. *Browner,* 144 F.3d 984 (6th Cir. 1998); *Wall,* 265 F.3d 426) plus any additional measures it may approve in conjunction with a redesignation action (*see* 68 FR 25426 (May 12, 2003) and citations therein). Following passage of the CAA of 1970, North Carolina has adopted and submitted, and EPA has fully approved at various times, provisions addressing various 1997 8-hour ozone NAAQS SIP elements applicable in the North Carolina portion of the Area (May 31, 1972, 37 FR 10842; July 13, 2011, 76 FR 41111). For example, EPA approved the emissions statements portion of the attainment demonstration SIP revision on April 24, 2012 (77 FR 24382), and the baseline emissions inventory portion of the attainment demonstration SIP revision on May 4, 2012 (77 FR 26441).

On April 29, 2013, EPA signed a **Federal Register** notice approving in-part and conditionally approving in-part the RACT demonstration for the North Carolina portion of the bi-state Charlotte Area. *See* 78 FR 27065 (May 9, 2013). On May 1, 2013, North Carolina submitted a SIP revision to meet the aforementioned conditional approval. EPA proposed to approve North Carolina's May 1, 2013, RACT SIP revision that fulfills the conditional approval on June 7, 2013. *See* 78 FR 34306. EPA did not receive any comments, adverse or otherwise, on the June 7, 2013, proposed rulemaking related to North Carolina's May 1, 2013, SIP revision. On July 12, 2013, the Acting Regional Administrator for EPA Region 4 signed a final rulemaking approving North Carolina's May 1, 2013, SIP revision to correct deficiencies for North Carolina RACT requirements.

As indicated above, EPA believes that the section 110 elements that are neither connected with nonattainment plan submissions nor linked to an area's nonattainment status are not applicable requirements for purposes of redesignation. *Sierra Club* v. *EPA,* 375 F.3d 537 (7th Cir. 2004); 68 FR 25424, 25427 (May 12, 2003) (redesignation of the St. Louis-East St. Louis Area to attainment of the 1-hour ozone NAAQS).

Criteria (3)—The Air Quality Improvement in the Bi-State Charlotte 1997 8-Hour Ozone NAAQS Nonattainment Area Is Due to Permanent and Enforceable Reductions in Emissions Resulting From Implementation of the SIP and Applicable Federal Air Pollution Control Regulations and Other Permanent and Enforceable Reductions

For redesignating a nonattainment area to attainment, the CAA requires EPA to determine that the air quality improvement in the area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP and applicable Federal air pollution control regulations and other permanent and enforceable reductions (CAA section 107(d)(3)(E)(iii)). EPA believes that North Carolina has demonstrated that the observed air quality improvement in the bi-state Charlotte Area is due to permanent and enforceable reductions in emissions resulting from implementation of the SIP, Federal measures, and other state adopted measures.

State, local, and Federal measures enacted in recent years have resulted in permanent emission reductions. Most of these emission reductions are enforceable through regulations. A few non-regulatory measures also result in emission reductions.

The state and local measures that have been implemented to date and relied upon by North Carolina to demonstrate attainment and/or maintenance include the Clean Air Bill I/M program; open burning ban; NO_X SIP Call; Clean Smokestacks Act; and Diesel Emissions Reduction Act (DERA) grants for repower or replacement of existing diesel engines. Local measures implemented by Mecklenburg County Air Quality (MCAQ) include prohibition of open burning of any kind and diesel engine emission reductions. Of these measures, the Clean Air Bill I/M program, open burning ban, NO_X SIP Call and Clean Smokestacks Act are permanent and enforceable. The Federal measures that have been implemented include the following:

Tier 2 vehicle standards. Implementation began in 2004 and will require all passenger vehicles in any manufacturer's fleet to meet an average standard of 0.07 grams of NO_X per mile. Additionally, in January 2006 the sulfur content of gasoline was required to be on average 30 ppm which assists in lowering the NO_X emissions. Most gasoline sold in North Carolina prior to January 2006 had a sulfur content of about 300 ppm. These emission reductions are federally enforceable.

Large Non-road Diesel Engines Rule. This rule was promulgated in 2004, and is being phased in between 2008 through 2014. This rule will also reduce the sulfur content in the nonroad diesel fuel. When fully implemented, this rule will reduce NO_X, VOC, particulate matter, and carbon monoxide. These emission reductions are federally enforceable.

Heavy-duty gasoline and diesel highway vehicle standards. These standards began to take effect in 2004 and are designed to reduce NO_X and VOC emissions. These emission reductions are federally enforceable.

Nonroad spark-ignition engines and recreational engines standards. The nonroad spark-ignition and recreational engine standards, effective in July 2003, regulate NO_X, hydrocarbons, and carbon monoxide from groups of previously unregulated nonroad engines. These engine standards apply to large spark-ignition engines (e.g., forklifts and airport ground service equipment), recreational vehicles (e.g., off-highway motorcycles and all-terrain-vehicles), and recreational marine diesel engines

[8] CAA section 176(c)(4)(E) requires states to submit revisions to their SIPs to reflect certain Federal criteria and procedures for determining transportation conformity. Transportation conformity SIPs are different from the MVEBs that are established in control strategy SIPs and maintenance plans.

sold in the United States and imported after the effective date of these standards.

When all of the nonroad spark-ignition and recreational engine standards are fully implemented, an overall 72 percent reduction in hydrocarbons, 80 percent reduction in NO_X, and 56 percent reduction in carbon monoxide emissions are expected by 2020. These controls will help reduce ambient concentrations of ozone, carbon monoxide, and fine particulate matter.

NO_X SIP Call. The NO_X SIP Call created the NO_X Budget Trading Program designed to reduce the amount of ozone that crosses state lines. By the end of 2008, ozone season emissions dropped by 62 percent from 2000 at all sources subject to the NO_X SIP Call (EPA, NO_X Budget Trading Program: 2008 Highlights, October 2009, page 3, available at *http://www.epa.gov/airmarkets/progress/NBP_4/NBP_2008_Highlights.pdf*). It follows that the bi-state Charlotte Area benefited from these overall reductions, since it is part of the larger NO_X SIP Call area. North Carolina provided the NO_X emission reductions, as the result of the NO_X SIP Call rule, from North Carolina power plants in the bi-state Charlotte Area, as well as the power plants located directly north and west of the Metrolina region [9] that may impact the Area in the March 28, 2013, submittal. There are four facilities located within the North Carolina portion of the Area located in Gaston, Lincoln and Rowan Counties. The facility west of the Metrolina region is Cliffside, located in Cleveland County, and the facility north of the Metrolina region is Marshall, located in Catawba County. This data is also from the EPA Clean Air Markets Division's database and represents the second and third quarters of the year (April through September), the period during which ozone levels are the highest. Two coal-fired power plants (Buck and Riverbend) were retired on April 1, 2013, and will result in additional emissions reductions.

EPA has considered the relationship of the North Carolina portion of the bi-state Charlotte Area's maintenance plan to the reductions currently required pursuant to CAIR. CAIR was remanded to EPA, and the process of developing a replacement rule is ongoing. However, the remand of CAIR does not alter the requirements of the NO_X SIP Call, and the State has now demonstrated that the bi-state Charlotte Area can maintain without CAIR. Therefore, EPA believes that the State's demonstration of maintenance under sections 175A and 107(d)(3)(E) remains valid.

The NO_X SIP Call requires states to make significant, specific emissions reductions. It also provides a mechanism, the NO_X Budget Trading Program, that states could use to achieve those reductions. When EPA promulgated CAIR, it discontinued (starting in 2009) the NO_X Budget Trading Program, 40 CFR 51.121(r), but created another mechanism—the CAIR ozone season trading program—which states could use to meet their SIP Call obligations, 70 FR 25289–90. EPA notes that a number of states, when submitting SIP revisions to require sources to participate in the CAIR ozone season trading program, removed the SIP provisions that required sources to participate in the NO_X Budget Trading Program. In addition, because the provisions of CAIR including the ozone season NO_X trading program remain in place during the remand, EPA is not currently administering the NO_X Budget Trading Program. Nonetheless, all states, regardless of the current status of their regulations that previously required participation in the NO_X Budget Trading Program, will remain subject to all of the requirements in the NO_X SIP Call even if the existing CAIR ozone season trading program is withdrawn or altered. In addition, the anti-backsliding provisions of 40 CFR 51.905(f) specifically provide that the provisions of the NO_X SIP Call, including the statewide NO_X emission budgets, continue to apply after revocation of the 1-hour ozone NAAQS.

All NO_X SIP Call states have SIPs that currently satisfy their obligations under the NO_X SIP Call; the NO_X SIP Call reduction requirements are being met; and EPA will continue to enforce the requirements of the NO_X SIP Call even after any response to the CAIR remand. For these reasons, EPA believes that regardless of the status of the CAIR program, the NO_X SIP Call requirements can be relied upon in demonstrating maintenance. Here, the State has demonstrated maintenance based in part on those requirements.

CAIR and CSAPR. CAIR remains in place and enforceable until substituted by a ''valid'' replacement rule. Regardless of the timing of the transition from CAIR to CSAPR, or a resulting court-ordered interstate transport remedy, emissions of NO_X and SO_2 have declined significantly and are expected to continue to decrease in the future due to the continuation of CAIR and North Carolina's own EGU emissions rules.

To the extent that the North Carolina submittal relies on CAIR reductions that occurred through 2012, the recent directive from the D.C. Circuit in *EME Homer City Generation, L.P.* v. *EPA,* 696 F.3d. 7 (D.C. Cir., 2012) ensures that the reductions associated with CAIR will be permanent and enforceable for the necessary time period for purposes of CAA section 107(d)(3)(E)(iii) and North Carolina's request to redesignate the Charlotte Area and seek approval of its maintenance plan and other requirements associated with redesignation. EPA has been ordered by the court to develop a new rule, and the opinion makes clear that after promulgating that new rule EPA must provide states an opportunity to draft and submit SIPs to implement that rule. CAIR thus cannot be replaced until EPA has promulgated a final rule through a notice-and-comment rulemaking process, states have had an opportunity to draft and submit SIPs, EPA has reviewed the SIPs to determine if they can be approved, and EPA has taken action on the SIPs, including promulgating a Federal Implementation Plan, if appropriate. The court's clear instruction to EPA is that it must continue to administer CAIR until a ''valid replacement'' exists and thus CAIR reductions may be relied upon until the necessary actions are taken by EPA and states to administer CAIR's replacement. Furthermore, the court's instruction provides an additional backstop; by definition, any rule that replaces CAIR and meets the court's direction would require upwind states to have SIPs that eliminate significant contributions to downwind nonattainment and prevent interference with maintenance in downwind areas.

Further, in vacating CSAPR and requiring EPA to continue administering CAIR, the D.C. Circuit emphasized that the consequences of vacating CAIR ''might be more severe now in light of the reliance interests accumulated over the intervening four years.'' *EME Homer City,* 696 F.3d at 38. The accumulated reliance interests include the interests of states who reasonably assumed they could rely on reductions associated with CAIR, which brought certain nonattainment areas into attainment with the NAAQS. If EPA were prevented from relying on reductions associated with CAIR in redesignation actions, states would be forced to impose additional, redundant reductions on top of those achieved by CAIR. EPA believes this is precisely the type of irrational result the court sought to avoid by ordering EPA to continue administering CAIR. For these reasons

[9] For the purposes of this document, the Metrolina region refers to the Charlotte metropolitan area and is inclusive of the bi-state Charlotte nonattainment area.

also, EPA believes it is appropriate to allow states to rely on CAIR, and the existing emissions reductions achieved by CAIR, as sufficiently permanent and enforceable for purposes such as redesignation. Following promulgation of the replacement rule, EPA will review SIPs as appropriate to identify whether there are any issues that need to be addressed. In light of these unique circumstances and for the reasons explained above, EPA is proposing to approve the redesignation request and related SIP revisions for the North Carolina portion of the bi-state Charlotte Area. EPA continues to implement CAIR in accordance with current direction from the court, and thus CAIR is in place and enforceable and will remain so until substituted by a valid replacement rule. North Carolina's SIP revision lists CAIR as a control measure, which was approved by EPA on October 5, 2007, 72 FR 56914, for the purpose of reduction SO_2 and NO_X emissions.

Criteria (4)—The North Carolina Portion of the Area Has a Fully Approved Maintenance Plan Pursuant to Section 175A of the CAA

For redesignating a nonattainment area to attainment, the CAA requires EPA to determine that the area has a fully approved maintenance plan pursuant to section 175A of the CAA (CAA section 107(d)(3)(E)(iv)). In conjunction with its request to redesignate the North Carolina portion of the bi-state Charlotte Area to attainment for the 1997 8-hour ozone NAAQS, NC DAQ submitted a SIP revision to provide for the maintenance of the 1997 8-hour ozone NAAQS for at least 10 years after the effective date of redesignation to attainment. EPA believes that this maintenance plan meets the requirements for approval under section 175A of the CAA.

a. What is required in a maintenance plan?

Section 175A of the CAA sets forth the elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment. Under section 175A, the plan must demonstrate continued attainment of the applicable NAAQS for at least 10 years after the Administrator approves a redesignation to attainment. Eight years after the redesignation, the state must submit a revised maintenance plan demonstrating that attainment will continue to be maintained for the 10 years following the initial 10-year period. To address the possibility of future NAAQS violations, the maintenance plan must contain contingency measures as EPA deems necessary to assure prompt correction of any future 1997 8-hour ozone violations. The Calcagni Memorandum provides further guidance on the content of a maintenance plan, explaining that a maintenance plan should address five requirements: The attainment emissions inventory, maintenance demonstration, monitoring, verification of continued attainment, and a contingency plan. As is discussed more fully below, EPA finds that North Carolina's maintenance plan includes all the necessary components and is thus proposing to approve it as a revision to the North Carolina SIP.

b. Attainment Emissions Inventory

The bi-state Charlotte Area attained the 1997 8-hour ozone NAAQS based on quality-assured monitoring data for the 3-year period from 2008–2010. North Carolina selected 2010 as the attainment emissions inventory year. The attainment inventory identifies a level of emissions in the Area that is sufficient to attain the 1997 8-hour ozone NAAQS. North Carolina began development of the attainment inventory by first generating a baseline emissions inventory for the State's portion of the bi-state Charlotte Area. As noted above, the year 2010 was chosen as the base year for developing a comprehensive emissions inventory for NO_X and VOC, for which projected emissions could be developed for 2013, 2016, 2019, 2022, and 2025. The projected summer day emission inventories have been estimated using projected rates of growth in population, traffic, economic activity, and other parameters. Naturally occurring, or biogenic, emissions are not included in the emissions inventory comparison, as these emissions are outside the State's span of control. In addition to comparing the final year of the plan (2025) to the base year (2010) North Carolina compared interim years to the baseline to demonstrate that these years are also expected to show continued maintenance of the 8-hour ozone standard.

The emissions inventory is composed of four major types of sources: point, area, on-road mobile, and non-road mobile. The complete descriptions of how the inventories were developed are discussed in the Appendix B of the March 28, 2013, submittal, which can be found in the docket for this action. Point source emissions are tabulated from data collected by direct on-site measurements of emissions or from mass balance calculations utilizing emission factors from EPA's AP–42 or stack test results. For each projected year's inventory, point sources are adjusted by growth factors based on Standard Industrial Classification codes generated using growth patterns obtained from County Business Patterns. For the electric generating utility sources, the estimated projected future year emissions were based on information provided by the utility company. For the sources that report to the USEPA's Clean Air Markets Division, the actual 2010 average summer day emissions were used. For the other Title V sources, the 2009 data was used which was the latest data available. For the small sources that only report emissions every 5 years, the most recently reported data was used and assumed to be equivalent to 2009 emissions since these sources do not vary much from year to year. The 2009 emissions data was grown to 2010 using the USEPA's EGAS model.

For area sources, emissions are estimated by multiplying an emission factor by some known indicator of collective activity such as production, number of employees, or population. For each projected year's inventory, area source emissions are changed by population growth, projected production growth, or estimated employment growth.

The non-road mobile sources emissions are calculated using EPA's NONROAD2008a model, with the exception of the railroad locomotives and aircraft engine. For each projected year's inventory, the emissions are estimated using EPA's NONROAD2008a model with activity input such as projected landing and takeoff data for aircraft and national fuel use from the Energy Information Administration for locomotives.

For highway mobile sources, EPA's Motor Vehicle Emission Simulator (MOVES) mobile model is run to generate emissions. The MOVES model includes the road class vehicle miles traveled (VMT) as an input file and can directly output the estimated emissions. For each projected year's inventory, the highway mobile sources emissions are calculated by running the MOVES mobile model for the future year with the projected VMT to generate emissions that take into consideration expected Federal tailpipe standards, fleet turnover, and new fuels.

The 2010 NO_X and VOC emissions for the North Carolina portion of the bi-state Charlotte Area, as well as the emissions for other years, were developed consistent with EPA guidance and are summarized in Tables 2 through 4 of the following subsection discussing the maintenance demonstration.

c. Maintenance Demonstration

The March 28, 2013, submittal updates the maintenance plan included in the November 2, 2011, maintenance plan for the North Carolina portion of the Area. The maintenance plan:

(i) Shows compliance with and maintenance of the 1997 8-hour ozone NAAQS by providing information to support the demonstration that current and future emissions of NO_X and VOC remain at or below 2010 emissions levels.

(ii) Uses 2010 as the attainment year and includes future emissions inventory projections for 2013, 2016, 2019, 2022, and 2025.

(iii) Identifies an ''out year'' at least 10 years (and beyond) after the time necessary for EPA to review and approve the maintenance plan. Per 40 CFR part 93, NO_X and VOC MVEBs were established for the last year (2025) of the maintenance plan (see section VI below). Additionally, NC DAQ opted to establish MVEBs for an interim year (2013).

(iv) Provides actual and projected emissions inventories, in tons per day (tpd), for the North Carolina portion of the bi-state Charlotte Area, as shown in Tables 2 through 4 below.

TABLE 2—ACTUAL AND PROJECTED ANNUAL NO_X EMISSIONS (TPD) FOR THE NORTH CAROLINA PORTION * OF THE BI-STATE CHARLOTTE AREA

Sector	2010	2013	2016	2019	2022	2025
Point	37.97	20.03	19.29	20.28	19.19	20.02
Area	8.16	8.24	8.31	8.42	8.49	8.67
Nonroad	41.31	35.90	30.64	26.89	24.50	23.09
Mobile	138.26	106.92	86.43	70.49	63.67	55.90
Total **	225.47	170.90	144.53	125.98	115.76	107.61

* Iredell County emissions for nonattainment area only.
** Total taken directly from the March 28, 2013, submittal, which was calculated using county-by-county emissions values rather than the total sector emissions values.

TABLE 3—ACTUAL AND PROJECTED ANNUAL VOC EMISSIONS (TPD) FOR THE NORTH CAROLINA PORTION * OF THE BI-STATE CHARLOTTE AREA

Sector	2010	2013	2016	2019	2022	2025
Point	14.78	15.78	17.04	18.32	19.5	20.87
Area	57.67	56.61	56.36	57.78	59.06	63.26
Nonroad	26.47	21.92	19.4	18.79	18.86	19.26
Mobile	66.70	51.32	41.58	34.47	30.21	28.67
Total **	165.44	145.48	134.26	129.26	127.63	132.06

* Iredell County emissions for nonattainment area only.
** Total taken directly from the March 28, 2013, submittal, which was calculated using county-by-county emissions values rather than the total sector emissions values.

TABLE 4—EMISSION ESTIMATES FOR THE NORTH CAROLINA PORTION OF THE BI-STATE CHARLOTTE AREA

Year	VOC (tpd)	NO_X (tpd)
2010	165.44	225.47
2013	145.48	170.90
2016	134.26	144.53
2019	129.26	125.98
2022	127.63	115.76
2025	132.06	107.61
Difference from 2010 to 2025	−33.38	−117.86

Tables 2 through 4 summarize the 2010 and future projected emissions of NO_X and VOC from the North Carolina portion of the bi-state Charlotte Area. In situations where local emissions are the primary contributor to nonattainment, the NAAQS should not be violated in the future as long as emissions from within the nonattainment area remain at or below the baseline with which attainment was achieved. North Carolina has projected emissions as described previously and determined that emissions in the North Carolina portion of the bi-state Charlotte Area will remain below those in the attainment year inventory for the duration of the maintenance plan.

As discussed in section VI of this proposed rulemaking, a safety margin is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan. The attainment level of emissions is the level of emissions during one of the years in which the area met the NAAQS. North Carolina selected 2010 as the attainment emissions inventory year for the North Carolina portion of the bi-state Charlotte Area. North Carolina calculated safety margins in its submittal for years 2013, 2016, 2019, 2022, and 2025. The State has decided to allocate a safety margin to the 2013 and 2025 MVEB for the bi-state Charlotte Area. For the year 2013, the NO_X and VOC safety margins were calculated as 54.57 tpd and 19.96 tpd, respectively. For the year 2025, the NO_X and VOC safety margins were calculated as 117.86 tpd and 33.38 tpd, respectively.

The State has decided to allocate a portion of the safety margin to the MVEBs to allow for unanticipated growth in VMT, changes and uncertainty in vehicle mix assumptions, etc, that will influence the emission estimations. NC DAQ developed and implemented a four-step approach for determining a factor to use to calculate the amount of safety margin to apply to the MVEBs. The MVEBs to be used for transportation conformity proposes is discussed in section VI. This allocation and the resulting available safety margin for the North Carolina portion of the bi-state Charlotte Area are discussed further in section VI of this proposed rulemaking.

d. Monitoring Network

There are currently seven monitors measuring ozone in the North Carolina portion of the bi-state Charlotte Area.[10]

[10] While there is a monitor in York County that the South Carolina Department of Health and Environmental Control (SC DHEC) operates, this

NC DAQ operates four of the monitors in the Area, whereas the Mecklenburg County Air Quality (MCAQ) Office operates three of the monitors in Mecklenburg County. The State of North Carolina, through NC DAQ, has committed to continue operation of the monitors in the North Carolina portion of the bi-state Charlotte Area in compliance with 40 CFR part 58 and have thus addressed the requirement for monitoring. EPA approved North Carolina's 2012 monitoring plan on September 21, 2012.

e. Verification of Continued Attainment

The State of North Carolina, through NC DAQ, has the legal authority to enforce and implement the requirements of the North Carolina portion of the Area 1997 8-hour ozone maintenance plan. This includes the authority to adopt, implement, and enforce any subsequent emissions control contingency measures determined to be necessary to correct future ozone attainment problems.

The large stationary sources are required to submit an emissions inventory annually to NC DAQ or MCAQ. NC DAQ will commit to review these emissions inventories to determine if any unexpected growth in NO_X emissions in the Area may endanger the maintenance of the 1997 8-hour ozone NAAQS. Additionally, as new VMT data are provided by the North Carolina Department of Transportation (NC DOT), NC DAQ commits to review these data and determine if any unexpected growth in VMT may endanger the maintenance of the 1997 8-hour ozone NAAQS.

Additionally, under the Consolidated Emissions Reporting Rule (CERR) and Air Emissions Reporting Requirements (AERR), NC DAQ is required to develop a comprehensive, annual, statewide emissions inventory every three years that is due twelve to eighteen months after the completion of the inventory year. The CERR and AERR inventory years are within a year of the baseline, interim, and final years of the maintenance plan. Therefore, NC DAQ commits to compare the CERR and AERR inventories as they are developed with the maintenance plan to determine if additional steps are necessary for continued maintenance of the 1997 8-hour ozone NAAQS in this Area.

f. Contingency Measures in the Maintenance Plan

The contingency measures are designed to promptly correct a violation of the NAAQS that occurs after redesignation. Section 175A of the CAA requires that a maintenance plan include such contingency measures as EPA deems necessary to assure that the state will promptly correct a violation of the NAAQS that occurs after redesignation. The maintenance plan should identify the contingency measures to be adopted, a schedule and procedure for adoption and implementation, and a time limit for action by the state. A state should also identify specific indicators to be used to determine when the contingency measures need to be implemented. The maintenance plan must include a requirement that a state will implement all measures with respect to control of the pollutant that were contained in the SIP before redesignation of the area to attainment in accordance with section 175A(d).

In the November 2, 2011, and March 28, 2013, submittals, North Carolina affirms that all programs instituted by the State and EPA will remain enforceable and that sources are prohibited from reducing emissions controls following the redesignation of the Area. The contingency plan included in the submittal includes a triggering mechanism to determine when contingency measures are needed and a process of developing and implementing appropriate control measures. The primary trigger of the contingency plan will be a violation of the 1997 8-hour ozone NAAQS (i.e., when the three-year average of the 4th highest values is equal to or greater than 0.085 ppm at a monitor in the Area). The trigger date will be 60 days from the date that the State observes a 4th highest value that, when averaged with the two previous ozone seasons' fourth highest values, would result in a three-year average equal to or greater than 0.085 ppm.

The secondary trigger will apply where no actual violation of the 1997 8-hour ozone NAAQS has occurred, but where the State finds monitored ozone levels indicating that an actual ozone NAAQS violation may be imminent. A pattern will be deemed to exist when there are two consecutive ozone seasons in which the 4th highest values are 0.085 ppm or greater at a single monitor within the Area. The trigger date will be 60 days from the date that the State observes a 4th highest value of 0.085 ppm or greater at a monitor for which the previous season had a 4th highest value of 0.085 ppm or greater.

Once the primary or secondary trigger is activated, the Planning Section of the NC DAQ, in consultation with SC DHEC and MCAQ, shall commence analyses including trajectory analyses of high ozone days and an emissions inventory assessment to determine those emission control measures that will be required for attaining or maintaining the 1997 8-hour ozone NAAQS. By May 1 of the year following the ozone season in which the primary or secondary trigger has been activated, North Carolina will complete sufficient analyses to begin adoption of necessary rules for ensuring attainment and maintenance of the 1997 8-hour ozone NAAQS. The rules would become State effective by the following January 1, unless legislative review is required.

At least one of the following contingency measures will be adopted and implemented upon a primary triggering event:

- NO_X RACT on stationary sources with a potential to emit less than 100 tons per year in the North Carolina portion of the Metrolina nonattainment area;
- diesel inspection and maintenance program;
- implementation of diesel retrofit programs, including incentives for performing retrofits;
- additional controls in upwind areas.

The NC DAQ commits to implement within 24 months of a primary or secondary trigger, or as expeditiously as practicable, at least one of the control measures listed above or other contingency measures that may be determined to be more appropriate based on the analyses performed.

Similarly, the tertiary trigger will not be an actual violation of the 1997 8-hour ozone NAAQS. This trigger will be a first alert as to a potential air quality problem on the horizon. The trigger will be activated when a monitor in the Area has a 4th highest value of 0.085 ppm or greater, starting the first year after the maintenance plan has been approved. The trigger date will be 60 days from the date that the State observes a 4th highest value of 0.085 ppm or greater at any monitor.

Once the tertiary trigger is activated, the Planning Section of the NC DAQ, in consultation with the SC DHEC and MCAQ, shall commence analyses including meteorological evaluation, trajectory analyses of high ozone days, and emissions inventory assessment to understand why a 4th highest exceedance of the standard has occurred. Once the analyses are completed, the NC DAQ will work with SC DHEC, MCAQ and the local air awareness program to develop an outreach plan identifying any additional voluntary measures that can be

monitor is not located within the bi-state Charlotte Area for the 1997 8-hour ozone NAAQS.

implemented. If the 4th highest exceedance occurs early in the season, the NC DAQ will work with entities identified in the outreach plan to determine if the measures can be implemented during the current season; otherwise, NC DAQ will work with SC DHEC, MCAQ, and the local air awareness coordinator to implement the plan for the following ozone season.

EPA has concluded that the maintenance plan adequately addresses the five basic components of a maintenance plan: attainment inventory, monitoring network, verification of continued attainment, and a contingency plan. Therefore, the maintenance plan SIP revision submitted by North Carolina for the State's portion of the Area meets the requirements of section 175A of the CAA and is approvable.

VI. What is EPA's analysis of North Carolina's proposed NO_X and VOC subarea MVEBs for the North Carolina portion of the bi-state Charlotte area?

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

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

As part of the consultation process on setting MVEBs, the NC DAQ discussed several options for setting the geographic extent of the MVEBs with the transportation partners. NC DAQ requested feedback on these options or other alternatives for consideration from the transportation partners. NC DAQ received feedback from only two of the transportation partners. As part of the public comment process, the NC DAQ provided several options for establishing the MVEBs.

After considering the comments received, the NC DAQ chose to establish subarea MVEBs based on geographical areas that correspond to the Metropolitan Planning Organization (MPO) and/or Rural Planning Organization (RPO) boundaries. This option is consistent with the Cabarrus-Rowan MPO (CRMPO) request and takes into consideration two of the comments from Mecklenburg-Union MPO (MUMPO). NC DAQ believes that this option is a good compromise between how MVEBs have been established in the past, addressing NC DAQ's concern with Mecklenburg County's on-road mobile source emissions and the preferences of the transportation partners. Further, NC DAQ believes this approach provides additional flexibility to the transportation partners while providing adequate assurance that the 1997 8-hour ozone NAAQS will be maintained in the Metrolina nonattainment area. Accordingly, NC DAQ established MVEBs for the CRMPO (Cabarrus and Rowan Counties), for the Gaston Urban Area MPO and Lake Norman RPO (Gaston, Iredell, and Lincoln Counties), and for the MUMPO and Rocky River RPO (Mecklenburg and Union Counties) geographical areas. Tables 5 through 7 below provide the subarea NO_X and VOC MVEBs in kilograms per day (kg/day),[11] for 2013 and 2025.

TABLE 5—CABARRUS-ROWAN MPO MVEB

[kg/day]

	2013	2025
NO_X Emissions:		
On-Road Mobile Emissions	19,838	9,961
Safety Margin Allocated to MVEB	1,984	1,992
NO_X Conformity MVEB	21,822	11,953
VOC Emissions:		
On-Road Mobile Emissions	9,863	5,425
Safety Margin Allocated to MVEB	986	1,085
VOC Conformity MVEB	10,849	6,510

TABLE 6—GASTON URBAN AREA MPO/LAKE NORMAN RPO MVEB

[kg/day]

	2013	2025
NO_X Emissions:		
On-Road Mobile Emissions	19,957	10,360
Safety Margin Allocated to MVEB	2,211	2,181
NO_X Conformity MVEB	22,168	12,541
VOC Emissions:		
On-Road Mobile Emissions	10,442	5,815
Safety Margin Allocated to MVEB	1,168	1,232
VOC Conformity MVEB	11,610	7,047

TABLE 7—MECKLENBURG-UNION MPO/ROCKY RIVER RPO MVEB

[kg/day]

	2013	2025
NO_X *Emissions:*		
On-Road Mobile Emissions	57,198	30,391
Safety Margin Allocated to MVEB	4,303	5,337
NO_X Conformity MVEB	61,501	35,728
VOC Emissions:		
On-Road Mobile Emissions	26,250	14,769
Safety Margin Allocated to MVEB	2,002	2,609
VOC Conformity MVEB	28,252	17,378

As mentioned above, the North Carolina portion of the Area has chosen to allocate a portion of the available safety margin to the NO_X and VOC MVEBs for 2013 and 2025 (45.20 tpd and 107.38 tpd of the NO_X 2013 and 2025 safety margins remain, respectively, and 19.96 tpd and 27.95 tpd of the VOC 2013 and 2025 safety margins remain, respectively).

[11] The conversion to kilograms used the actual emissions reported in the MOVES model. The conversion was done utilizing the ''CONVERT'' function in an EXCEL spreadsheet.

Through this rulemaking, EPA is proposing to approve the subarea MVEBs for NO_X and VOC for 2013 and 2025 for the North Carolina portion of the bi-state Charlotte Area because EPA has determined that the Area maintains the 1997 8-hour ozone NAAQS with the emissions at the levels of the budgets. Once the subarea MVEBs for the bi-state Charlotte Area are approved or found adequate (whichever is completed first), they must be used for future conformity determinations. After thorough review, EPA has determined that the budgets meet the adequacy criteria, as outlined in 40 CFR 93.118(e)(4), and is proposing to approve the budgets because they are consistent with maintenance of the 1997 8-hour ozone NAAQS through 2025.

VII. What is the status of EPA's adequacy determination for the proposed NO_X and VOC Subarea MVEBs for 2013 and 2025 for the North Carolina portion of the bi-state Charlotte area?

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

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

As discussed earlier, North Carolina's March 28, 2013, maintenance plan submission includes NO_X and VOC subarea MVEBs for the North Carolina portion of the bi-state Charlotte Area for 2013, an interim year of the maintenance plan, and 2025, the last year of the maintenance plan. EPA is reviewing the NO_X and VOC subarea MVEBs through the adequacy process. The North Carolina SIP submission, including the bi-state Charlotte Area NO_X and VOC subarea MVEBs, opened for public comment on EPA's adequacy Web site on February 21, 2013, found at: *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm.* The EPA public comment period on adequacy for the MVEBs for 2013 and 2025 for the North Carolina portion of the bi-state Charlotte Area closed on March 25, 2013.

EPA intends to make its determination on the adequacy of the 2013 and 2025 subarea MVEBs for the North Carolina portion of the bi-state Charlotte Area for transportation conformity purposes in the near future by completing the adequacy process that was started on February 21, 2013. After EPA finds the 2013 and 2025 MVEBs adequate or approves them, the new subarea MVEBs for NO_X and VOC must be used for future transportation conformity determinations. For required regional emissions analysis years that involve 2013 through 2024, the applicable 2013 MVEBs will be used and for 2025 and beyond, the applicable budgets will be the new 2025 MVEBs established in the maintenance plan, as defined in section VI of this proposed rulemaking.

VIII. Proposed Action on the Redesignation Request And Maintenance Plan SIP Revision Including Proposed Approval of the 2013 and 2025 NO_X and VOC Subarea MVEBs for the North Carolina Portion of the Area

As discussed above, section 172(c)(3) of the CAA requires areas to submit a base year emissions inventory. EPA approved the 2002 base year emissions inventory for the North Carolina portion of the bi-state Charlotte Area (as submitted in North Carolina's November 12, 2009, 1997 8-hour ozone attainment demonstration SIP revision) on May 4, 2012. *See* 77 FR 26441. Emissions contained in the submittal cover the general source categories of point sources, area sources, on-road mobile sources, and non-road mobile sources. All emission summaries were accompanied by source-specific descriptions of emission calculation procedures and sources of input data. North Carolina's submittal documents 2002 emissions in the North Carolina portion of the Area in units of tons per summer day. Table 6, below, provides a summary of the 2002 emissions of NO_X and VOC for the North Carolina portion of the bi-state Charlotte Area.

TABLE 6—NORTH CAROLINA PORTION OF THE BI-STATE CHARLOTTE AREA 2002 EMISSIONS FOR NO_X AND VOC

[Tons per summer day]

County	Point		Area		Non-road		Mobile	
	NO_X	VOC	NO_X	VOC	NO_X	VOC	NO_X	VOC
Cabarrus	2.6	2.2	0.8	6.0	5.4	2.7	17.2	21.5
Gaston	34.8	2.5	1.3	8.9	4.9	2.9	20.0	13.5
Iredell (partial)*	8.5	0.9	0.3	1.9	1.4	0.9	5.6	5.1
Lincoln	0.3	2.1	0.5	3.1	1.9	1.3	6.1	7.1
Mecklenburg	2.1	5.7	7.0	29.4	32.1	24.1	78.7	68.0
Rowan	11.0	6.3	0.8	5.6	4.1	2.3	19.7	14.8
Union	0.2	1.0	1.0	6.4	7.7	4.7	11.3	13.0

* Only part of Iredell County is in the nonattainment area.

IX. What is the effect of EPA's proposed actions?

EPA's proposed actions establish the basis upon which EPA may take final action on the issues being proposed for approval today. Approval of North Carolina's redesignation request would change the legal designation of Cabarrus, Gaston, Iredell, Lincoln, Mecklenburg, Rowan and Union Counties in their entireties, and a portion of Iredell County (Davidson and Coddle Creek Townships) in North Carolina, as found at 40 CFR part 81, from nonattainment to attainment for the 1997 8-hour ozone NAAQS. Approval of North Carolina's request would also incorporate a plan for maintaining the 1997 8-hour ozone NAAQS in the North Carolina portion of the bi-state Charlotte Area through 2025 into the SIP. This maintenance plan includes contingency measures to remedy any future violations of the 1997 8-hour ozone NAAQS and procedures for evaluation of potential violations. The maintenance plan also establishes NO_X and VOC subarea MVEBs for 2013 and 2025 for the North Carolina portion of the bi-state Charlotte Area. The subarea MVEBs are listed in Tables 5 through 7 in Section VI. Additionally, EPA is notifying the public of the status of EPA's adequacy determination for the newly-established NO_X and VOC subarea MVEBs for 2013 and 2025 for the North Carolina portion of the bi-state Charlotte Area.

X. Proposed Actions on the Redesignation Request and Maintenance Plan SIP Revisions Including Approval of the NO_X and VOC Subarea MVEBs for 2013 and 2025 for the North Carolina Portion of the Bi-State Charlotte Area

EPA previously determined that the entire bi-state Charlotte Area was attaining the 1997 8-hour ozone NAAQS on November 15, 2011, at 76 FR 70656. EPA is now taking two separate but related actions regarding the redesignation and maintenance of the 1997 8-hour ozone NAAQS for the North Carolina portion of the bi-state Charlotte Area. Today's notice of proposed rulemaking is in response to North Carolina's November 2, 2011, SIP revision (as supplemented by a March 28, 2013, SIP revision).

EPA is proposing to determine, based on complete, quality-assured, and certified monitoring data for the 2008–2010 monitoring period that the entire bi-state Charlotte Area is attaining the 1997 8-hour ozone NAAQS. Further, based on NC DAQ's November 2, 2011, SIP revision (as supplemented by a March 28, 2012, SIP revision), EPA is proposing to determine that the North Carolina portion of the bi-state Charlotte Area has met the criteria under CAA section 107(d)(3)(E) for redesignation from nonattainment to attainment for the 1997 8-hour ozone NAAQS. On this basis, EPA is proposing to approve North Carolina's redesignation request for the North Carolina portion of the bi-state Charlotte Area.

EPA is also proposing to approve the maintenance plan for the North Carolina portion of the Area, including the NO_X and VOC subarea MVEBs for 2013 and 2025, into the North Carolina SIP (under CAA section 175A). The maintenance plan demonstrates that the Area will continue to maintain the 1997 8-hour ozone NAAQS and that the budgets meet all of the adequacy criteria contained in 40 CFR 93.118(e)(4) and (5). Further, as part of today's action, EPA is describing the status of its adequacy determination for the NO_X and VOC MVEBs for 2013 and 2025 in accordance with 40 CFR 93.118(f)(1). Within 24 months from the effective date of EPA's adequacy determination for the MVEBs or the effective date for the final rule for this action, whichever is earlier, the transportation partners will need to demonstrate conformity to the new NO_X and VOC MVEBs pursuant to 40 CFR 93.104(e).

If finalized, approval of the redesignation request would change the official designation of Cabarrus, Gaston, Iredell, Lincoln, Mecklenburg, Rowan and Union Counties in their entireties, and a portion of Iredell County (Davidson and Coddle Creek Townships) in North Carolina, as found at 40 CFR part 81, from nonattainment to attainment for the 1997 8-hour ozone NAAQS.

XI. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of a maintenance plan under section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those imposed by state law. A redesignation to attainment does not in and of itself create any new requirements, but rather results in the applicability of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, these proposed actions merely approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For this reason, these proposed actions:

- Are not "significant regulatory action[s]" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- are 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.*);
- do 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);
- do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- are not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- do not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

List of Subjects

40 CFR Part 52

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

40 CFR Part 81

Environmental protection, Air pollution control.

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

Dated: July 12, 2013.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2013–17834 Filed 7–25–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 170

[EPA–HQ–OPP–2011–0184; FRL–9384–4]

RIN 2070–AJ22

Notification of Submission to the Secretary of Agriculture; Pesticides, Agricultural Worker Protection Standard Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of submission to the Secretary of Agriculture.

SUMMARY: This document notifies the public as required by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that the EPA Administrator has forwarded to the Secretary of the United States Department of Agriculture (USDA) a draft regulatory document concerning Pesticides; Agricultural Worker Protection Standard Revisions. The draft regulatory document is not available to the public until after it has been signed and made available by EPA.

DATES: See Unit I. under **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2011–0184, is available at *http://www.regulations.gov,* or, at the Office of Pesticide Programs Regulatory Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Jeanne Kasai, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–3240; email address: *kasai.jeanne@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What action is EPA taking?

Section 25(a)(2)(A) of FIFRA requires the EPA Administrator to provide the Secretary of USDA with a copy of any draft proposed rule at least 60 days before signing it in proposed form for publication in the **Federal Register**. The draft proposed rule is not available to the public until after it has been signed by EPA. If the Secretary of USDA comments in writing regarding the draft proposed rule within 30 days after receiving it, the EPA Administrator shall include the comments of the Secretary of USDA and the EPA Administrator's response to those comments with the proposed rule that publishes in the **Federal Register**. If the Secretary of USDA does not comment in writing within 30 days after receiving the draft proposed rule, the EPA Administrator may sign the proposed rule for publication in the **Federal Register** any time after the 30-day period.

II. Do any statutory and Executive Order reviews apply to this notification?

No. This document is merely a notification of submission to the Secretary of USDA. As such, none of the regulatory assessment requirements apply to this document.

List of Subjects in 40 CFR Part 170

Agricultural worker safety, Environmental protection, Farmworker, Pesticide and pests, Pesticide safety training, Pesticide worker safety, Worker protection standard regulations.

Dated: July 19, 2013.

Steven Bradbury,

Director, Office of Pesticide Programs.

[FR Doc. 2013–17927 Filed 7–25–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1983–0002; FRL–9839–5]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Deletion of the Cannon Engineering Corp. (CEC), Superfund Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of intent.

SUMMARY: The Environmental Protection Agency (EPA) Region 1 is issuing a Notice of Intent to Delete the Cannon Engineering Corp. (CEC), Superfund Site (Site) located in Bridgewater, Massachusetts, from the National Priorities List (NPL) and requests public comments on this proposed action. The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA and the State of Massachusetts, through the Massachusetts Department of Environmental Protection (MassDEP), have determined that all appropriate response actions under CERCLA, other than five-year reviews, have been completed. However, this deletion does not preclude future actions under Superfund.

DATES: Comments must be received by August 26, 2013.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–1983–0002, by one of the following methods:

- *http://www.regulations.gov.* Follow on-line instructions for submitting comments.
- *Email: golden.derrick@epa.gov* or *brown.rudy@epa.gov.*
- *Fax:* 617–918–0448 or 617–918–0031.
- *Mail:* Derrick Golden, EPA Region 1—New England, 5 Post Office Square, Suite 100, Mail Code OSRR07–4, Boston, MA 02109–3912 or Rudy Brown, EPA Region 1—New England, 5 Post Office Square, Suite 100, Mail Code ORAO1–1, Boston, MA 02109–3912.
- *Hand delivery:* Derrick Golden, EPA Region 1—New England, 5 Post Office Square, Suite 100, Mail Code OSRR07–4, Boston, MA 02109–3912 or Rudy Brown, EPA Region 1—New England, 5 Post Office Square, Suite 100, Mail Code ORAO1–1, Boston, MA 02109–3912. Such deliveries are only accepted during the Docket's normal hours of operation (M–F, 9–5), and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID no. EPA–HQ–SFUND–1983–0002. 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. 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 EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment 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 *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 statue. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at:

U.S. Environmental Protection Agency, Records Center, 5 Post Office Square, Suite 100, Boston, MA 02109, 617–918–1440, Monday-Friday: 9:00 a.m.–5:00 p.m., Saturday and Sunday—Closed, and

Bridgewater Public Library, 15 South Street, Bridgewater, MA 02324, 508–697–3331, Monday-Wednesday: 9:00 a.m.–8:00 p.m., Thursday: 10:00 a.m.–5:00 p.m., Friday: 10:00 a.m.–2:00 p.m., Saturday: 10:00 a.m.–2:00 p.m., Sunday: Closed.

FOR FURTHER INFORMATION CONTACT: Derrick Golden, Remedial Project Manager, U.S. Environmental Protection Agency, Region 1 New England, 5 Post Office Square, Mail code OSRR07–4, Boston, MA 02109–3912, (617) 918–1448, *email: golden.derrick@epa.gov.*

SUPPLEMENTARY INFORMATION: In the ''Rules and Regulations'' Section of today's **Federal Register**, we are publishing a direct final Notice of Deletion of Cannon Engineering Corp. (CEC), Superfund Site without prior Notice of Intent to Delete because we view this as a noncontroversial revision and anticipate no adverse comment. We have explained our reasons for this deletion in the preamble to the direct final Notice of Deletion, and those reasons are incorporated herein. If we receive no adverse comment(s) on this deletion action, we will not take further action on this Notice of Intent to Delete. If we receive adverse comment(s), we will withdraw the direct final Notice of Deletion, and it will not take effect. We will, as appropriate, address all public comments in a subsequent final Notice of Deletion based on this Notice of Intent to Delete. We will not institute a second comment period on this Notice of Intent to Delete. Any parties interested in commenting must do so at this time.

For additional information, see the direct final Notice of Deletion which is located in the Rules section of this **Federal Register**.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

Dated: July 18, 2013.

H. Curtis Spalding,

Regional Administrator, EPA Region 1.

[FR Doc. 2013–18048 Filed 7–25–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF ENERGY

48 CFR Parts 925, 952 and 970

RIN 1991–AB99

Acquisition Regulations: Export Control

AGENCY: Department of Energy.

ACTION: Notice of reopening of public comment period.

SUMMARY: On June 12, 2013, the Department of Energy (DOE) published a proposed rulemaking in the **Federal Register** (78 FR 35195) to amend the Department of Energy Acquisition Regulation (DEAR) to add export control requirements applicable to the performance of DOE contracts. The public comment period ended on July 12, 2013. The reopening of the public comment period ends on August 23, 2013.

DATES: Written comments must be received on or before close of business August 23, 2013.

ADDRESSES: You may submit comments, identified by ''DEAR: Export Control and RIN 1991–AB99,'' by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email to: DEARrulemaking@hq.doe.gov.* Include DEAR: Export Control and RIN 1991–AB99 in the subject line of the message.
- *Mail to:* U.S. Department of Energy, Office of Acquisition and Project Management, MA–611, 1000 Independence Avenue SW., Washington, DC 20585. Comments by email are encouraged.

FOR FURTHER INFORMATION CONTACT: Lawrence Butler, (202) 287–1945 or *lawrence.butler@hq.doe.gov.*

Issued in Washington, DC, on July 19, 2013.

David Boyd,

Deputy Director, Office of Acquisition and Project Management, Department of Energy.

[FR Doc. 2013–17975 Filed 7–25–13; 8:45 am]

BILLING CODE 6450–01–P

Notices

Federal Register
Vol. 78, No. 144
Friday, July 26, 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

Submission for OMB Review; Comment Request

July 22, 2013.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by August 26, 2013 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW., Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Animal Disease Traceability Information Systems, Agreements, and Reports (formerly: National Animal Identification System).

OMB Control Number: 0579–0259.

Summary of Collection: The Animal and Plant Health Inspection Service (APHIS) has the authority to issue orders and promulgate regulations to prevent the introduction into the United States and the dissemination within the United States of any pest or disease of livestock. APHIS' regulations govern cooperative programs to control and eradicate communicable diseases of livestock. The regulations also establish requirements for the interstate movement of livestock to prevent the dissemination of diseases of livestock within the United States. Knowing where diseased and at-risk animals are, where they have been, and when, is indispensable in emergency response and in ongoing disease control and eradication programs. To provide a system that could provide for animal traceability, APHIS developed the Animal Disease Traceability (ADT) framework and ADT information systems. The basic data APHIS acquires through the ADT information systems will help APHIS obtain timely information on animal movement tracebacks and trace forwards when responding to an animal disease of concern.

Need and Use of the Information: APHIS' goal is to create an effective, consistent, and efficient system which will allow traces of animals to be completed in a timely manner, detection of disease, and ensure rapid containment of disease. The ADT information systems involve reporting and recordkeeping activities, including animal identification; premises registration; nonproducer participant registration; updates submitted by animal identification number manufacturers and managers; cooperative agreements; cooperative agreement applications; cooperator (State/Tribe) quarterly accomplishment reports; an identification number management system; and records associated with animal movement activities. Failing to collect the needed information would make it impossible for APHIS to conduct a timely traceback or trace forward of animals potentially exposed to disease.

Description of Respondents: Business or other for-profit; State, Local, or Tribal Government.

Number of Respondents: 60,315.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 47,054.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2013–17925 Filed 7–25–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2012–0046]

GENECTIVE SA; Availability of Plant Pest Risk Assessment, Environmental Assessment, Preliminary Finding of No Significant Impact, and Preliminary Determination of Nonregulated Status of Maize Genetically Engineered for Herbicide Resistance

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared a preliminary determination regarding a request from GENECTIVE SA, seeking a determination of nonregulated status of maize designated as VCO–01981–5, which has been genetically engineered for resistance to the herbicide glyphosate. We are also making available for public review our plant pest risk assessment, environmental assessment, and preliminary finding of no significant impact for the preliminary determination of nonregulated status.

DATES: We will consider any information that we receive on or before August 26, 2013.

ADDRESSES: You may submit any information by either of the following methods:

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2012-0046.*

• *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2012–0046, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-0046* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 7997039 before coming.

Supporting documents are also available on the APHIS Web site at http://www.aphis.usda.gov/biotechnology/petitions_table_pending.shtml under APHIS Petition Number 11–342–01p.

FOR FURTHER INFORMATION CONTACT: Dr. Rebecca Stankiewicz Gabel, Chief, Biotechnology Environmental Analysis Branch, Environmental Risk Analysis Programs, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 851–3927, email: *rebecca.l.stankiewicz-gabel@aphis.usda.gov.* To obtain copies of the petition, contact Ms. Cindy Eck at (301) 851–3892, email: *cynthia.a.eck@aphis.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the authority of the plant pest provisions of the Plant Protection Act (7 U.S.C. 7701 *et seq.*), the regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered (GE) organisms and products are considered ''regulated articles.''

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. APHIS received a petition (APHIS Petition Number 11–342–01p) from GENECTIVE SA of Chappes, France, seeking a determination of nonregulated status of maize (*Zea mays* L.) designated as event VCO–01981–5, which has been genetically engineered for resistance to the herbicide glyphosate. The petition stated that this maize is unlikely to pose a plant pest risk and, therefore, should not be a regulated article under APHIS' regulations in 7 CFR part 340.

According to our process [1] for soliciting public comment when considering petitions for determinations of nonregulated status of GE organisms, APHIS accepts written comments regarding a petition once APHIS deems it complete. In a notice [2] published in the **Federal Register** on July 13, 2012, (77 FR 41353–41354, Docket No. APHIS–2012–0046), APHIS announced the availability of the GENECTIVE SA petition for public comment. APHIS solicited comments on the petition for 60 days ending on September 11, 2012, in order to help identify potential environmental and interrelated economic issues and impacts that APHIS may determine should be considered in our evaluation of the petition.

APHIS received 79 comments on the petition. Several of these comments included electronic attachments consisting of a consolidated document of many identical or nearly identical letters, for a total of 4,693 comments. Issues raised during the comment period include outcrossing and cross-pollination concerns and effects of herbicide use, such as the development of herbicide-resistant weeds and effects on non-target organisms. APHIS has evaluated the issues raised during the comment period and, where appropriate, has provided a discussion of these issues in our environmental assessment (EA).

After public comments are received on a completed petition, APHIS evaluates those comments and then provides a second opportunity for public involvement in our decisionmaking process. According to our public review process (see footnote 1), the second opportunity for public involvement follows one of two approaches, as described below.

If APHIS decides, based on its review of the petition and its evaluation and analysis of comments received during the 60-day public comment period on the petition, that the petition involves a GE organism that raises no substantive new issues, APHIS will follow Approach 1 for public involvement. Under Approach 1, APHIS announces in the **Federal Register** the availability of APHIS' preliminary regulatory determination along with its EA, preliminary finding of no significant impact (FONSI), and its plant pest risk assessment (PPRA) for a 30-day public review period. APHIS will evaluate any information received related to the petition and its supporting documents during the 30-day public review period. For this petition, we are using Approach 1.

If APHIS decides, based on its review of the petition and its evaluation and analysis of comments received during the 60-day public comment period on the petition, that the petition involves a GE organism that raises substantive new issues, APHIS will follow Approach 2. Under Approach 2, APHIS first solicits written comments from the public on a draft EA and PPRA for a 30-day comment period through the publication of a **Federal Register** notice. Then, after reviewing and evaluating the comments on the draft EA and PPRA and other information, APHIS will revise the PPRA as necessary and prepare a final EA and, based on the final EA, a National Environmental Policy Act (NEPA) decision document (either a FONSI or a notice of intent to prepare an environmental impact statement).

As part of our decisionmaking process regarding a GE organism's regulatory status, APHIS prepares a PPRA to assess the plant pest risk of the article. APHIS also prepares the appropriate environmental documentation—either an EA or an environmental impact statement—in accordance with NEPA, to provide the Agency with a review and analysis of any potential environmental impacts associated with the petition request.

APHIS has prepared a PPRA and has concluded that maize event VCO–01981–5 is unlikely to pose a plant pest risk. In section 403 of the Plant Protection Act, ''plant pest'' is defined as any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product: A protozoan, a nonhuman animal, a parasitic plant, a bacterium, a fungus, a virus or viroid, an infectious agent or

[1] On March 6, 2012, APHIS published in the **Federal Register** (77 FR 13258–13260, Docket No. APHIS–2011–0129) a notice describing our process for soliciting public comment when considering petitions for determinations of nonregulated status for GE organisms. To view the notice, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0129.*

[2] To view the notice, the petition, and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2012-;0046.*

other pathogen, or any article similar to or allied with any of the foregoing.

APHIS has prepared an EA in which we present two alternatives based on our analysis of data submitted by GENECTIVE SA, a review of other scientific data, field tests conducted under APHIS oversight, and comments received on the petition. APHIS is considering the following alternatives: (1) Take no action, i.e., APHIS would not change the regulatory status of maize event VCO–01981–5 and it would continue to be a regulated article, or (2) make a determination of nonregulated status of maize event VCO–01981–5.

The EA was prepared in accordance with (1) NEPA, as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372). Based on our EA and other pertinent scientific data, APHIS has reached a preliminary FONSI with regard to the preferred alternative identified in the EA.

Based on APHIS' analysis of field and laboratory data submitted by GENECTIVE SA, references provided in the petition, peer-reviewed publications, information analyzed in the EA, the PPRA, comments provided by the public, and discussion of issues in the EA in response to those public comments, APHIS has determined that maize event VCO–01981–5 is unlikely to pose a plant pest risk. We have therefore reached a preliminary decision to make a determination of nonregulated status of maize event VCO–01981–5, whereby maize event VCO–01981–5 would no longer be subject to our regulations governing the introduction of certain GE organisms.

We are making available for a 30-day review period APHIS' preliminary regulatory determination of maize event VCO–01981–5, along with our PPRA, EA, and preliminary FONSI for the preliminary determination of nonregulated status. The EA, preliminary FONSI, PPRA, and our preliminary determination for maize event VCO–01981–5, as well as the GENECTIVE SA petition and the comments received on the petition, are available as indicated under **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** above. Copies of these documents may also be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT**.

After the 30-day review period closes, APHIS will review and evaluate any information received during the 30-day review period. If, after evaluating the information received, APHIS determines that we have not received substantive new information that would warrant APHIS altering our preliminary regulatory determination or FONSI, substantially changing the proposed action identified in the EA, or substantially changing the analysis of impacts in the EA, APHIS will notify the public through an announcement on our Web site of our final regulatory determination. If, however, APHIS determines that we have received substantive new information that would warrant APHIS altering our preliminary regulatory determination or FONSI, substantially changing the proposed action identified in the EA, or substantially changing the analysis of impacts in the EA, then APHIS will notify the public of our intent to conduct additional analysis and to prepare an amended EA, a new FONSI, and/or a revised PPRA, which would be made available for public review through the publication of a notice of availability in the **Federal Register**. APHIS will also notify the petitioner.

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 19th day of July, 2013.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–17937 Filed 7–25–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request–WIC Nutrition Services and Administration (NSA) Cost Study

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this proposed information collection. This collection is a new collection to obtain data on how State and local WIC agencies calculate NSA costs; how recent Program changes have impacted NSA costs; and how administrative costs and policies compare to those of Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF).

DATES: Written comments must be received on or before September 24, 2013.

ADDRESSES: Comments are invited on (a) whether the proposed data 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 that were used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Written comments may be sent to: Dr. Melissa Abelev, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 1014, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Dr. Melissa Abelev at 703–305–2209 or via email to *Melissa.Abelev@fns.usda.gov.* Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5:00 p.m., Monday through Friday) at 3101 Park Center Drive, Room 1014, Alexandria, Virginia 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Dr. Melissa Abelev at 703–305–2209.

SUPPLEMENTARY INFORMATION:

Title: WIC Nutrition Services and Administration (NSA) Cost Study.

Form Number: N/A.

OMB Number: Not yet assigned.

Expiration Date: Not yet determined.

Type of Request: New collection.

Abstract: The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), (Pub. L. 109–85), is administered at the Federal level by the Food and Nutrition Service (FNS) of the U.S. Department of Agriculture. Through Federal grants to States, WIC

provides low-income pregnant, breastfeeding, and postpartum women, infants, and children up to age five with nutritious supplemental foods. The program also provides nutrition education and referrals to health and social services.

NSA costs, the focus of this study, are the direct and indirect costs, which State and local agencies determine to be necessary to support WIC Program operations, exclusive of food costs. NSA costs include, but are not limited to, the costs of Program administration, start-up, monitoring, auditing, the development of and accountability for food delivery systems, nutrition education and breastfeeding promotion and support, outreach, certification, and developing and printing food instruments and cash-value vouchers.

The current federal WIC regulations are designed to encourage women to breastfeed and to provide appropriate nutritional support for WIC participants. As part of these provisions, States must spend a minimum amount of grant funds, as determined by a national formula, on nutrition education and breastfeeding support services.

The last study on NSA costs took place in 2000. Since then, there have been many changes in the WIC Program—from new food packages, to the Value Enhanced Nutrition Assessment (VENA), to Management Information System (MIS) upgrades, and the start of the mandated conversion to Electronic Benefit Transfer (EBT) cards—all of which have impacted NSA costs. A census of state and local agencies will be conducted to provide insight into how NSA grant funds are used and have been impacted by recent changes. It will also provide a point of comparison with the administrative costs of other federal assistance programs by collecting data from state and local officials overseeing SNAP and TANF.

Data will be collected in four ways: (1) The collection of extant WIC State agency documents as summarized annually on FNS Forms 798 and 798–A (currently approved under 0584–0045); (2) a web survey of all WIC State and local agencies (preceded by a letter of introduction and recruitment); (3) key informant interviews with WIC administrators in 14 WIC State agencies plus interviews with 32 local agency directors within these State agencies; and (4) key informant interviews with state SNAP and TANF officials in nine jurisdictions plus interviews with two local SNAP/TANF agency officials (preceded by a letter of introduction and recruitment).

Affected Public: State, Local, and Tribal Government: Respondent groups identified include: All State WIC Directors; all local WIC agency Directors; selected State WIC Directors; selected local WIC agency Directors; selected state and local SNAP and TANF agencies.

Estimated Number of Respondents: The total estimated number of respondents is 4,156. This includes: 90 State WIC directors (extant data request); 90 State WIC directors (letter); 90 State WIC Directors (web survey); 14 State WIC directors (interview); 1,900 local WIC agency directors (letter); 1,900 local WIC agency directors (web survey); 32 local WIC agency directors (interview); 9 state SNAP agency officials (letter); 9 state SNAP agency officials (interview); 9 state TANF agency officials (letter); 9 state TANF agency officials (interview); one local SNAP agency official (letter); one local SNAP agency official (interview); one local TANF agency official (letter); one local SNAP agency official (interview).

Estimated Number of Responses per Respondent: All response tasks listed above require just one response each.

Estimated Total Annual Responses: 4,156.

Estimated Time per Response: The estimated time for each response is shown in the burden table below. Dividing the total hours of 2,772.00 by the 4,156 respondents (or responses) yields an average estimated time of .667 hours per response.

Estimated Total Annual Burden on Respondents: 2,772.00 hours. See the table following for estimated total annual burden for each type of respondent.

Respondent	Estimated number respondent	Responses annually per respondent	Total annual responses (column b × c)	Estimated average number of hours per response	Estimated total hours (column d × e)
Reporting Burden					
State WIC Director Form 798/798–A Extant Data Request	90	1	90	1.00	90.00
State WIC Director Letter of Introduction and Recruitment	90	1	90	0.33	30.00
State WIC Director Web Survey	90	1	90	1.00	90.00
State WIC Director Interview	14	1	14	4.00	56.00
State SNAP Official Letter of Introduction and Recruitment	9	1	9	0.25	2.25
State SNAP Official Interview	9	1	9	1.50	13.50
State TANF Official Letter of Introduction and Recruitment	9	1	9	0.25	2.25
State TANF Official Interview	9	1	9	1.50	13.50
Local WIC Agency Director Letter of Introduction and Recruitment	1,900	1	1,900	0.25	475.00
Local WIC Agency Director Web Survey	1,900	1	1,900	1.00	1,900
Local WIC Agency Director Interview	32	1	32	3.00	96.00
Local SNAP Official Letter of Introduction and Recruitment	1	1	1	0.25	0.25
Local SNAP Official Interview	1	1	1	1.50	1.50
Local TANF Official Letter of Introduction and Recruitment	1	1	1	0.25	0.25
Local TANF Official Interview	1	1	1	1.50	1.50
Total Reporting Burden	4,156	1	4,156	.666987	2,772.00

Dated: July 17, 2013.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2013–17992 Filed 7–25–13; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Enhancing Completion Rates for Supplemental Nutrition Assistance Program (SNAP) Quality Control Reviews

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this proposed information collection. This is a new collection for Enhancing Completion Rates for SNAP Quality Control Reviews.

DATES: Written comments must be received on or before September 24, 2013.

ADDRESSES: Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology.

Comments may be sent to Steven Carlson, Office of Research and Analysis, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 1014, Alexandria, VA 22302. Comments may also be submitted via fax to the attention of Steven Carlson at 703–305–2576 or via email to *Steve.Carlson@fns.usda.gov.* Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5:00 p.m. Monday through Friday) at 3101 Park Center Drive, Room 1014, Alexandria, VA 22302.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collection should be directed to Steven Carlson at 703–305–2017.

SUPPLEMENTARY INFORMATION: *Title:* Enhancing Completion Rates for SNAP (Supplemental Nutrition Assistance Program) Quality Control Reviews.

OMB Number: Not yet assigned.

Expiration Date: Not yet determined.

Type of Request: New collection of information.

Abstract:

Section 17 [7 U.S.C. 2026] (a)(1) of the Food and Nutrition Act of 2008, provides general legislative authority for the planned data collection. It authorizes the Secretary of Agriculture to enter into contracts with private institutions to undertake research that will help improve the administration and effectiveness of SNAP in delivering nutrition-related benefits.

States conduct monthly quality control (QC) reviews of a statistical sample of households participating in SNAP to assess the validity of SNAP cases and, ultimately, the error rate for SNAP. This requires completing as many reviews as possible. However, beginning in 1985, the completion rate of sampled QC reviews decreased nationally, reaching a low in FY 2006. The completion rate has increased somewhat since then, but not to previous levels. Completion rates vary considerably among States as well. This research will identify the factors associated with incomplete reviews in active SNAP cases and recommend ways to enhance completion rates for SNAP QC reviews.

Primary data collected from persons involved in conducting and monitoring the QC reviews and extant State administrative data, will be analyzed to compare information across the States; provide descriptive estimates of the contribution to payment error associated with incomplete reviews; and assess the need to adjust the current procedures for treating incomplete cases.

The information collection includes site visits at six State agencies, in-depth (semi-structured) interviews with SNAP QC staff during those site visits, and Web and telephone interviews with SNAP QC staff in the remaining 47 States not being visited. The SNAP QC director, up to two SNAP QC supervisors and up to five State QC reviewers from each State will be interviewed.[1]

The specific research objectives are to: describe the process of conducting a QC review at the State and Federal levels; describe the characteristics of incomplete cases and compare them to complete cases using extant administrative case file data; describe the challenges and best practices in the QC review process at the State level; determine whether incomplete cases are being reviewed and processed correctly; determine the impact of incomplete cases on overall payment error; and determine the extent to which incomplete cases bias the data in the QC database.

Affected Public:

State Employees: Respondent groups identified include (1) State QC directors, if the position exists or State SNAP directors, in all 53 SNAP States; (2) State QC supervisors in 53 SNAP States, up to 2 per State (if more than 2 in a State, selected as a sample of convenience); and (3) State QC reviewers from 53 SNAP States, up to 5 per State (if more than 5 in a State, selected as a sample of convenience).

Estimated Number of Respondents:

The total estimated number of respondents is 424. This includes 53 State QC or State SNAP directors (1 in the pretest, 100 percent of whom will complete interviews; 6 in person, 100 percent of whom will complete interviews; and 46 online or by telephone, 78 percent of whom will complete surveys); 106 State QC supervisors (3 in the pretest, 100 percent of whom will complete interviews; 12 in person, 100 percent of whom will complete interviews; and 91 online or by telephone, 81 percent of whom will complete surveys); and 265 State QC reviewers (5 in the pretest, 100 percent of whom will complete interviews; 30 in person, 100 percent of whom will complete interviews; and 230 online or by telephone, 81 percent of whom will complete surveys).

Estimated Number of Responses per Respondent:

[1] Additional information contributing to this research will be collected from FNS regional offices and staff acting in their official capacities (not subject to OMB approval) and SNAP participants sampled for QC with incomplete reviews (OMB approval previously granted for the QC Review Schedule (0584–0299) and Worksheet for QC Reviews (0584–0074)).

All respondents (State SNAP QC directors or State SNAP directors, State SNAP QC supervisors, and State SNAP QC reviewers) will respond once each, either one in-person interview or one Web or telephone survey. In addition, all SNAP QC directors will be contacted with an advance letter and six will receive follow-up communications to arrange site visits.

Estimated Total Annual Responses:

The estimated total annual responses is 1,040, including initial recruitment and coordination communications, pretests and completed interviews and surveys.

Estimated Time per Response:

Response times may vary from 0.05 to 1 hour depending on actual activity and respondent group. The estimated time per interview is 0.5 hours to 1 hour, depending on respondent group and interview mode, as shown in the table below.

Estimated Total Annual Burden on Respondents:

The estimated total annual burden on respondents is 255.60 hours (including recruitment communications and completed and attempted interviews and surveys). See the table below for estimated total annual burden for each type of respondent.

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Affected Public	Respondent Type	Instrument Type	Estimated Number of Respondents	Frequency of Response	Total Annual Responses	Response Burden Hours	Estimated Total Hours
State, Local or Tribal Government Agencies	State QC Directors	Advance letter *	53	1	53	0.05	2.65
		Site visit recruitment email/follow-up communications*	6	1	6	1	6
		Interview pretest*	1	1	1	1	1
		In-person interview*	6	1	6	1	6
		Web survey	18	1	18	0.5	9
		Web survey (non-response)	28	1	28	0.05	1.4
		Survey: First phone call	11	1	11	0.5	5.5
		Survey: First phone call (non-response)	17	1	17	0.08	1.36
		Follow-up phone call #1	3	1	3	0.5	1.5
		Follow-up phone call #1 (non-response)	14	1	14	0.08	1.12
		Follow-up phone call #2	2	1	2	0.5	1
		Follow-up phone call #2 (non-response)	12	1	12	0.08	0.96
		Follow-up phone call #3	2	1	2	0.5	1
		Follow-up phone call #3 (non-response)	10	1	10	0.08	0.8
	SUBTOTAL State QC Directors		**53**	**---**	**183**	**---**	**39.29**
	State QC Supervisors	Interview pretest*	1	1	1	1	1.00
		In-person interview*	12	1	12	1	12.00
		Survey pretest*	2	1	2	0.5	1.00
		Web survey	36	1	36	0.5	18.00
		Web survey (non-response)	55	1	55	0.05	2.75
		Survey: First phone call	22	1	22	0.5	11.00
		Survey: First phone call (non-response)	33	1	33	0.08	2.64
		Follow-up phone call #1	6	1	6	0.5	3.00
		Follow-up phone call #1 (non-response)	27	1	27	0.08	2.16
		Follow-up phone call #2	5	1	5	0.5	2.50
		Follow-up phone call #2 (non-response)	22	1	22	0.08	1.76
		Follow-up phone call #3	4	1	4	0.5	2.00
		Follow-up phone call #3 (non-response)	18	1	18	0.08	1.44
	SUBTOTAL State QC Supervisor		**106**	**---**	**243**	**---**	**61.25**
	State QC Reviewers	Interview pretest*	2	1	2	1	2
		In-person interview*	30	1	30	1	30
		Survey pretest*	3	1	3	0.5	1.5

		Web survey	92	1	92	0.5	46
		Web survey (non-response)	138	1	138	0.05	6.9
		Survey: First phone call	56	1	56	0.5	28
		Survey: First phone call (non-response)	85	1	85	0.08	6.8
		Follow-up phone call #1	17	1	17	0.5	8.5
		Follow-up phone call #1 (non-response)	68	1	68	0.08	5.44
		Follow-up phone call #2	13	1	13	0.5	6.5
		Follow-up phone call #2 (non-response)	55	1	55	0.08	4.4
		Follow-up phone call #3	11	1	11	0.5	5.5
		Follow-up phone call #3 (non-response)	44	1	44	0.08	3.52
	SUBTOTAL State QC Reviewer		**265**	**---**	**614**	**---**	**155.06**
ESTIMATED GRAND TOTAL BURDEN HOURS			**424**	**---**	**1,040**	**---**	**255.60**

Dated: July 16, 2013.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2013–17997 Filed 7–25–13; 8:45 am]

BILLING CODE 3410–30–C

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Child and Adult Care Food Program: National Average Payment Rates, Day Care Home Food Service Payment Rates, and Administrative Reimbursement Rates for Sponsoring Organizations of Day Care Homes for the Period July 1, 2013 Through June 30, 2014

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: This notice announces the annual adjustments to the national average payment rates for meals and snacks served in child care centers, outside-school-hours care centers, at-risk afterschool care centers, and adult day care centers; the food service payment rates for meals and snacks served in day care homes; and the administrative reimbursement rates for sponsoring organizations of day care homes, to reflect changes in the Consumer Price Index. Further adjustments are made to these rates to reflect the higher costs of providing meals in the States of Alaska and Hawaii. The adjustments contained in this notice are made on an annual basis each July, as required by the laws and regulations governing the Child and Adult Care Food Program.

DATES: These rates are effective from July 1, 2013 through June 30, 2014.

FOR FURTHER INFORMATION CONTACT: Tina Namian, Section Head, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 640, Alexandria, Virginia 22302–1594, 703–305–2590.

SUPPLEMENTARY INFORMATION:

Definitions

The terms used in this notice have the meanings ascribed to them in the Child and Adult Care Food Program regulations, 7 CFR part 226.

Background

Pursuant to sections 4, 11, and 17 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753, 1759a and 1766), section 4 of the Child Nutrition Act of 1966 (42 U.S.C. 1773) and 7 CFR 226.4, 226.12 and 226.13 of the Program regulations, notice is hereby given of the new payment rates for institutions participating in the Child and Adult Care Food Program (CACFP). These rates are in effect during the period, July 1, 2013 through June 30, 2014.

As provided for under the law, all rates in the CACFP must be revised annually, on July 1, to reflect changes in the Consumer Price Index (CPI), published by the Bureau of Labor Statistics of the United States Department of Labor, for the most recent 12-month period. In accordance with this mandate, the United States Department of Agriculture (USDA) last published the adjusted national average payment rates for centers, the food service payment rates for day care homes, and the administrative reimbursement rates for sponsoring organizations of day care homes, for the period from July 1, 2012 through June 30, 2013, on July 24, 2012, in the **Federal Register** at 77 FR 43229.

Adjusted Payments

The following national average payment factors and food service payment rates for meals and snacks are in effect from July 1, 2013 through June 30, 2014. All amounts are expressed in dollars or fractions thereof. Due to a higher cost of living, the reimbursements for Alaska and Hawaii are higher than those for all other States. The District of Columbia, Virgin Islands, Puerto Rico, and Guam use the figures specified for the contiguous States. These rates do not include the value of USDA foods or cash-in-lieu of USDA foods which institutions receive as additional assistance for each lunch or supper served to participants under the Program. A notice announcing the value of USDA foods and cash-in-lieu of USDA foods is published separately in the **Federal Register**.

National Average Payment Rates for Centers

Payments for breakfast served are: *Contiguous States*—paid rate –28 cents, reduced price rate—128 cents, free rate—158 cents; *Alaska*—paid rate—41 cents, reduced price rate—223 cents, free rate—253 cents; *Hawaii*—paid rate—31 cents, reduced price rate—155 cents, free rate—185 cents.

Payments for lunch or supper served are: *Contiguous States*—paid rate—28 cents, reduced price rate—253 cents, free rate—293 cents; *Alaska*—paid rate—45 cents, reduced price rate—434 cents, free rate– 474 cents; *Hawaii*—

paid rate—32 cents, reduced price rate—302 cents, free rate—342 cents.

Payments for snack served are: *Contiguous States*—paid rate—7 cents, reduced price rate—40 cents, free rate—80 cents; *Alaska*—paid rate—11 cents, reduced price rate—65 cents, free rate—130 cents; *Hawaii*—paid rate—8 cents, reduced price rate—47 cents, free rate—94 cents.

Food Service Payment Rates for Day Care Homes

Payments for breakfast served are: *Contiguous States*—tier I—128 cents and tier II—47 cents; *Alaska*—tier I—204 cents and tier II—72 cents; *Hawaii*—tier I—149 cents and tier II—54 cents.

Payments for lunch or supper served are: *Contiguous States*—tier I—240 cents and tier II—145 cents; *Alaska*—tier I—389 cents and tier II—235 cents; *Hawaii*—tier I –281 cents and tier II—169 cents.

Payments for snack served are: *Contiguous States*—tier I—71 cents and tier II—19 cents; *Alaska*—tier I—116 cents and tier II—32 cents; *Hawaii*—tier I –83 cents and tier II—23 cents.

Administrative Reimbursement Rates for Sponsoring Organizations of Day Care Homes

Monthly administrative payments to sponsors for each sponsored day care home are: *Contiguous States*—initial 50 homes—109 dollars, next 150 homes—83 dollars, next 800 homes—65 dollars, each additional home—57 dollars; *Alaska*—initial 50 homes—176 dollars, next 150 homes—134 dollars, next 800 homes—105 dollars, each additional home—92 dollars; *Hawaii*—initial 50 homes—127 dollars, next 150 homes—97 dollars, next 800 homes—76 dollars, each additional home—67 dollars.

Payment Chart

The following chart illustrates the national average payment factors and food service payment rates for meals and snacks in effect from July 1, 2013 through June 30, 2014.

CHILD AND ADULT CARE FOOD PROGRAM (CACFP)

[Per Meal Rates in Whole or Fractions of U.S. Dollars Effective from July 1, 2013–June 30, 2014]

Centers	Breakfast	Lunch and Supper [1]	Snack
CONTIGUOUS STATES:			
PAID	$0.28	$0.28	$0.07
REDUCED PRICE	1.28	2.53	0.40
FREE	1.58	2.93	0.80
ALASKA:			
PAID	0.41	0.45	0.11
REDUCED PRICE	2.23	4.34	0.65
FREE	2.53	4.74	1.30
HAWAII:			
PAID	0.31	0.32	0.08
REDUCED PRICE	1.55	3.02	0.47
FREE	1.85	3.42	0.94

[1] These rates do not include the value of USDA foods or cash-in-lieu of USDA foods which institutions receive as additional assistance for each CACFP lunch or supper served to participants. A notice announcing the value of USDA foods and cash-in-lieu of USDA foods is published separately in the FEDERAL REGISTER.

Day Care Homes	Breakfast		Lunch and Supper		Snack	
	TIER I	TIER II	TIER I	TIER II	TIER I	TIER II
CONTIGUOUS STATES	$1.28	$0.47	$2.40	$1.45	$0.71	$0.19
ALASKA	2.04	0.72	3.89	2.35	1.16	0.32
HAWAII	1.49	0.54	2.81	1.69	0.83	0.23

ADMINISTRATIVE REIMBURSEMENT RATES FOR SPONSORING ORGANIZATIONS OF DAY CARE HOMES

[Per home/per month rates in U.S. dollars]

	Initial 50	Next 150	Next 800	Each addl
CONTIGUOUS STATES	$109	$83	$65	$57
ALASKA	176	134	105	92
HAWAII	127	97	76	67

The changes in the national average payment rates for centers reflect a 2.27 percent increase during the 12-month period, May 2012 to May 2013, (from 237.262 in May 2012, as previously published in the **Federal Register**, to 242.642 in May 2013) in the food away from home series of the CPI for All Urban Consumers.

The changes in the food service payment rates for day care homes reflect a 0.77 percent increase during the 12-month period, May 2012 to May 2013, (from 231.518 in May 2012, as previously published in the **Federal Register**, to 233.302 in May 2013) in the food at home series of the CPI for All Urban Consumers.

The changes in the administrative reimbursement rates for sponsoring organizations of day care homes reflect a 1.36 percent increase during the 12-month period, May 2012 to May 2013, (from 229.815 in May 2012, as previously published in the **Federal Register**, to 232.945 in May 2013) in the series for all items of the CPI for All Urban Consumers.

The total amount of payments available to each State agency for distribution to institutions participating in CACFP is based on the rates contained in this notice.

This action is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 601–612) and thus is exempt from the provisions of that Act. This notice has been determined to be exempt under Executive Order 12866.

CACFP is listed in the Catalog of Federal Domestic Assistance under No. 10.558 and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR Part 3015, Subpart V, and final rule related notice published at 48 FR 29114, June 24, 1983.)

This notice has been determined to be not significant and was reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866. This notice imposes no new reporting or recordkeeping provisions that are subject to OMB review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3518).

Authority: Sections 4(b)(2), 11a, 17(c) and 17(f)(3)(B) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753(b)(2), 1759a, 1766(f)(3)(B)) and section 4(b)(1)(B) of the Child Nutrition Act of 1966 (42 U.S.C. 1773(b)(1)(B)).

Dated: July 17, 2013.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2013–17991 Filed 7–25–13; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Food Distribution Program: Value of Donated Foods From July 1, 2013 Through June 30, 2014

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: This notice announces the national average value of donated foods or, where applicable, cash in lieu of donated foods, to be provided in school year 2014 (July 1, 2013 through June 30, 2014) for each lunch served by schools participating in the National School Lunch Program (NSLP), and for each lunch and supper served by institutions participating in the Child and Adult Care Food Program (CACFP).

DATES: *Effective Date:* July 1, 2013.

FOR FURTHER INFORMATION CONTACT: Anne Fiala, Program Analyst, Policy Branch, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Alexandria, Virginia 22302–1594, or via telephone (703) 305–2662.

SUPPLEMENTARY INFORMATION:

These programs are listed in the Catalog of Federal Domestic Assistance under Nos. 10.555 and 10.558 and are subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V, and final rule related notice published at 48 FR 29114, June 24, 1983.)

This notice imposes no new reporting or recordkeeping provisions that are subject to Office of Management and Budget review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). This action is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 601–612) and thus is exempt from the provisions of that Act. This notice was reviewed by the Office of Management and Budget under Executive Order 12866.

National Average Minimum Value of Donated Foods for the Period July 1, 2013 Through June 30, 2014

This notice implements mandatory provisions of sections 6(c) and 17(h)(1)(B) of the Richard B. Russell National School Lunch Act (the Act) (42 U.S.C. 1755(c) and 1766(h)(1)(B)). Section 6(c)(1)(A) of the Act establishes the national average value of donated food assistance to be given to States for each lunch served in the NSLP at 11.00 cents per meal. Pursuant to section 6(c)(1)(B), this amount is subject to annual adjustments on July 1 of each year to reflect changes in a three-month average value of the Price Index for Foods Used in Schools and Institutions for March, April, and May each year (Price Index). Section 17(h)(1)(B) of the Act provides that the same value of donated foods (or cash in lieu of donated foods) for school lunches shall also be established for lunches and suppers served in the CACFP. Notice is hereby given that the national average minimum value of donated foods, or cash in lieu thereof, per lunch under the NSLP (7 CFR part 210) and per lunch and supper under the CACFP (7 CFR Part 226) shall be 23.25 cents for the period July 1, 2013 through June 30, 2014.

The Price Index is computed using five major food components in the Bureau of Labor Statistics Producer Price Index (cereal and bakery products; meats, poultry and fish; dairy; processed fruits and vegetables; and fats and oils). Each component is weighted using the relative weight as determined by the Bureau of Labor Statistics. The value of food assistance is adjusted each July 1 by the annual percentage change in a three-month average value of the Price Index for March, April, and May each year. The three-month average of the Price Index increased by 2.0 percent from 200.89 for March, April, and May of 2012, as previously published in the **Federal Register**, to 204.88 for the same three months in 2013. When computed on the basis of unrounded data and rounded to the nearest one-quarter cent, the resulting national average for the period July 1, 2013 through June 30, 2014 will be 23.25 cents per meal. This is an increase of half of one cent from the school year 2013 (July 1, 2012 through June 30, 2013) rate.

Authority: Sections 6(c)(1)(A) and (B), 6(e)(1), and 17(h)(1)(B) of the Richard B. Russell National School Lunch Act (42 U.S.C. 1755(c)(1)(A) and (B) and (e)(1), and 1766(h)(1)(B)).

Dated: July 16, 2013.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2013–17998 Filed 7–25–13; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

National School Lunch, Special Milk, and School Breakfast Programs, National Average Payments/Maximum Reimbursement Rates

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: This Notice announces the annual adjustments to the ''national average payments,'' the amount of money the Federal Government provides States for lunches, afterschool snacks and breakfasts served to children participating in the National School Lunch and School Breakfast Programs; to the ''maximum reimbursement rates,'' the maximum per lunch rate from Federal funds that a State can provide a school food authority for lunches served to children participating in the National School Lunch Program; and to the rate of reimbursement for a half-pint of milk served to non-needy children in a school or institution which participates in the Special Milk Program for Children. The payments and rates are prescribed on an annual basis each July. The annual payments and rates adjustments for the National School Lunch and School Breakfast Programs

reflect changes in the Food Away From Home series of the Consumer Price Index for All Urban Consumers. The annual rate adjustment for the Special Milk Program reflects changes in the Producer Price Index for Fluid Milk Products.

DATES: These rates are effective from July 1, 2013 through June 30, 2014.

FOR FURTHER INFORMATION CONTACT: William Wagoner, Section Chief, School Programs Section, Policy and Program Development Branch, Child Nutrition Division, Food and Nutrition Service, USDA, 3101 Park Center Drive, Room 640, Alexandria, VA 22302 or phone (703) 305–2590.

SUPPLEMENTARY INFORMATION:

Background

Special Milk Program for Children—Pursuant to section 3 of the Child Nutrition Act of 1966, as amended (42 U.S.C. 1772), the Department announces the rate of reimbursement for a half-pint of milk served to non-needy children in a school or institution that participates in the Special Milk Program for Children. This rate is adjusted annually to reflect changes in the Producer Price Index for Fluid Milk Products, published by the Bureau of Labor Statistics of the Department of Labor.

For the period July 1, 2013 through June 30, 2014, the rate of reimbursement for a half-pint of milk served to a non-needy child in a school or institution which participates in the Special Milk Program is 20.25 cents. This reflects an increase of 6.13 percent in the Producer Price Index for Fluid Milk Products from May 2012 to May 2013 (from a level of 208.8 in May 2012, as previously published in the **Federal Register** to 221.6 in May 2013).

As a reminder, schools or institutions with pricing programs that elect to serve milk free to eligible children continue to receive the average cost of a half-pint of milk (the total cost of all milk purchased during the claim period divided by the total number of purchased half-pints) for each half-pint served to an eligible child.

National School Lunch and School Breakfast Programs—Pursuant to sections 11 and 17A of the Richard B. Russell National School Lunch Act, (42 U.S.C. 1759a and 1766a), and section 4 of the Child Nutrition Act of 1966 (42 U.S.C. 1773), the Department annually announces the adjustments to the National Average Payment Factors and to the maximum Federal reimbursement rates for lunches and afterschool snacks served to children participating in the National School Lunch Program and breakfasts served to children participating in the School Breakfast Program. Adjustments are prescribed each July 1, based on changes in the Food Away From Home series of the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor. The changes in the national average payment rates for schools and residential child care institutions for the period July 1, 2013 through June 30, 2014 reflect a 2.27 percent increase in the Consumer Price Index for All Urban Consumers during the 12-month period May 2012 to May 2013 (from a level of 237.262 in May 2012, as previously published in the **Federal Register** to 242.642 in May 2013). Adjustments to the national average payment rates for all lunches served under the National School Lunch Program, breakfasts served under the School Breakfast Program, and afterschool snacks served under the National School Lunch Program are rounded down to the nearest whole cent.

Lunch Payment Levels—Section 4 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1753) provides general cash for food assistance payments to States to assist schools in purchasing food. The Richard B. Russell National School Lunch Act provides two different section 4 payment levels for lunches served under the National School Lunch Program. The lower payment level applies to lunches served by school food authorities in which less than 60 percent of the lunches served in the school lunch program during the second preceding school year were served free or at a reduced price. The higher payment level applies to lunches served by school food authorities in which 60 percent or more of the lunches served during the second preceding school year were served free or at a reduced price.

To supplement these section 4 payments, section 11 of the Richard B. Russell National School Lunch Act (42 U.S.C.1759 (a)) provides special cash assistance payments to aid schools in providing free and reduced price lunches. The section 11 National Average Payment Factor for each reduced price lunch served is set at 40 cents less than the factor for each free lunch.

As authorized under sections 8 and 11 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1757 and 1759a), maximum reimbursement rates for each type of lunch are prescribed by the Department in this Notice. These maximum rates are to ensure equitable disbursement of Federal funds to school food authorities.

Section 201 of the Healthy, Hunger-Free Kids Act of 2010—Section 201 of the Healthy, Hunger-Free Kids Act of 2010 made significant changes to the Richard B. Russell National School Lunch Act. On April 27, 2012, the interim rule entitled, ''Certification of Compliance With Meal Requirements for the National School Lunch Program Under the Healthy, Hunger-Free Kids Act of 2010'' (77 FR 25024), was published and provides eligible school food authorities with performance-based cash reimbursement in addition to the general and special cash assistance described above. The interim rule requires that school food authorities be certified by the State agency as being in compliance with the updated meal pattern and nutrition standard requirements set forth in amendments to 7 CFR Parts 210 and 220 on January 26, 2012, in the final rule entitled ''Nutrition Standards in the National School Lunch and School Breakfast Programs'' (77 FR 4088). Certified school food authorities are eligible to receive performance-based cash assistance for each reimbursable lunch served (an additional six cents per lunch available beginning October 1, 2012, and adjusted annually thereafter).

Afterschool Snack Payments in Afterschool Care Programs—Section 17A of the Richard B. Russell National School Lunch Act (42 U.S.C. 1766a) establishes National Average Payments for free, reduced price and paid afterschool snacks as part of the National School Lunch Program.

Breakfast Payment Factors—Section 4 of the Child Nutrition Act of 1966 (42 U.S.C. 1773) establishes National Average Payment Factors for free, reduced price and paid breakfasts served under the School Breakfast Program and additional payments for free and reduced price breakfasts served in schools determined to be in ''severe need'' because they serve a high percentage of needy children.

Revised Payments

The following specific section 4, section 11 and section 17A National Average Payment Factors and maximum reimbursement rates for lunch, the afterschool snack rates, and the breakfast rates are in effect from July 1, 2013 through June 30, 2014. Due to a higher cost of living, the average payments and maximum reimbursements for Alaska and Hawaii are higher than those for all other States. The District of Columbia, Virgin Islands, Puerto Rico and Guam use the figures specified for the contiguous States.

National School Lunch Program Payments

Section 4 National Average Payment Factors—In school food authorities which served less than 60 percent free and reduced price lunches in School Year 2011–12, the payments for meals served are: *Contiguous States*—paid rate—28 cents, free and reduced price rate—28 cents, maximum rate—36 cents; *Alaska*—paid rate—45 cents, free and reduced price rate—45 cents, maximum rate—57 cents; *Hawaii*—paid rate—32 cents, free and reduced price rate—32 cents, maximum rate—41 cents.

In school food authorities which served 60 percent or more free and reduced price lunches in School Year 2011–12, payments are: *Contiguous States*—paid rate—30 cents, free and reduced price rate—30 cents, maximum rate—36 cents; *Alaska*—paid rate—47 cents, free and reduced price rate—47 cents, maximum rate—57 cents; *Hawaii*—paid rate—34 cents, free and reduced price rate—34 cents, maximum rate—41 cents.

School food authorities certified to receive the performance-based cash assistance will receive an additional 6 cents (adjusted annually) added to the above amounts as part of their section 4 payments.

Section 11 National Average Payment Factors—Contiguous States—free lunch—265 cents, reduced price lunch—225 cents; *Alaska*—free lunch—429 cents, reduced price lunch—389 cents; *Hawaii*—free lunch—310 cents, reduced price lunch—270 cents.

Afterschool Snacks in Afterschool Care Programs—The payments are: *Contiguous States*—free snack—80 cents, reduced price snack—40 cents, paid snack—07 cents; *Alaska*—free snack—130 cents, reduced price snack—65 cents, paid snack—11 cents; *Hawaii*—free snack—94 cents, reduced price snack—47 cents, paid snack—08 cents.

School Breakfast Program Payments

For schools ''not in severe need'' the payments are: *Contiguous States*—free breakfast—158 cents, reduced price breakfast—128 cents, paid breakfast—28 cents; *Alaska*—free breakfast—253 cents, reduced price breakfast—223 cents, paid breakfast—41 cents; *Hawaii*—free breakfast—185 cents, reduced price breakfast—155 cents, paid breakfast—31 cents.

For schools in ''severe need'' the payments are: *Contiguous States*—free breakfast—189 cents, reduced price breakfast—159 cents, paid breakfast—28 cents; *Alaska*—free breakfast—303 cents, reduced price breakfast—273 cents, paid breakfast—41 cents; *Hawaii* - free breakfast—221 cents, reduced price breakfast—191 cents, paid breakfast—31 cents.

Payment Chart

The following chart illustrates the lunch National Average Payment Factors with the sections 4 and 11 already combined to indicate the per lunch amount; the maximum lunch reimbursement rates; the reimbursement rates for afterschool snacks served in afterschool care programs; the breakfast National Average Payment Factors including ''severe need'' schools; and the milk reimbursement rate. All amounts are expressed in dollars or fractions thereof. The payment factors and reimbursement rates used for the District of Columbia, Virgin Islands, Puerto Rico and Guam are those specified for the contiguous States.

SCHOOL PROGRAMS—MEAL, SNACK AND MILK PAYMENTS TO STATES AND SCHOOL FOOD AUTHORITIES

[Expressed in dollars or fractions thereof effective from July 1, 2013—June 30, 2014]

National School Lunch Program *	Less than 60%	Less than 60% + 6 cents	60% or more	60% or more + 6 cents	Maximum rate	Maximum rate + 6 cents
CONTIGUOUS STATES:						
PAID	0.28	0.34	0.30	0.36	0.36	0.42
REDUCED PRICE	2.53	2.59	2.55	2.61	2.70	2.76
FREE	2.93	2.99	2.95	3.01	3.10	3.16
ALASKA:						
PAID	0.45	0.51	0.47	0.53	0.57	0.63
REDUCED PRICE	4.34	4.40	4.36	4.42	4.60	4.66
FREE	4.74	4.80	4.76	4.82	5.00	5.06
HAWAII:						
PAID	0.32	0.38	0.34	0.40	0.41	0.47
REDUCED PRICE	3.02	3.08	3.04	3.10	3.22	3.28
FREE	3.42	3.48	3.44	3.50	3.62	3.68

School breakfast program	Non–severe need	Severe need
CONTIGUOUS STATES:		
PAID	0.28	0.28
REDUCED PRICE	1.28	1.59
FREE	1.58	1.89
ALASKA:		
PAID	0.41	0.41
REDUCED PRICE	2.23	2.73
FREE	2.53	3.03
HAWAII:		
PAID	0.31	0.31
REDUCED PRICE	1.55	1.91
FREE	1.85	2.21

Special milk program	All milk	Paid milk	Free Milk
PRICING PROGRAMS WITHOUT FREE OPTION	0.2025	N/A	N/A

Special milk program	All milk	Paid milk	Free Milk
PRICING PROGRAMS WITH FREE OPTION	N/A	0.2025	Average Cost Per ½ Pint of Milk
NONPRICING PROGRAMS	0.2025	N/A	N/A

AFTERSCHOOL SNACKS SERVED IN AFTERSCHOOL CARE PROGRAMS

CONTIGUOUS STATES:	
PAID	0.07
REDUCED PRICE	0.40
FREE	0.80
ALASKA:	
PAID	0.11
REDUCED PRICE	0.6
FREE	1.30
HAWAII:	
PAID	0.08
REDUCED PRICE	0.47
FREE	0.94

* Payment listed for Free and Reduced Price Lunches include both section 4 and section 11 funds

This action is not a rule as defined by the Regulatory Flexibility Act (5 U.S.C. 601–612) and thus is exempt from the provisions of that Act.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), no new recordkeeping or reporting requirements have been included that are subject to approval from the Office of Management and Budget.

This notice has been determined to be not significant and was reviewed by the Office of Management and Budget in conformance with Executive Order 12866.

National School Lunch, School Breakfast and Special Milk Programs are listed in the Catalog of Federal Domestic Assistance under No. 10.555, No. 10.553 and No. 10.556, respectively, and are subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR Part 3015, Subpart V, and the final rule related notice published at 48 FR 29114, June 24, 1983).

Authority: Sections 4, 8, 11 and 17A of the Richard B. Russell National School Lunch Act, as amended, (42 U.S.C. 1753, 1757, 1759a, 1766a) and sections 3 and 4(b) of the Child Nutrition Act, as amended, (42 U.S.C. 1772 and 42 U.S.C. 1773(b)).

Dated: July 16, 2013.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2013–17990 Filed 7–25–13; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–31–2013]

Foreign-Trade Zone 230—Piedmont Triad Area, North Carolina, Authorization of Production Activity, Oracle Flexible Packaging, Inc., (Foil-Backed Paperboard), Winston-Salem, North Carolina

On March 25, 2013, the Piedmont Triad Partnership, grantee of FTZ 230, submitted a notification of proposed production activity to the Foreign-Trade Zones (FTZ) Board on behalf of Oracle Flexible Packaging, Inc., within Site 28, in Winston-Salem, North Carolina.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (78 FR 23220, 4–18–2013). The FTZ Board has determined that no further review of the activity is warranted at this time. The production activity described in the notification is authorized, subject to the FTZ Act and the Board's regulations, including Section 400.14.

Dated: July 23, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–18052 Filed 7–25–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free Trade Agreement (NAFTA), Article 1904 Binational Panel Reviews: Notice of Termination of Panel Review

AGENCY: NAFTA Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: On June 24, 2013, a Notice of Motion to requesting termination of the panel review of the final results of the U.S. Department of Commerce's 2010 — 2011 New Shipper Antidumping Administrative Review of Seamless Refined Copper Pipe and Tube from Mexico (Secretariat File No. USA–MEX–2012–1904–03) was filed by the Complainant, GD Affiliates S. de R.L. de C.V. Motions consenting to the dismissal were filed by the Petitioner, Cerro Flow Products, LLC, Wieland Copper Products LL,C, and Mueller Copper Tube Co., on July 1, 2013 and the U.S. Investigating Authority, the U.S. Department of Commerce, on July 3, 2013.

SUMMARY: Pursuant to the Notice of Motion requesting termination of the panel review by a participant and consented to by all the participants, and pursuant to Rule 71(2) of the Rules of Procedure for Article 1904 Binational Panel Review, the panel review is terminated as of July 3, 2013. A panel has not been appointed to this panel review.

FOR FURTHER INFORMATION CONTACT: Ellen Bohon, United States Secretary, NAFTA Secretariat, Suite 2061, 14th

and Constitution Avenue, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the North American Free Trade Agreement (''Agreement'') established a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1994, the Government of the United States, the Government of Canada, and the Government of Mexico established Rules of Procedure for Article 1904 Binational Panel Reviews (''Rules''). These Rules were published in the **Federal Register** on February 23, 1994 (59 FR 8686). The panel review in this matter was requested and terminated pursuant to these Rules.

Dated: July 5, 2013.

Ellen Bohon,

United States Secretary, NAFTA Secretariat.

[FR Doc. 2013–17891 Filed 7–25–13; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC780

South Atlantic Fishery Management Council (Council); Public Meeting

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

ACTION: Notice of a public hearing meeting.

SUMMARY: The South Atlantic Fishery Management Council (SAFMC) will hold a public hearing meeting pertaining to: Amendment 5 to the Dolphin Wahoo Fishery Management Plan (FMP); and the Generic Dealer Amendment.

DATES: The meeting will be held on August 15, 2013, from 4 p.m. to 6 p.m.

ADDRESSES: The meeting will be held at the Radisson Airport Hotel, 2081 Post Road, Warwick, RI 02886; telephone: (401) 739–3000.

Council address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; telephone: (843) 571–4366 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: The items of discussion are as follows:

Public Hearing: Amendment 5 to the Dolphin Wahoo FMP

1. This amendment would revise the Allowable Biological Catches (ABCs), Annual Catch Limits (ACLs), Accountability Measures (AMs) and Annual Catch Targets (ACTs) for Dolphin and Wahoo that were implemented through the Comprehensive ACL Amendment.

2. Additionally, the amendment would revise management framework in the Dolphin Wahoo FMP as well as commercial trip limits for Dolphin.

3. Written comments may be directed to Bob Mahood, Executive Director, SAFMC (see Council address) or via email to: *DWAmend5Comments@safmc.net.* Comments will be accepted until 5 p.m. on August 18, 2013.

Public Hearing: Generic Dealer Amendment

1. The Generic Dealer Amendment would create a universal federal dealer permit that would be required to purchase all species managed by the SAFMC and the Gulf of Mexico Fishery Management Council (GMFMC).

2. The amendment also includes actions to create new requirements for dealer reporting (frequency and methods) as well as requirements to maintain dealer permits.

3. Written comments may be directed to Bob Mahood, Executive Director, SAFMC (see Council address) or via email to: *JointDealer AmendPHComments@safmc.net.* Comments will be accepted until 5 p.m. on August 18, 2013.

Council staff will present an overview of the amendments and will be available for informal discussions and to answer questions. Members of the public will also have the opportunity to go on record to record their comments on the public hearing topics for consideration by the SAFMC and GMFMC.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (see **ADDRESSES**) 3 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 23, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–17959 Filed 7–25–13; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Clarification of Sourcing Requirements for the Procurement List

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Clarification of Sourcing Requirements for Commodities and other Products on the Procurement List that have been identified as Satisfying Government-wide Requirements

SUMMARY: The Committee for Purchase From People Who Are Blind or Severely Disabled (operating as the U.S. AbilityOne Commission (Commission)) is clarifying the sourcing requirements for commodities and other products on the Procurement List that have been identified for satisfying Government-wide requirements and thus subject to the AbilityOne Program's Government-wide procurement preference. The full list of products with this Government-wide procurement preference furnished under the auspices of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) and the AbilityOne Program is posted at *www.abilityone.gov.* Changes to the responsible contracting activity designations as published in the **Federal Register** on December 1, 2006, are identified in this notice.

DATES: *Effective Date:* The changes delineated are effective the date of this notice.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Arlington, VA 22202—4149.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone 703–603–2118, Fax: 703–603–0655, or email *cmtefedreg@abilityone.gov.*

SUPPLEMENTARY INFORMATION: The Commission previously published a notice in the **Federal Register** (71 FR 69535, Dec 1, 2006) that established the General Services Administration (GSA) as the AbilityOne Program's only responsible contracting activity for products within the first category (the A List) and second category (the B List) purchased by Federal employees. The responsible contracting activity for

products within the third category (the C List) is a Government agency (civil and military) which represents the end-users of the specialized or niche product(s) within this category.

In order to take full advantage of the Department of Defense (DoD) 4140.1–R, DoD Supply Chain Materiel Management Regulation, the AbilityOne Program is designating the Defense Logistics Agency (DLA) as an additional contracting activity for products within the A List and B List categories. The DoD 4140.1–R, May 23, 2003, AP7: Appendix 7, Agreement between the Department of Defense and the General Services Administration Governing Supply Management Relationships Under the National Supply System provides DLA the authority to procure and supply certain assigned products for the entire Government within the terms of that Agreement. The AbilityOne Program's addition of DLA as an additional contracting activity for products that have the Procurement List procurement preference across all entities of the Government (A List) or that have purchasing preference across a broad selection of Federal agencies (B List) is supported by this regulation. This change enhances the availability of AbilityOne Program products to Government agencies (civil and military) regardless of which organization (DLA or GSA) manages a particular Federal Supply Classification.

When proposing to add a product to its Procurement List, the Commission's notices published in the **Federal Register** will continue to identify the category group (A List, B List, or C List) as described in its December 2006 **Federal Register** notice. The notices will also identify the relevant contracting activity responsible for aggregating requirements with AbilityOne products that have purchasing preference. All other aspects of the December 2006 **Federal Register** notice remain in effect.

Patricia Briscoe,

Director, Business Operations (Pricing and Information Management).

[FR Doc. 2013–17983 Filed 7–25–13; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Addition and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Addition to and Deletions from the Procurement List.

SUMMARY: The Committee is proposing to add a service to the Procurement List that will be provided by a nonprofit agency employing persons who are blind or have other severe disabilities, and deletes services previously provided by such agencies.

Comments Must Be Received on Or Before: August 26, 2013.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 10800, Arlington, Virginia, 22202–4149.

FOR FURTHER INFORMATION OR TO SUBMIT COMMENTS CONTACT: Patricia Briscoe, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 USC 8503 (a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Addition

If the Committee approves the proposed addition, the entity of the Federal Government identified in this notice will be required to procure the service listed below from the nonprofit agency employing persons who are blind or have other severe disabilities.

The following service is proposed for addition to the Procurement List for provision by the nonprofit agency listed:

Service

Service Type/Location: Facility and Grounds Maintenance Service US Army Corps of Engineers, Wallisville Lake 20020 IH–10 East Feeder Road Wallisville, TX.

NPA: Training, Rehabilitation, & Development Institute, Inc., San Antonio, TX.

Contracting Activity: DEPT OF THE ARMY, W076 ENDIST GALVESTON, GALVESTON, TX.

Deletions

The following services are proposed for deletion from the Procurement List:

Services

Service Type/Location: Mailing Service, VA Eastern Colorado Health Care System (ECHCS), 1055 Clermont Street, Denver, CO.

NPA: Jewish Family Service of Colorado, Denver, CO.

Contracting Activity: DEPARTMENT OF VETERANS AFFAIRS, 259–NETWORK CONTRACT OFFICE 19, GLENDALE, CO.

Service Type/Location: Document Destruction, USDA, Farm Service Agency, 4300 Goodfellow Blvd., St. Louis, MO.

NPA: Vintage Support Group, Inc.—Deleted, Belleville, IL

Contracting Activity: DEPARTMENT OF AGRICULTURE, FARM SERVICE AGENCY, KANSAS CITY ACQUISITION BRANCH, KANSAS CITY, MO.

Patricia Briscoe,

Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2013–17982 Filed 7–25–13; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds a products and services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Effective Date:* 8/26/2013

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 10800, Arlington, Virginia, 22202–4149.

FOR FURTHER INFORMATION CONTACT: Patricia Briscoe, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 5/31/2013 (78 FR 32631–32632); 6/7/2013 (78 FR 34350–34351); and 6/14/2013 (78 FR 35874–35875), the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and services and impact of the additions on the current or most recent contractors, the Committee has determined that the products and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or

other compliance requirements for small entities other than the small organizations that will provide the products and services to the Government.

2. The action will result in authorizing small entities to provide the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 USC 8501–8506) in connection with the products and services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products and services are added to the Procurement List:

Products

NSN: 7510–00–NIB–9905—Self Stick Rectangular Flag, 1'' x 1.7'', Bright Blue.
NPA: Association for the Blind and Visually Impaired—Goodwill Industries of Greater Rochester, Rochester, NY.
Contracting Activity: General Services Administration, New York, NY.
COVERAGE: A-List for the Total Government Requirement as aggregated by the General Services Administration.
NSN: 7920–00–NIB–0564—Towel, Cleaning, Non-woven Microfiber, Disposable, 16'' x 16''.
NPA: Bestwork Industries for the Blind, Inc., Runnemede, NJ.
Contracting Activity: General Services Administration,, Fort Worth, TX.
COVERAGE: A-List for the Total Government Requirement as aggregated by the General Services Administration.

Services

Service Type/Location: Grounds Maintenance Service, U.S. Census Bureau National Processing Center, 1201 E 10th Street, Jeffersonville, IN.
NPA: Rauch, Inc., New Albany, IN.
Contracting Activity: Dept of Commerce, Bureau of the Census, Jeffersonville, IN.
Service Type/Location: Janitorial Service, Department of Transportation, Suisun Bay Reserve Fleet, 2595 Lake Herman Road, Benicia, CA.
NPA: Solano Diversified Services, Vallejo, CA.
Contracting Activity: Dept of Transportation, Maritime Administration, San Francisco, CA.

Patricia Briscoe,

Deputy Director, Business Operations (Pricing and Information Management).

[FR Doc. 2013–17984 Filed 7–25–13; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2013–OS–0125]

Privacy Act of 1974; System of Records

AGENCY: Defense Information Systems Agency, DoD.

ACTION: Notice to alter a System of Records.

SUMMARY: The Defense Information Systems Agency proposes to alter a system of records in its existing inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective on August 26, 2013 unless comments are received which result in a contrary determination. Comments will be accepted on or before August 26, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

* Mail: Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Jeanette Weathers-Jenkins, DISA Privacy Officer, Chief Information Office, 6916 Cooper Avenue, Fort Meade, MD 20755–7901, or by phone at (301) 225–8158.

SUPPLEMENTARY INFORMATION: The Defense Information Systems Agency notices for system of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or from the Defense Privacy and Civil Liberties Office Web site *http://dpclo.defense.gov/privacy/SORNs/component/disa/index.html.* The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on June 3, 2013, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I of OMB Circular No. A–130, Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: July 23, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

K890.08

SYSTEM NAME:

Recall Roster/Locator Records (July 6, 2005, 70 FR 38892)

* * * * *

CHANGES:

SYSTEM LOCATION:

Delete entry and replace with ''Defense Information Systems Agency (DISA), Chief Information Office (CIO), 6916 Cooper Ave., Ft. Meade, MD 20755–7901.''

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with ''Civilian employees, military personnel and contractors assigned to DISA.''

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''Individual's name, emergency contact information, organizational and home address, work and home telephone numbers, email address, and cell phone number.''

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''5 U.S.C. 301, Department Regulations; 10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; E.O. 12656, Assignment of Emergency Preparedness Responsibilities; Presidential Decision Directive 67, Enduring Constitutional Government and Continuity of Government Operations; Federal Preparedness Circular 65, Federal Executive Branch Continuity of Operations; and DoD Directive 3020.36, Assignment of National Security Emergency Preparedness (NSEP) Responsibilities to DoD Components.''

PURPOSE(S):

Delete entry and replace with ''Information is collected and maintained to ensure that DISA has the capability to recall personnel to their place of duty when required, for use in emergency notification, and to perform

relevant functions/requirements/actions consistent with DISA mission.''

* * * * *

STORAGE:

Delete entry and replace with ''Records may be stored on paper and/or electronic storage media.''

RETRIEVABILITY:

Delete entry and replace with ''Retrieve by full name.''

SAFEGUARDS:

Delete entry and replace with ''Records are maintained in a controlled facility. Physical entry is restricted by the use of locks, guards, password protection and is accessible only to authorized personnel. Access to records is limited to person(s) responsible for servicing the record in performance of their official duties and who are properly screened and cleared for need-to-know. Access to computerized data is restricted by Common Access Card (CAC) and/or password which are changed periodically.''

RETENTION AND DISPOSAL:

Delete entry and replace with ''Records are continuously updated. Records that are no longer current are destroyed by shredding, pulping, macerating, or burning. Obsolete computer records are erased or overwritten.''

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''DISA Privacy Officer, Defense Information Systems Agency (DISA), Chief Information Office (CIO), 6916 Cooper Ave, Fort Meade, MD 20755–7901.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Defense Information Systems Agency, Chief Information Office (CIO), 6916 Cooper Ave, Fort Meade, MD 20755–7901.

The full name, home address, and telephone number of the requesting individual will be required to determine if the system contains a record about him or her. As proof of identity the requester must present a current DISA identification badge or a driver's license.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about them contained in this system of records should address written inquiries to the Defense Information Systems Agency, Chief Information Office (CIO), 6916 Cooper Ave, Fort Meade, MD 20755–7901.

The full name, home address, telephone number of the requesting individual will be required to determine if the system contains a record about him or her. As proof of identity the requester must present a current DISA identification badge or a driver's license.''

CONTESTING RECORD PROCEDURES:

Delete entry and replace with ''DISAs rules for accessing records, for contesting content and appealing initial agency determinations are published in DISA Instruction 210–225–2; 32 CFR part 316; or may be obtained from the DISA Privacy Officer.''

RECORD SOURCE CATEGORIES:

Delete entry and replace with ''Information is obtained from the subject individual and official personnel office documents.''

* * * * *

[FR Doc. 2013–17986 Filed 7–25–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2013–OS–0166]

Privacy Act of 1974; System of Records

AGENCY: Office of the Inspector General, DoD.

ACTION: Notice to alter a System of Records.

SUMMARY: The Office of the Inspector General proposes to alter a system of records, CIG–16, Defense Case Activity Tracking System (D–CATS), in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. This system records complaints, allegations of wrongdoing, and requests for assistance; documents inquiries; compiles statistical information; provides prompt, responsive and accurate information regarding the status of ongoing cases; provides a record of complaint disposition and records actions taken and notifications of interested parties and agencies.

DATES: This proposed action will be effective on August 26, 2013 unless comments are received which result in a contrary determination. Comments will be accepted on or before August 26, 2013.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

* *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, 2nd Floor, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mark Dorgan, DoD IG FOIA/Privacy Office, Department of Defense, Inspector General, 4800 Mark Center Drive, Alexandria, VA 22350–1500 or telephone: (703) 699–5680.

SUPPLEMENTARY INFORMATION: The Office of the Inspector General notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or from the Defense Privacy and Civil Liberties Web site at *http://dpclo.defense.gov/privacy/SORNs/component/oig/index.html.*

The proposed systems reports, as required by 5 U.S.C. 552a of the Privacy Act of 1974, were submitted on July 10, 2013, to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records about Individuals,'' dated February 8, 1996, (February 20, 1996, 61 FR 6427).

Dated: July 17, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

CIG–16

SYSTEM NAME:

DoD Hotline Program Case Files (October 15, 2008, 73 FR 61089).

CHANGES:

* * * * *

SYSTEM NAME:

Delete entry and replace with ''Defense Case Activity Tracking System (D–CATS).''

SYSTEM LOCATION:

Delete entry and replace with ''DoD Hotline, Office of Communications and Congressional Liaison, and Office of the Assistant Inspector General for Administrative Investigations, Office of the Inspector General of the Department of Defense (DoD), 4800 Mark Center Drive, Alexandria, VA 22350–1500.''

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with ''Individual's name, and case number; records resulting from the referral of, and inquiry into, hotline complaints, whistleblower reprisal investigations, improper mental health evaluations and senior official investigations, including the allegations submitted to the DoD Inspector General, referral documents to DoD components, investigative reports, information received from witnesses, records of action taken, disposition of the case, and supporting documentation.''

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with ''Public Law 95–452 as amended, Inspector General Act of 1978; and DoD Directive 5106.01, Inspector General of the Department of Defense.''

PURPOSE(S):

Delete entry and replace with ''To record complaints, allegations of wrongdoing, and requests for assistance; to document inquiries; to compile statistical information; to provide prompt, responsive and accurate information regarding the status of ongoing cases; to provide a record of complaint disposition and to record actions taken and notifications of interested parties and agencies.

Complaints appearing to involve criminal wrongdoing will be referred to the Defense Criminal Investigative Service or other criminal investigative units of DoD components.''

* * * * *

RETRIEVABILITY:

Delete entry and replace with ''By individual's name, subject matter, or case number.''

SAFEGUARDS:

Delete entry and replace with ''Full access is limited to DoD Hotline and Administrative Investigations staff. Read only access is provided to authorized DoD IG personnel consistent with their official duties. Paper and automated records are stored in rooms protected by cipher lock. The automated system is restricted to personnel with designated access, and regular back-ups of data are performed.''

RETENTION AND DISPOSAL:

Delete entry and replace with ''Hotline case files not referred for further review are destroyed after 2 years. Automated and paper records of Hotline cases referred for investigation, whistleblower reprisal cases and senior official cases are destroyed ten years after case closure.''

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with ''Assistant Inspector General for Administration and Management, Office of the Inspector General of the Department of Defense, 4800 Mark Center Drive, Alexandria, VA 22350–1500.''

NOTIFICATION PROCEDURE:

Delete entry and replace with ''Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Chief, Freedom of Information Act Requester Service Center/Privacy Act Office, Assistant Inspector General for Communications and Congressional Liaison, Office of the Inspector General, DoD, 4800 Mark Center Drive, Alexandria, VA 22350–1500.

For verification purposes, individuals shall provide their full name, address, any details that may assist in locating records of the individual and their signature.

In addition, the requester must provide a notarized statement or a signed declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).' (Signature).

If executed within the United States, its territories, possessions, or commonwealths: 'I declare under penalty of perjury that the foregoing is true and correct. Executed on (date).' (Signature).''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system should address written inquiries to the Chief, Freedom of Information Act Requester Service Center/Privacy Act Office, Assistant Inspector General for Communications and Congressional Liaison, Office of the Inspector General, DoD, 4800 Mark Center Drive, Alexandria, VA 22350–1500.

For verification purposes, individuals shall provide their full name, address, any details that may assist in locating records of the individual and their signature.

In addition, the requester must provide a notarized statement or a signed declaration made in accordance with 28 U.S.C. 1746, in the following format:

If executed outside the United States:

'I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).' (Signature).

If executed within the United States, its territories, possessions, or commonwealths: 'I declare under penalty of perjury that the foregoing is true and correct. Executed on (date).' (Signature).''

* * * * *

[FR Doc. 2013–17960 Filed 7–25–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket No. DARS–2013–0011]

Submission for OMB Review; Comment Request

ACTION: Notice.

The Defense Acquisition Regulations System has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

DATES: Consideration will be given to all comments received by August 26, 2013.

Title, Associated Form, and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS), Part 211 and related clause at 252.211; Radio Frequency Identification Advance Shipment Notices, OMB Control Number 0704–0434.

Type of Request: Extension.

Number of Respondents: 5,450.

Responses Per Respondent: 1,640.

Annual Responses: 8,940,996.

Average Burden Per Response: Approximately 1.35 seconds.

Annual Burden Hours: 3,354.

Needs and Uses: DoD uses advance shipment notices for the shipment of material containing RFID tag data. DoD receiving personnel use the advance shipment notice to associate the unique

identification encoded on the RFID tag with the corresponding shipment. Use of the RFID technology permits DoD an automated and sophisticated end-to-end supply chain, which has increased visibility of assets and permits delivery of supplies to the warfighter more quickly.

Affected Public: Businesses or other for-profit and not-for profit institutions.

Frequency: On Occasion.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

You may also submit comments, identified by docket number and title, by the following method:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, docket number, and title for the **Federal Register** document. The general policy for comments and other public 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 provided. To confirm receipt of your comment(s), please check *http://www.regulations.gov* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

DoD Clearance Officer: Ms. Patricia Toppings.

Written requests for copies of the information collection proposal should be sent to Ms. Toppings at WHS/ESD/Information Management Division, 4800 Mark Center Drive, 2nd Floor, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Kortnee Stewart,

Editor, Defense Acquisition Regulations System.

[FR Doc. 2013–17987 Filed 7–25–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Notice of a Joint Technical Assistance Workshop for Preparing Fiscal Year (FY) 2014 Grant Applications

AGENCY: International and Foreign Language Education, Office of Postsecondary Education, Department of Education.

ACTION: Notice.

[Catalog of Federal Domestic Assistance Number: 84.015A, 84.015B, 84.220A, 84.229A, and 84.016A.]

SUMMARY: The Department of Education (Department) International and Foreign Language Education (IFLE) announces a joint technical assistance workshop and project directors' meeting to be held in Washington, DC, September 22–24, 2013. The objective for the technical assistance workshop is to provide applicants with guidance on how to develop high-quality grant applications for programs authorized by Title VI of the Higher Education Act (HEA) that the Department expects to hold competitions for in FY 2014.

FOR FURTHER INFORMATION CONTACT: Cheryl E. Gibbs, IFLE, U.S. Department of Education, 1990 K Street NW., Washington, DC 20006–8521. Telephone: (202) 502–7634 or by email: *cheryl.gibbs@ed.gov* or Michelle Ward, IFLE. Telephone: (202) 502–7623 or by email: *michelle.ward@ed.gov.*

If you use a telecommunications device for the deaf or a text telephone, call the Federal Relay Service, toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The technical assistance workshop will provide assistance to applicants for the National Resource Centers (NRC) Program, the Foreign Language and Area Studies (FLAS) Fellowships Program, and the Centers for International Business Education (CIBE) Program, and the Language Resource Centers (LRC) Program. The project directors' meeting will provide assistance to FY 13 grantees of the Undergraduate International Studies and Foreign Language (UISFL) Program.

Workshop sessions include, but are not limited to sessions about the selection criteria, performance measures, program and project evaluation, and competition priorities. Technical assistance information will also include panels that will be open to all participants on topics such as language assessment, education abroad opportunities for students, integrating international education competencies into teacher education programs, outreach to underrepresented groups and institutions, and the role of international education programs in responding to President Obama's goals for achieving global competitiveness and improved college completion rates, among other topics.

The UISFL project directors' meeting will cover Department guidance for grant administration and risk management, budget and project revisions, the challenges facing project directors and key staff in administering their UISFL projects, and best practices gleaned from funded projects. UISFL program staff will discuss strategies for achieving successful project implementation and long-term sustainability, resource leveraging, and activities that could be conducted in coordination with NRC and LRC institutions.

A tentative agenda for the joint meeting is available at *http://iflemeetings.com/agenda/.*

Please be advised that this notice announces only the joint technical assistance workshop and project directors' meeting. The Department has not established deadline dates for any FY 2014 competitions. All FY 2014 competition notices will be published at a later time.

Other Information: Participants from NRC, FLAS, CIBE, and LRC institutions must not use grant funds for any costs associated with the technical assistance workshop. Project directors and participants from FY 13 UISFL grantee institutions are permitted to use grant funds to attend their meeting.

Exhibits: We welcome exhibit materials from individuals, institutions, and organizations but space is limited. Please see specific instructions for submitting exhibit proposals and materials at *http://iflemeetings.com/exhibitors/.*

Assistance to Individuals with Disabilities Attending the Technical Assistance Workshop:

The site for the joint technical assistance workshop and project directors' meeting is accessible to individuals with disabilities. If you need an auxiliary aid or service to participate (e.g., interpreting service, assistive listening device, or materials in an alternative format), notify the contact person listed under **FOR FURTHER INFORMATON CONTACT** at least two weeks before the scheduled workshop 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.

Registration: There is no registration fee for attending this joint meeting. All participants, however, should register online at *http://iflemeetings.com.*

Use the ''Contact Us'' page on the Web site *http://iflemeetings.com/contact/* to submit any questions you might have. All inquiries will be responded to online. Meeting Site and Reservations: The location for the joint workshop and meeting is as follows:

The Washington Hilton, 1990 Connecticut Avenue NW., Washington, DC 20009.

Participants are responsible for arranging their own travel and making their room reservations online. More information about how to obtain a hotel group rate is available at *http://iflemeetings.com/logistics/.*

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact persons listed in the **FOR FURTHER INFORMATION CONTACT** section.

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.

Program Authority: 20 U.S.C. §§ 1121–1123 and 1130–1131.

Dated: July 23, 2013.

Brenda Dann-Messier,

Assistant Secretary for Vocational and Adult Education, delegated the authority to perform the functions and duties of the Assistant Secretary for Postsecondary Education.

[FR Doc. 2013–18023 Filed 7–25–13; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2003–0079: FRL9840–1]

Agency Information Collection Activities; Proposed Collection; Comment Request; 8-Hour Ozone National Ambient Air Quality Standard Implementation Rule, EPA ICR No. 2236.04

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that the EPA is planning to submit to the Office of Management and Budget a request to renew an existing approved Information Collection Request (ICR) 2236.03—8-Hour Ozone National Ambient Air Quality Standard Implementation Rule. This ICR is scheduled to expire on July 31, 2013. Before submitting the ICR to OMB for review and approval, the EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before August 26, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2003–0079, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.*
- *Fax:* (202) 564–9744.
- *Mail:* Environmental Protection Agency, Air and Radiation Docket, Mailcode 2822T, 1200 Pennsylvania Ave. NW., Washington, D.C 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please include a total of two copies.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2003–0079. 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 *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means 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 *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 and any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

FOR FURTHER INFORMATION CONTACT: Mr. H. Lynn Dail, Air Quality Policy Division, Office of Air Quality Planning and Standards, Mail Code C539–01, Environmental Protection Agency, T.W. Alexander Drive, Research Triangle Park, NC 27711; telephone number: (919) 541–2363; fax number: 919–541–0824; email address: *dail.lynn@epa.gov.*

SUPPLEMENTARY INFORMATION:

How can I access the docket and/or submit comments?

The EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2003–0079, which is available for online viewing at *www.regulations.gov,* or in person viewing at the Air Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC The EPA/DC Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Air and Radiation Docket and Information Center is 202–566–1742.

Use *www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and access those documents in the public docket that are available electronically. Once in the system, select ''search'' and then key in the docket ID number identified in this document.

What information is the EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, the EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the

functions of the agency, including whether the information will have practical utility;

(ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) enhance the quality, utility and clarity of the information to be collected; and

(iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical or other technological collection techniques or other forms of information technology, e.g., by permitting electronic submission of responses. In particular, the EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that the EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Offer alternative ways to improve the collection activity.
6. Make sure to submit your comments by the deadline identified under DATES.
7. To ensure proper receipt by the EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date and *Federal Register* citation.

What information collection activity or ICR does this apply to?

Affected entities: Entities potentially affected by this action are state and local air agencies. They are potentially affected by the attainment demonstration, Reasonable Further Progress (RFP) State Implementation Plan (SIP) submission and Reasonable Available Control Technology (RACT) SIP submission for their nonattainment areas. State and local agencies are part of the North American Industrial Classification System Code number 924110. There are other entities that may be indirectly affected, as they may comment on the draft submissions before they are forwarded to the EPA's regional offices. These include potentially regulated entities, representatives of special interest groups and individuals.

Title: 8-Hour Ozone National Ambient Air Quality Standard Implementation Rule.

ICR numbers: EPA ICR No. 2236.03, OMB Control No. 2060–0594.

ICR status: This ICR is currently scheduled to expire on July 31, 2013. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9. They are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The PRA requires the information found in this ICR number 2236.03 to assess the burden (in hours and dollars) of the 1997 8-hour Ozone National Ambient Air Quality Standard (NAAQS) Implementation Rule as well as the periodic reporting and record keeping necessary to maintain the rule. The rule was proposed on June 2, 2003 (68 FR 32802), and promulgated in two Phases: Phase 1 published on April 30, 2004 (69 FR 23951), and Phase 2 published on November 29, 2005 (70 FR 71612). The preamble to the proposed and final regulations addressed the administrative burden in general terms. The preamble to the final Phase 2 rule stated that an ICR would be prepared (70 FR 71692). The rule includes requirements that involve collecting information from states with areas that remain designated nonattainment for the 1997 8-hour ozone NAAQS. The time period covered in this ICR is a 3-year period from August 1, 2013, through July 31, 2016. These information collection milestones include state submission of an attainment demonstration SIP, an RFP SIP submission and an RACT SIP. However, not all of the milestones and associated burden and administrative costs estimates apply to every designated nonattainment area. The burden estimated is for 6 of the 38 nonattainment areas that were reclassified to a higher classification resulting in new SIP revisions required. The remaining 32 nonattainment areas have either met the requirements or have had their requirements suspended.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 1,111 hours per response. Burden means the total time, effort or financial resources expended by persons to generate, maintain, retain or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install and utilize technology and systems for the purposes of collecting, validating and verifying information, processing and maintaining information and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the agency's estimate, which is only briefly summarized here:

Respondents/Affected Entities: State and local governments.

Estimated total number of respondents: 6.

Frequency of response: Annual.

Estimated total annual burden hours: 6,667 hours.

Estimated total annual costs: $434,000. This includes an estimated burden cost of $0 for capital investment or maintenance and operational costs.

Are there changes in the estimates from the last approval?

There is neither an increase nor a decrease of hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB.

What is the next step in the process for this ICR?

The EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, the EPA will issue another *Federal Register* notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

Dated: July 22, 2013.

Mary E. Henigin,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. 2013–18047 Filed 7–25–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9010–3]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed 07/15/2013 Through 07/19/2013

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html.*

EIS No. 20130213, Draft EIS, USFS, CA, Sugarloaf Hazardous Fuels Reduction Project, Comment Period Ends: 09/09/2013, Contact: Sharen Parker 530–534–6500.

EIS No. 20130214, Final Supplement, FHWA, WA, SR 167 Puyallup to SR 509, SR 167 Puyallup River Bridge Replacement, Review Period Ends: 08/26/2013, Contact: Dean Moberg 360–534–9344.

EIS No. 20130215, Second Draft Supplement, FHWA, WI, Wisconsin State Highway 23 Fond Du Lac to Plymouth—Project ID 1440–13/15–00 Limited Scope, Comment Period Ends: 09/30/2013, Contact: George Poirier 608–829–7500.

EIS No. 20130216, Draft EIS, FTA, WA, Lynnwood Link Extension, Comment Period Ends: 09/23/2013, Contact: Daniel Drais 206–220–7954.

EIS No. 20130217, Draft EIS, NPS, VA, Antietam National Battlefield, Monocacy National Battlefield and Manassas National Battlefield Park Draft White-tailed Deer Management Plan, Comment Period Ends: 09/27/2013, Contact: Tracy Atkins 303–969–2325.

EIS No. 20130218, Final EIS, USFWS, WA, Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls, Review Period Ends: 08/25/2013, Contact: Paul Henson 503–231–6179.

EIS No. 20130219, Final EIS, NPS, GA, Fort Pulaski National Monument General Management Plan and Wilderness Study, Review Period Ends: 08/26/2013, Contact: David Libman 404–507–5701.

EIS No. 20130220, Draft EIS, NPS, OH, Cuyahoga Valley National Park White-tailed Deer Management Plan, Comment Period Ends: 09/24/2013, Contact: Lisa Petit 440–546–5970.

EIS No. 20130221, Draft Supplement, BLM, CA, Palen Solar Electrical Generating System, Comment Period Ends: 10/24/2013, Contact: Frank McMenimen 760–833–7150.

EIS No. 20130222, Final EIS, BLM, CA, Ocotillo Sol Project, California Desert Conservation Area Plan Amendment, Review Period Ends: 08/26/2013, Contact: Noel Ludwig 951–697–5365.

EIS No. 20130223, Draft EIS, USACE, MO, St. Johns Bayou and New Madrid Floodway Project, Comment Period Ends: 09/09/2013, Contact: Joshua Koontz 901–544–3975.

EIS No. 20130224, Draft EIS, CALTRANS, CA, Ferguson Slide Permanent Restoration Project, Comment Period Ends: 09/26/2013, Contact: Scott Smith 559–445–6172.

EIS No. 20130225, Final EIS, USACE, CA, Salton Sea Species Conservation Habitat Project, Review Period Ends: 08/26/2013, Contact: Lanika Cervantes 760–602–4838.

Amended Notices

EIS No. 20130176, Draft EIS, APHIS, TX, Cattle Fever Tick Eradication Program—Tick Control Barrier, Comment Period Ends: 08/30/2013 Contact: Michelle Gray 301–851–3186.

Revision to FR Notice Published 06/21/2013; Extending Comment Period from 08/05/213 to 08/30/2013.

EIS No. 20130207, Draft EIS, FHWA, DC, Virginia Avenue Tunnel Reconstruction, Comment Period Ends: 09/25/2013, Contact: Michael Hicks 202–219–3513.

Revision to FR Notice Published 07/12/2013; Extending Comment Period from 08/26/2013 to 09/25/2013.

Dated: July 23, 2013.

Cliff Rader,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2013–18059 Filed 7–25–13; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB)

AGENCY: Federal Communications Commission.

ACTION: Notice; request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3502 -3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimates; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before August 26, 2013. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B. Herman, Federal Communications Commission, via the Internet at Judith-b.herman@fcc.gov. To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, FCC, at 202–418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0710.

Title: Policy and Rules Under Parts 1 and 51 Concerning the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996—CC Docket No. 96–98.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 15,282 respondents; 1,067,987 responses.

Estimated Time per Response: .50 hours to 4,000 hours.

Frequency of Response: On occasion reporting requirement, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 1–4, 201–205, 214, 224, 251, 303(r) and 601 of the Communications Act of 1934, as amended.

Total Annual Burden: 645,798 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting respondents to submit confidential information to the Commission. If the respondents wish confidential treatment of their information, they may request confidential treatment under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this expiring information collection during this comment period to obtain the full, three year clearance from the Office of Management and Budget (OMB). The Commission is reporting no change in the recordkeeping, reporting and/or third party disclosure requirements. There is no change in the Commission's previous (2010) burdens.

The Commission adopted rules in this information collection to implement the First Report and Order on Reconsideration issued in CC Docket No. 96–98 implementing parts of sections 251 and 252 of the Telecommunications Act of 1996 that affect local competition. Incumbent local exchange carriers (LECs) are required to offer interconnection, unbundled network elements (UNEs), transport and termination, and wholesale rates for certain services to new entrants. Incumbent LECS must price such services and rates that are cost-based and just and reasonable and provide access to right-of-way as well as establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic.

OMB Control Number: 3060–0742.

Title: Sections 52.21 through 52.36, Telephone Number Portability, 47 CFR Part 52, Subpart (C) and CC Docket No. 95–116.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 3,616 respondents; 10,001,890 responses.

Estimated Time per Response: 2 hours to 410 hours.

Frequency of Response: On occasion and one time reporting requirements, recordkeeping requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 151, 152, 154(i), 201–205, 215, 251(b)(2), 251(e)(2) and 332 of the Communications Act of 1934, as amended.

Total Annual Burden: 672,516 hours.

Total Annual Cost: $13,424,320.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: The Commission is not requesting respondents to submit confidential information to the Commission. If the respondents wish confidential treatment of their information, they may request confidential treatment under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this expiring information collection during this comment period to obtain the full, three year clearance from the Office of Management and Budget (OMB). There is no change to the reporting, recordkeeping and/or third party disclosure requirements. There is no change in the Commission's previous burden hour and cost estimates.

Section 251(b)(2) of the Communications Act of 1934, as amended, requires LECs to ''provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.'' Through the LNP process, consumers have the ability to retain their phone number when switching telecommunications service providers, enabling them to choose a provider that best suits their needs and enhancing competition. In the *Porting Interval Order and Further Notice,* the Commission mandated a one business day porting interval for simple wireline-to-wireline and intermodal port requests.

The information collected in the standard local service request data fields is necessary to complete simple wireline-to-wireline and intermodal ports within the one business day porting interval mandated by the Commission and will be used to comply with Section 251 of the Telecommunications Act of 1996.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2013–17951 Filed 7–25–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection(s) Being Submitted for Review and Approval to the Office of Management and Budget (OMB)

AGENCY: Federal Communications Commission.

ACTION: Notice; request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required b y the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3502–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimates; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be

submitted on or before August 26, 2013. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct your PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at 202–395–5167 or via Internet at *Nicholas_A._Fraser@omb.eop.gov* and to Judith B. Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov*. To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, FCC, at 202–418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–XXXX.

Title: Survey for Urban Rates for Fixed Voice and Fixed Broadband Residential Services.

Form Number: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit.

Number of Respondents: 1,000 respondents; 1,000 responses.

Estimated Time per Response: 3.5 hours.

Frequency of Response: Annual reporting requirement.

Obligation to Respond: Mandatory. Statutory authority for this information collection is contained in 47 U.S.C. sections 254 of the Communications Act of 1934, as amended.

Total Annual Burden: 3,500 hours.

Total Annual Cost: N/A.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: The information being collected is not confidential and no assurances of confidentiality are being provided.

Needs and Uses: The Commission will submit this new collection to the OMB for approval in order to obtain the three year clearance from them.

To implement certain reforms to universal service support, the Commission's Wireline Competition Bureau and the Wireless Telecommunications Bureau in an Order, DA 13–598, adopted the form and content for a survey of urban rates for fixed voice and fixed broadband residential services. The information collected in this survey will be used to establish a rate floor that eligible telecommunications carriers (ETCs) receiving high-cost loop support (HCLS) or frozen high-cost support must meet to receive their full support amounts and to help ensure that universal service support recipients offering fixed voice and broadband services do so at reasonably comparable rates to those in urban areas.

Specifically, the Commission directed the Bureaus to ''develop a methodology'' to survey a representative sample of facilities-based fixed voice service providers taking into account the relative categories of fixed voice providers as determined in the most recent FCC Form 477 data collection.

''The Commission also delegated authority to conduct an annual survey, in order to specify an appropriate minimum for usage allowances and to adjust such a minimum over time.''

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2013–17950 Filed 7–25–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice; request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501—3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information burden for small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before September 24, 2013. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Benish Shah, Federal Communications Commission, via the Internet at *Benish.shah@fcc.gov*. To submit your PRA comments by email send them to: *PRA@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: Benish Shah, Office of Managing Director, (202) 418–7866.

SUPPLEMENTARY INFORMATION: *OMB Control No.:* 3060–0936.

Title: Sections 95.1215, 95.1217, 95.1223 and 95.1225—Medical Device Radiocommunications Service (MedRadio).

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit and not-for-profit institutions.

Number of Respondents: 3,120 respondents; 3,120 responses.

Estimated Time per Response: 1–3 hours.

Frequency of Response: On occasion reporting requirement, third party disclosure requirement and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151 and 303 of the Communications Act of 1934, as amended.

Total Annual Burden: 9,120 hours.

Total Annual Cost: $462,600.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: No information is requested that would require assurance of confidentiality.

Needs and Uses: The Commission will submit this information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting a revision (there has been a program change in the reporting, recordkeeping requirements and/or third party disclosure requirements, the number of respondents/operators increased from 100 to 2,620, therefore, the annual burden and cost has also increased).

The Commission now seeks OMB approval for a revision. On May 24, 2012, the Commission released a Report

and Order, ET Docket No. 08–59, FCC 12–54, Amendment of Parts 2 and 95 of the Commission's rules which revised the requirements for manufacturers of transmitters for the ''Medical Device Radiocommunication Service'' to include with each transmitting device a statement regarding harmful interference and to label the device in a conspicuous location on the device. The Report and Order also adopted rules for ''Medical Body Area Network'' (MBAN), which requires the Commission to establish a process by which MBAN users will register and coordinate the use of certain medical devices. The frequency coordinator will make the database available to equipment manufacturers and the public. The coordinator will also notify users of potential frequency conflicts.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2013–17949 Filed 7–25–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act (PRA), pursuant to 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320 Appendix A.1. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before September 24, 2013.

ADDRESSES: You may submit comments, identified by FR 1374, by any of the following methods:

- *Agency Web site:* http://www.federalreserve.gov. Follow the instructions for submitting comments at *http://www.federalreserve.gov/apps/foia/proposedregs.aspx*.
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-Mail: regs.comments@federalreserve.gov*. Include OMB number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9:00 a.m. and 5:00 p.m. on weekdays.

Additionally, commenters may send a copy of their comments to the OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235 725 17th Street NW., Washington, DC 20503 or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, once approved. These documents will also be made available on the Federal Reserve Board's public Web site at: *http://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer—Cynthia Ayouch—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

Request for Comment on Information Collection Proposal

The following information collection, which is being handled under this delegated authority, has received initial Board approval and is hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

Proposal to approve under OMB delegated authority the extension for three years, with revision, of the following report:

Report title: Intermittent Survey of Business.

Agency form number: FR 1374.

OMB control number: 7100–0302.

Frequency: On Occasion.

Reporters: Businesses and state and local governments.

Estimated annual reporting hours: 1,825 hours.

Estimated average hours per response: 15 minutes.

Number of respondents: 2410.

General description of report: This information collection is voluntary (12 U.S.C. 225a and 263) and may be given confidential treatment (5 U.S.C. 552(b)(4)).

Abstract: The survey data are used by the Federal Reserve to gather information specifically tailored to the Federal Reserve's policy and operational responsibilities. There are two parts to this event-generated survey. First, under the guidance of Board economists, the Federal Reserve Banks survey business contacts as economic developments warrant. Currently, there are approximately 240 business

respondents for each survey (about 20 per Reserve Bank); occasionally state and local government officials are called, in which case there are far fewer respondents. It is necessary to conduct these surveys to provide timely information to the members of the Board and to the presidents of the Reserve Banks. Usually, these surveys are conducted by Reserve Bank staff economists telephoning or emailing purchasing managers, economists, or other knowledgeable individuals at selected, relevant businesses. Reserve Bank staff may also use online survey tools to collect responses to the survey. The frequency and content of the questions, as well as the entities contacted, vary depending on developments in the economy. Second, economists at the Board survey business contacts by telephone, inquiring about current business conditions. Board economists conduct these surveys as economic conditions require, with approximately ten respondents for each survey.

Current actions: The Federal Reserve proposes to increase the permitted number of respondents from 240 to 2,400, for the Reserve Bank surveys. This increase would allow (but not require) Reserve Banks to survey an average of 200 respondents per District instead of 20, providing better representation and more complete coverage of the developments within each District. The Reserve Banks have recently increased the number of businesses surveyed to better assess local markets (especially with respect to issues of broad applicability). The Board part of the survey would remain unchanged.

Board of Governors of the Federal Reserve System, July 23, 2013.

Robert de V. Frierson,

Secretary of the Board.

[FR Doc. 2013–17961 Filed 7–25–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 131 0069]

General Electric Company; Analysis of Proposed Agreement Containing Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before August 19, 2013.

ADDRESSES: Interested parties may file a comment at *https://ftcpublic.commentworks.com/ftc/geavioconsent* online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''General Electric, File No. 131 0069'' on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/geavioconsent*, by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Stephen W. Rodger (202–326–3643), FTC, Bureau of Competition, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for July 19, 2013), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm*. A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW, Washington, DC 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 19, 2013. Write AGeneral Electric, File No. 131 0069'' on your comment. Your comment B including your name and your state B will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm*. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any A[t]rade secret or any commercial or financial information which * * * is privileged or confidential,'' as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/geavioconsent* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home*. you also may file a comment through that Web site.

If you file your comment on paper, write AGeneral Electric, File No. 131 0069'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary,

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

Room H–113 (Annex D), 600 Pennsylvania Avenue NW, Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before August 19, 2013. You can find more information, including routine uses permitted by the Privacy Act, in the Commission=s privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

Analysis of Agreement Containing Consent Order To Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Order (''Consent Agreement'') with General Electric Company (''GE''), which is designed to remedy the anticompetitive effects of its proposed acquisition of the aviation business of Avio S.p.A. (''Avio''). Under the terms of the proposed Consent Agreement, GE would be required, among other things, to avoid interference with Avio's design and development work on a critical engine component—the accessory gearbox (''AGB'')—on the Pratt & Whitney PW1100G engine for the Airbus S.A.S. (''Airbus'') A320neo aircraft. GE and Pratt & Whitney are the only manufacturers of engines for the A320neo, and compete head-to-head for sales of engines to purchasers of that aircraft.

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make final the accompanying Decision and Order (''Order'').

Pursuant to an Agreement dated December 21, 2012, GE proposes to acquire Avio's aviation business for approximately $4.3 billion. The Commission's Complaint alleges that the proposed acquisition is in violation of Section 5 of the FTC Act, as amended, 15 U.S.C 45, and that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, by lessening the competition in the worldwide market for engine sales on the A320neo aircraft. That is because the acquisition would provide GE with the ability and incentive to disrupt the design and certification of the AGB for the Pratt & Whitney PW1100G engine, which in turn would provide GE with market power in the market for engines for the A320neo aircraft, allowing it to raise prices, reduce quality, or delay delivery of engines to A320neo customers. The proposed Consent Agreement will remedy the alleged violations by eliminating GE's ability and incentive to engage in such anticompetitive conduct post-merger.

II. The Parties

GE, headquartered in Connecticut, is one of the world's largest companies, with business segments serving a wide variety of industries throughout the globe. GE's aviation segment, among other things, designs and manufactures jet engines for commercial and military aircraft. GE sells narrow-body commercial aircraft engines through its 50% stake in CFM International (''CFM''), a joint venture with the French engine manufacturer Snecma S.A.

Avio is headquartered in Torino, Italy, and is an important designer and manufacturer of component parts for civil and military aircraft engines. Avio provides, among other things, structural parts, gearboxes, and electrical systems for aircraft engines. Avio is currently the sole designer of the AGB on the Pratt & Whitney PW1100G engine.

III. The Products and Structure of the Markets

AGBs use the mechanical power of the rotating turbine shaft in a jet engine to power various accessory systems needed by the engine and the aircraft, including oil and hydraulic pumps and electrical systems. Although AGBs on different aircraft engines perform similar functions, AGBs are designed for the specific engine in which it will be used to account for the shape of that engine, the position of the AGB in the engine, and the configuration and specifications of the various accessory systems the gearbox will power. Because AGBs require significant cost and time to develop, and because the aircraft engine—with its AGB—must be tested extensively and certified for flight by aviation authorities before it can be put into service, an engine manufacturer cannot quickly or easily replace an engine's AGB if it encounters difficulties with its component supplier.

Avio has the sole design responsibility for the AGB on the forthcoming Pratt & Whitney PW1100G engine, which will be one of two engines available on the Airbus A320neo aircraft. While Avio is in the advanced stages of designing this AGB, further development and testing must be completed before the AGB and the PW1100G engine will be certified for use by aviation authorities. Beyond that, further design work may be necessary even after the AGB and engine receive certification. Pratt & Whitney has no viable alternative to continuing to work with Avio to develop the AGB for the PW1100G, even after its rival engine manufacturer, GE, acquires Avio.

Aircraft engines provide the thrust necessary for flight and must be specifically engineered for the requirements and mission profile of the aircraft on which they are to be installed. When designing a new airplane, an aircraft manufacturer typically approaches engine manufacturers as potential suppliers and selects one or more to provide engines for the aircraft under development. These engines become customers' only options for that aircraft platform. Airbus chose to work with only Pratt & Whitney and CFM to develop engines for the A320neo platform. Aside from the PW1100G, the only other engine available for the Airbus A320neo is the CFM Leap 1–A engine, in which GE has a 50% interest. These two engines compete for sales on the A320neo aircraft platform, and because other engine manufacturers could not design, or attain certification for, an alternate A320neo engine within several years, purchasers of this aircraft do not have other viable substitutes for these engines.

The relevant geographic market in which to analyze the effects of the proposed transaction is the entire world. Engine component developers located around the world supply components to engine manufacturers who are also located worldwide. The aircraft manufacturers themselves are located across the globe, sell to customers worldwide, and do not significantly alter aircraft features for specific national markets.

IV. Entry

Entry into the relevant markets would not be timely, likely, or sufficient in magnitude to deter or counteract the anticompetitive effects likely to result from the proposed transaction. AGB design for large commercial aircraft like the A320neo requires significant

experience and resources, and it would take several years for a third-party provider to complete the development process and begin supplying AGBs for the PW1100G. This delay would make such third-party entry insufficient to prevent any potential anticompetitive effects from the proposed transaction. Similarly, entry into the market for engines powering the A320neo is also unlikely to deter or counter the anticompetitive effects of the proposed transaction. The design and production of an aircraft engine, along with the necessary certification of that engine on the aircraft platform, takes many years and a large financial investment.

V. Effects of the Acquisition

The proposed transaction, if consummated, would provide GE with both the ability and the incentive to disrupt the design and certification of the Avio-supplied AGB for the Pratt & Whitney PW1100G engine. A delay in the development of the PW1100G engine would substantially increase GE's market power for the sale of engines for the A320neo, as it manufactures the only other engine option for that aircraft. In response to such a delay, a significant number of Pratt &Whitney customers would likely switch to the CFM Leap 1–A, and GE would likely use its increased market power to raise price, reduce quality, or delay delivery of engines to customers of the A320neo aircraft.

VI. The Consent Agreement

The proposed Consent Agreement remedies the acquisition's likely anticompetitive effects by removing GE's ability and incentive to disrupt Avio's AGB work during the design, certification, and initial production ramp-up phase. The proposed Consent Agreement incorporates portions of a recent commercial agreement between GE, Avio, and Pratt & Whitney and Pratt & Whitney's original contract with Avio that relate to the design and development of the AGB and related parts for the PW1100G. A breach by GE of these aspects of these agreements therefore would constitute a violation of the Consent Agreement.

The Consent Agreement further requires GE not to interfere with Avio staffing decisions as they relate to work on the AGB for the PW1100G. It allows Pratt & Whitney to have a technical representative and a customer representative on-site at GE/Avio's facility to observe work on the PW1100G AGB. In addition, should Pratt & Whitney terminate its agreement with Avio, GE will be required to provide certain transition services, including licenses to intellectual property and access to specialized Avio tools, to help Pratt & Whitney or a third-party supplier produce AGBs and related parts for the PW1100G. The Consent Agreement also contains a firewall provision that limits GE's access, through Avio, to Pratt & Whitney's proprietary information relating to the AGB. Finally, the Consent Agreement allows for the appointment of an FTC-approved monitor to oversee GE's compliance with its obligations under the Consent Agreement.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

By direction of the Commission, Commissioner Wright recused.

Donald S. Clark

Secretary.

[FR Doc. 2013–17947 Filed 7–25–13; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0090; Docket 2012–0076; Sequence 71]

Federal Acquisition Regulation; Information Collection; Rights in Data and Copyrights

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 of a previously approved information collection requirement concerning rights in data and copyrights.

DATES: Submit comments on or before September 24, 2013.

ADDRESSES: Submit comments identified by Information Collection 9000–0090, Rights in Data and Copyrights, 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 9000–0090, Rights in Data and Copyrights''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0090, Rights in Data and Copyrights'' on your attached document.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street NW., Washington, DC 20405. ATTN: Hada Flowers/IC 9000–0090, Rights in Data and Copyrights.

Instructions: Please submit comments only and cite Information Collection 9000–0090, Rights in Data and Copyrights, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Marissa Petrusek, Procurement Analyst, Contract Policy Branch, GSA (202) 501–0136 or email *marissa.petrusek@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Subpart 27.4, Rights in Data and Copyrights is a regulation which concerns the rights of the Government and contractors with whom the Government contracts, regarding the use, reproduction, and disclosure of information developed under such contracts. The delineation of such rights is necessary in order to protect the contractor's rights to not disclose proprietary data and to ensure that data developed with public funds is available to the public. The specific clauses associated with this information collection are as follows:

(1) FAR 52.227–15, Representation of Limited Rights Data and Restricted Computer Software. This clauses is included in solicitations if the contracting officer requires an offeror to state whether limited rights data or restricted computer software are likely to be used in meeting the requirements. FAR 52.227–15 requires the contractor to identify whether data proposed for fulfilling the requirements is limited to data rights or restricted software. If the government does not receive unlimited rights, the contractor must provide a list of the data not covered. This

information is submitted with a contractor's proposal to the Government. The Government uses the information to identify when there are only limited data rights or restricted software rights.

(2) FAR 52.227–16, Additional Data Requirements. This clause is included in all contracts for experimental, developmental, research, or demonstration work (other than basic or applied research to be performed solely by a university or college where the contract amount will be $500,000 or less). The clause requires that the contractor keep all data first produced in the performance of the contract for a period of three years from the final acceptance of all items delivered under the contract.

FAR 52.227–16 allows the Government to require delivery of data not initially asked for at anytime during the contract and up to three years after completion. All data covered by this clause is paid for by the Government. FAR 52.227–16 also requires a record-keeping burden from the contractor to maintain data first produced or specifically used in performance of the contract within three years after acceptance of all items delivered under the contract. Much of this data will be in the form of the deliverables provided to the Government under the contract (final report, drawings, specifications, etc.). Some data, however, will be in the form of computations, preliminary data, records of experiments, etc., and these will be the data that will be required to be kept over and above the deliverables. The purpose of such recordkeeping requirements is to ensure that the Government can fully evaluate the research in order to ascertain future activities and to ensure that the research was completed and fully reported, as well as to give the public an opportunity to assess the research results and secure any additional information.

When FAR 52.227–16 was first proposed, comments were received from educational institutions, which stated that requiring their investigators to keep records of unlimited rights data for three years after acceptance of deliverables was unreasonable because investigators do not segregate their research by contract, but rather combine it with other data to continue their research. In light of this, a $500,000 threshold was adopted after surveying the major civilian R&D agencies, whose data suggested that the average value of an R&D contract ranged between $250,000 to $300,000; commensurate with other clause thresholds (*e.g.,* small business subcontracting). Thus, for most R&D contracts with universities, no recordkeeping is required.

(3) FAR 52.227–17, Rights in Data-Special Works. This clause is included in solicitations and contracts primarily for production or compilation of data. FAR 52.227–17 is used in rare and exceptional circumstances to permit the Government to limit the Contractor's rights in data by preventing the release, distribution and publication of any data first produced in the performance of the contract. This clause may also be limited to particular items and not the entire contract.

(4) FAR 52.227–18, Rights in Data-Existing Works. This clause is included in contracts for audiovisual or similar works. FAR 52.227–18 is used when the Government is acquiring existing audiovisual or similar works, such as books, without modification. This clause requires contractors to grant license for the Government to reproduce, prepare derivative works, and perform or display the materials publically.

(5) FAR 52.227–19, Commercial Computer Software License. This clause is used in contracts and purchase orders for the acquisition of commercial software. FAR 52.227–19 requires the Government to set forth the minimum data rights it requires above and beyond what is set forth in the contractor's standard commercial license. The contractor is responsible for affixing a notice on any commercial software delivered under the contract that provides notice that the Government's rights regarding the data are set forth in the contract.

(6) FAR 52.227–20, Rights in Data—SBIR Program. This clause is only required for small business innovation research (SBIR) contracts and it limits the Government's rights to disclose data first produced under the contract.

(7) FAR 52.227–21, Technical Data Declaration, Revisions and Withholding of Payment—Major Systems. This clause requires the contractor to certify that the data delivered under the contract is complete, accurate and compliant with the requirements of the contract.

(8) FAR 52.227–22 Major Systems—Minimum Rights. This clause is used in Civilian Agency Contracts, except for NASA and Coast Guard, providing the Government unlimited rights in any technical data, other than computer software, developed in the performance of the contract and related to a major system or supplies for a major system. As this provision is for major systems only, and few civilian agencies have such major systems, only about 30 contracts will require this certification.

(9) FAR 52.227–23, Rights to Proposal Data (technical). This clause allows the Government to identify pages of a proposal that, as a condition of contact award, would be subject to unlimited rights in the technical data.

(10) FAR 52.227–14, Rights in Data—General. Paragraph (d) outlines a procedure whereby a contracting officer can challenge restrictive markings on data delivered. Under civilian agency contracts, limited rights data or restricted computer software is rarely, if ever, delivered to the Government. Therefore, there will rarely be any challenges. Thus, there is no burden on the public and no information collection associated with this clause.

B. Annual Reporting Burden

A reassessment of the rights in data and copyright provisions was performed. Based on the comprehensive reassessment performed, this information collection requirement represents a decrease from what was published in the **Federal Register** at 75 FR 27782 on May 18, 2010. The decrease is most likely a result of increased use of Governmentwide contracts including the GSA Federal Supply Schedule contracts, an increased use of commercial products since the inception of the clauses, and budget constraints over the last several years that have reduced research and development budgets and the ability to purchase costly data rights.

There is no centralized database in the Federal Government that maintains information regarding the use of rights in data and copyright clauses. Subject matter experts in the intellectual property law field were consulted to obtain additional information that helped in estimating the revised public burden. FedBizOpps was searched to determine the use of these clauses in competitive contract solicitations throughout the Government. The Federal Procurement Data System (FPDS) was used to determine the likely contracts that would contain rights in data and copyright provisions. An assumption was made that sole source contracts citing the existence of limited rights in data, patent rights, copyrights or secret processes would contain the rights in data and copyright clauses, and were used as the basis for this information collection. Consequently, the FPDS data formed the basis for the estimated the number of respondents per year based on the likely contracts awarded that would include the applicable clauses associated with this collection (52.227–15 through 52.227–23). The estimated number of contracts was then totaled to determine the

overall number of respondents associated with this collection. Estimates were based on the total number of unique contractors awarded a sole source contract based on the existence of limited rights in data, patent rights, copyrights or secret processes. Similarly, FPDS data was used to estimate the number of responses per respondent for this collection. The estimate was based on the average number of actions per contractor and rounded to the nearest whole number. The estimates were then averaged to determine the overall number of responses per respondent associated with this collection. One burden hour was estimated per response to read and prepare information. No public comments were received in prior years that have challenged the validity of the Government's estimate.

Respondents: 419.

Responses Per Respondent: 2.76.

Annual Responses: 1,156.

Hours Per Response: 1.

Total Burden Hours: *1,156.*

C. Annual Recordkeeping Burden

The annual recordkeeping burden is estimated as follows:

Recordkeepers: 446.

Responses: 5.

Annual Response: 2,230.

Hours per Recordkeeper: 2.

Total Recordkeeping Burden Hours: 4,460.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 9000–0090, Rights in Data and Copyrights, telephone (202) 501–4755. Please cite OMB Control No. 9000–0090, Rights in Data and Copyrights, in all correspondence.

Dated: July 18, 2013.

Karlos Morgan,

Acting Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2013–17941 Filed 7–25–13; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Docket 2012–0076; Sequence 47; OMB Control No. 9000–0091]

Federal Acquisition Regulation; Submission for OMB Review; Anti-Kickback Procedures

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 of an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning anti-kickback procedures. A notice was published in the **Federal Register** at 77 FR 75164, on December 19, 2012. One respondent submitted comments.

DATES: Submit comments on or before August 26, 2013.

ADDRESSES: Submit comments identified by Information Collection 9000–0091, Anti-Kickback Procedures, 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 9000–0091, Anti-Kickback Procedures''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0091, Anti-Kickback Procedures'' on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street Street NW., Washington, DC 20405–0001. ATTN: Hada Flowers/IC 9000–0091, Anti-Kickback Procedures.

Instructions: Please submit comments only and cite Information Collection 9000–0091, Anti-Kickback Procedures, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, Office of Governmentwide Acquisition Policy, GSA, (202) 219–0202 or email *Cecelia.davis@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Federal Acquisition Regulation (FAR) 52.203–7, Anti-Kickback Procedures, requires that all contractors have in place and follow reasonable procedures designed to prevent and detect in its own operations and direct business relationships, violations of 41 U.S.C. chapter 87, Kickbacks. Whenever prime contractors or subcontractors have reasonable grounds to believe that a violation of the statute may have occurred, they are required to report the possible violation in writing to the contracting agency inspector general, the head of the contracting agency if an agency does not have an inspector general, or the Department of Justice. The information is used to determine if any violations of the statute have occurred.

There is no Governmentwide data collection process or system which identifies the number of alleged violations of 41 U.S.C. chapter 87, Kickbacks that are reported annually to agency inspectors general, the heads of the contracting agency if an agency does not have an inspector general, or the Department of Justice.

B. Discussion and Analysis

The analysis of the public comment is summarized as follows:

Comment: The respondent commented that the extension of the information collection would violate the fundamental purposes of the Paperwork Reduction Act because of the burden it puts on the entity submitting the information and the agency collecting the information.

Response: In accordance with the Paperwork Reduction Act (PRA), agencies can request OMB approval of an existing information collection. The PRA requires that agencies use the **Federal Register** notice and comment process, to extend OMB's approval, at least every three years. This extension, to a previously approved information collection, pertains to the requirements at FAR 52.203–7((c)(2), which requires contractors and subcontractors to promptly report possible violations of the Kickbacks statute to the Government. There are no aspects of this requirement that can be reduced or eliminated without negatively

impacting the ability of the Government to assess contractor responsibility, investigate and address potential criminal actions, and protect the Government's interests in maintaining the integrity of the acquisition process. Not granting this extension would consequently eliminate a FAR clause that provides a benefit to the public and the agency collecting the information.

Comment: The respondent commented that the agency did not accurately estimate the public burden, stating that the agency's methodology for calculating the burden is insufficient and inadequate and does not reflect the total burden. The respondent stated that—

- The actual number of respondents subject to the information collection is likely 25 to 50 times greater than the estimate of 100 respondents (i.e., 2500 to 5000);
- There is no basis provided for the estimate of 1 response per respondent; and
- The estimate of 1 hour per response is unreasonably low and unsubstantiated. The estimated burden hours should be modified in this instance for the same reasons that they were modified upward in FAR Case 2007–006, Contractor Business Ethics Compliance Program and Disclosure Requirements.

Response: It is important to distinguish between the total burden of compliance with a particular provision or clause, and the portion of that burden that constitutes an information collection requirement. This analysis addresses the latter. In this particular case, the information collection requirement is in paragraph (c)(2) of 52.203–7, which requires a report of possible violations to the Government. Establishing procedures within an organization to prevent and detect anti-kickback violations or cooperating with a Federal investigation do not constitute information collection requirements.

Therefore, the only contractors and subcontractors included in the estimate of respondents to the information collection requirement are those contractors or subcontractors that are reporting a suspected violation of the Kickback statute in a given year. Based on discussions with subject matter experts with experience in an Office of the Inspector General, the estimate of 100 responses per year more than likely exceeds the actual responses. It is also unlikely, that the same respondent would be reporting instances of kickback violations more than once in a year. The estimated number of respondents and responses remain as previously approved.

With regard to the estimated information collection burden hours, as stated in the **Federal Register** notice for FAR Case 2007–006, burden includes estimated hours only for those actions which a company would not undertake in the normal course of business. In the normal course of business, a company that is concerned about ethical behavior will take reasonable steps to determine the credibility of allegations of misconduct within the firm. It is left to the discretion of the company what these reasonable steps may entail. The Government has added the requirement to report in writing to the Government when the Contractor has reasonable grounds to believe that a violation of the Kickback statute has occurred, which would not necessarily otherwise occur. The burden is prepared taking into consideration the necessary criteria in OMB guidance for estimating the paperwork burden put on the entity submitting the information. For example, consideration is given to an entity reviewing instructions; using technology to collect, process, and disclose information; adjusting existing practices to comply with requirements; searching data sources; completing and reviewing the response; and transmitting or disclosing information. The estimated burden hours for a collection are based on an average between the hours that a simple disclosure by a very small business might require and the much higher numbers that might be required for a very complex disclosure by a major corporation. Careful consideration went into assessing the burden for this collection. However, upon further discussion with subject matter experts, we have revised upward the estimated hours to 20 hours per response, considering particularly the hours that would be required for review within the company, prior to release to the Government. At any point, members of the public may submit comments for further consideration, and are encouraged to provide data to support their request for an adjustment.

Comment: The respondent stated that the agency and OMB should assess the need to extend this information collection requirement in the context of assessing the total information collection burden. The respondent further commented that the ''collective burden of compliance'' required of the Government acquisition community annually totals over 30 million hours. According to the respondent, the collective burden greatly exceeds the agency's estimates and outweighs any potential utility of the extension.

Response: The criteria for extension of an information collection requirement must be based primarily on the need and use for the required information. It is essential for contractors to report violations of the Kickback statute, regardless of whether there are 100 responses per year or 1000 responses per year. If the agencies have determined that the information is essential to comply with statute or to protect the interests of the Government, then the extension should be approved. If there are questions concerning the validity of the estimated burden hours, those can be reviewed and refined as necessary.

We cannot effectively address the broad allegations with regard to the accuracy and utility of the entire collective burden imposed on all Federal acquisitions. We can only effectively address each individual information collection requirement that is under consideration for OMB approval. As stated, the respondent has not pointed out any aspect of the Anti-Kickback clause that could be amended to reduce the information collection burden imposed by that clause. Further, the respondent specifically does not challenge the propriety of the underlying information collection requirement. We constantly review information collection requirements imposed by FAR regulations for ways to reduce the burdens and still achieve the objectives of the regulations, whether based on policy or statute. We would welcome any specific recommendations as to information collection requirements (other than those required by statute) in which the burden is perceived to outweigh the benefit, with specific recommendations as to how the burden should be reduced.

C. Annual Reporting Burden

Respondents: 100.

Responses per Respondent: 1.

Annual Responses: 100.

Hours Per Response: 20.

Total Burden Hours: 2,000.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street Street, NW., Washington, DC 20405–0001, telephone (202) 501–4755. Please cite OMB Control No. 9000–0091, Anti-Kickback Procedures, in all correspondence.

Dated: July 18, 2013.

William Clark,

Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2013–17939 Filed 7–25–13; 8:45 am]

BILLING CODE 6820–EP–P

GENERAL SERVICES ADMINISTRATION

[Notice–MK–2013–06; Docket No. 2013–0002; Sequence 22]

The Presidential Commission on Election Administration (PCEA); Upcoming Public Advisory Meeting

AGENCY: Office of Government-wide Policy, U.S. General Services Administration (GSA).

ACTION: Meeting Notice.

SUMMARY: The Presidential Commission on Election Administration (PCEA), a Federal Advisory Committee established in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C., App., and Executive Order 13639, as amended by EO 13644, will hold a meeting open to the public on Thursday, August 8, 2013.

DATES: *Effective date:* July 26, 2013.

Meeting date: The meeting will be held on Thursday, August 8, 2013, beginning at 9:00 a.m. eastern time, ending no later than 7:00 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Nejbauer, Designated Federal Officer, General Services Administration, Presidential Commission on Election Administration, 1776 G Street NW., Washington, DC 20006, email *mark.nejbauer@supportthevoter.gov.*

SUPPLEMENTARY INFORMATION:

Background: The PCEA was established to identify best practices and make recommendations to the President on the efficient administration of elections in order to ensure that all eligible voters have the opportunity to cast their ballots without undue delay, and to improve the experience of voters facing other obstacles in casting their ballots.

Agenda: The purpose of this meeting is for the PCEA to receive information to assist its members in collecting information and data relevant to its deliberations on the subjects set forth in Executive Order 13639, as amended.

The agenda will be as follows:

- Introductions & Statement of Plan for The Meeting
- Testimony by state, county and local election officials
- Receipt of reports by experts in some of the subject areas detailed in Executive Order 13639
- Testimony by interested members of the public

Meeting Access: The PCEA will convene its meeting in the History Colorado Center, 1200 Broadway, Denver, CO 80203. This site is accessible to individuals with disabilities. The meeting may also be webcast or made available via audio link. Please refer to PCEA's Web site, *http://www.supportthevoter.gov,* for the most up-to-date meeting agenda and access information.

Attendance at the Meeting: Individuals interested in attending the meeting must register in advance because of limited space. Please contact Mr. Nejbauer at the email address above to register to attend this meeting and obtain meeting materials. Materials may also be accessed online at *http://www.supportthevoter.gov.* To attend this meeting, please submit your full name, organization, email address, and phone number to Mark Nejbauer by 5:00 p.m. eastern standard time on Monday, August 5, 2013. Detailed meeting minutes will be posted within 90 days of the meeting.

Procedures for Providing Public Comments: In general, public comments will be posted on the PCEA Web site (see above). All comments, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. Any comments submitted in connection with the PCEA meeting will be made available to the public under the provisions of the Federal Advisory Committee Act.

Contact Mark Nejbauer at *mark.nejbauer@supportthevoter.gov* to register to comment during the meeting's public comment period. Registered speakers will be allowed a maximum of 5 minutes each due to limited time for individual testimony. Written copies providing expanded explanations of witnesses' presentations are encouraged. Requests to comment at the meeting must be received by 5:00 p.m. eastern standard time on Monday, August 5, 2013.

The public is invited to submit written comments for this meeting until 5:00 p.m. eastern time on Monday, August 5, 2013, by either of the following methods:

Electronic or Paper Statements: Submit electronic statements to Mr. Nejbauer, Designated Federal Officer at *mark.nejbauer@supportthevoter.gov;* or send three (3) copies of any written statements to Mr. Nejbauer at the PCEA GSA address above. Written testimony not received by 5:00 p.m. Eastern Time on Monday, August 5, 2013 may be submitted but will not be considered at the Thursday, August 8, 2013 meeting.

Dated: July 19, 2013.

Anne Rung,

Administrator, Office of Government-wide Policy, General Services Administration.

[FR Doc. 2013–17952 Filed 7–25–13; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier: HHS–OS–20078–60D]

Agency Information Collection Activities; Proposed Collection; Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary, Department of Health and Human Services, announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). The ICR is for extending the use of the approved information collection assigned OMB control number 0990–0360, which expires on September 30, 2013. Prior to submitting that ICR to OMB, Office of the Secretary seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on the ICR must be received on or before September 24, 2013.

ADDRESSES: Submit your comments to *Information.CollectionClearance@hhs.gov* or by calling (202) 690–6162.

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–20078–60D for reference.

Information Collection Request Title: Girls at Greater Risk for Juvenile Delinquency and HIV Prevention Program

OMB No.: 0990–0360

Abstract: The Office on Women's Health (OWH) is seeking an extension of its data collection associated with the evaluation of the Girls at Greater Risk for Juvenile Delinquency and HIV

Prevention Program. The evaluation is designed to determine best practices and gender responsive strategies for at-risk girls between the ages of nine and 17 years. Data will continue to be collected from program participants (girls), parents of program participants, program staff (i.e. program directors and program staff), program partners, and community residents. Collected data will be submitted to OWH on a quarterly basis. Primarily private non-profit organizations and girls and adolescents participating in the program and their parents will be affected by this data collection.

Need and Proposed Use of the Information: The purpose of the extended data collection is to add to the evaluation database. The Girls at Greater Risk Program is in its final year and the data collected from participants will add another full data cohort to the evaluation.

Likely Respondents: The respondents are primarily private non-profit organizations, girls and adolescent females participating in funded ''Girls at Greater Risk for Juvenile Delinquency and HIV Prevention Programs'', parents of program participants, program staff (i.e. program directors and program staff), program partners, and community residents that participate in community events sponsored by the Girls at Greater Risk Program.

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
Prevention Education Questionnaire (Girls and Female Adolescents)	750	2	2	3,000
Girls at Greater Risk Focus Group Protocol for Program Participants and Background Information for Participant Focus Group	120	1	1.5	180
Girls at Greater Risk Focus Group Protocol for Parents/Legal Guardians of Participants and Background Information for Parent Focus Group	120	1	1.5	180
Girls at Greater Risk Focus Group Protocol for Partners and Background Information for Partners Focus Group	120	1	1.5	180
Partners: Process Evaluation Questionnaire	60	1	.75	45
Program Staff: Process Evaluation Questionnaire	10	2	.75	15
Program Directors: Process Evaluation Questionnaire	10	2	1.5	30
Program Staff data capture (entry) into data portal	10	150	.5	750
Community Event Survey	250	1	.083	21
Total	1450			4,401

Office of the Secretary specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Darius Taylor,

Deputy Information Collection Clearance Officer.

[FR Doc. 2013–17920 Filed 7–25–13; 8:45 am]

BILLING CODE 4150–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day-13–12QU]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Impact Evaluation of CDC's Colorectal Cancer Control Program (CRCCP)—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Colorectal cancer (CRC) is the second leading cause of cancer deaths in the U.S.; however, screening can effectively reduce CRC incidence and mortality. CDC's Colorectal Cancer Control Program (CRCCP) was established to increase population-level screening rates to 80 percent. Currently, 25 states and four tribal organizations receive CDC funds to increase colorectal cancer screening rates. The CRCCP is the first cancer prevention and control program funded by CDC emphasizing both the direct provision of screening services and broader screening promotion. CRCCP grantees are required to establish evidence-based colorectal cancer screening delivery programs for persons

50–64 years of age, focusing on asymptomatic persons at average risk for CRC with low incomes and inadequate or no health insurance coverage for CRC screening. Approximately 33 percent of each grantee award may be used to fund the provision of screening and diagnostic tests. Additional program activities such as patient recruitment, patient navigation, provider education, quality assurance, and data management are also supported under this component of the program.

The CRCCP offers a unique and important opportunity to evaluate the efficacy of this new public health model. CDC plans to conduct an impact evaluation to determine whether CRCCP program activities increase state-level colorectal cancer screening rates and other proximal outcomes. The impact evaluation will use a quasi-experimental, control group design with pre- and post-tests involving a total of six states: three CRCCP grantee states (Alabama, Nebraska, and Washington) represent the intervention programs and three non-CRCCP states (Tennessee, Oklahoma, and Wisconsin) represent the control states.

CDC plans to complete two cycles of information collection over a three-year period. The first information collection will be initiated in 2013 and the second information collection will be initiated in 2015. Three types of information will be collected at each time, including: (1) A general population survey administered by telephone with a state-based, representative, cross-sectional, random sample of adults aged 50–75 (population survey); (2) a mail-back, written, survey of a state-based, representative sample of primary care providers (provider survey); and (3) qualitative case studies of program implementation (case studies) based on interviews with Colorectal Control Program staff, program evaluators, and state and local partners in both grantee and non-grantee states. Information will be collected from each site to identify interviewees and prepare for the site visit.

The general population survey includes questions related to knowledge of and attitudes toward colorectal cancer, history of colorectal cancer screening and intentions for future screening, and barriers to screening. The estimated burden per response is 23 minutes. The provider survey of primary care physicians includes questions related to knowledge of colorectal cancer screening guidelines and screening quality, office systems that support screening, and patterns of referrals to screening. The estimated burden per response is 12 minutes. For the case studies, interview guides will be used to conduct interviews with program staff and stakeholders to gather detailed information about colorectal cancer screening provision and promotion efforts. The estimated burden for each interview is one hour to one hour and 15 minutes. Evaluation staff will also collect information through document review and field observation.

The information to be collected will be used to assess the impact of the CRCCP in improving proximal outcomes (e.g., provider knowledge, population attitudes) and in increasing population-level CRC screening rates. Results of the evaluation will be used to improve program performance, plan future public health programs, and improve efficiencies. OMB approval is requested for three years. The total estimated annualized burden hours are 2,425. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form Name	Number of respondents	Number of responses per respondent	Average burden per response (in hr)
General Population	Screener for the Colorectal Cancer Population Survey.	9,600	1	5/60
General Population Eligible Individuals ages 50–75 years.	Colorectal Cancer Population Survey	3,200	1	23/60
Primary Care Providers	Survey of Primary Care Providers	1,600	1	12/60
CRCCP and Non-Grantee Program Director	Suggested Interviewees Form	4	1	1
CRCCP and Non-Grantee Program Directors	Site Visit Instructions Template	4	1	5
CRCCP Grantee Program Staff	Interview Guide: Grantee Program Staff	12	1	75/60
CRCCP Grantee Evaluators	Interview Guide: Grantee Program Evaluator	4	1	1
CRCCP State and Local Sector Partners	Interview Guide: Grantee Partner	4	1	1
CRCCP Private Sector Partners	Interview Guide: Grantee Partner	4	1	1
Non-Grantee Program Staff	Interview Guide: Non-grantee Program Staff	12	1	75/60
Non-Grantee Evaluator	Interview Guide: Non-grantee Program Evaluator.	4	1	1
Non-grantee State and Local Partners	Interview Guide: Non-grantee Partner	4	1	1
Non-grantee Private Sector Partners	Interview Guide: Non-grantee Partner	4	1	1

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–17957 Filed 7–25–13; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers CMS–R–13, CMS–R–297, CMS–10088, CMS–10293, CMS–10477, CMS–855(POH), CMS–2552–10, CMS–10185 and CMS–10463]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by *August 26, 2013:*

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions: OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–6974 *OR* Email: *OIRA_submission@omb.eop.gov.*

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* Conditions of Coverage for Organ Procurement Organizations and Supporting Regulations; *Use:* Section 1138(b) of the Social Security Act, as added by section 9318 of the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99–509), sets forth the statutory qualifications and requirements that organ procurement organizations (OPOs) must meet in order for the costs of their services in procuring organs for transplant centers to be reimbursable under the Medicare and Medicaid programs. An OPO must be certified and designated by the Secretary as an OPO and must meet performance-related standards prescribed by the Secretary. The corresponding regulations are found at 42 CFR Part 486 (Conditions for Coverage of Specialized Services Furnished by Suppliers) under subpart G (Requirements for Certification and Designation and Conditions for Coverage: Organ Procurement Organizations).

Since each OPO has a monopoly on organ procurement within its designated service area (DSA), we must hold OPOs to high standards. Collection of this information is necessary for us to assess the effectiveness of each OPO and determine whether it should continue to be certified as an OPO and designated for a particular donation service area by the Secretary or replaced by an OPO that can more effectively procure organs within that DSA. *Form Number:* CMS–R–13 (OCN: 0938–0688); *Frequency:* Occasionally; *Affected Public:* Private sector—Not-for-profit institutions; *Number of Respondents:* 58; *Total Annual Responses:* 58; *Total Annual Hours:* 14,453. (For policy questions regarding this collection contact Diane Corning at 410–786–8486.)

2. *Type of Information Collection Request:* Extension without change of a currently approved collection; *Title of Information Collection:* Request for Employment Information; *Use:* The Social Security Administration uses this form to obtain information from employers regarding whether a Medicare beneficiary's coverage under a group health plan is based on current employment status. *Form Number:* CMS–R–297 (OCN: 0938–0787); *Frequency:* Once; *Affected Public:* Private sector—Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 15,000; *Total Annual Responses:* 15,000; *Total Annual Hours:* 3,750. (For policy questions regarding this collection contact Lindsay Smith at 410–786–6843.)

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Notification of Fiscal Intermediaries (FIs) and CMS of Co-located Medicare Providers and Supporting Regulations; *Use:* Many long-term care hospitals (LTCHs) are co-located with other Medicare providers (acute care hospitals, inpatient rehabilitation facilities, skilled nursing facilities, and psychiatric facilities), which leads to potential gaming of the Medicare system based on patient shifting. We require that LTCHs notify FIs, Medicare administrative contractors (MACs), and CMS of co-located providers and establish policies to limit payment abuse that will be based on FIs and MACs tracking patient movement among these co-located providers under 42 CFR 412.22(e)(6) and (h)(5).

Based upon being able to identify co-located providers, FIs, MACs, and CMS will be able to track patient shifting between LTCHs and other in-patient providers which will lead to appropriate payments under § 412.532. That section limits payments to LTCHs where over 5 percent of admissions represent patients who had been sequentially discharged by the LTCH, admitted to an on-site provider, and subsequently readmitted to the LTCH. Since each discharge triggers a Medicare payment, we implemented this policy to discourage payment abuse. *Form Number:* CMS–10088 (OCN: 0938–0897); *Frequency:* Occasionally; *Affected Public:* Private sector—Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 25; *Total Annual Responses:* 25; *Total Annual Hours:* 6. (For policy questions regarding this collection contact Judy Richter at 410–786–2590.)

4. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Tribal Consultation State Plan Amendment Template; *Use:* Certain states utilize a process to seek advice on a regular ongoing basis from designees of the Indian Health Service (IHS) and Urban Indian Organizations concerning Medicaid and Children's Health Insurance Program (CHIP) matters having a direct effect on them. The consultation process is required for the 37 states in which 1 or more Indian Health Programs or Urban Indian Organizations furnish health care services. The states' Medicaid agency will complete the template page and submit it for approval as part of its state plan amendment. The purpose is to document how the state meets the tribal consultation requirements. *Form Number:* CMS–10293 (OCN: 0938–1098); *Frequency:* Occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 37; *Total Annual Responses:* 37; *Total Annual Hours:* 37. (For policy questions regarding this collection contact Lane Terwilliger at 410–786–6618.)

5. *Type of Information Collection Request*) New Collection (Request for a new control number); *Title of Information Collection:* Medicaid Incentives for Prevention of Chronic Disease (MIPCD) Demonstration; *Use:* Under section 4108(d)(1) of the Affordable Care Act, we are required to contract with an independent entity or organization to conduct an evaluation of the Medicaid Incentives for Prevention of Chronic Disease (MIPCD) demonstration. The contractor will conduct state site visits, two rounds of focus group discussions, interviews with key program stakeholders, and field a beneficiary satisfaction survey. Both the state site visits and interviews with key program stakeholders will entail one-on-one interviews; however each set will have a unique data collection form. Thus, each evaluation task listed above has a separate data collection form and this proposed information collection encompasses four data collection forms. The purpose of the evaluation and assessment includes determining the following:

- The effect of such initiatives on the use of health care services by Medicaid beneficiaries participating in the program;
- The extent to which special populations (including adults with disabilities, adults with chronic illnesses, and children with special health care needs) are able to participate in the program;
- The level of satisfaction of Medicaid beneficiaries with respect to the accessibility and quality of health care services provided through the program; and
- The administrative costs incurred by state agencies that are responsible for administration of the program.

Form Number: CMS–10477 (OCN: 0938–NEW); *Frequency:* Annually; *Affected Public:* Individuals and households, Business or other for-profits and Not-for-profit institutions, State, Local or Tribal Governments; *Number of Respondents:* 4,524; *Total Annual Responses:* 4,524; *Total Annual Hours:* 1,795. (For policy questions regarding this collection contact Jean Scott at 410–786–6327.)

6. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Annual Report of Physician-Owned Hospital Ownership and/or Investment Interest; *Use:* Section 6001 of the Affordable Care Act (ACA) requires Medicare hospitals to report whether they have any physician owners including immediately family members of the physician. Currently the CMS 855A captures basic ownership and managerial information on providers. The CMS 855A was revised in July 2011 and a specific attachment designed to capture physician-owned hospital ownership and investment interest data was added to the form. The attachment is being removed from the CMS 855A application because the annual reporting requirement for physician-owned hospitals is not required for Medicare enrollment processing. This physician-owned hospital data collection is mandated to be reported on an annual basis. Additionally, the ACA prohibits the expansion of current physician-owned hospitals and banned the establishment of new ones making the CMS 855A the improper method to collect this required annual report.

We are requesting the physician-owned hospital ownership information, investment information or both, previously collected in Attachment 1 of the CMS 855A enrollment application to become a stand-alone form with a unique OMB number for the following reasons:

- The physician-owned data collection has a small targeted audience of approximately 140 physician-owned hospitals nationwide.
- The physician-owned data collection is required annually, as noted above.
- The data required under section 6001 is more specific than the data currently collected on the CMS–855A provider enrollment application.
- The data is not required for Medicare provider enrollment purposes.

Form Number: CMS–855 (POH)(OCN: 0938–New); *Frequency:* Yearly; *Affected Public:* Private Sector—Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 140; *Total Annual Responses:* 140; *Total Annual Hours:* 140. (For policy questions regarding this collection contact Kim McPhillips at 410–786–5374.)

7. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Hospital and Health Care Complexes and Supporting Regulations in 42 CFR 413.20 and 413.24; *Use:* Medicare Part A institutional providers must provide adequate cost data to receive Medicare reimbursement (42 CFR 413.24(a)). Providers must submit the cost data to their Medicare Fiscal Intermediary (FI)/ Medicare Administrative Contractor (MAC) through the Medicare cost report (MCR). We are submitting a revision of the Hospital and Hospital Health Care Complex Cost Report, Form CMS–2552–10. Form CMS 2552–10 is used by hospitals participating in the Medicare program to report the health care costs to determine the amount of reimbursable costs for services rendered to Medicare beneficiaries. The revisions were caused by legislative requirements in the Patient Protection and Affordable Care Act of 2010 and the Temporary Payroll Tax Cut Continuation Act of 2011. *Form Number:* CMS–2552–10 (OCN: 0938–0050); *Frequency:* Yearly; *Affected Public:* Private sector—Business or other for-profits and Not-for-profit institutions; *Number of*

Respondents: 6,171; *Total Annual Responses:* 6,171; *Total Annual Hours:* 4,153,083. (For policy questions regarding this collection contact Nadia Massuda at 410–786–5834.)

8. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Medicare Part D Reporting Requirements; *Use:* Title I, Part 423, § 423.514 describes our regulatory authority to establish reporting requirements for Part D sponsors. It is noted that each Part D plan sponsor must have an effective procedure to develop, compile, evaluate, and report to us, to its enrollees, and to the general public, at the times and in the manner that we requires, statistics in the following areas: the cost of its operations; the patterns of utilization of its services; the availability, accessibility, and acceptability of its services; information demonstrating that the Part D plan sponsor has a fiscally sound operation; and other matters that we may require. CMS has identified the appropriate data needed to effectively monitor plan performance. Changes to the currently approved data collection instrument reflect new executive orders, legislation, as well as recent changes to Agency policy and guidance. *Form Number:* CMS–10185 (OCN: 0938–0992); *Frequency:* Occasionally; *Affected Public:* Business and other for-profits; *Number of Respondents:* 690; *Total Annual Responses:* 8,067; *Total Annual Hours:* 12,658. (For policy questions regarding this collection contact Latoyia Grant at 410–786–5434.)

9. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Cooperative Agreement to Support Navigators in Federally-facilitated and State Partnership Exchanges; *Use:* Section 1311(i) of the Affordable Care Act requires Exchanges to establish a Navigator grant program as part of its function to provide consumers with assistance when they need it. Navigators will assist consumers by providing education about and facilitating selection of qualified health plans (QHPs) within Exchanges, as well as other required duties. Section 1311(i) requires that an Exchange operating as of January 1, 2014, must establish a Navigator Program under which it awards grants to eligible individuals or entities who satisfy the requirements to be Exchange Navigators. For Federally-facilitated Exchanges (FFE) and State Partnership Exchanges (SPEs), we will be awarding the grants. Navigator awardees must provide quarterly, bi-annual, and an annual progress report to us on the activities performed during the grant period and any sub-awardees receiving funds. The 60-day **Federal Register** notice was published on April 12, 2013 (78 FR 21957). Several commenters suggested changes to the reporting requirements which were incorporated where appropriate. *Form Number:* CMS–10463 (OCN: 0938–NEW); *Frequency:* Annually, Quarterly; *Affected Public:* Private sector; *Number of Respondents:* 264; *Total Annual Responses:* 1,848; *Total Annual Hours:* 308,352. (For policy questions regarding this collection contact Holly Whelan at 301–492–4220.)

Dated: July 23, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–18004 Filed 7–25–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10326, CMS–10487, CMS–P–0015A, CMS–R–10, CMS–R–240, CMS–10282, CMS–R–65 and CMS–10491]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by September 24, 2013:

ADDRESSES: When commenting, please reference the document identifier or OMB control number (OCN). To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development,Attention: Document Identifier/OMB Control Number ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: Reports Clearance Office at (410) 786–1326.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10326 Electronic Submission of Medicare Graduate Medical Education (GME) Affiliation Agreements

CMS–10487 Medicaid Emergency Psychiatric Demonstration (MEPD) Evaluation

CMS–P–0015A Medicare Current Beneficiary Survey

CMS–R–10 Advance Directives (Medicare and Medicaid) and Supporting Regulations

CMS–R–240 Prospective Payments for Hospital Outpatient Services and Supporting Regulations
CMS–10282 Conditions of Participation for Comprehensive Outpatient Rehabilitation Facilities (CORFs) and supporting regulations
CMS–R–65 Final Peer Review Organizations Sanction Regulations in 42 CFR Sections 1004.40, 1004.50, 1004.60, and 1004.70
CMS–10491 Enrollment Assistance Program

Under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collections

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Electronic Submission of Medicare Graduate Medical Education (GME) Affiliation Agreements; *Use:* We use the information contained in electronic affiliation agreements as documentation of the existence of Medicare GME affiliations, and to verify that the affiliations being formed by teaching hospitals for the purposes of sharing their Medicare Graduate Medical Education FTE cap slots are valid according to CMS regulations. The affiliation agreements are also used as reference materials when potential issues involving specific affiliations arise. *Form Number:* CMS–10326 (OCN: 0938–1111); *Frequency:* Yearly; *Affected Public:* Private sector—Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 125; *Total Annual Responses:* 125; *Total Annual Hours:* 166. (For policy questions regarding this collection contact Tzvi Hefter at 410–786–0614.)

2. *Type of Information Collection Request:* New Collection (Request for a new OMBcontrol number); *Title of Information Collection:* Medicaid Emergency Psychiatric Demonstration (MEPD) Evaluation; *Use:* Since the inception of Medicaid, inpatient care provided to adults ages 21 to 64 in institutions for mental disease (IMDs) has been excluded from federal matching funds. The Emergency Medical Treatment and Active Labor Act (EMTALA), however, requires IMDs that participate in Medicare to provide treatment for psychiatric emergency medical conditions (EMCs), even for Medicaid patients for whose services cannot be reimbursed. Section 2707 of the Affordable Care Act (ACA) directs the Secretary of Health and Human Services to conduct and evaluate a demonstration project to determine the impact of providing payment under Medicaid for inpatient services provided by private IMDs to individuals with emergency psychiatric conditions between the ages of 21 and 64. We will use the data to evaluate the Medicaid Emergency Psychiatric Demonstration (MEPD) in accordance with the ACA mandates. This evaluation in turn will be used by Congress to determine whether to continue or expand the demonstration. If the decision is made to expand the demonstration, the data collected will help to inform both CMS and its stakeholders about possible effects of contextual factors and important procedural issues to consider in the expansion, as well as the likelihood of various outcomes. *Form Number:* CMS–10487 (OCN: 0938–NEW); *Frequency:* Annually; *Affected Public:* Individuals and households; State, Local and Tribal governments; Business and other for-profits and Not-for-profits; *Number of Respondents:* 93; *Total Annual Responses:* 1,944; *Total Annual Hours:* 2,046. (For policy questions regarding this collection contact Negussie Tilahun at 410–786–2058.)

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicare Current Beneficiary Survey; *Use:* We are the largest single payer of health care in the United States. With full implementation of the Affordable Care Act of 2010 (ACA), the agency will play a direct or indirect role in administering health insurance coverage for more than 120 million people across the Medicare, Medicaid, CHIP, and Exchange populations. One of our critical aims is to be an effective steward, major force, and trustworthy partner in leading the transformation of the health care system. We also aim to provide Americans with high quality care and better health at lower costs through improvement. At the forefront of these initiatives is the newly formed Center for Medicare and Medicaid Innovation (CMMI).

CMMI is authorized by Section 1115A of the Social Security Act, as established by section 3021 of the ACA and was established to ''test innovative payment and service delivery models to reduce program expenditures. . .while preserving or enhancing the quality of care furnished'' to Medicare, Medicaid and CHIP beneficiaries. Implicit across all of CMMI activities is an emphasis on diffusion—finding and validating innovative models that have the potential to scale, facilitating rapid adoption, and letting them take root in organizations, health systems, and communities across America.

The Medicare Current Beneficiary Survey (MCBS) is the most comprehensive and complete survey available on the Medicare population and is essential in capturing data not otherwise collected through our operations. The MCBS is an in-person, nationally-representative, longitudinal survey of Medicare beneficiaries that we sponsor and is directed by the Office of Information Products and Data Analytics (OIPDA) in partnership with the CMMI. The survey captures beneficiary information whether aged or disabled, living in the community or facility, or serviced by managed care or fee-for-service. Data produced as part of the MCBS are enhanced with our administrative data (e.g. fee-for-service claims, prescription drug event data, enrollment, etc.) to provide users with more accurate and complete estimates of total health care costs and utilization. The MCBS has been continuously fielded for more than 20 years (encompassing over 1 million interviews), and consists of three annual interviews per survey participant.

The MCBS continues to provide unique insight into the Medicare program and helps both us and our external stakeholders better understand and evaluate the impact of existing programs and significant new policy initiatives. In the past, MCBS data have been used to assess potential changes to the Medicare program. For example, the MCBS was instrumental in supporting the development and implementation of the Medicare prescription drug benefit by providing a means to evaluate prescription drug costs and out-of-pocket burden for these drugs to Medicare beneficiaries. *Form Number:* CMS–P–0015A (OCN: 0938–0568); Frequency: Occasionally; *Affected Public:* Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 16,550; *Total Annual Responses:* 49,650; *Total Annual Hours:* 58,450 (For policy questions regarding

this collection contact William Long at 410–786–7927.)

4. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* Advance Directives (Medicare and Medicaid) and Supporting Regulations; *Use:* The advance directives requirement was enacted because Congress wanted individuals to know that they have a right to make health care decisions and to refuse treatment even when they are unable to communicate. Steps have been taken at both the federal and state level, to afford greater opportunity for the individual to participate in decisions made concerning the medical treatment to be received by an adult patient in the event that the patient is unable to communicate to others, a preference about medical treatment. The individual may make his preference known through the use of an advance directive, which is a written instruction prepared in advance, such as a living will or durable power of attorney. This information is documented in a prominent part of the individual's medical record. Advance directives as described in the Patient Self-Determination Act have increased the individual's control over decisions concerning medical treatment. Sections 4206 of the Omnibus Budget Reconciliation Act of 1990 defined an advance directive as a written instruction recognized under State law relating to the provision of health care when an individual is incapacitated (those persons unable to communicate their wishes regarding medical treatment).

All states have enacted legislation defining a patient's right to make decisions regarding medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives. Participating hospitals, skilled nursing facilities, nursing facilities, home health agencies, providers of home health care, hospices, religious nonmedical health care institutions, and prepaid or eligible organizations (including Health Care Prepayment Plans (HCPPs) and Medicare Advantage Organizations (MAOs) such as Coordinated Care Plans, Demonstration Projects, Chronic Care Demonstration Projects, Program of All Inclusive Care for the Elderly, Private Fee for Service, and Medical Savings Accounts must provide written information, at explicit time frames, to all adult individuals about: a) the right to accept or refuse medical or surgical treatments; b) the right to formulate an advance directive; c) a description of applicable State law (provided by the State); and d) the provider's or organization's policies and procedures for implementing an advance directive. *Form Number:* CMS–R–10 (OCN: 0938–0610); *Frequency:* Yearly; *Affected Public:* Business or other for-profits; *Number of Respondents:* 39,575; *Total Annual Responses:* 39, 575; *Total Annual Hours:* 2,836,441. (For policy questions regarding this collection contact Sonia Swancy at 410–786–8445.)

5. *Type of Information Collection Request:* Extension of a currently approved collection.

Title of Information Collection: Prospective Payments for Hospital Outpatient Services and Supporting Regulations; *Use:* The Secretary is required to establish a prospective payment system (PPS) for hospital outpatient services. Successful implementation of an outpatient PPS (OPPS) requires that we distinguish facilities or organizations that function as departments of hospitals from those that are freestanding. In this regard, we will be able to determine: which services should be paid under the OPPS, the clinical laboratory fee schedule, or other payment provisions applicable to services furnished to hospital outpatients. Information from 42 CFR 413.65(b)(3) and (c) reports is needed to make these determinations. Additionally, hospitals and other providers are authorized to impose deductible and coinsurance charges for facility services, but does not allow such charges by facilities or organizations which are not provider-based. This provision requires that we collect information from the required reports so it can determine which facilities are provider-based. *Form Number:* CMS–R–240 (OCN: 0938–0798). *Frequency:* Occasionally; *Affected Public:* Private sector—Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 905; *Total Annual Responses:* 500,405; *Total Annual Hours:* 26,563. (For policy questions regarding this collection contact Daniel Schroder at 410–786–7452.)

6. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* Conditions of Participation for Comprehensive Outpatient Rehabilitation Facilities (CORFs) and Supporting Regulations; *Use:* The Conditions of Participation (CoPs) and accompanying requirements specified in the regulations are used by our surveyors as a basis for determining whether a comprehensive outpatient rehabilitation facility (CORF) qualifies to be awarded a Medicare provider agreement. We believe the health care industry practice demonstrates that the patient clinical records and general content of records are necessary to ensure the well-being and safety of patients and that professional treatment and accountability are a normal part of industry practice. *Form Number:* CMS–10282 (OCN: 0938–1091); *Frequency:* Yearly; *Affected Public:* Private sector—Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 314; *Total Annual Responses:* 314; *Total Annual Hours:* 8,076. (For policy questions regarding this collection contact Jacqueline Leach at 410–786–4282.)

7. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* Final Peer Review Organizations Sanction Regulations in 42 CFR Sections 1004.40, 1004.50, 1004.60, and 1004.70; *Use:* The Peer Review Improvement Act of 1982 amended Title XI of the Social Security Act (the Act), creating the Utilization and Quality Control Peer Review Organization Program. Section 1156 of the Act imposes obligations on health care practitioners and others who furnish or order services or items under Medicare. This section also provides for sanction actions, if the Secretary determines that the obligations as stated by this section are not met. Quality Improvement Organizations (QIOs) are responsible for identifying violations. The QIOs may allow practitioners or other entities, opportunities to submit relevant information before determining that a violation has occurred. The information collection requirements contained in this information collection request are used by the QIOs to collect the information necessary to make their decision. *Form Number:* CMS–R–65 (OCN: 0938–0444); *Frequency:* On occasion; *Affected Public:* Private sector—Business or other for-profit and Not-for-profit institutions; *Number of Respondents:* 53; *Total Annual Responses:* 53; *Total Annual Hours:* 14,310. (For policy questions regarding this collection contact Coles Mercier at 410–786–2112.)

8. *Type of Information Collection Request:* New collection (Request for a new OMBcontrol number); *Title of Information Collection:* Enrollment Assistance Program; *Use:* As required by the Affordable Care Act, CMS will implement a grant-based Navigator Program to provide support to targeted communities. However, there will also be a need for broader based enrollment assistance in population centers that we identify in states with Federally-facilitated Marketplaces (FFMs) to provide Health Insurance Marketplace

enrollment assistance to populations not covered or targeted by the Navigator Program. The target populations are individual consumers and families eligible to enroll in Qualified Health Plans (QHPs) in population centers we identify. Without such access to in-person enrollment assistance, millions of individuals who will be eligible for health insurance coverage in the Marketplaces might not have access to the direct assistance required to make educated choices on available healthcare options and may therefore be unable to successfully enroll in the Marketplaces. To monitor program effectiveness, the Enrollment Assistance Program will provide weekly, monthly, quarterly and annual reports to us. *Form Number:* CMS–10491 (OCN: 0938–NEW); *Frequency:* Weekly, Monthly, Quarterly, Yearly; *Affected Public:* Private Sector; *Number of Respondents:* 1; *Number of Responses:* 84; *Total Annual Hours:* 554. (For policy questions regarding this collection contact Eliza Bangit at 301–492–4219.)

Dated: July 23, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–17985 Filed 7–25–13; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–2388–N]

RIN 0938–AR79

Children's Health Insurance Program (CHIP); Final Allotments to States, the District of Columbia, and U.S. Territories and Commonwealths for Fiscal Year 2013

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice sets forth the final allotments of federal funding available to each State, the District of Columbia, and each U.S. Territory and Commonwealth for fiscal year 2013. Title XXI of the Social Security Act (the Act) authorizes payment of federal matching funds to States, the District of Columbia, and the U.S. Territories and Commonwealths to initiate and expand health insurance coverage to uninsured, low-income children under the Children's Health Insurance Program (CHIP). The fiscal year allotments contained in this notice were determined in accordance with the funding provisions and final regulations published in the February 17, 2011 **Federal Register** (76 FR 9233).

DATES: This notice is effective on August 26, 2013. Final allotments for fiscal year 2013 may be available for expenditure by states beginning with October 1, 2012.

FOR FURTHER INFORMATION CONTACT: Richard Strauss, (410) 786–2019.

SUPPLEMENTARY INFORMATION:

I. Purpose of This Notice

This notice sets forth the allotments available to each state, the District of Columbia, and each U.S. Territory and Commonwealth for fiscal year (FY) 2013 under title XXI of the Social Security Act (the Act). States may implement the Children's Health Insurance Program (CHIP) through a separate state program under title XXI of the Act, an expansion of a State Medicaid program under title XIX of the Act, or a combination of both. CHIP allotments for FY 2009 and subsequent fiscal years are available to match expenditures under an approved state child health plan for 2 fiscal years, including the year for which the allotments were provided. As specified by the Act, the allotments are available to states for FY 2013, and the unexpended amounts of such allotments for a state may be carried over to FY 2014 for use by the state. Federal funds appropriated for title XXI of the Act are limited, and the law specifies a methodology to divide the total fiscal year appropriation into individual allotments available for each state, the District of Columbia, and each U.S. Territory and Commonwealth with an approved child health plan.

Section 2104(b) of the Act requires states, the District of Columbia, and U.S. Territories and Commonwealths to have an approved child health plan for the fiscal year in order for the Secretary to provide an allotment for that fiscal year. All states, the District of Columbia, and U.S. Territories and Commonwealths have approved plans for FY 2013. Therefore, the FY 2013 allotments contained in this notice pertain to all states, the District of Columbia, and U.S. Territories and Commonwealths.

In general, funding is appropriated under section 2104(a) of the Act for purposes of providing allotments to states under CHIP for each fiscal year. Section 2104(a) was amended by section 10203(d)(1) of the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148, enacted on March 23, 2010) (the Affordable Care Act) to extend appropriations for funding for CHIP fiscal year allotments through FY 2015.

II. Methodology for Determining CHIP Fiscal Year Allotments for the 50 States, the District of Columbia, and the U.S. Territories and Commonwealths

A. Funding Authority for the CHIP Fiscal Year Allotments

Section 2104(a)(1) through (18) of the Act appropriates federal funds for providing states' allotments for FYs 2009 through 2015. In particular, the appropriated amounts available for allotments for FYs 2009 through 2015, are as follows: $10,562,000,000 for FY 2009; 12,520,000,000 for FY 2010; $13,459,000,000 for FY 2011; $14,982,000,000 for FY 2012; $17,406,000,000 for FY 2013, $19,147,000,000 for FY 2014; and $2,850,000,000 for each of the first and second half of FY 2015. Also, section 108 of the Children's Health Insurance Program Reauthorization Act of 2009 (Pub. L. 111–3, enacted on February 4, 2009) (CHIPRA), as amended by section 10203(d) of the Affordable Care Act, provides for a one-time appropriation of $15,361,000,000 for allotments for the first half of FY 2015. Therefore, the total appropriation for providing allotments during FY 2015 is $21,061,000,000 (determined as the sum of $2,850,000,000, $15,361,000,000, and $2,850,000,000).

B. Methodology for Determining State's Fiscal Year Allotments

1. General

On September 16, 2009 we published a proposed rule in the **Federal Register** (74 FR 47517) and on February 17, 2011, we published the final rule in the **Federal Register** (76 FR 9233) to implement the methodologies and procedures to determine the fiscal year allotments of federal funds as specified under section 2104(m) of the Act for FY 2009 through FY 2015. In general, the States' fiscal year allotments are provided from the appropriation for the respective fiscal year allotment, subject to a proration adjustment described in section II.B.7 of this notice.

2. FY 2009 Through FY 2012 CHIP Allotments

The final methodology is determined in accordance with the September 16, 2009 **Federal Register** (74 FR 47517) which contained the FY 2009 CHIP allotments, the February 17, 2011 **Federal Register** (76 FR 9233) which contained the FY 2010 and FY 2011 CHIP allotments, and the July 24, 2012 **Federal Register** (77 FR 43290) which contained the FY 2012 CHIP allotments.

3. FY 2013 Allotments

The FY 2013 allotments for the 50 States and the District of Columbia, and the Commonwealths and Territories, are provided from the FY 2013 appropriation ($17,406,000,000). The amounts of these allotments are subject to a proration adjustment described in section II.B.7 of this notice, if necessary. Section 2104(m)(2)(B)(i) of the Act, as amended by the Affordable Care Act, requires a ''rebasing'' process be used for determining the FY 2013 allotments; the rebasing methodology means the states' payments rather than their allotments for FY 2012 must be considered in calculating the FY 2013 allotments. In particular, the FY 2013 allotments are determined by multiplying the allotment increase factor for FY 2013 for the state by the sum of: any federal payments made from the states' available allotments in FY 2012; any amounts provided as redistributed allotments in FY 2012 to the state; and any federal payments attributable to any contingency fund payments made to the State for FY 2012 determined under section 2104(n) of the Act.

4. FY 2014 Allotments

The FY 2014 allotments for the 50 States and the District of Columbia, and the Commonwealths and Territories, are provided from the FY 2014 appropriation of $19,147,000,000, and are subject to a proration adjustment described in section II.B.7 of this notice, if necessary. Under section 2104(m)(2)(B)(ii) of the Act, as amended by the Affordable Care Act, the FY 2014 allotment for each State is determined by multiplying the allotment increase factor for FY 2014 for the state, by the sum of: the state's FY 2013 allotment; and any contingency fund payment made to the state for FY 2013, as determined in section 2104(n) of the Act.

For the 50 States and the District of Columbia, under section 2104(m)(6) of the Act, the FY 2014 allotment may include additional amounts in situations where such states have submitted an expansion allotment adjustment request before August 31, 2013.

5. FY 2015 Allotments

Under section 2104(m)(3) of the Act, the FY 2015 allotments for the 50 states and the District of Columbia, and the Commonwealths and Territories, are comprised of 2 components related to the first half of FY 2015 (that is, the period of October 1, 2014 through March 31, 2015) and second half of FY 2015 (that is, April 1, 2015 through September 30, 2015). The FY 2015 allotments for the first and second half of FY 2015 are subject to a proration adjustment described in section II.B.7 of this notice, as necessary.

The allotments for the first half of FY 2015 are provided from a total available appropriation of $18,211,000,000, comprised of $2,850,000,000 appropriated under section 2104(a)(18)(A) of the Act, and $15,361,000,000 appropriated by section 108 of CHIPRA, as amended by the Affordable Care Act. The allotments for the first half of FY 2015 are equal to the ''first half ratio'' multiplied by the allotment increase factor for FY 2015 multiplied by the sum of any federal payments made from the States' available allotments in FY 2014; any amounts provided as redistributed allotments in FY 2014 to the state; and any federal payments attributable to any contingency fund payments made to the State for FY 2014 as determined under section 2104(n) of the Act. The first half ratio is the percentage determined by dividing $18,211,000,000 (calculated as the sum of $2,850,000,000 (the appropriation for the first half of FY 2015) and 15,361,000,000 (the one-time appropriation for the first half of the FY 2015)) by $21,061,000,000 (calculated as the sum of $2,850,000,000(the appropriation for the second half of FY 2015) and $18,211,000,000).

The states' CHIP allotments for the second half of FY 2015 are provided from a total available appropriation of $2,850,000,000, appropriated under section 2104(a)(18)(B) of the Act. The allotments for the second half of FY 2015 are equal to $2,850,000,000 multiplied by a percentage equal to the amount of the allotment for the state for the first half of FY 2015 divided by the sum of all such first half of FY 2015 allotments for all States.

6. Proration Rule

Under section 2104(m)(4) of the Act, if the amount of States' (including the 50 States, the District of Columbia, and the Commonwealths and Territories) allotments for a fiscal year, or in the case of FY 2015, the amount of an allotment for each half of the fiscal year, exceeds the total appropriations available for such periods, the total allotments for each of these periods will be reduced on a proportional basis. The total amount available nationally for the period is multiplied by a proration percentage determined by dividing the amount determined for the period by the sum of such amounts.

7. The Allotment Increase Factor For A Fiscal Year

Under section 2104(m)(5) of the Act, the allotment increase factor for a fiscal year is equal to the product of 2 amounts for the fiscal year: the per capita health care growth factor and the child population growth factor.

The per capita health care growth factor for a fiscal year is equal to 1 plus the percentage increase in the projected per capita amount of the National Health Expenditures from the calendar year in which the previous fiscal year ends to the calendar year in which the fiscal year involved ends, as most recently published by CMS before the beginning of the fiscal year involved.

In general, for the 50 States and the District of Columbia, the Child Population Growth Factor (CPGF) for a fiscal year is equal to 1 plus the percentage increase (if any, expressed in decimal format) in the population of children in the State from July 1 in the previous fiscal year to July 1 in the fiscal year involved, as determined by CMS based on the most recent published estimates of the Census Bureau available before the beginning of the fiscal year involved, plus 1 percentage point (expressed as 0.01). In the determination of the CPGF, section 2104(m)(5)(B) of the Act refers to ''the percentage increase (if any)'' of the population of children in the State. In this regard, the CPGF refers only to increases in the population of children. Thus, if there was a decrease in the population of children over the indicated period, the CPGF for such State would be1 plus 0.0 percent plus 1 percentage point; that is, negative growth in the children population would not result in the growth factor being less than 101 percent (expressed as 1.01).

8. Allotments for the Commonwealths And Territories

Section 2104(m)(1)(B) of the Act provided for 2009 allotments for the commonwealths and territories based upon the highest amount available for any fiscal year from 1999 through 2008, multiplied by the allotment increase factor with the term ''United States'' substituted for the term ''the State'' (so that the increase for the commonwealths and territories will be based on the CPFG rate for the entire country rather than specific to the commonwealth or territory). For fiscal years *after* FY 2009, the CHIP allotment for the commonwealths and territories is determined using the same methodology described above for the 50 States and District of Columbia. The 2009 change

to the allotment increase factor does not apply, and thus we will determine a commonwealth or territory-specific allotment increase factor, based on the CPFG for each commonwealth or territory, based on the most recent published estimates of the Census Bureau.

C. FY 2013 Allotments Determined in Accordance With Such Methodologies and Procedures.

We calculated the FY 2013 allotments as discussed in section II.B.4 of this notice and in accordance with section 2104(m) of the Act and final regulations at 42 CFR 457.609 (published in the February 17, 2011 **Federal Register**. That calculation is presented in 2 tables described in section III of this notice. Table 1 provides the calculation of the allotment increase factor for FY 2013, and Table 2 provides the calculation of the FY 2013 allotment.

III. Tables

Following are the keys and associated tables for the CHIP funding provisions as discussed in previous sections (note that for purposes of presentation and due to rounding, not all numbers following decimals are shown in the following tables):

Table 1—Allotment Increase Factor for FY 2013

Table 2—Children's Health Insurance Program Allotments for FY 2013

A. Table 1—Allotment Increase Factor For FY 2013

Key to Table 1

Column/Description

Column A = *State.* Column A contains the name of the State, District of Columbia, U.S. Commonwealth or Territory.

Column B = *PCNHE 2012, PCNHE 2013, PCHCG Factor.* Column B contains the calculation of the Per Capita Health Care Growth (PCHCG) Factor for FY 2013, determined as 1 plus the percentage increase in the Per Capita National Health Expenditures (PCNHE) (source: Centers for Medicare & Medicaid Services, Office of the Actuary) from calendar year 2012 to calendar year 2013.

Columns C through F = *Calculation of the Child Population Growth Factor (CPGF) for FY 2013:*

Column C = *July 1, 2012 Child Population.* Column C contains the population of children in each state or the United States as of July 1, 2012, as provided by the most recent published data of the Census Bureau before the beginning of FY 2013.

Column D = *July 1, 2013 Child Population.* Column D contains the population of children in each state or the United States as of July 1, 2013, as provided by the most recent published data of the Census Bureau before the beginning of FY 2013.

Column E = *Percent Increase 2012—2013.* Column E contains the percentage increase, if any, of the population of children in each state, or the United States, from July 1, 2012 to July 1, 2013, calculated as the difference between the number in Column D minus the number in Column C divided by the number in Column C.

Column F = FY 2013 *Child Population Growth Factor.* Column F contains the Child Population Growth Factor (CPGF) for each state, determined as 1.01 plus the percent in Column E for the State.

Column G = FY 2013 *Allotment Increase Factor.* Column G contains the FY 2013 Allotment Increase Factor, calculated as the PCHCG factor in Column B multiplied by the CPGF percent in Column F.

TABLE 1—ALLOTMENT INCREASE FACTOR FOR FY 2013

State	PCNHE 2012–$8,953 PCNHE 2013—$9,214 PCHCG factor*—1.0292	Child population growth factor (CPGF) for FY 2013				FY 2013 Allotment increase factor Col B × F
		July 1, 2012 population	July 1, 2013 population	Percent increase 2012–2013 (D–C)/C	FY 2013 CPGF Col E + 1.01	
A	B	C	D	E	F	G
Alabama	1.0292	1,190,177	1,185,745	0.00	101.00	1.0394
Alaska	1.0292	197,821	197,483	0.00	101.00	1.0394
Arizona	1.0292	1,709,881	1,704,721	0.00	101.00	1.0394
Arkansas	1.0292	748,748	748,686	0.00	101.00	1.0394
California	1.0292	9,802,326	9,781,108	0.00	101.00	1.0394
Colorado	1.0292	1,305,223	1,311,232	0.46	101.46	1.0442
Connecticut	1.0292	845,091	833,027	0.00	101.00	1.0394
Delaware	1.0292	217,092	216,511	0.00	101.00	1.0394
District of Columbia	1.0292	118,912	122,540	3.05	104.05	1.0708
Florida	1.0292	4,231,207	4,228,907	0.00	101.00	1.0394
Georgia	1.0292	2,634,887	2,639,023	0.16	101.16	1.0411
Hawaii	1.0292	320,876	321,411	0.17	101.17	1.0412
Idaho	1.0292	451,195	450,659	0.00	101.00	1.0394
Illinois	1.0292	3,252,752	3,227,501	0.00	101.00	1.0394
Indiana	1.0292	1,679,592	1,672,236	0.00	101.00	1.0394
Iowa	1.0292	765,073	762,718	0.00	101.00	1.0394
Kansas	1.0292	762,720	761,315	0.00	101.00	1.0394
Kentucky	1.0292	1,077,372	1,075,953	0.00	101.00	1.0394
Louisiana	1.0292	1,183,059	1,184,741	0.14	101.14	1.0409
Maine	1.0292	283,150	279,480	0.00	101.00	1.0394
Maryland	1.0292	1,425,777	1,422,901	0.00	101.00	1.0394
Massachusetts	1.0292	1,493,331	1,483,033	0.00	101.00	1.0394
Michigan	1.0292	2,407,389	2,374,494	0.00	101.00	1.0394
Minnesota	1.0292	1,346,832	1,343,206	0.00	101.00	1.0394
Mississippi	1.0292	790,318	787,474	0.00	101.00	1.0394
Missouri	1.0292	1,482,863	1,472,896	0.00	101.00	1.0394
Montana	1.0292	235,024	234,574	0.00	101.00	1.0394
Nebraska	1.0292	487,198	488,415	0.25	101.25	1.0420
Nevada	1.0292	697,086	696,921	0.00	101.00	1.0394

TABLE 1—ALLOTMENT INCREASE FACTOR FOR FY 2013—Continued

State	PCNHE 2012–$8,953 PCNHE 2013—$9,214 PCHCG factor*—1.0292	Child population growth factor (CPGF) for FY 2013				FY 2013 Allotment increase factor Col B × F
		July 1, 2012 population	July 1, 2013 population	Percent increase 2012–2013 (D–C)/C	FY 2013 CPGF Col E + 1.01	
A	B	C	D	E	F	G
New Hampshire	1.0292	293,783	288,459	0.00	101.00	1.0394
New Jersey	1.0292	2,142,311	2,124,544	0.00	101.00	1.0394
New Mexico	1.0292	549,684	551,522	0.33	101.33	1.0429
New York	1.0292	4,533,608	4,506,651	0.00	101.00	1.0394
North Carolina	1.0292	2,427,545	2,433,066	0.23	101.23	1.0418
North Dakota	1.0292	162,495	163,927	0.88	101.88	1.0485
Ohio	1.0292	2,825,825	2,801,252	0.00	101.00	1.0394
Oklahoma	1.0292	994,142	1,000,112	0.60	101.60	1.0456
Oregon	1.0292	913,230	912,653	0.00	101.00	1.0394
Pennsylvania	1.0292	2,921,487	2,898,558	0.00	101.00	1.0394
Rhode Island	1.0292	233,902	230,480	0.00	101.00	1.0394
South Carolina	1.0292	1,148,077	1,150,117	0.18	101.18	1.0413
South Dakota	1.0292	214,867	215,447	0.27	101.27	1.0422
Tennessee	1.0292	1,574,981	1,572,746	0.00	101.00	1.0394
Texas	1.0292	7,408,497	7,484,215	1.02	102.02	1.0500
Utah	1.0292	933,382	941,395	0.86	101.86	1.0483
Vermont	1.0292	133,891	131,547	0.00	101.00	1.0394
Virginia	1.0292	1,966,500	1,967,568	0.05	101.05	1.0400
Washington	1.0292	1,674,524	1,679,579	0.30	101.30	1.0426
West Virginia	1.0292	406,890	405,501	0.00	101.00	1.0394
Wisconsin	1.0292	1,396,702	1,387,539	0.00	101.00	1.0394
Wyoming	1.0292	142,250	142,106	0.00	101.00	1.0394
Total States	1.0292	78,141,545	77,997,895	0.00	101.00	1.0394
American Samoa	1.0292	19,210	18,198	0.00	101.00	1.0394
Guam	1.0292	54,032	53,490	0.00	101.00	1.0394
Northern Mariana Islands	1.0292	16,469	16,227	0.00	101.00	1.0394
Puerto Rico	1.0292	910,852	889,582	0.00	101.00	1.0394
Virgin Islands	1.0292	24,590	23,763	0.00	101.00	1.0394
Total Territories	1.0292	1,025,153	1,001,260	0.00	101.00	1.0394
Total States/Territories	1.0292	79,166,698	78,999,155	0.00	101.00	1.0394

Footnotes:
* Calculated as 1 + (($9,214–$8,953)/$8,953); $8,953 is per capita NHE for 2012 and $9,214 is per capita NHE for 2013.
PCHCG FACTOR is "Per Capita Health Care Growth Factor".

B. Table 2—Children's Health Insurance Program Allotment for FY 2013

Key to Table 2

Column/Description

Column A = *State.* Column A contains the name of the state, District of Columbia, U.S. Commonwealth or Territory.

Column B = *FY 2012 FS Expenditures Applied Against Allotments.* Column B contains the amount of federal share (FS) payments to the state that were attributable and countable towards the allotments available to the state in FY 2012. These amounts were based on the States' submissions of the 4 quarterly FY 2012 expenditure reports.

Column C = *FY 2012 Contingency Fund Payments.* Column C contains the amounts of any contingency funds payments made to a State for FY 2012 determined in accordance with the provisions of section 2104(n) of the Act.

Column D = *FY 2012 FS Expenditures Applied Against Redistributions.* Column D contains the total amount of federal payments redistributed to the state in FY 2012 determined in in accordance with the provisions of section 2104(f) of the Act.

Column E = *FY 2012 Total FS Expenditures.* Column E contains the total amount of the FY 2012 federal payments to the state determined as the sum of the amounts in Columns B, C, and D.

Column F = *FY 2013 Allotment Increase Factor.* Column F contains the Allotment Increase Factor for FY 2013 for each state as contained in Column G of Table 1.

Column G = *FY 2013 CHIP Allotment.* Column G contains the product of the total FY 2012 federal share expenditures in Column E and the amount of the FY 2013 Allotment Increase Factor in Column F. This amount represents the FY 2013 CHIP allotment.

TABLE 2—CHILDREN'S HEALTH INSURANCE PRORAM ALLOTMENTS FOR FY 2013

State	FY 2012 FS expenditures applied against allotments/1	FY 2012 Contingency fund payments	FY 2012 FS expenditures applied against redistributions	FY 2012 Total FS expenditures Col B + C + D	FY 2013 Allotment increase factor	FY 2013 CHIP allotment Col E × F
A	B	C	D	E	F	G
Alabama	$156,666,630	$0	$0	$156,666,630	1.0394	$162,846,151
Alaska	19,777,701	0	0	19,777,701	1.0394	20,557,808
Arizona	24,428,316	0	0	24,428,316	1.0394	25,391,861
Arkansas	99,204,579	0	0	99,204,579	1.0394	103,117,581
California	1,246,835,487	0	0	1,246,835,487	1.0394	1,296,015,369
Colorado	126,262,430	0	0	126,262,430	1.0442	131,840,929
Connecticut	39,760,103	0	0	39,760,103	1.0394	41,328,391
Delaware	15,141,183	0	0	15,141,183	1.0394	15,738,408
District of Columbia	13,883,678	0	0	13,883,678	1.0708	14,867,242
Florida	345,422,131	0	0	345,422,131	1.0394	359,046,879
Georgia	271,558,901	0	0	271,558,901	1.0411	282,708,900
Hawaii	24,789,079	0	0	24,789,079	1.0412	25,809,390
Idaho	34,592,745	0	0	34,592,745	1.0394	35,957,213
Illinois	265,108,645	0	0	265,108,645	1.0394	275,565,527
Indiana	139,361,391	0	0	139,361,391	1.0394	144,858,329
Iowa	88,986,083	0	0	88,986,083	1.0394	92,496,029
Kansas	53,296,813	0	0	53,296,813	1.0394	55,399,040
Kentucky	142,273,872	0	0	142,273,872	1.0394	147,885,689
Louisiana	165,120,888	0	0	165,120,888	1.0409	171,875,479
Maine	30,284,258	0	0	30,284,258	1.0394	31,478,783
Maryland	154,385,062	0	0	154,385,062	1.0394	160,474,590
Massachusetts/2	318,320,572	0	0	318,320,572	1.0394	330,876,333
Michigan	52,717,514	0	0	52,717,514	1.0394	54,796,891
Minnesota	30,864,280	0	0	30,864,280	1.0394	32,081,683
Mississippi	170,165,124	0	0	170,165,124	1.0394	176,877,077
Missouri	118,282,444	0	0	118,282,444	1.0394	122,947,949
Montana	57,136,546	0	0	57,136,546	1.0394	59,390,226
Nebraska	40,751,950	0	0	40,751,950	1.0420	42,464,124
Nevada	30,260,365	0	0	30,260,365	1.0394	31,453,948
New Hampshire	17,504,890	0	0	17,504,890	1.0394	18,195,349
New Jersey	615,891,341	0	0	615,891,341	1.0394	640,184,412
New Mexico	119,117,210	0	0	119,117,210	1.0429	124,225,549
New York	557,751,171	0	0	557,751,171	1.0394	579,750,975
North Carolina	291,999,510	0	0	291,999,510	1.0418	304,200,528
North Dakota	16,510,403	0	0	16,510,403	1.0485	17,311,376
Ohio	323,299,011	0	0	323,299,011	1.0394	336,051,140
Oklahoma	109,210,015	0	0	109,210,015	1.0456	114,192,613
Oregon	138,435,048	0	0	138,435,048	1.0394	143,895,447
Pennsylvania	294,116,617	0	0	294,116,617	1.0394	305,717,683
Rhode Island	38,007,530	0	0	38,007,530	1.0394	39,506,690
South Carolina	94,387,784	0	0	94,387,784	1.0413	98,283,399
South Dakota	18,650,766	0	0	18,650,766	1.0422	19,438,235
Tennessee	192,636,297	0	0	192,636,297	1.0394	200,234,597
Texas	849,095,131	0	0	849,095,131	1.0500	891,517,738
Utah	59,616,038	0	0	59,616,038	1.0483	62,494,237
Vermont	12,542,134	0	0	12,542,134	1.0394	13,036,843
Virginia	179,399,135	0	0	179,399,135	1.0400	186,575,583
Washington	92,985,481	0	0	92,985,481	1.0426	96,942,063
West Virginia	46,443,775	0	0	46,443,775	1.0394	48,275,692
Wisconsin	99,094,456	0	0	99,094,456	1.0394	103,003,114
Wyoming	10,355,354	0	0	10,355,354	1.0394	10,763,808
States/DC Total	8,452,687,867	0	0	8,452,687,867		8,799,944,890
Commonwealths and Territories						
American Samoa	1,252,669	0	0	1,252,669	1.0394	1,302,079
Guam	4,359,910	0	0	4,359,910	1.0394	4,531,881
N. Mariana Islands	898,682	0	0	898,682	1.0394	934,129
Puerto Rico	103,910,799	0	23,714,630	127,625,429	1.0394	132,659,456
Virgin Islands	0	0	0	0	1.0394	0
Total	110,422,060	0	23,714,630	134,136,690		139,427,545
National Total	8,563,109,927	0	23,714,630	8,586,824,557		8,939,372,435

Footnotes:

/1 Final CHIP Allotments for FY 2013 based on reported expenditures for quarters 1 through 4 of FY 2012.
/2 MA expenditures adjusted to only include amounts claimed on FY 2012 expenditure reports up to FY 2012 ten percent limit.

IV. Collection of Information Requirements

This document does not impose any information collection or recordkeeping requirements. Consequently, it is not subject to Office of Management and Budget review under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Authority: (Section 1102 of the Social Security Act (42 U.S.C. 1302))

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)
(Catalog of Federal Domestic Assistance Program No. 93.767, State Children's Health Insurance Program))

Dated: May 15, 2013.

Marilyn Tavenner,

Administrator, Centers for Medicare & Medicaid Services.

Dated: June 28, 2013.

Kathleen Sebelius,

Secretary. Department of Health and Human Services.

[FR Doc. 2013–17966 Filed 7–25–13; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–2387–N]

RIN 0938–AR78

Medicaid Program; State Allotments for Payment of Medicare Part B Premiums for Qualifying Individuals (QIs): Federal Fiscal Years 2012 and 2013

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice sets forth the States' final allotments available to pay the Medicare Part B premiums for Qualifying Individuals (QIs) for the Federal fiscal year (FY) 2012 and the preliminary QI allotments for FY 2013. The amounts of these QI allotments were determined in accordance with the methodology set forth in regulations and reflect funding for the QI program made available under recent legislation.

DATES: The final QI allotments for payment of Medicare Part B premiums for FY 2012 are effective October 1, 2011. The preliminary QI allotments for FY 2013 are effective October 1, 2012.

FOR FURTHER INFORMATION CONTACT: Richard Strauss, (410) 786–2019.

SUPPLEMENTARY INFORMATION:

I. Background

A. QI Allotments for FY 2012

Section 110 of the Medicare and Medicaid Extenders Act of 2010 (Pub. L. 111–309, enacted on December 15, 2010) (MMEA) extended the authority and funding for the QI program for the first quarter of FY 2012 (that is, through December 31, 2011) by providing $280 million available for the first quarter of FY 2012. Section 310 of the Temporary Payroll Tax Cut Continuation Act of 2011 (Pub. L. 112–78, enacted on December 23, 2011) (TPTCA) provided temporary continued authority and an additional $150 million in funding for the QI program for the period January 1, 2012 through February 29, 2012. With the enactment of TPTCA, the QI program was authorized and funded at a total amount nationally of $430 million ($280 million plus $150 million) for FY 2012 through February 29, 2012. Section 3101 of the Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. 112–96, enacted on February 22, 2012) (MCTRJCA) extended the authority and funding for the QI program for FY 2012; in particular, authority for the QI program was extended for all of FY 2012 and funding for the program for the period January 1, 2012 through September 30, 2012 was increased to $450 million. Therefore, the total funding available for the QI program for FY 2012 is $730 million ($280 million plus $450 million).

B. QI Allotments for FY 2013 and Thereafter

Section 3101 of the MCTRJCA extended the authority and funding for the QI program by providing $280 million, available for the period October 1, 2012 through December 31, 2012, the first quarter of FY 2013. Most recently, section 621 of the American Taxpayer Relief Act of 2012 (Pub. L. 112–240, enacted on January 2, 2013) (ATRA), extended the authority for the QI program for all of FY 2013 and provided $485 million in additional funding for the program for the period January 1, 2013 through September 30, 2013. Therefore the total funding available for the QI program for FY 2013 is $765 million ($280 million plus $485 million).

Finally, section 621 of ATRA further extended the authority and funding for the QI program by providing $300 million, available for the period October 1, 2013 through December 31, 2013, the first quarter of FY 2014.

C. Methodology for Calculating the Fiscal Year QI Allotments.

The amounts of the states' final FY 2012 and preliminary FY 2013 QI allotments, contained in this notice, were determined in accordance with the methodology set forth in existing regulations at 42 CFR 433.10(c)(5) and reflect funding for the QI program made available under the legislation discussed above.

II. Charts

The final QI allotments for FY 2012 and the preliminary QI allotments for FY 2013 are shown by state in Chart 1 and Chart 2 below, respectively:

Chart 1—Final Qualifying Individuals Allotments for October 1, 2011 through September 30, 2012.

Chart 2—Preliminary Qualifying Individuals Allotments for October 1, 2012 through September 30, 2013.

TABLE 1—FINAL QUALIFYING INDIVIDUALS ALLOTMENTS FOR OCTOBER 1, 2011 THROUGH SEPTEMBER 30, 2012

State	Initial QI allotments for FY 2012			FY 2012 estimated QI expenditures/1	Need (difference) If E>D, E–D	Pct of Tot. need states F/(Tot. of F)	Reduction pool for non-need states If D >= E, D–E	Pct of Tot. non-need states H/(Tot. of H)	Reduction adj. for non-need states Col. I x $82,487,822	Increase adj. for need states Col. G x $82,487,822	Final FY 2012 QI allotment/2
	Number of individuals/3 (000s)	Percentage of total Col B/Tot. Col B	Initial QI allotment Col C x $730,000,000								
A	B	C	D	E	F	G	H	I	J	K	L
Alabama	43	3.22	$23,513,109	$21,324,574	NA	NA	$2,188,535	1.2003	$990,139	NA	$22,522,970
Alaska	2	0.15	1,093,633	283,429	NA	NA	810,204	0.4444	366,553	NA	727,080
Arizona	14	1.05	7,655,431	16,592,682	8,937,252	10.8346	Need	Need	Need	8,937,252	16,592,682
Arkansas	21	1.57	11,483,146	12,996,962	1,513,816	1.8352	Need	Need	Need	1,513,816	12,996,962
California	89	6.67	48,666,667	27,247,615	NA	NA	21,419,052	11.7477	9,690,422	NA	38,976,244
Colorado	16	1.20	8,749,064	5,418,415	NA	NA	3,330,649	1.8268	1,506,854	NA	7,242,209
Connecticut	15	1.12	8,202,247	2,292,128	NA	NA	5,910,119	3.2415	2,673,860	NA	5,528,387
Delaware	4	0.30	2,187,266	3,030,541	843,275	1.0223	Need	Need	Need	843,275	3,030,541
District of Columbia	2	0.15	1,093,633	0	NA	NA	1,093,633	0.5998	494,782	NA	598,851
Florida	83	6.22	45,385,768	66,783,222	21,397,454	25.9401	Need	Need	Need	21,397,454	66,783,222
Georgia	35	2.62	19,138,577	35,076,093	15,937,516	19.3211	Need	Need	Need	15,937,516	35,076,093
Hawaii	5	0.37	2,734,082	1,308,325	NA	NA	1,425,758	0.7820	645,042	NA	2,089,040
Idaho	6	0.45	3,280,899	2,501,976	NA	NA	778,923	0.4272	352,401	NA	$2,928,498
Illinois	64	4.79	34,996,255	23,748,898	NA	NA	11,247,356	6.1688	5,088,537	NA	29,907,718
Indiana	39	2.92	21,325,843	6,522,130	NA	NA	14,803,712	8.1194	6,697,506	NA	14,628,336
Iowa	16	1.20	8,749,064	4,338,994	NA	NA	4,410,070	2.4188	1,995,207	NA	6,753,857
Kansas	19	1.42	10,389,513	4,613,481	NA	NA	5,776,032	3.1680	2,613,196	NA	7,776,317
Kentucky	32	2.40	17,498,127	15,249,091	NA	NA	2,249,037	1.2335	1,017,511	NA	16,480,617
Louisiana	28	2.10%	15,310,861	19,883,851	4,572,989	5.5438	Need	Need	Need	4,572,989	19,883,851
Maine	6	0.45	3,280,899	5,308,878	2,027,979	2.4585	Need	Need	Need	2,027,979	5,308,878
Maryland	19	1.42	10,389,513	7,562,402	NA	NA	2,827,111	1.5506	1,279,044	NA	9,110,470
Massachusetts	34	2.55	18,591,760	10,276,939	NA	NA	8,314,821	4.5604%	3,761,797	NA	14,829,963
Michigan	39	2.92	21,325,843	16,321,547	NA	NA	5,004,296	2.7447	2,264,047	NA	19,061,796
Minnesota	21	1.57	11,483,146	5,943,209	NA	NA	5,539,937	3.0385	2,506,382	NA	8,976,764
Mississippi	19	1.42	10,389,513	14,400,900	4,011,386	4.8630	Need	Need	Need	4,011,386	14,400,900
Missouri	35	2.62	19,138,577	4,570,341	NA	NA	14,568,235	7.9902	6,590,971	NA	12,547,606
Montana	7	0.52	3,827,715	1,425,081	NA	NA	2,402,634	1.3178	1,087,001	NA	2,740,714
Nebraska	7	0.52	3,827,715	2,313,332	NA	NA	1,514,383	0.8306	685,138	NA	3,142,577
Nevada	9	0.67	4,921,348	4,662,209	NA	NA	259,140	0.1421	117,240	NA	4,804,108
New Hampshire	5	0.37	2,734,082	2,212,296	NA	NA	521,787	0.2862	236,067	NA	2,498,015
New Jersey	29	2.17	15,857,678	9,166,126	NA	NA	6,691,552	3.6701	3,027,397	NA	12,830,281
New Mexico	10	0.75	5,468,165	4,058,656	NA	NA	1,409,509	0.7731	637,691	NA	4,830,474
New York	78	5.84	42,651,685	44,692,419	2,040,734	2.4740	Need	Need	Need	2,040,734	44,692,419
North Carolina	47	3.52	25,700,375	28,365,556	2,665,181	3.2310	Need	Need	Need	2,665,181	28,365,556
North Dakota	3	0.22	1,640,449	629,590	NA	NA	1,010,859	0.5544	457,334	NA	1,183,116
Ohio	58	4.34	31,715,356	24,831,767	NA	NA	6,883,589	3.7754	3,114,278	NA	28,601,078
Oklahoma	17	1.27	9,295,880	10,241,906	946,026	1.1469	Need	Need	Need	946,026	10,241,906
Oregon	17	1.27	9,295,880	13,072,852	3,776,972	4.5788	Need	Need	Need	3,776,972	13,072,852
Pennsylvania	66	4.94	36,089,888	32,079,327	NA	NA	4,010,560	2.1997	1,814,460	NA	34,275,427
Rhode Island	5	0.37	2,734,082	2,388,025	NA	NA	346,058	0.1898	156,564	NA	2,577,519
South Carolina	26	1.95	14,217,228	13,359,233	NA	NA	857,995	0.4706	388,175	NA	13,829,054
South Dakota	4	0.30	2,187,266	1,915,993	NA	NA	271,273	0.1488	122,729	NA	2,064,536
Tennessee	32	2.40	17,498,127	29,077,199	11,579,072	14.0373	Need	Need	Need	11,579,072	29,077,199
Texas	105	7.87	57,415,730	34,868,400	NA	NA	22,547,330	12.3665	10,200,879	NA	47,214,851
Utah	5	0.37	2,734,082	2,429,445	NA	NA	304,638	0.1671	137,824	NA	2,596,258
Vermont	2	0.15	1,093,633	3,331,803	2,238,170	2.7133	Need	Need	Need	2,238,170	3,331,803
Virginia	25	1.87	13,670,412	13,050,355	NA	NA	620,057	0.3401	280,526	NA	13,389,886
Washington	26	1.95	14,217,228	6,502,266	NA	NA	7,714,963	4.2314	3,490,409	NA	10,726,820
West Virginia	16	1.20	8,749,064	6,165,223	NA	NA	2,583,841	1.4172	1,168,983	NA	7,580,080
Wisconsin	27	2.02	14,764,045	4,954,841	NA	NA	9,809,204	5.3801	4,437,887	NA	10,326,158
Wyoming	3	0.22	1,640,449	771,814	NA	NA	868,636	0.4764	392,989	NA	1,247,461
Total	1,335	100.00	730,000,000	630,162,333	82,487,822	100.0000	182,325,489	100.0000	82,487,822	82,487,822	730,000,000

Footnotes:
/1 FY 2012 Estimates from July 2012 CMS Survey of States; Estimates Are For Months October 2011 Through September 2012.
/2 For Need States, Final FY 2012 QI Allotment is equal to Initial QI Allotment in Column D increased by amount in Column K.
For Non-Need States, Final FY 2012 QI Allotment is equal to Initial QI Allotment in Column D reduced by amount in Column J.
/3 Three-year average (2008–2010) of number (000) of Medicare beneficiaries in State who are not enrolled in Medicaid but whose incomes are at least 120% but less than 135% of federal poverty level.
Source: Census Bureau Annual Social and Economic Supplement (ASEC) to the 2011 Current Population Survey (CPS).

TABLE 2—PRELIMINARY QUALIFYING INDIVIDUALS ALLOTMENTS FOR OCTOBER 1, 2012 THROUGH SEPTEMBER 30, 2013

State	Initial QI allotments for FY 2013			FY 2013 estimated QI expenditures/1	Need (difference) If E>D, E–D	Pct of Tot. need states F/(Tot. of F)	Reduction pool for non-need states If D > = E, D–E	Pct of Tot. non-need states H/(Tot. of H)	Reduction adj. for non-need states Col. I x $103,554,487	Increase adj. for need states Col. G x $103,554,487	Preliminary FY 2013 QI allotment/2
	Number of individuals/3 (000s)	Percentage of total Col B/Tot. Col B	Initial QI allotment Col C x $765,000,000								
A	B	C	D	E	F	G	H	I	J	K	L
Alabama	38	2.64	$20,159,501	$24,188,697	$4,029,197	3.8909	Need	Need	Need	$4,029,197	$24,188,697
Alaska	2	0.14	1,061,026	378,052	NA	NA	682,974	0.4239	438,933	NA	622,093
Arizona	21	1.46	11,140,777	20,302,279	9,161,503	8.8470	Need	Need	Need	9,161,503	20,302,279
Arkansas	27	1.87	14,323,856	14,968,578	644,722	0.6226	Need	Need	Need	644,722	14,968,578
California	107	7.42	56,764,910	30,667,238	NA	NA	26,097,672	16.1967	16,772,428	NA	39,992,482
Colorado	16	1.11	8,488,211	6,261,250	NA	NA	2,226,960	1.3821	1,431,221	NA	7,056,990
Connecticut	15	1.04	7,957,698	4,295,522	NA	NA	3,662,176	2.2728	2,353,604	NA	5,604,094
Delaware	4	0.28	2,122,053	3,516,899	1,394,847	1.3470	Need	Need	Need	1,394,847	3,516,899
District of Columbia	2	0.14	1,061,026	0	NA	NA	1,061,026	0.6585	681,899	NA	379,127
Florida	96	6.66	50,929,265	75,922,288	24,993,023	24.1351	Need	Need	Need	24,993,023	75,922,288
Georgia	45	3.12	23,873,093	37,187,452	13,314,359	12.8573	Need	Need	Need	13,314,359	37,187,452
Hawaii	6	0.42	3,183,079	1,502,678	NA	NA	1,680,401	1.0429	1,079,959	NA	2,103,120
Idaho	7	0.49	3,713,592	2,746,709	NA	NA	966,883	0.6001	621,396	NA	3,092,197
Illinois	68	4.72	36,074,896	28,872,870	NA	NA	7,202,026	4.4697	4,628,592	NA	31,446,304
Indiana	43	2.98	22,812,067	6,951,308	NA	NA	15,860,759	9.8435	10,193,378	NA	12,618,688
Iowa	16	1.11	8,488,211	4,940,141	NA	NA	3,548,070	2.2020	2,280,271	NA	6,207,940
Kansas	18	1.25	9,549,237	5,443,274	NA	NA	4,105,963	2.5482	2,638,817	NA	6,910,420
Kentucky	34	2.36	18,037,448	18,127,195	89,747	0.0867	Need	Need	Need	89,747	18,127,195
Louisiana	29	2.01	15,384,882	22,144,578	6,759,696	6.5277	Need	Need	Need	6,759,696	22,144,578
Maine	7	0.49	3,713,592	7,045,460	3,331,867	3.2175	Need	Need	Need	3,331,867	7,045,460
Maryland	24	1.66	12,732,316	8,602,875	NA	NA	4,129,441	2.5628	2,653,906	NA	10,078,411
Massachusetts	28	1.94	14,854,369	10,893,600	NA	NA	3,960,769	2.4581	2,545,503	NA	12,308,866
Michigan	38	2.64	20,159,501	20,967,835	808,334	0.7806	Need	Need	Need	808,334	20,967,835
Minnesota	22	1.53	11,671,290	6,559,682	NA	NA	5,111,608	3.1724	3,285,124	NA	8,386,166
Mississippi	18	1.25	9,549,237	16,529,838	6,980,601	6.7410	Need	Need	Need	6,980,601	16,529,838
Missouri	39	2.70	20,690,014	4,700,909	NA	NA	15,989,105	9.9231	10,275,864	NA	10,414,150
Montana	6	0.42	3,183,079	1,512,121	NA	NA	1,670,958	1.0370	1,073,890	NA	2,109,189
Nebraska	6	0.42	3,183,079	2,506,770	NA	NA	676,309	0.4197	434,650	NA	2,748,429
Nevada	10	0.69	5,305,132	5,177,080	NA	NA	128,052	0.0795	82,296	NA	5,222,836
New Hampshire	6	0.42	3,183,079	2,861,766	NA	NA	321,313	0.1994	206,501	NA	2,976,578
New Jersey	40	2.77	21,220,527	9,901,642	NA	NA	11,318,885	7.0247	7,274,411	NA	13,946,116
New Mexico	9	0.62	4,774,619	4,787,611	12,993	0.0125	Need	Need	Need	12,993	4,787,611
New York	85	5.89	45,093,620	50,481,630	5,388,010	5.2031	Need	Need	Need	5,388,010	50,481,630
North Carolina	38	2.64	20,159,501	28,897,791	8,738,290	8.4383	Need	Need	Need	8,738,290	28,897,791
North Dakota	3	0.21	1,591,540	692,912	NA	NA	898,628	0.5577	577,529	NA	1,014,010
Ohio	54	3.74	28,647,712	28,435,844	NA	NA	211,867	0.1315	136,163	NA	28,511,549
Oklahoma	27	1.87	14,323,856	11,348,409	NA	NA	2,975,446	1.8466%	1,912,257	NA	12,411,598
Oregon	17	1.18	9,018,724	16,832,070	7,813,346	7.5452	Need	Need	Need	7,813,346	16,832,070
Pennsylvania	78	5.41	41,380,028	34,628,979	NA	NA	6,751,049	4.1898	4,338,758	NA	37,041,270
Rhode Island	6	0.42	3,183,079	2,625,070	NA	NA	558,009	0.3463	358,621	NA	2,824,458
South Carolina	33	2.29	17,506,935	13,456,800	NA	NA	4,050,135	2.5136	2,602,937	NA	14,903,998
South Dakota	4	0.28	2,122,053	2,344,945	222,892	0.2152	Need	Need	Need	222,892	2,344,945
Tennessee	48	3.33	25,464,632	30,163,578	4,698,945	4.5377	Need	Need	Need	4,698,945	30,163,578
Texas	106	7.35	56,234,397	35,884,800	NA	NA	20,349,597	12.6294	13,078,261	NA	43,156,136
Utah	6	0.42	3,183,079	2,680,802	NA	NA	502,277	0.3117	322,803	NA	2,860,276
Vermont	2	0.14	1,061,026	4,047,877	2,986,851	2.8843	Need	Need	Need	2,986,851	4,047,877
Virginia	23	1.60	12,201,803	14,387,068	2,185,265	2.1103	Need	Need	Need	2,185,265	14,387,068
Washington	23	1.60	12,201,803	7,274,362	NA	NA	4,927,441	3.0581	3,166,764	NA	9,035,039
West Virginia	17	1.18	9,018,724	6,550,585	NA	NA	2,468,139	1.5318	1,586,221	NA	7,432,503
Wisconsin	22	1.53	11,671,290	5,416,651	NA	NA	6,254,639	3.8817	4,019,726	NA	7,651,564
Wyoming	3	0.21	1,591,540	810,736	NA	NA	780,803	0.4846	501,806	NA	1,089,734
Total	1,442	100.00	765,000,000	707,425,105	103,554,487	100.0000	161,129,382	100.0000	103,554,487	103,554,487	765,000,000

Footnotes:
/1 FY 2013 Estimates from July 2012 CMS Survey of States; Estimates Are For Months October 2012 Through September 2013.
/2 For Need States, Preliminary FY 2013 QI Allotment is equal to Initial QI Allotment in Column D increased by amount in Column K.
For Non-Need States, Preliminary FY 2013 QI Allotment is equal to Initial QI Allotment in Column D reduced by amount in Column J.
/3 Three-year average (2009–2011) of number (000) of Medicare beneficiaries in State who are not enrolled in Medicaid but whose incomes are at least 120% but less than 135% of federal poverty level.
Source: Census Bureau Annual Social and Economic Supplement (ASEC) to the 2012 Current Population Survey (CPS).

The following describes the information contained in the columns of Chart 1 and Chart 2:

Column A—*State.* Column A shows the name of each state. Columns B through D show the determination of an Initial QI Allotment for FY 2012 (Chart 1) or FY 2013 (Chart 2) for each state, based only on the indicated Census Bureau data.

Column B—*Number of Individuals.* Column B contains the estimated average number of Medicare beneficiaries for each state that are not covered by Medicaid whose family income is at least 120 but less than 135 percent of the federal poverty level. With respect to the *final FY 2012 QI allotment (Chart 1),* Column B contains the number of such individuals for the years 2008 through 2010, as obtained from the Census Bureau's Annual Social and Economic Supplement to the 2011 Current Population Survey. With respect to the *preliminary FY 2013 QI allotment (Chart 2),* Column B contains the number of such individuals for the years 2009 through 2012, as obtained from the Census Bureau's Annual Social and Economic Supplement to the Current Population Survey.

Column C—*Percentage of Total.* Column C provides the percentage of the total number of individuals for each state, that is, the Number of Individuals for the state in Column B divided by the sum total of the Number of Individuals for all States in Column B.

Column D—*Initial QI Allotment.* Column D contains each state's Initial QI Allotment for FY 2012 (Chart 1) or FY 2013 (Chart 2), calculated as the state's Percentage of Total in Column C multiplied by the total amount available nationally for QI allotments for the fiscal year. The total amount available nationally for QI allotments each fiscal year is $730,000,000 for FY 2012 (Chart 1) and $765,000,000 for FY 2013 (Chart 2).

Columns E through L show the determination of the States' Final QI Allotments for FY 2012 (Chart 1) or Preliminary QI Allotments for FY 2013 (Chart 2).

Column E —*FY 2012 or FY 2013 Estimated QI Expenditures.* Column E contains the states' estimates of their total QI expenditures for FY 2012 (Chart 1) or FY 2013 (Chart 2) based on information obtained from states in the summer of 2012 and as updated.

Column F—*Need (Difference).* Column F contains the additional amount of QI allotment needed for those states whose estimated expenditures in Column E exceeded their Initial QI allotments in Column D for FY 2012 (Chart 1) or for FY 2013 (Chart 2) for such states, Column F shows the amount in Column E minus the amount in Column D. For other ''Non-Need'' States, Column F shows ''NA''.

Column G—*Percent of Total Need States.* For states whose projected QI expenditures in Column E are greater than their initial QI allotment in Column D for FY 2012 (Chart 1) or FY 2013 (Chart 2), respectively, Column G shows the percentage of total need, determined as the amount for each Need State in Column F divided by the sum of the amounts for all states in Column F. For Non-Need States, the entry in Column G is ''NA''.

Column H —*Reduction Pool for Non-Need States.* Column H shows the amount of the pool of surplus QI allotments for FY 2012 (Chart 1) or FY 2013 (Chart 2), respectively, for those states that project QI expenditures for the fiscal year that are less than the Initial QI allotment for the fiscal year (referred to as non-need States). For states for which the estimates in Column E of QI expenditures for FY 2012 or FY 2013, respectively, are equal to or less than their Initial QI allotments in Column D for FY 2012 or FY 2013, respectively, Column H shows the amount in Column D minus the amount in Column E. For the states with a need, Column H shows ''Need''. The reduction pool of excess QI allotments is equal to the sum of the amounts in Column H.

Column I—*Percent of Total Non-Need States.* For states whose projected QI expenditures in Column E are less than their Initial QI allotment in Column D for FY 2012 (Chart 1) or FY 2013 (Chart 2), Column I shows the percentage of the total reduction pool in Column H, determined as the amount for each Non-Need State in Column H divided by the sum of the amounts for all States in Column H. For Need States, the entry in Column I is ''Need''.

Column J—*Reduction Adjustment for Non-Need States.* Column J shows the amount of adjustment needed to reduce the Initial QI allotments in Column D for FY 2012 (Chart 1) or FY 2013 (Chart 2) for Non-Need States in order to address the total need shown in Column F. The amount in Column J is determined as the percentage in column I for Non-Need States multiplied by the lesser of the total need in Column F (equal to the sum of Needs in Column F) or the total Reduction Pool in Column H (equal to the sum of the Non-Need amounts in Column H). For Need States, the entry in Column J is ''Need''.

Column K—*Increase Adjustment for Need States.* Column K shows the amount of adjustment to increase the Initial QI Allotment in Column D for FY 2012 (Chart 1) or FY 2013 (Chart 2) for Need States in order to address the total need shown for the fiscal year in Column F. The amount in Column K is determined as the percentage in Column G for Need States multiplied by the lesser of the total need in Column F (equal to the sum of Needs in Column F) or the total Reduction Pool in Column H (equal to the sum of the Non-Need amounts in Column H). For Non-Need States, the entry in Column K is ''NA''.

Column L—*Final FY 2012 QI Allotment (Chart 1) or Preliminary FY 2013 QI Allotment (Chart 2).* Column L contains the Final QI Allotment for each state for FY 2012 (Chart 1) or the Preliminary QI Allotment for FY 2013 (Chart 2). For states that need additional QI allotment amounts for the fiscal year based on Estimated QI Expenditures in Column E as compared to their Initial QI allotments in Column D for the fiscal year (states with a projected need amount are shown in Column F), Column L is equal to the Initial QI allotment in Column D for FY 2012 (Chart 1) or FY 2013 (Chart 2) plus the amount determined in Column K for Need States. For Non-Need States (states with a projected surplus in Column H), Column L is equal to the QI Allotment in Column D reduced by the Reduction Adjustment amount in Column J.

III. Collection of Information Requirements

This notice does not impose any information collection or recordkeeping requirements. Consequently, it does not need Office of Management and Budget review under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Authority: (Section 1102 of the Social Security Act (42 U.S.C. 1302))

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: May 15, 2013.

Marilyn Tavenner,

Administrator, Centers for Medicare & Medicaid Services.

Dated: June 28, 2013.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2013–17962 Filed 7–25–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–2342–N]

RIN 0938–AR91

Medicaid Program; Disproportionate Share Hospital Allotments and Institutions for Mental Diseases Disproportionate Share Hospital Limits for FY 2012, and Preliminary FY 2013 Disproportionate Share Hospital Allotments and Limits

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice announces the final federal share disproportionate share hospital (DSH) allotments for federal fiscal year (FY) 2012 and the preliminary federal share DSH allotments for FY 2013. This notice also announces the final FY 2012 and the preliminary FY 2013 limits on aggregate DSH payments that states may make to institutions for mental diseases (IMDs) and other mental health facilities. This notice also includes background information describing the methodology for determining the amounts of states' FY DSH allotments and IMD DSH limits.

DATES: *Effective Date:* This notice is effective on August 26, 2013. The final allotments and limitations set forth in this notice are effective for the fiscal years specified.

FOR FURTHER INFORMATION CONTACT: Richard Strauss, (410) 786–2019.

SUPPLEMENTARY INFORMATION:

I. Background

In general, in accordance with the methodology specified under section 1923(f)(3) of the Social Security Act (the Act), a state's federal fiscal year (FY) disproportionate share hospital (DSH) allotment is calculated by increasing the amount of its DSH allotment for the preceding FY by the percentage change in the Consumer Price Index for all Urban Consumers (CPI–U) for the previous FY. Also in accordance with section 1923(f)(3) of the Act, a state's DSH allotment for a FY is subject to the limitation that an increase to a state's DSH allotment for a FY cannot result in the DSH allotment exceeding the greater of the state's DSH allotment for the previous FY or 12 percent of the state's total medical assistance expenditures for the allotment year (this is referred to as the 12 percent limit).

Furthermore, under section 1923(h) of the Act, federal financial participation (FFP) for DSH payments to institutions for mental diseases (IMDs) and other mental health facilities is limited to state-specific aggregate amounts determined in accordance with the methodology specified under such section. Under this provision, the aggregate limit for DSH payments to IMDs and other mental health facilities is the lesser of a state's FY 1995 total computable (state and federal share) IMD and other mental health facility DSH expenditures applicable to the state's FY 1995 DSH allotment (as reported on the Form CMS–64 as of January 1, 1997), or the amount equal to the product of the state's current year total computable DSH allotment and the applicable percentage specified in section 1902(h) of the Act (the applicable percentage is the IMD share of DSH total computable expenditures as of FY 1995).

In general, we determine states' DSH allotments and IMD DSH limits for a FY using the most recent available estimates of or actual medical assistance expenditures, including DSH expenditures in their Medicaid programs and the most recent available change in the CPI–U used for the FY in accordance with the methodology prescribed in statute. The indicated estimated or actual expenditures are obtained from states for each relevant FY from the most recent available quarterly Medicaid budget reports (Form CMS–37) or quarterly Medicaid expenditure reports (Form CMS–64), respectively, submitted by the states. For example, as part of the initial determination of a state's FY DSH allotment (referred to as the preliminary DSH allotments) that is determined before the beginning of the FY for which the DSH allotments and IMD DSH limits are being determined, we use estimated expenditures for the FY obtained from the August submission of the CMS–37 submitted by states prior to the beginning of the FY; such estimated expenditures are subject to update and revision during the FY before such actual expenditure data become available. We also use the most recent available estimated CPI–U percentage change that is available before the beginning of the FY for determining the states' preliminary FY DSH allotments; such estimated CPI–U percentage change is subject to update and revision during the FY before the actual CPI–U percentage change becomes available. In determining the final DSH allotments and IMD DSH limits for a FY we use the actual expenditures for the FY and actual CPI–U percentage change for the previous FY.

II. Provisions of the Notice

A. Calculation of the Final FY 2012 Federal Share State DSH Allotments, and the Preliminary FY 2013 Federal Share State DSH Allotments

1. Final FY 2012 Federal Share State DSH Allotments

Chart 1 of the Addendum to this notice provides the states' final FY 2012 DSH allotments determined in accordance with section 1923(f)(3) of the Act. As described in the background section, in general, the DSH allotment for a FY is calculated by increasing the FY DSH allotment for the preceding FY by the CPI–U increase for the previous fiscal year. For purposes of calculating the states' final FY 2012 DSH allotments, the preceding final fiscal year DSH allotments (for FY 2011) were contained in the **Federal Register** published on July 24, 2012 (77 FR 43301). For purposes of calculating the states' final FY 2012 DSH allotments we are using the actual Medicaid expenditures for FY 2012. Finally, for purposes of calculating the states' final FY 2012 DSH allotments, the applicable historical percentage change in the CPI–U for the previous FY (FY 2011) was 2.6 percent; we note that this is an increase from the estimated 2.4 percentage change in the CPI–U for FY 2011 that was available and used in the calculation of the preliminary FY 2012 DSH allotments which were published in the July 24, 2012 **Federal Register** (77 FR 43301).

2. Calculation of the Preliminary FY 2013 Federal Share State DSH Allotments

Chart 2 of the Addendum to this notice provides the preliminary FY 2013 DSH allotments determined in accordance with section 1923(f)(3) of the Act. The preliminary FY 2013 DSH allotments contained in this notice were determined based on the most recent available estimates from states of their FY 2013 total computable Medicaid expenditures. Also, the preliminary FY 2013 allotments contained in this notice were determined by increasing the final FY 2012 DSH allotments as contained in this notice (and described in section II.A.1. above) by 2.4 percent, representing the most recent available estimate of the percentage increase in the CPI–U for FY 2012 (the previous FY to FY 2013). In this regard, we note that in September of 2012 for purposes of calculating preliminary FY 2013 DSH allotments for states (which at that time was prior to the beginning FY 2013), we

calculated such preliminary FY 2013 allotments by increasing states' preliminary FY 2012 allotments by 2.5 percent, representing the estimate of the percentage change in the CPI–U for FY 2012 available at that time. Again, we note that the preliminary FY 2013 allotments contained in this notice were determined using the final FY 2012 DSH allotments contained in this notice, the most recent available estimates of FY 2013 Medicaid expenditures, and the most recent available estimate of the percentage change in the CPI–U for FY 2012.

States' final FY 2013 DSH allotments will be published in future rulemaking based on the states' four quarterly Medicaid expenditure reports (Form CMS–64) for FY 2013 available following the end of FY 2013 and the actual change in the CPI–U for FY 2012.

B. Calculation of the Final FY 2012 and the Preliminary FY 2013 IMD DSH Limits

Section 1923(h) of the Act specifies the methodology to be used to establish the limits on the amount of DSH payments that a state can make to IMDs and other mental health facilities. FFP is not available for IMD or DSH payments that exceed the IMD limits. In this notice, we are publishing the final FY 2012 and the preliminary FY 2013 IMD DSH Limits determined in accordance with the provisions discussed above.

Charts 3 and 4 of the ''Addendum'' to this notice detail each state's final FY 2012 and preliminary FY 2013 IMD DSH Limit, respectively, determined in accordance with section 1923(h) of the Act

III. Collection of Information Requirements

This notice does not impose any new or revised information collection or recordkeeping requirements. The requirements and burden associated with Form CMS–37 (OMB No. 0938–0101), and Form CMS–64 (OMB No. 0938–0067) are unaffected by this notice. Consequently, this notice, the Form CMS–37, and Form CMS–64 are not subject to Office of Management and Budget review under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

IV. Regulatory Impact Statement

We have examined the impact of this notice as required by Executive Order 12866 on Regulatory Planning and Review (September 1993), 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), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs 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). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This notice reaches the $100 million economic threshold and thus is considered a major rule under the Congressional Review Act.

The final FY 2012 DSH allotments being published in this notice are approximately $20 million more than the preliminary FY 2012 DSH allotments published in the July 24, 2012 **Federal Register** (77 FR 43301). The increase in the final FY 2012 DSH allotments is due to the difference between the actual percentage change in the CPI–U for FY 2011 used in the calculation of the final FY 2012 allotments [2.6 percent) as compared to the estimated percentage change in the CPI–U for FY 2011 used in the calculation of the preliminary FY 2012 allotments (2.4 percent). The final FY 2012 IMD DSH limits being published in this notice are approximately $1 million more than the preliminary FY 2012 IMD DSH limits published in the July 24, 2012 **Federal Register** (77 FR 43301). The increases in the IMD DSH limits are because the DSH allotment for a FY is a factor in the determination of the IMD DSH limit for the FY. Since the final FY 2012 DSH allotments were increased as compared to the preliminary FY 2012 DSH allotments, the associated FY 2012 IMD DSH limits for some states were also increased.

The preliminary FY 2013 DSH allotments being published in this notice are about $182 million more than the final FY 2012 DSH allotments being published in this notice. The increase in the DSH allotments is due to the application of the statutory formula for calculating DSH allotments under which the prior fiscal year allotments are increased by the percentage increase in the CPI–U for the prior fiscal year. The preliminary FY 2013 IMD DSH limits being published in this notice are about $13 million more than the final FY 2012 IMD DSH limits being published in this notice. The increase in the IMD DSH limits is because the DSH allotment for a FY is a factor in the determination of the IMD DSH limit for the FY. Since the preliminary FY 2013 DSH allotments are greater than the final FY 2012 DSH allotments, the associated preliminary FY 2013 IMD DSH limits for some states also increased.

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of less than $7.0 million to $34.5 million in any one year. Individuals and states are not included in the definition of a small entity. We are not preparing an analysis for the RFA because the Secretary has determined that this notice will not have significant economic impact on a substantial number of small entities. Specifically, any impact on providers is due to the effect of the various controlling statutes; providers are not impacted as a result of the independent regulatory action in publishing this notice. The purpose of the notice is to announce the latest distributions as required by the statute.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Core-Based Statistical Area for Medicaid payment regulations and has fewer than 100 beds. We are not preparing analysis for section 1102(b) of the Act because the Secretary has determined that this notice will not have a significant impact on the operations of a substantial number of small rural hospitals.

The Medicaid statute specifies the methodology for determining the amounts of states' DSH allotments and IMD DSH limits; and as described previously, the application of the methodology specified in statute results in the decreases or increases in states' DSH allotments and IMD DSH limits for the applicable FYs. The statute applicable to these allotments and limits does not apply to the determination of the amounts of DSH payments made to specific DSH hospitals; rather, these allotments and limits represent an overall limit on the total of such DSH

payments. In this regard, we do not believe that this notice will have a significant economic impact on a substantial number of small entities.

Section 202 of the Unfunded Mandates Reform Act of 1995 also 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. This notice will have no consequential effect on state, local, or tribal governments, in the aggregate, or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has Federalism implications. Since this notice does not impose any costs on state or local governments, the requirements of E.O. 13132 are not applicable.

Alternatives Considered

The methodologies for determining the states' fiscal year DSH allotments and IMD DSH Limits, as reflected in this notice, were established in accordance with the methodologies and formula for determining states' allotments as specified in statute. This notice does not put forward any further discretionary administrative policies for determining such allotments.

Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), in the Table 1, we have prepared an accounting statement showing the classification of the estimated expenditures associated with the provisions of this notice. Table 1 provides our best estimate of the change (decrease) in the federal share of states' Medicaid DSH payments resulting from the application of the provisions of the Medicaid statute relating to the calculation of states' FY DSH allotments and the increase in the FY DSH allotments from FY 2012 to FY 2013.

TABLE 1—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE FY 2012 TO FY 2013

[in Millions]

Category	Transfers
Annualized Monetized Transfers.	$182
From Whom To Whom?.	Federal Government to States.

Congressional Review Act

This proposed regulation is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and has been transmitted to the Congress and the Comptroller General for review.

In accordance with the provisions of Executive Order 12866, this notice was reviewed by the Office of Management and Budget.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: June 20, 2013.

Marilyn Tavenner,

Administrator, Centers for Medicare & Medicaid Services.

Dated: July 19, 2013.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

Addendum

This addendum contains the charts 1 through 4 (preceded by associated keys) that are referred to in the preamble of this notice.

Key to Chart 1. Final DSH Allotments for FY 2012

KEY TO CHART 1—FINAL DSH ALLOTMENTS FOR FY 2012.

[The Final FY 2012 DSH allotments for the non-low DSH States are presented in the top section of this chart, and the final FY 2012 DSH allotments for the low-DSH States are presented in the bottom section of this chart]

Column	Description
Column A	State.
Column B	FY 2012 FMAPs. This column contains the states' FY 2012 Federal Medical Assistance Percentages.
Column C	Prior FY (2011) DSH Allotments. This column contains the states' prior FY 2011 DSH Allotments as would be determined without the application of section 5002 of ARRA.
Column D	Prior Fiscal Year (FY 2011) Allotment x (100% + Percentage Increase in CPI–U): 102.6%. This column contains the amount in Column D increased by 1 plus the percentage increase in the CPI–U for the prior FY (2.6 percent).
Column E	FY 2012 TC MAP Exp. Including DSH.This column contains the amount of the states' FY 2012 total computable (TC) medical assistance expenditures including DSH expenditures.
Column F	FY 2012 TC DSH Expenditures. This column contains the amount of the states' FY 2012 total computable DSH expenditures.
Column G	FY 2012 TC MAP Exp. Net of DSH. This column contains the amount of the states' projected FY 2012 total computable medical assistance expenditures net of DSH expenditures, calculated as the amount in Column E minus the amount in Column F.
Column H	12% Amount. This column contains the amount of the "12 percent limit" in federal share for the fiscal year, determined in accordance with the provisions of section 1923(f)(3) of the Act.
Column I	Greater of FY 2011 Allotment or 12% Limit. This column contains the greater of the state's prior FY (FY 2011) DSH allotment or the amount of the 12% Limit, determined as the maximum of the amount in Column C or Column I.
Column J	FY 2012 DSH Allotment. This column contains the states' final FY 2012 DSH allotments, determined as the minimum of the amount in Column I or Column D.
	For states with "na" in Columns I or D, refer to the footnotes in the chart.

CHART 1—FINAL DSH ALLOTMENTS FOR FISCAL YEAR: 2012

State	FY 2012 FMAPs (percent)	Prior FY (2011) allotments	Prior Fiscal Year (FY 2011) Allotment (Col C × 100% + Pct Increases in CPIU: 102.6%	FY 2012 TC MAP Exp. Including DSH	FY 2012 TC DSH Expenditures	FY 2012 TC MAP Exp. Net of DSH Col E–F	"12% Amount" =Col G × .12/(1-.12/ B)* (In FS)	Greater of Col H OR Col C (12% Limit, FY2011 Allotment)	2012 FY 2012 DSH Allotment MIN Col D, Col I
A	B	C	D	E	F	G	H	I	J
ALABAMA	68.62%	$307,525,116	$315,520,769	$4,980,627,414	$458,470,904	$4,522,156,510	$657,669,473	$657,669,473	$315,520,769
ARIZONA	67.30	101,258,270	103,890,985	7,902,936,657	194,651,219	7,708,285,438	1,125,716,333	1,125,716,333	103,890,985
CALIFORNIA	50.00	1,096,339,537	1,124,844,365	48,965,395,434	2,101,502,957	46,863,892,477	7,399,561,970	7,399,561,970	1,124,844,365
COLORADO	50.00	92,507,555	94,912,751	4,686,399,553	189,455,472	4,496,944,081	710,043,802	710,043,802	94,912,751
CONNECTICUT	50.00	200,016,335	205,216,760	6,463,271,670	478,109,955	5,985,161,715	945,025,534	945,025,534	205,216,760
DISTRICT OF COLUMBIA	70.00	61,255,002	62,847,632	2,099,098,380	61,103,120	2,037,995,260	295,157,934	295,157,934	62,847,632
FLORIDA	56.04	200,016,335	205,216,760	17,794,004,730	365,483,097	17,428,521,633	2,661,292,513	2,661,292,513	205,216,760
GEORGIA	66.16	268,771,950	275,760,021	8,299,066,366	415,817,421	7,883,248,945	1,155,588,811	1,155,588,811	275,760,021
HAWAII/1	na	na	na	na	na	na	na	na	10,000,000
ILLINOIS	50.00	215,017,560	220,608,017	13,216,199,698	443,954,241	12,772,245,457	2,016,670,335	2,016,670,335	220,608,017
INDIANA	66.96	213,767,459	219,325,413	7,450,053,558	-1,293,679	7,451,347,237	1,089,393,474	1,089,393,474	219,325,413
KANSAS	56.91	41,253,369	42,325,957	2,633,525,501	74,168,771	2,559,356,730	389,186,350	389,186,350	42,325,957
KENTUCKY	71.18	145,011,843	148,782,151	5,564,881,723	208,470,796	5,356,410,927	773,104,420	773,104,420	148,782,151
LOUISIANA/2	na	na	na	na	na	na	na	na	731,960,000
MAINE	63.27	105,008,576	107,738,799	2,369,701,164	41,241,661	2,328,459,503	344,813,652	344,813,652	107,738,799
MARYLAND	50.00	76,256,228	78,238,890	7,564,182,204	36,324,863	7,527,857,341	1,188,609,054	1,188,609,054	78,238,890
MASSACHUSETTS	50.00	305,024,911	312,955,559	12,660,753,340	0	12,660,753,340	1,999,066,317	1,999,066,317	312,955,559
MICHIGAN	66.14	265,021,644	271,912,207	12,377,302,267	276,022,328	12,101,279,939	1,774,019,923	1,774,019,923	271,912,207
MISSISSIPPI	74.18	152,512,455	156,477,779	4,432,068,902	210,532,157	4,221,536,745	604,349,172	604,349,172	156,477,779
MISSOURI	63.45	473,788,694	486,107,200	8,620,708,926	755,588,598	7,865,120,328	1,163,946,087	1,163,946,087	486,107,200
NEVADA	56.20	46,253,777	47,456,375	1,730,509,323	85,540,193	1,644,969,130	250,988,050	250,988,050	47,456,375
NEW HAMPSHIRE	50.00	160,111,598	164,274,500	1,174,440,051	41,992,778	1,132,447,273	178,807,464	178,807,464	164,274,500
NEW JERSEY	50.00	643,802,579	660,541,446	10,263,014,973	1,242,812,460	9,020,202,513	1,424,242,502	1,424,242,502	660,541,446
NEW YORK	50.00	1,606,381,192	1,648,147,103	51,477,488,275	3,250,438,690	48,227,049,585	7,614,797,303	7,614,797,303	1,648,147,103
NORTH CAROLINA	65.28	295,024,095	302,694,721	12,074,012,547	310,365,066	11,763,647,481	1,729,574,116	1,729,574,116	302,694,721
OHIO	64.15	406,283,181	416,846,544	16,241,807,775	544,474,576	15,697,333,199	2,317,125,042	2,317,125,042	416,846,544
PENNSYLVANIA	55.07	561,295,840	575,889,532	20,215,741,634	1,161,609,171	19,054,132,463	2,923,550,707	2,923,550,707	575,889,532
RHODE ISLAND	52.12	65,005,309	66,695,447	1,841,508,177	127,714,099	1,713,794,078	267,167,340	267,167,340	66,695,447
SOUTH CAROLINA	70.24	327,526,749	336,042,444	4,611,047,760	457,157,861	4,153,889,899	601,172,857	601,172,857	336,042,444
TENNESSEE/1	na	na	na	na	na	na	na	na	123,562,982
TEXAS	58.22	956,328,103	981,192,634	27,523,481,436	1,515,965,665	26,007,515,771	3,931,174,993	3,931,174,993	981,192,634
VERMONT	57.58	22,501,838	23,086,886	1,332,991,907	37,448,781	1,295,543,126	196,395,015	196,395,015	23,086,886
VIRGINIA	50.00	87,614,730	89,892,713	6,806,627,571	214,541,182	6,592,086,389	1,040,855,746	1,040,855,746	89,892,713
WASHINGTON	50.00	185,015,110	189,825,503	7,452,641,090	392,480,601	7,060,160,489	1,114,762,182	1,114,762,182	189,825,503
WEST VIRGINIA	72.62	67,505,513	69,260,656	2,772,398,537	75,461,531	2,696,937,006	387,696,929	387,696,929	69,260,656
TOTAL		9,751,002,453	10,004,528,517	343,597,888,543	15,767,606,535	327,830,282,008	50,271,525,401	50,271,525,401	10,870,051,501
LOW DSH STATES									
ALASKA	50.00	20,371,357	20,901,012	1,323,188,957	19,859,459	1,303,329,498	205,788,868	205,788,868	20,901,012
ARKANSAS	70.71	43,141,306	44,262,980	4,105,082,591	61,447,395	4,043,635,196	584,415,830	584,415,830	44,262,980
DELAWARE	54.17	9,053,936	9,289,338	1,484,381,209	12,647,971	1,471,733,238	226,863,997	226,863,997	9,289,338
IDAHO	70.23	16,438,844	16,866,254	1,420,520,599	23,407,154	1,397,113,445	202,203,559	202,203,559	16,866,254
IOWA	60.71	39,384,356	40,408,349	3,416,666,341	51,985,041	3,364,681,300	503,230,881	503,230,881	40,408,349
MINNESOTA	50.00	74,694,976	76,637,045	8,661,424,765	47,645,449	8,613,779,316	1,360,070,418	1,360,070,418	76,637,045
MONTANA	66.11	11,351,703	11,646,847	965,777,404	17,086,812	948,690,592	139,089,858	139,089,858	11,646,847
NEBRASKA	56.64	28,300,533	29,036,347	1,675,943,349	41,928,603	1,634,014,746	248,791,923	248,791,923	29,036,347
NEW MEXICO	69.36	20,371,357	20,901,012	3,420,434,313	56,394,276	3,364,040,037	488,137,692	488,137,692	20,901,012
NORTH DAKOTA	55.40	9,552,761	9,801,133	732,046,343	1,163,524	730,882,819	111,956,428	111,956,428	9,801,133
OKLAHOMA	63.88	36,215,744	37,157,353	4,397,686,300	36,151,183	4,361,535,117	644,444,557	644,444,557	37,157,353
OREGON	62.91	45,269,681	46,446,693	4,542,895,184	69,278,705	4,473,616,479	663,371,155	663,371,155	46,446,693
SOUTH DAKOTA	59.13	11,045,549	11,332,733	740,258,203	751,299	739,506,904	111,335,565	111,335,565	11,332,733
UTAH	70.99	19,619,586	20,129,695	1,870,691,982	32,876,938	1,837,815,044	265,400,556	265,400,556	20,129,695
WISCONSIN	60.53	94,540,543	96,998,597	6,978,470,509	101,257	6,978,369,252	1,044,469,048	1,044,469,048	96,998,597

WYOMING	50.00	226,348	232,233	518,211,253	452,696	517,758,557	81,751,351	81,751,351	232,233
TOTAL LOW DSH STATES		$479,578,580	$492,047,623	$46,253,679,302	$473,177,762	$45,780,501,540	$6,881,321,686	$6,881,321,686	$492,047,621
TOTAL		$10,230,581,033	$10,496,576,140	$389,851,567,845	$16,240,784,297	$373,610,783,548	$57,152,847,088	$57,152,847,088	$11,362,099,122

[1] Hawaii and Tennessee DSH allotments are determined under section 1923(f)(6) of the Act. Under this provision, for FY 2012, Tennessee's DSH payments are limited to $70,108,895 and Hawaii's DSH allotment is limited to $10,000,000.

[2] FY 2012 DSH allotment for Louisiana determined under the provisions of section 1903(f)(3)(C) and (D) of the Act.

Key to Chart 2. Preliminary DSH Allotments for FY 2013

KEY TO CHART 2—PRELIMINARY DSH ALLOTMENTS FOR FISCAL YEAR: 2013

[The Preliminary FY 2013 DSH allotments for the non-low DSH States are presented in the top section of this chart, and thepreliminary FY 2013 DSH allotments for the low-DSH States are presented in the bottom section of this chart]

Column	Description
Column A	State.
Column B	FY 2013 FMAPs. This column contains the States' FY 2013 Federal Medical Assistance Percentages.
Column C	Prior FY (2012) DSH Allotments. This column contains the States' prior FY 2012 DSH Allotments.
Column D	Prior FY (2012) DSH Allotments (Col C) × (100% + Percentage Increase in CPIU): 102.4%. This column contains the amount in Column D increased by 1 plus the estimated percentage increase in the CPI–U for the prior FY (102.4 percent).
Column E	FY 2013 TC MAP Exp. Including DSH. This column contains the amount of the States' projected FY 2013 total computable (TC) medical assistance expenditures including DSH expenditures.
Column F	FY 2013 TC DSH Expenditures. This column contains the amount of the States' projected FY 2013 total computable DSH expenditures.
Column G	FY 2013 TC MAP Exp. Net of DSH. This column contains the amount of the States' projected FY 2013 total computable medical assistance expenditures net of DSH expenditures, calculated as the amount in Column E minus the amount in Column F.
Column H	12% Amount. This column contains the amount of the ''12 percent limit'' in Federal share, determined in accordance with the provisions of section 1923(f)(3) of the Act.
Column I	Greater of FY 2012 Allotment or 12% Limit. This column contains the greater of the State's prior FY (FY 2012) DSH allotment or the amount of the 12% Limit, determined as the maximum of the amount in Column C or Column H.
Column J	FY 2013 DSH Allotment. This column contains the States' preliminary FY 2013 DSH allotments, determined as the minimum of the amount in Column I or Column D. For states with ''na'' in Columns I or D, refer to the footnotes in the chart.

CHART 2—PRELIMINARY DSH ALLOTMENTS FOR FISCAL YEAR: 2013

State	FY 2013 FMAPs	Prior FY (2012) DSH allotments	Prior FY (2012) DSH allotment (Col C) × 100% + Pct Increase in CPIU: 102.4%	FY 2013 TC MAP Exp. including DSH	FY 2013 TC DSH Expenditures	FY 2013 TC MAP EXP. Net Of DSH (Col E − F)	"12% Amouunt" = Col G × .12/(1 − 12/Col B)* (In FS)	Greater of Col H Or Col C 12% Limit, FY 2012 Allotment)	2013 FY 2013 DSH Allotment MIN Col I, Col D
A	B	C	D	E	F	G	H	I	J
ALABAMA	68.53%	$315,520,769	$323,093,267	$5,329,850,000	$471,003,000	$4,858,847,000	$706,832,022	$706,832,022	$323,093,267
ARIZONA	65.68	103,890,985	106,384,369	8,671,536,000	213,742,000	8,457,794,000	1,241,820,961	1,241,820,961	106,384,369
CALIFORNIA	50.00	1,124,844,365	1,151,840,630	66,298,257,000	919,513,000	65,378,744,000	10,322,959,579	10,322,959,579	1,151,840,630
COLORADO	50.00	94,912,751	97,190,657	5,051,411,000	192,614,000	4,858,797,000	767,178,474	767,178,474	97,190,657
CONNECTICUT	50.00	205,216,760	210,141,962	6,431,510,000	290,445,000	6,141,065,000	969,641,842	969,641,842	210,141,962
DISTRICT OF COLUMBIA	70.00	62,847,632	64,355,975	2,263,613,000	57,226,000	2,206,387,000	319,545,703	319,545,703	64,355,975
FLORIDA	58.08	205,216,760	210,141,962	19,230,077,000	383,399,000	18,846,678,000	2,850,560,048	2,850,560,048	210,141,962
GEORGIA	65.56	275,760,021	282,378,262	8,369,129,000	415,995,000	7,953,134,000	1,168,201,938	1,168,201,938	282,378,262
ILLINOIS	50.00	220,608,017	225,902,609	15,891,835,000	492,771,000	15,399,064,000	2,431,431,158	2,431,431,158	225,902,609
INDIANA	67.16	219,325,413	224,589,223	8,205,160,000	296,676,000	7,908,484,000	1,155,475,965	1,155,475,965	224,589,223
KANSAS	56.51	42,325,957	43,341,780	2,631,311,000	75,425,000	2,555,886,000	389,395,061	389,395,061	43,341,780
KENTUCKY	70.55	148,782,151	152,352,923	6,003,011,000	207,429,000	5,795,582,000	838,008,492	838,008,492	152,352,923
LOUISIANA/3	na	na	na	na	na	na	na	na	731,960,000
MAINE	62.57	107,738,799	110,324,530	2,411,890,000	38,474,000	2,373,416,000	352,393,844	352,393,844	110,324,530
MARYLAND	50.00	78,238,890	80,116,623	7,990,885,000	28,789,000	7,962,096,000	1,257,173,053	1,257,173,053	80,116,623
MASSACHUSETTS	50.00	312,955,559	320,466,492	14,457,969,000	0	14,457,969,000	2,282,837,211	2,282,837,211	320,466,492
MICHIGAN	66.39	271,912,207	278,438,100	13,054,597,000	489,458,000	12,565,139,000	1,840,484,453	1,840,484,453	278,438,100
MISSISSIPPI	73.43	156,477,779	160,233,246	4,938,125,000	306,480,000	4,631,645,000	664,369,251	664,369,251	160,233,246
MISSOURI	61.37	486,107,200	497,773,773	9,167,121,000	731,848,000	8,435,273,000	1,258,268,675	1,258,268,675	497,773,773
NEVADA	59.74	47,456,375	48,595,328	1,788,469,000	81,265,000	1,707,204,000	256,359,532	256,359,532	48,595,328
NEW HAMPSHIRE	50.00	164,274,500	168,217,088	1,194,634,000	76,100,000	1,118,534,000	176,610,632	176,610,632	168,217,088
NEW JERSEY	50.00	660,541,446	676,394,441	10,885,937,000	1,285,149,000	9,600,788,000	1,515,913,895	1,515,913,895	676,394,441
NEW YORK	50.00	1,648,147,103	1,687,702,633	60,543,793,000	3,138,550,000	57,405,243,000	9,063,985,737	9,063,985,737	1,687,702,633
NORTH CAROLINA	65.51	302,694,721	309,959,394	12,152,941,000	348,212,000	11,804,729,000	1,734,242,863	1,734,242,863	309,959,394
OHIO	63.58	416,846,544	426,850,861	17,759,856,000	0	17,759,856,000	2,626,998,785	2,626,998,785	426,850,861
PENNSYLVANIA	54.28	575,889,532	589,710,881	21,684,533,000	811,678,000	20,872,855,000	3,215,644,000	3,215,644,000	589,710,881
RHODE ISLAND	51.26	66,695,447	68,296,138	2,138,378,000	133,105,000	2,005,273,000	314,183,272	314,183,272	68,296,138
SOUTH CAROLINA	70.43	336,042,444	344,107,463	4,819,642,000	488,104,000	4,331,538,000	626,534,769	626,534,769	344,107,463
TENNESSEE/2	na	na	na	na	na	na	na	na	53,100,000
TEXAS	59.30	981,192,634	1,004,741,257	30,522,421,000	2,362,443,000	28,159,978,000	4,236,499,016	4,236,499,016	1,004,741,257
VERMONT	56.04	23,086,886	23,640,971	1,453,569,000	37,449,000	1,416,120,000	216,238,051	216,238,051	23,640,971
VIRGINIA	50.00	89,892,713	92,050,138	7,614,317,000	292,128,000	7,322,189,000	1,156,135,105	1,156,135,105	92,050,138
WASHINGTON	50.00	189,825,503	194,381,315	7,263,797,000	408,769,000	6,855,028,000	1,082,372,842	1,082,372,842	194,381,315
WEST VIRGINIA	72.04	69,260,656	70,922,912	3,049,170,000	70,185,000	2,978,985,000	428,926,208	428,926,208	70,922,912
TOTAL	0.00	10,004,528,519	10,244,637,203	389,268,744,000	15,144,424,000	374,124,320,000	57,467,222,436	57,467,222,436	11,029,697,203
LOW DSH STATES									
ALASKA	50.00	20,901,012	21,402,636	4,345,689,000	43,820,000	4,301,869,000	679,242,473.68	679,242,474	21,402,636
ARKANSAS	70.17	44,262,980	45,325,292	1,580,616,000	16,393,000	1,564,223,000	226,429,145	226,429,145	45,325,292
DELAWARE	55.67	9,289,338	9,512,282	1,656,878,000	19,283,000	1,637,595,000	250,510,411	250,510,411	9,512,282
HAWAII/1	51.86	10,000,000	10,240,000	15,891,835,000	492,771,000	15,399,064,000	2,404,201,080.90	2,404,201,081	10,240,000
IDAHO	71.00	16,866,254	17,271,044	1,804,672,000	22,633,000	1,782,039,000	257,338,513.22	257,338,513	17,271,044
IOWA	59.59	40,408,349	41,378,149	3,701,627,000	53,705,000	3,647,922,000	548,131,133	548,131,133	41,378,149
MINNESOTA	50.00	76,637,045	78,476,334	9,033,277,000	127,149,000	8,906,128,000	1,406,230,737	1,406,230,737	78,476,334
MONTANA	66.00	11,646,847	11,926,371	1,035,493,000	18,023,000	1,017,470,000	149,228,933	149,228,933	11,926,371
NEBRASKA	55.76	29,036,347	29,733,219	1,982,015,000	40,798,000	1,941,217,000	296,825,210	296,825,210	29,733,219
NEW MEXICO	69.07	20,901,012	21,402,636	3,663,793,000	21,380,000	3,642,413,000	528,995,548	528,995,548	21,402,636
NORTH DAKOTA	52.27	9,801,133	10,036,360	783,683,000	1,474,000	782,209,000	121,835,802	121,835,802	10,036,360
OKLAHOMA	64.00	37,157,353	38,049,129	4,822,776,000	49,525,000	4,773,251,000	704,972,455	704,972,455	38,049,129
OREGON	62.44	46,446,693	47,561,414	5,261,131,000	100,645,000	5,160,486,000	766,583,852	766,583,852	47,561,414
SOUTH DAKOTA	56.19	11,332,733	11,604,719	792,356,000	2,821,000	789,535,000	120,472,428	120,472,428	11,604,719
UTAH	69.61	20,129,695	20,612,808	2,104,256,000	29,583,000	2,074,673,000	300,818,582	300,818,582	20,612,808
WISCONSIN	59.74	96,998,597	99,326,563	7,576,743,000	159,936,000	7,416,807,000	1,113,732,845	1,113,732,845	99,326,563

CHART 2—PRELIMINARY DSH ALLOTMENTS FOR FISCAL YEAR: 2013—Continued

State	FY 2013 FMAPs	Prior FY (2012) DSH allotments	Prior FY (2012) DSH allotment (Col C) × 100% + Pct Increase in CPIU: 102.4%	FY 2013 TC MAP Exp. including DSH	FY 2013 TC DSH Expenditures	FY 2013 TC MAP EXP. Net Of DSH (Col E − F)	"12% Amouunt" = Col G × .12/(1 − 12/Col B)* (In FS)	Greater of Col H Or Col C 12% Limit, FY 2012 Allotment)	2013 FY 2013 DSH Allotment MIN Col I, Col D
A	B	C	D	E	F	G	H	I	J
WYOMING	50.00	232,233	237,807	548,369,000	463,000	547,906,000	86,511,474	86,511,474	237,807
TOTAL LOW DSH STATES	0.00	502,047,621	514,096,764	66,585,209,000	1,200,402,000	65,384,807,000	9,962,060,622	9,962,060,622	514,096,763
TOTAL	0.00	10,506,576,140	10,758,733,967	455,853,953,000	16,344,826,000	439,509,127,000	67,429,283,058	67,429,283,058	11,543,793,966

FOOTNOTES:

/1 Begining FY 2013, under section 1923(f)(6)(B)(II) of the Act, Hawaii's DSH allotments are determined as for low-DSH states. This means its allotments are determined as for all States, by increasing the previous fiscal year allotment by the CPI–U for the previous fiscal year.

/2 Tennessee's DSH allotments are determined under section 1923(f)(6)(A)(v)(II) of the Act. Under this provision, Tennessee's DSH payments for FY 2013 are limited to $53,100,000

/3 FY 2013 DSH allotment for Louisiana determined under the provisions of section 1903(f)(3)(C) and (D) of the Act.

Key to Chart 3. Final IMD DSH Limit for FY 2012

KEY TO CHART 3—FINAL IMD DSH LIMIT FOR FY: 2012

The final FY 2012 IMD DSH limits for the non-low DSH States are presented in the top section of this chart and the final FY 2012 IMD DSH Limits for the low-DSH States are presented in the bottom section of the chart]

Column	Description
Column A	State.
Column B	Inpatient Hospital Services FY 95 DSH Total Computable. This column contains the States' total computable FY 1995 inpatient hospital DSH expenditures as reported on the Form CMS–64.
Column C	IMD and Mental Health Services FY 95 DSH Total Computable. This column contains the total computable FY 1995 mental health facility DSH expenditures as reported on the Form CMS–64 as of January 1, 1997.
Column D	Total Inpatient & IMD & Mental Health FY 95 DSH Total Computable, Col. B + C. This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FY 1995 as reported on the Form CMS–64 as of January 1, 1997 (representing the sum of Column B and Column C).
Column E	Applicable Percent Col. C/D. This column contains the ''applicable percentage'' representing the total Computable FY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FY 1995 (the amount in Column C divided by the amount in Column D) Per section 1923(h)(2)(A)(ii)(III) Of the Act, for FYs after FY 2002, the applicable Percentage can be no greater than 33 percent.
Column F	FY 2012 Federal Share DSH Allotment. This column contains the states' final FY 2012 DSH allotments.
Column G	FY 2012 FMAP.
Column H	FY 2012 DSH Allotments in Total Computable Col. F/G. This column contains States' FY 2012 total computable DSH allotment (determined as Column F/Column G).
Column I	Col E × Col H in TC. This column contains the applicable percent of FY 2012 total computable DSH allotment (calculated as the percentage in Column E multiplied by the amount in Column H)
Column J	FY 2012 TC IMD DSH Limit. Lesser of Col. C or I. This column contains the total computable amount of the FY 2012 TC IMD DSH Limit equal to the lesser of the amount in Column C or Column I.
Column K	FY 2012 IMD DSH Limit in Federal Share, Col. G × J. This column contains the FY 2012 federal share IMD DSH limit determined by converting the total computable FY 2012 IMD DSH Limit from Column J into a federal share amount by multiplying it by the FY 2012 FMAP in Column G.

CHART 3—FINAL IMD DSH LIMIT FOR FY: 2012

State	Impatient hospital service for FY 95 DSH total computable	IMD and mental health services FY 95 DSH total computable	Total inpatient & IMD and mental health FY 95 DSH total computable Col B + C	Applicable percent Col C/D	FY 2012 Allotment in FS	FY 2012 FMAP	FY 2012 Allotments In TC Col F/G	CoL E x Col H In TC	FY 2012 TC IMD Limit (Lesser Of Col 1 or Col C)	2012 FY 2012 IMD Limit in FS Col G x J
A	B	C	D	E	F	G	H	I	J	K
ALABAMA	413,006,229	4,451,770	417,457,999	1.07%	315,520,769	68.62%	459,808,757	4,903,398	4,451,770	3,054,805
ARIZONA	93,916,100	28,474,900	122,391,000	23.27%	103,890,985	67.30%	154,369,963	35,914,971	28,474,900	19,163,608
CALIFORNIA	2,189,879,543	1,555,919	2,191,435,462	0.07%	1,124,844,365	50.00%	2,249,688,730	1,597,279	1,555,919	777,960
COLORADO	173,900,441	594,776	174,495,217	0.34%	94,912,751	50.00%	189,825,502	647,030	594,776	297,388
CONNECTICUT	303,359,275	105,573,725	408,933,000	25.82%	205,216,760	50.00%	410,433,520	105,961,112	105,573,725	52,786,863
DISTRICT OF COLUMBIA	39,532,234	6,545,136	46,077,370	14.20%	62,847,632	70.00%	89,782,331	12,753,279	6,545,136	4,581,595
FLORIDA	184,468,014	149,714,986	334,183,000	33.00%	205,216,760	56.04%	366,196,931	120,844,987	120,844,987	67,721,531
GEORGIA	407,343,557	0	407,343,557	0.00%	275,760,021	66.16%	416,807,771	0	0	0
HAWAII	0	0	0	0.00%	10,000,000	50.48%	19,809,826	0	0	0
ILLINOIS	315,868,508	89,408,276	405,276,784	22.06%	220,608,017	50.00%	441,216,034	97,336,849	89,408,276	44,704,138
INDIANA	79,960,783	153,566,302	233,527,085	33.00%	219,325,413	66.96%	327,546,913	108,090,481	108,090,481	72,377,386
KANSAS	11,587,208	76,663,508	88,250,716	33.00%	42,325,957	56.91%	74,373,497	24,543,254	24,543,254	13,967,566
KENTUCKY	158,804,908	37,443,073	196,247,981	19.08%	148,782,151	71.18%	209,022,409	39,880,366	37,443,073	26,651,979
LOUISIANA	1,078,512,169	132,917,149	1,211,429,318	10.97%	731,960,000	61.09%	1,198,166,639	131,461,977	131,461,977	80,310,122
MAINE	99,957,958	60,958,342	160,916,300	33.00%	107,738,799	63.27%	170,284,177	56,193,779	56,193,779	35,553,804
MARYLAND	22,226,467	120,873,531	143,099,998	33.00%	78,238,890	50.00%	156,477,780	51,637,667	51,637,667	25,818,834
MASSACHUSETTS	469,653,946	105,635,054	575,289,000	18.36%	312,955,559	50.00%	625,911,118	114,930,330	105,635,054	52,817,527
MICHIGAN	133,258,800	304,765,552	438,024,352	33.00%	271,912,207	66.14%	411,116,128	135,668,322	135,668,322	89,731,028
MISSISSIPPI	182,608,033	0	182,608,033	0.00%	156,477,779	74.18%	210,943,353	0	0	0
MISSOURI	521,946,524	207,234,618	729,181,142	28.42%	486,107,200	63.45%	766,126,399	217,734,528	207,234,618	131,490,365
NEVADA	73,560,000	0	73,560,000	0.00%	47,456,375	56.20%	84,441,948	0	0	0
NEW HAMPSHIRE	92,675,916	94,753,948	187,429,864	33.00%	164,274,500	50.00%	328,549,000	108,421,170	94,753,948	47,376,974
NEW JERSEY	736,742,539	357,370,461	1,094,113,000	32.66%	660,541,446	50.00%	1,321,082,892	431,505,706	357,370,461	178,685,231
NEW YORK	2,418,869,368	605,000,000	3,023,869,368	20.01%	1,648,147,103	50.00%	3,296,294,206	659,505,340	605,000,000	302,500,000
NORTH CAROLINA	193,201,966	236,072,627	429,274,593	33.00%	302,694,721	65.28%	463,686,766	153,016,633	153,016,633	99,889,258
OHIO	535,731,956	93,432,758	629,164,714	14.85%	416,846,544	64.15%	649,799,757	96,497,121	93,432,758	59,937,114
PENNSYLVANIA	388,207,319	579,199,682	967,407,001	33.00%	575,889,532	55.07%	1,045,740,933	345,094,508	345,094,508	190,043,546
RHODE ISLAND	108,503,167	2,397,833	110,901,000	2.16%	66,695,447	52.12%	127,965,171	2,766,784	2,397,833	1,249,751
SOUTH CAROLINA	366,681,364	72,076,341	438,757,705	16.43%	336,042,444	70.24%	478,420,336	78,591,867	72,076,341	50,626,422
TENNESSEE	0	0	0	0.00%	123,562,982	66.36%	186,200,998	0	0	0
TEXAS	1,220,515,401	292,513,592	1,513,028,993	19.33%	981,192,634	58.22%	1,685,318,849	325,822,355	292,513,592	170,301,413
VERMONT	19,979,252	9,071,297	29,050,549	31.23%	23,086,886	57.58%	40,095,321	12,520,127	9,071,297	5,223,253
VIRGINIA	129,313,480	7,770,268	137,083,748	5.67%	89,892,713	50.00%	179,785,426	10,190,712	7,770,268	3,885,134
WASHINGTON	171,725,815	163,836,435	335,562,250	33.00%	189,825,503	50.00%	379,651,006	125,284,832	125,284,832	62,642,416
WEST VIRGINIA	66,962,606	18,887,045	85,849,651	22.00%	69,260,656	72.62%	95,374,079	20,982,433	18,887,045	13,715,772
TOTAL	13,402,460,846	4,118,758,904	17,521,219,750	.....	10,870,051,501	.....	19,310,314,466	3,630,299,198	3,392,027,231	1,907,882,783
.										
LOW DSH STATES										
ALASKA	2,506,827	17,611,765	20,118,592	33.00%	20,901,012	50.00%	41,802,024	13,794,668	13,794,668	6,897,334
ARKANSAS	2,422,649	819,351	3,242,000	25.27%	44,262,980	70.71%	62,597,907	15,820,376	819,351	579,363
DELAWARE	0	7,069,000	7,069,000	33.00%	9,289,338	54.17%	17,148,492	5,659,002	5,659,002	3,065,482
IDAHO	2,081,429	0	2,081,429	0.00%	16,866,254	70.23%	24,015,740	0	0	0
IOWA	12,011,250	0	12,011,250	0.00%	40,408,349	60.71%	66,559,626	0	0	0
MINNESOTA	24,240,000	5,257,214	29,497,214	17.82%	76,637,045	50.00%	153,274,090	27,317,654	5,257,214	2,628,607
MONTANA	237,048	0	237,048	0.00%	11,646,847	66.11%	17,617,376	0	0	0
NEBRASKA	6,449,102	1,811,337	8,260,439	21.93%	29,036,347	56.64%	51,264,737	11,241,257	1,811,337	1,025,941
NEW MEXICO	6,490,015	254,786	6,744,801	3.78%	20,901,012	69.36%	30,134,100	1,138,321	254,786	176,720
NORTH DAKOTA	214,523	988,478	1,203,001	33.00%	9,801,133	55.40%	17,691,576	5,838,220	988,478	547,617

OKLAHOMA	20,019,969	3,273,248	23,293,217	14.05%	37,157,353	63.88%	58,167,428	8,173,900	3,273,248	2,090,951
OREGON	11,437,908	19,975,092	31,413,000	33.00%	46,446,693	62.91%	73,830,381	24,364,026	19,975,092	12,566,330
SOUTH DAKOTA	321,120	751,299	1,072,419	33.00%	11,332,733	59.13%	19,165,792	6,324,711	751,299	444,243
UTAH	3,621,116	934,586	4,555,702	20.51%	20,129,695	70.99%	28,355,677	5,817,066	934,586	663,463
WISCONSIN	6,609,524	4,492,011	11,101,535	33.00%	96,998,597	60.53%	160,248,797	52,882,103	4,492,011	2,719,014
WYOMING	0	0	0	0.00%	232,233	50.00%	464,466	0	0	0
TOTAL LOW DSH STATES ...	98,662,480	63,238,167	161,900,647	.....	492,047,621	.....	822,338,209	178,371,303	58,011,072	33,405,065
TOTAL ..	13,501,123,326	4,181,997,071	17,683,120,397	.....	11,362,099,122	.....	20,132,652,675	3,808,670,501	3,450,038,303	1,941,287,848

Key to Chart 4. Preliminary IMD DSH
Limit for FY 2013

KEY TO CHART 4—PRELIMINARY IMD DSH LIMIT FOR FY: 2013

[The preliminary FY 2013 IMD DSH Limits for the non-low DSH States are presented in the top section of this chart and the preliminary FY 2013 IMD DSH limits for the low-DSH States are presented in the bottom section of the chart]

Column	Description
Column A	State.
Column B	Inpatient Hospital Services FY 95 DSH Total Computable.
	This column contains the States' total computable FY
	1995 inpatient hospital DSH expenditures as reported on the
	Form CMS–64.
Column C	IMD and Mental Health Services FY 95 DSH Total Computable. This column contains the total computable FY 1995 mental health facility DSH expenditures as reported on the Form CMS–64 as of January 1, 1997.
Column D	Total Inpatient Hospital & IMD & Mental Health FY 95 DSH Total Computable, Col. B + C. This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FY 1995 as reported on the Form CMS–64 as of January 1, 1997 (representing the sum of Column B and Column C).
Column E	Applicable Percentage, Col. C/D. This column contains the ''applicable percentage'' representing the total Computable FY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FY 1995 (the amount in Column C divided by the amount in Column D) Per section 1923(h)(2)(A)(ii)(III) Of the Act, for FYs after FY 2002, the applicable Percentage can be no greater than 33 percent.
Column F	FY 2013 Federal Share DSH Allotment. This column contains the states' preliminary FY 2012 DSH allotments.
Column G	FY 2013 FMAP.
Column H	FY 2013 DSH Allotments in Total Computable, Col. F/G. This column contains states' FY 2013 total computable DSH allotment (determined as Column F/Column G).
Column I	Applicable Percentage Applied to FY 2013 Allotments in TC, Col E x Col H. This column contains the applicable percentage of FY 2013 total computable DSH allotment (calculated as the percentage in Column E multiplied by the amount in Column H).
Column J	FY 2013 TC IMD DSH Limit. Lesser of Col. I or C. This column contains the total computable FY 2013 TC IMD DSH Limit equal to the lesser of the amount in Column I or Column C.
Column K	FY 2013 IMD DSH Limit in Federal Share, Col. G x J. This column contains the FY 2013 Federal Share IMD DSH limit determined by converting the total computable FY 2013 IMD DSH Limit from Column J into a federal share amount by multiplying it by the FY 2013 FMAP in Column G.

CHART 4—PRELIMINARY IMD DSH LIMIT FOR FY: 2013

State	Inpatient hospital services FY 95 DSH total computable	IMD and mental health services FY 95 DSH total computable	Total inpatient & IMD & mental health FY 95 DSH total computable Col B + C	Applicable percentage Col C/D	FY 2013 Allotment in FS	FY 2013 FMAPs	FY 2013 Allotments in TC Col F/G	Applicable percentage applied to FY 2013 allotments in TC Col E × Col H	FY 2013 TC IMD Limit (lesser of Col I or Col C)	2013 FY 2013 IMD Limit in FS Col G × J
A	B	C	D	E	F	G	H	I	J	K
ALABAMA	$413,006,229	$4,451,770	$417,457,999	1.07	$323,093,267	68.53	$471,462,523	$5,027,674	$4,451,770	$3,050,798
ARIZONA	93,916,100	28,474,900	122,391,000	23.27	106,384,369	65.68	161,973,765	37,684,035	28,474,900	18,702,314
CALIFORNIA	2,189,879,543	1,555,919	2,191,435,462	0.07	1,151,840,630	50.00	2,303,681,260	1,635,614	1,555,919	777,960
COLORADO	173,900,441	594,776	174,495,217	0.34	97,190,657	50.00	194,381,314	662,559	594,776	297,388
CONNECTICUT	303,359,275	105,573,725	408,933,000	25.82	210,141,962	50.00	420,283,924	108,504,179	105,573,725	52,786,863
DISTRICT OF COLUMBIA	39,532,234	6,545,136	46,077,370	14.20	64,355,975	70.00	91,937,107	13,059,358	6,545,136	4,581,595
FLORIDA	184,468,014	149,714,986	334,183,000	33.00	210,141,962	58.08	361,814,673	119,398,842	119,398,842	69,346,847
GEORGIA	407,343,557	0	407,343,557	0.00	282,378,262	65.56	430,717,300	0	0	0
ILLINOIS	315,868,508	89,408,276	405,276,784	22.06	225,902,609	50.00	451,805,218	99,672,933	89,408,276	44,704,138
INDIANA	79,960,783	153,566,302	233,527,085	33.00	224,589,223	67.16	334,409,206	110,355,038	110,355,038	74,114,444
KANSAS	11,587,208	76,663,508	88,250,716	33.00	43,341,780	56.51	76,697,540	25,310,188	25,310,188	14,302,787
KENTUCKY	158,804,908	37,443,073	196,247,981	19.08	152,352,923	70.55	215,950,281	41,202,167	37,443,073	26,416,088
LOUISIANA	1,078,512,169	132,917,149	1,211,429,318	10.97	731,960,000	61.24	1,195,231,875	131,139,977	131,139,977	80,310,122
MAINE	99,957,958	60,958,342	160,916,300	33.00	110,324,530	62.57	176,321,768	58,186,183	58,186,183	36,407,095
MARYLAND	22,226,467	120,873,531	143,099,998	33.00	80,116,623	50.00	160,233,246	52,876,971	52,876,971	26,438,486
MASSACHUSETTS	469,653,946	105,635,054	575,289,000	18.36	320,466,492	50.00	640,932,984	117,688,658	105,635,054	52,817,527
MICHIGAN	133,258,800	304,765,552	438,024,352	33.00	278,438,100	66.39	419,397,650	138,401,225	138,401,225	91,884,573
MISSISSIPPI	182,608,033	0	182,608,033	0.00	160,233,246	73.43	218,212,238	0	0	0
MISSOURI	521,946,524	207,234,618	729,181,142	28.42	497,773,773	61.37	811,102,775	230,516,896	207,234,618	127,179,885
NEVADA	73,560,000	0	73,560,000	0.00	48,595,328	59.74	81,344,707	0	0	0
NEW HAMPSHIRE	92,675,916	94,753,948	187,429,864	33.00	168,217,088	50.00	336,434,176	111,023,278	94,753,948	47,376,974
NEW JERSEY	736,742,539	357,370,461	1,094,113,000	32.66	676,394,441	50.00	1,352,788,882	441,861,843	357,370,461	178,685,231
NEW YORK	2,418,869,368	605,000,000	3,023,869,368	20.01	1,687,702,633	50.00	3,375,405,266	675,333,468	605,000,000	302,500,000
NORTH CAROLINA	193,201,966	236,072,627	429,274,593	33.00	309,959,394	65.51	473,148,212	156,138,910	156,138,910	102,286,600
OHIO	535,731,956	93,432,758	629,164,714	14.85	426,850,861	63.58	671,360,272	99,698,919	93,432,758	59,404,548
PENNSYLVANIA	388,207,319	579,199,682	967,407,001	33.00	589,710,881	54.28	1,086,423,878	358,519,880	358,519,880	194,604,591
RHODE ISLAND	108,503,167	2,397,833	110,901,000	2.16	68,296,138	51.26	133,234,760	2,880,720	2,397,833	1,229,129
SOUTH CAROLINA	366,681,364	72,076,341	438,757,705	16.43	344,107,463	70.43	488,580,808	80,260,965	72,076,341	50,763,367
TENNESSEE	0	0	0	0.00	53,100,000	66.13	80,296,386	0	0	0
TEXAS	1,220,515,401	292,513,592	1,513,028,993	19.33	1,004,741,257	59.30	1,694,336,015	327,565,642	292,513,592	173,460,560
VERMONT	19,979,252	9,071,297	29,050,549	31.23	23,640,971	56.04	42,185,887	13,172,925	9,071,297	5,083,555
VIRGINIA	129,313,480	7,770,268	137,083,748	5.67	92,050,138	50.00	184,100,276	10,435,289	7,770,268	3,885,134
WASHINGTON	171,725,815	163,836,435	335,562,250	33.00	194,381,315	50.00	388,762,630	128,291,668	128,291,668	64,145,834
WEST VIRGINIA	66,962,606	18,887,045	85,849,651	22.00	70,922,912	72.04	98,449,350	21,658,997	18,887,045	13,606,227
TOTAL	13,402,460,846	4,118,758,904	17,521,219,750	.....	11,029,697,203	.....	19,623,398,153	3,718,165,001	3,418,809,673	1,921,150,660
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
LOW DSH STATES	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
ALASKA	2,506,827	17,611,765	20,118,592	33.00	21,402,636	50.00	42,805,272	14,125,740	14,125,740	7,062,870
ARKANSAS	2,422,649	819,351	3,242,000	25.27	45,325,292	70.17	64,593,547	16,324,734	819,351	574,939
DELAWARE	0	7,069,000	7,069,000	33.00	9,512,282	55.67	17,086,909	5,638,680	5,638,680	3,139,053
HAWAII	0	0	0	0.00	10,240,000	51.86	19,745,469	0	0	0
IDAHO	2,081,429	0	2,081,429	0.00	17,271,044	71.00	24,325,414	0	0	0
IOWA	12,011,250	0	12,011,250	0.00	41,378,149	59.59	69,438,075	0	0	0
MINNESOTA	24,240,000	5,257,214	29,497,214	17.82	78,476,334	50.00	156,952,668	27,973,278	5,257,214	2,628,607
MONTANA	237,048	0	237,048	0.00	11,926,371	66.00	18,070,259	0	0	0
NEBRASKA	6,449,102	1,811,337	8,260,439	21.93	29,733,219	55.76	53,323,563	11,692,713	1,811,337	1,010,002
NEW MEXICO	6,490,015	254,786	6,744,801	3.78	21,402,636	69.07	30,986,877	1,170,535	254,786	175,981

CHART 4—PRELIMINARY IMD DSH LIMIT FOR FY: 2013—Continued

State	Inpatient hospital services FY 95 DSH total computable	IMD and mental health services FY 95 DSH total computable	Total inpatient & IMD & mental health FY 95 DSH total computable Col B + C	Applicable percentage Col C/D	FY 2013 Allotment in FS	FY 2013 FMAPs	FY 2013 Allotments in TC Col F/G	Applicable percentage applied to FY 2013 allotments in TC Col E × Col H	FY 2013 TC IMD Limit (lesser of Col I or Col C)	2013 FY 2013 IMD Limit in FS Col G × J
A	B	C	D	E	F	G	H	I	J	K
NORTH DAKOTA	214,523	988,478	1,203,001	33.00	10,036,360	52.27	19,200,995	6,336,328	988,478	516,677
OKLAHOMA	20,019,969	3,273,248	23,293,217	14.05	38,049,129	64.00	59,451,764	8,354,379	3,273,248	2,094,879
OREGON	11,437,908	19,975,092	31,413,000	33.00	47,561,414	62.44	76,171,387	25,136,558	19,975,092	12,472,447
SOUTH DAKOTA	321,120	751,299	1,072,419	33.00	11,604,719	56.19	20,652,641	6,815,372	751,299	422,155
UTAH	3,621,116	934,586	4,555,702	20.51	20,612,808	69.61	29,611,849	6,074,765	934,586	650,565
WISCONSIN	6,609,524	4,492,011	11,101,535	33.00	99,326,563	59.74	166,264,752	54,867,368	4,492,011	2,683,527
WYOMING	0	0	0	0.00	237,807	50.00	475,614	0	0	0
TOTAL LOW DSH STATES	98,662,480	63,238,167	161,900,647		514,096,763		869,157,055	184,510,449	58,321,822	33,431,702
TOTAL	13,501,123,326	4,181,997,071	17,683,120,397		11,543,793,966		20,492,555,208	3,902,675,450	3,477,131,494	1,954,582,362

[FR Doc. 2013–17965 Filed 7–25–13; 8:45 am]
BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3280–FN]

Medicare and Medicaid Programs; Initial Approval of Center for Improvement in Healthcare Quality's (CIHQ's) Hospital Accreditation Program

AGENCY: Centers for Medicare and Medicaid Services, HHS.

ACTION: Final notice.

SUMMARY: This final notice announces our decision to approve the Center for Improvement in Healthcare Quality (CIHQ) as a national accrediting organization for hospitals that wish to participate in the Medicare or Medicaid programs.

DATES: This final notice is effective July 26, 2013 through July 26, 2017.

FOR FURTHER INFORMATION CONTACT: Cindy Melanson, (410) 786–0310. Monda Shaver, (410) 786–3410. Patricia Chmielewski, (410) 786–6899.

SUPPLEMENTARY INFORMATION:

I. Background

Under the Medicare program, eligible beneficiaries may receive covered services in a hospital provided certain requirements are met. Section 1861(e) of the Social Security Act (the Act) establishes distinct criteria for facilities seeking designation as a hospital. Regulations concerning provider agreements are at 42 CFR part 489 and those pertaining to activities relating to the survey and certification of facilities are at 42 CFR part 488. The regulations at 42 CFR part 482 specify the conditions that a hospital must meet to participate in the Medicare program, the scope of covered services, and the conditions for Medicare payment for hospitals.

Generally, to enter into an agreement, a hospital must first be certified by a State survey agency as complying with the conditions or requirements set forth in part 482. Thereafter, the hospital is subject to regular surveys by a State survey agency to determine whether it continues to meet these requirements. However, there is an alternative to surveys by State agencies. Certification by a nationally recognized accreditation program can substitute for ongoing State review.

Section 1865(a)(1) of the Act provides that, if a provider entity demonstrates through accreditation by an approved national accrediting organization (AO) that all applicable Medicare conditions are met or exceeded, we will deem that provider entity as having met the requirements. Accreditation by an AO is voluntary and is not required for Medicare participation.

If an AO is recognized by the Secretary as having standards for accreditation that meet or exceed Medicare requirements, any provider entity accredited by the national accrediting body's approved program would be deemed to have met the Medicare conditions. A national AO applying for approval of its accreditation program under part 488, subpart A, must provide CMS with reasonable assurance that the AO requires the accredited provider entities to meet requirements that are at least as stringent as the Medicare conditions. Our regulations concerning the approval of AOs are set forth at § 488.4 and § 488.8(d)(3). The regulations at § 488.8(d)(3) require AOs to reapply for continued approval of their accreditation program every 6 years, or sooner, as determined by CMS.

II. Application Approval Process

Section 1865(a)(3)(A) of the Act provides a statutory timetable to ensure that our review of applications for CMS-approval of an accreditation program is conducted in a timely manner. The Act provides us 210 days after the date of receipt of a complete application, with any documentation necessary to make the determination, to complete our survey activities and application process. Within 60 days after receiving a complete application, we must publish a notice in the **Federal Register** that identifies the national accrediting body making the request, describes the request, and provides no less than a 30-day public comment period. At the end of the 210-day period, we must publish a notice in the **Federal Register** approving or denying the application.

III. Provisions of the Proposed Notice

On February 22, 2013, we published a proposed notice in the **Federal Register** (78 FR 12325) announcing CIHQ's request for approval of its hospital accreditation program. In the proposed notice, we detailed our evaluation criteria. Under section 1865(a)(2) of the Act, and in our regulations at § 488.4 and § 488.8, we conducted a review of CIHQ's application in accordance with the criteria specified by our regulations, which include, but are not limited to, the following:

- An onsite administrative review of CIHQ's: (1) Corporate policies; (2) financial and human resources available to accomplish the proposed surveys; (3) procedures for training, monitoring, and evaluation of its surveyors; (4) ability to investigate and respond appropriately to complaints against accredited facilities; and, (5) survey review and decision-making process for accreditation.
- The comparison of CIHQ's accreditation to our current Medicare hospital conditions of participation.
- A documentation review of CIHQ's survey process to determine the following:

++ Determine the composition of the survey team, surveyor qualifications, and CIHQ's ability to provide continuing surveyor training.

++ Compare CIHQ's processes to those of State survey agencies, including survey frequency, and the ability to investigate and respond appropriately to complaints against accredited facilities.

++ Evaluate CIHQ's procedures for monitoring hospitals out of compliance with CIHQ's program requirements. The monitoring procedures are used only when CIHQ identifies noncompliance. If noncompliance is identified through validation reviews, the State survey agency monitors corrections as specified at § 488.7(d).

++ Assess CIHQ's ability to report deficiencies to the surveyed facilities and respond to the facility's plan of correction in a timely manner.

++ Establish CIHQ's ability to provide CMS with electronic data and reports necessary for effective validation and assessment of the organization's survey process.

++ Determine the adequacy of staff and other resources.

++ Confirm CIHQ's ability to provide adequate funding for performing required surveys.

++ Confirm CIHQ's policies with respect to whether surveys are announced or unannounced.

++ Obtain CIHQ's agreement to provide CMS with a copy of the most current accreditation survey together with any other information related to the survey as we may require, including corrective action plans.

In accordance with section 1865(a)(3)(A) of the Act, the February 22, 2013 proposed notice also solicited public comments regarding whether CIHQ's requirements met or exceeded the Medicare conditions of participation for hospitals. We received 56 comments in response to our proposed notice. The commenters expressed unanimous support for CIHQ's hospital

accreditation program. In addition, the commenters stated CIHQ's standards are closely aligned with the hospital conditions of participation, thus allowing hospitals to be in compliance with the Medicare requirements.

IV. Provisions of the Final Notice

A. Differences Between CIHQ's Standards and Requirements for Accreditation and Medicare's Conditions and Survey Requirements

We compared CIHQ's hospital requirements and survey process with the Medicare conditions of participation and survey process as outlined in the State Operations Manual (SOM). Our review and evaluation of CIHQ's hospital application, which were conducted as described in section III of this final notice, yielded the following:

- To meet the requirements at § 482.13(a)(2), CIHQ revised its standards to address the hospital's responsibility to provide a process for prompt resolution of patient grievances.
- To meet the requirements at § 482.13(b)(2), CIHQ revised its standards to address the role of the patient's representative (as allowed under State law) .
- To meet the requirements at § 482.13(b)(3), CIHQ revised its standards to include the requirements at § 489.100, § 489.102, and § 489.104 regarding advance directives.
- To meet the requirements at § 482.13(d)(2), CIHQ revised its standards to ensure that hospitals have a responsibility to meet patient requests for access to information as quickly as its record keeping system permits.
- To meet the requirements at § 482.13(e)(4)(i), CIHQ modified its standards to require the hospital update the patient's plan of care when restraints or seclusion are utilized.
- To meet the requirements at § 482.13(e)(5), CIHQ modified its standards to include the provision allowing other licensed independent practitioners, who are responsible for the care of the patient, to write orders for restraint or seclusion.
- To meet the requirements at § 482.13(e)(8)(ii), CIHQ modified its standards to include the reference to a physician or other licensed independent practitioner, as delineated at § 482.12(c).
- To meet the requirements at § 482.13(e)(11), CIHQ modified its standards to address that the physician and other licensed independent practitioners training requirements must be specified in hospital policy.
- To meet the requirements at § 482.13(g)(1), CIHQ modified its standards to permit the hospital to communicate deaths to CMS by facsimile or electronically as determined by CMS.
- To meet the requirements at § 482.13(h)(1), CIHQ modified its standards to require the hospital to inform each patient of his or her visitation rights.
- To meet the requirements at § 482.22(a)(2), CIHQ modified its standards to require that a candidate who has been recommended by the medical staff and appointed by the governing body be subject to all medical staff bylaws, rules, and regulations, in addition to the requirements contained at § 482.22.
- To meet the requirements at § 482.23(b)(3), CIHQ modified its standards to include language that a registered nurse must supervise the care of each patient.
- To meet the requirements at § 482.23(c)(1), CIHQ modified its standards to address biologicals.
- To meet the requirements at § 482.23(c)(1)(ii), CIHQ modified its standards to address pre-printed and electronic standing orders, order sets, and protocols for orders related to the preparation and administration of drugs and biologicals.
- To meet the requirements at § 482.23(c)(4), CIHQ modified its standards to address the requirement that blood and intravenous medication administration occurs only in accordance with state law and approved medical staff policies and procedures.
- To meet the requirements at § 482.24(c)(1) through (c)(3)(iv), CIHQ modified its standards to address the requirements related to the appropriate authentication of all orders, including verbal orders; the appropriate use of standing orders, order sets and protocols within nationally recognized guidelines; the periodic review of such orders and protocols; and the authentication of such orders and protocols within the medical record.
- To meet the requirements at § 482.25, CIHQ modified its standards to address the medical staff's responsibility to oversee the development of policies and procedures to minimize drug errors.
- To meet the requirements at § 482.25(a), CIHQ modified its standards to require that the pharmacy or drug storage area be administered in accordance with accepted professional principles.
- To meet the requirements at§ 482.25(b)(4), CIHQ modified its standards to limit the removal of drugs and biologicals from the pharmacy or storage area only by personnel designated in the policies of the medical staff and pharmaceutical service, in accordance with federal and sState law.
- To meet the requirements at § 482.25(b)(5), CIHQ modified its standards to address the medical staff's responsibility to predetermine a reasonable time to automatically stop drugs and biologicals.
- To meet the requirements at § 482.25(b)(6), CIHQ modified its standards to address the immediate reporting of drug errors, adverse reactions, and incompatibilities to the attending physician.
- To meet the requirements at § 482.26, CIHQ modified its standards to clearly identify radiologic services as a service that the hospital is required to provide its patients.
- To meet the requirements at § 482.41(a), CIHQ modified its standards to delineate that building inspections and maintenance are to be conducted on an on-going basis. CIHQ also modified its standards to specify that if a hospital intends to provide medical treatment to the victims of a disaster, it must be in compliance with NFPA99, Section 11–3.
- To meet the requirements at § 482.41(b)(7) and NFPA 101 (LSC) 18/19.7.1, CIHQ modified its standards to require: a written evacuation and relocation plan be available to all supervisory personnel and employees; that employees are informed of their duties under the plan; and that a copy of the plan is to be readily available at all times in the telephone operator's position or at the security center. In addition, CIHQ modified its standards to require that the hospital instruct employees on life safety procedures and devices.
- To meet the requirements at § 482.41(b)(7), the NFPA 101 (LSC) 18/19.7.2.1, and the Life Safety Code Annex A 19.7.1.2, CIHQ modified its standards to require signal transmission of alarms for all fire drills and that all fire drills be scheduled unannounced on a random basis.
- To meet the requirements at § 482.43, CIHQ modified its standards to address the hospital's responsibility to have a discharge planning process in writing that applies to all patients.
- To meet the requirements at § 482.43(b)(6), CIHQ modified its standards to require that the results of the discharge planning evaluation be discussed with the patient or an individual acting on behalf of the patient.
- To meet the requirements at § 482.51, CIHQ modified its standards to specify that if outpatient surgical services are offered, the services must be

consistent in quality with inpatient surgical services.

• To meet the requirements at § 482.51(b)(5), CIHQ modified its standards to require that the operating room register be complete and up-to-date.

• To meet the requirements at § 482.51(b)(6), CIHQ modified its standards to address the requirement that an operative report must be written or dictated immediately following surgery and signed by the surgeon.

• To meet the requirements at § 482.56(a)(2), CIHQ modified its standards to include the reference to part 484 of the Code of Federal Regulations.

• To meet the survey process requirements in Appendix A of the SOM, CIHQ revised its policies outlining the survey size and composition to require that every survey will include at least one registered nurse with hospital survey experience.

• To meet the survey process requirements in Appendix Q of the SOM, CIHQ revised its policies to require notification to CMS of an immediate jeopardy situation, the content of the CMS notification, and the appropriate level of citation related to immediate jeopardy findings.

• To meet the requirements found at Section 2728B of the SOM, CIHQ revised its policies to require a more detailed monitoring plan that includes frequency of monitoring, duration of monitoring, sample size and target threshold, as part of a hospital's plan of correction for deficiencies found on survey.

• To meet the requirements found at Section 2005A2 of the SOM, CIHQ revised its policies to require the issuance of an accreditation denial for hospitals initially seeking participation in the Medicare program when the hospital has been found to be non-compliant with a condition of participation.

• To meet the requirements at § 498.13 and Section 2008D of the SOM, CIHQ revised its policies to clearly state that the final accreditation decision is based on the final survey report in which the provider meets all requirements or the date, which the provider is found to meet all conditions but has lower level deficiencies and CIHQ has received an acceptable plan of correction.

• To meet the requirements at Section 3012 of the SOM, CIHQ revised its policies to accurately reflect the requirement that follow-up surveys must be conducted within 45 calendar days from the survey end-date of the survey, which the condition level finding was cited.

• To clarify the survey process and to ensure the consistent application of survey activities, CIHQ updated its policies, survey tools and guidance to surveyors related to tracer activities, patient interviews, and staff interviews.

• To eliminate any real or perceived conflict of interest between CIHQ's consulting services through ''Accreditation Resource Services'' and its accreditation activities, CIHQ updated its plan to ensure that both entities are separated by a firewall and that information is not shared.

B. Term of Approval

Based on our review and observations described in section III of this final notice, we have determined that CIHQ's requirements for hospitals meet or exceed our requirements. Therefore, we approve CIHQ as a national accreditation organization for hospitals that request participation in the Medicare program, effective July 26, 2013. through July 26, 2017.

V. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program; No. 93.773 Medicare—Hospital Insurance Program; and No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: July 2, 2013.

Marilyn Tavenner,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2013–18014 Filed 7–25–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–9080–N]

Medicare and Medicaid Programs; Quarterly Listing of Program Issuances—April Through June 2013

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This quarterly notice lists CMS manual instructions, substantive and interpretive regulations, and other **Federal Register** notices that were published from April through June 2013, relating to the Medicare and Medicaid programs and other programs administered by CMS.

FOR FURTHER INFORMATION CONTACT: It is possible that an interested party may need specific information and not be able to determine from the listed information whether the issuance or regulation would fulfill that need. Consequently, we are providing contact persons to answer general questions concerning each of the addenda published in this notice.

Addenda	Contact	Phone Number
I CMS Manual Instructions	Ismael Torres	(410) 786-1864
II Regulation Documents Published in the **Federal Register**	Terri Plumb	(410) 786-4481
III CMS Rulings	Tiffany Lafferty	(410)786-7548
IV Medicare National Coverage Determinations	Wanda Belle	(410) 786-7491
V FDA-Approved Category B IDEs	John Manlove	(410) 786-6877
VI Collections of Information	Mitch Bryman	(410) 786-5258
VII Medicare –Approved Carotid Stent Facilities	Lori Ashby	(410) 786-6322
VIII American College of Cardiology-National Cardiovascular Data Registry Sites	Marie Casey, BSN, MPH	(410) 786-7861
IX Medicare's Active Coverage-Related Guidance Documents	Lori Ashby	(410) 786-6322
X One-time Notices Regarding National Coverage Provisions	Lori Ashby	(410) 786-6322
XI National Oncologic Positron Emission Tomography Registry Sites	Stuart Caplan, RN, MAS	(410) 786-8564
XII Medicare-Approved Ventricular Assist Device (Destination Therapy) Facilities	Marie Casey, BSN, MPH	(410) 786-7861
XIII Medicare-Approved Lung Volume Reduction Surgery Facilities	Marie Casey, BSN, MPH	(410) 786-7861
XIV Medicare-Approved Bariatric Surgery Facilities	Kate Tillman, RN, MAS	(410) 786-9252
XV Fluorodeoxyglucose Positron Emission Tomography for Dementia Trials	Stuart Caplan, RN, MAS	(410) 786-8564
All Other Information	Annette Brewer	(410) 786-6580

I. Background

The Centers for Medicare & Medicaid Services (CMS) is responsible for administering the Medicare and Medicaid programs and coordination and oversight of private health insurance. Administration and oversight of these programs involves the following: (1) Furnishing information to Medicare and Medicaid beneficiaries, health care providers, and the public; and (2) maintaining effective communications with CMS regional offices, state governments, state Medicaid agencies, state survey agencies, various providers of health care, all Medicare contractors that process claims and pay bills, National Association of Insurance Commissioners (NAIC), health insurers, and other stakeholders. To implement the various statutes on which the programs are based, we issue regulations under the authority granted to the Secretary of the Department of Health and Human Services under sections 1102, 1871, 1902, and related provisions of the Social Security Act (the Act) and Public Health Service Act. We also issue various manuals, memoranda, and statements necessary to administer and oversee the programs efficiently.

Section 1871(c) of the Act requires that we publish a list of all Medicare manual instructions, interpretive rules, statements of policy, and guidelines of general applicability not issued as regulations at least every 3 months in the **Federal Register**.

II. Revised Format for the Quarterly Issuance Notices

While we are publishing the quarterly notice required by section 1871(c) of the Act, we will no longer republish duplicative information that is available to the public elsewhere. We believe this approach is in alignment with CMS' commitment to the general principles of the President's Executive Order 13563 released January 2011entitled ''Improving Regulation and Regulatory Review,'' which promotes modifying and streamlining an agency's regulatory program to be more effective in achieving regulatory objectives. Section 6 of Executive Order 13563 requires agencies to identify regulations that may be ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand or repeal them in accordance with what has been learned.'' This approach is also in alignment with the President's Open Government and Transparency Initiative that establishes a system of transparency, public participation, and collaboration.

Therefore, this quarterly notice provides only the specific updates that have occurred in the 3-month period along with a hyperlink to the full listing that is available on the CMS Web site or the appropriate data registries that are used as our resources. This information is the most current up-to-date information and will be available earlier than we publish our quarterly notice. We believe the Web site list provides more timely access for beneficiaries, providers, and suppliers. We also believe the Web site offers a more convenient tool for the public to find the full list of qualified providers for these specific services and offers more flexibility and ''real time'' accessibility. In addition, many of the Web sites have listservs; that is, the public can subscribe and receive immediate notification of any updates to the Web site. These listservs avoid the need to check the Web site, as notification of updates is automatic and sent to the subscriber as they occur. If assessing a Web site proves to be difficult, the contact person listed can provide information.

III. How To Use the Notice

This notice is organized into 15 addenda so that a reader may access the subjects published during the quarter covered by the notice to determine whether any are of particular interest. We expect this notice to be used in concert with previously published notices. Those unfamiliar with a description of our Medicare manuals should view the manuals at http://www.cms.gov/manuals.

Authority: (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance, Program No. 93.774, Medicare—Supplementary Medical Insurance Program, and Program No. 93.714, Medical Assistance Program)

Dated: July 19, 2013.

Kathleen Cantwell,

Director, Office of Strategic Operations and Regulatory Affairs.

BILLING CODE 4120–01–P

Publication Dates for the Previous Four Quarterly Notices

We publish this notice at the end of each quarter reflecting information released by CMS during the previous quarter. The publication dates of the previous four Quarterly Listing of Program Issuances notices are: May 18, 2012 (77 FR 29648), August 17, 2012 (77 FR 49799), November 9, 2012 (77 FR 67368) and May 3, 2013 (78 FR 26038). For the purposes of this quarterly notice, we are providing only the specific updates that have occurred in the 3-month period along with a hyperlink to the website to access this information and a contact person for questions or additional information.

Addendum I: Medicare and Medicaid Manual Instructions (April through June 2013)

The CMS Manual System is used by CMS program components, partners, providers, contractors, Medicare Advantage organizations, and State Survey Agencies to administer CMS programs. It offers day-to-day operating instructions, policies, and procedures based on statutes and regulations, guidelines, models, and directives. In 2003, we transformed the CMS Program Manuals into a web user-friendly presentation and renamed it the CMS Online Manual System.

How to Obtain Manuals

The Internet-only Manuals (IOMs) are a replica of the Agency's official record copy. Paper-based manuals are CMS manuals that were officially released in hardcopy. The majority of these manuals were transferred into the Internet-only manual (IOM) or retired. Pub 15-1, Pub 15-2 and Pub 45 are exceptions to this rule and are still active paper-based manuals. The remaining paper-based manuals are for reference purposes only. If you notice policy contained in the paper-based manuals that was not transferred to the IOM, send a message via the CMS Feedback tool.

Those wishing to subscribe to old versions of CMS manuals should contact the National Technical Information Service, Department of Commerce, 5301 Shawnee Road, Alexandria, VA 22312 Telephone (703-605-6050). You can download copies of the listed material free of charge at: http://cms.gov/manuals.

How to Review Transmittals or Program Memoranda

Those wishing to review transmittals and program memoranda can access this information at a local Federal Depository Library (FDL). Under the FDL program, government publications are sent to approximately 1,400 designated libraries throughout the United States. Some FDLs may have arrangements to transfer material to a local library not designated as an FDL. Contact any library to locate the nearest FDL. This information is available at http://www.gpo.gov/libraries/

In addition, individuals may contact regional depository libraries that receive and retain at least one copy of most federal government publications, either in printed or microfilm form, for use by the general public. These libraries provide reference services and interlibrary loans; however, they are not sales outlets. Individuals may obtain information about the location of the nearest regional depository library from any library. CMS publication and transmittal numbers are shown in the listing entitled Medicare and Medicaid Manual Instructions. To help FDLs locate the materials, use the CMS publication and transmittal numbers. For example, to find the Medicare Claims Processing publication titled Claim Status Category and Claim Status Codes Update use CMS-Pub. 100-04, Transmittal No. 2681.

Addendum I lists a unique CMS transmittal number for each instruction in our manuals or program memoranda and its subject number. A transmittal may consist of a single or multiple instruction(s). Often, it is necessary to use information in a transmittal in conjunction with information currently in the manual. For the purposes of this quarterly notice, we list only the specific updates to the list of manual instructions that have occurred in the 3-month period. This information is available on our website at www.cms.gov/Manuals.

Transmittal Number	Manual/Subject/Publication Number
	Medicare General Information (CMS-Pub. 100-01)
00	None
	Medicare Benefit Policy (CMS-Pub. 100-02)
170	Updates to Medicare Coverage of Hepatitis B Vaccine and its Administration and Medicare Coverage of the Annual Wellness Visit (AWV) Providing Personalized Prevention Plan Services (PPPS) Antigens Immunizations Annual Wellness Visit (AWV) Providing Personalized Prevention Plan Services (PPPS) Routine Services and Appliances
171	Implementation of the End Stage Renal Disease (ESRD) Prospective Payment System (PPS) Definitions Relating to ESRD Renal Dialysis Items and Services Composite Rate Items and Services Drugs and Biologicals

	ESRD Prospective Payment System (PPS) Base Rate Bad Debts Reserved Composite Rate Tests for Hemodialysis, IPD, CCPD, and Hemofiltration Composite Rate Tests for CAPD Brief History of ESRD Composite Payment Rates for Outpatient Maintenance Dialysis
Medicare National Coverage Determination (CMS-Pub. 100-03)	
153	Autologous Platelet-Rich Plasma (PRP) for Chronic Non-Healing Wounds Blood-Derived Products for Chronic Non-Healing Wounds
154	Autologous Platelet-Rich Plasma (PRP) for Chronic Non-Healing Wounds Blood-Derived Products for Chronic Non-Healing Wounds
155	Ocular Photodynamic Therapy (OPT) with Verteporfin for Macular Degeneration Photodynamic Therapy Ocular Photodynamic Therapy (OPT) Photosensitive Drugs Verteporfin
Medicare Claims Processing (CMS-Pub. 100-04)	
2680	Data Reporting on Home Health Prospective Payment System (HH PPS) Claims HH PPS Claims Input/Output Record Layout
2681	Claim Status Category and Claim Status Codes Update
2682	Quarterly Update for the Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Competitive Bidding Program (CBP) - July 2013 Competitive Bidding Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Single Payment Amounts
2683	Non-systems Internet Only Manual (IOM) Changes
2684	Common Edits and Enhancements Modules (CEM) Code Set Update
2685	Issued to a specific, audience not posted to Internet/Intranet due to Confidentiality of Instruction
2686	Remittance Advice Remark and Claims Adjustment Reason Code and Medicare Remit Easy Print and PC Print Update
2687	Clarify the definition of customized durable medical equipment (DME) Items
2688	Reporting End Stage Renal Disease (ESRD) Drugs Administered Through the Dialysate
2689	National Coverage Determination (NCD) for Transcatheter Aortic Valve Replacement (TAVR) – Implementation of Mandatory Reporting of Clinical Trial Number Claims Processing Requirements for TAVR Services on Professional Claims Claims Processing Requirements for TAVR Services on Inpatient Hospital Claims
2690	Billing Social Work and Psychological Services in Comprehensive Outpatient Rehabilitation Facilities (CORFs) Application of Financial Limitations Notification for Beneficiaries Exceeding Financial Limitations Multiple Procedure Payment Reductions for Outpatient Rehabilitation Services

	Applicable Types of Bill Billing for Biofeedback Training for the Treatment of Urinary Incontinence Allowable Revenue Codes on CORF 75X Bill Types Outpatient Mental Health Treatment Limitation Billing for Social Work and Psychological Services in a CORF
2691	Issued to a specific, audience not posted to Internet/Intranet due to Confidentiality of Instruction
2692	Issued to a specific, audience not posted to Internet/Intranet due to Confidentiality of Instruction
2693	Issued to a specific, audience not posted to Internet/Intranet due to Sensitivity of Instruction
2694	Discontinuation of Home Health Type of Bill 33X Noncovered Charges on Outpatient Bills Claim Submission and Processing Chart Summarizing the Effects of RAP/Claim Actions on the HH PPS Episode File Request for Anticipated Payment (RAP)/HH PPS Claims Collection of Deductible and Coinsurance from Patient General Medical and Other Health Services Not Covered Under the Plan of Care (Bill Type 34X) Osteoporosis Injections as HHA Benefit
2695	Quarterly Healthcare Common Procedure Coding System (HCPCS) Drug/Biological Code Changes - July 2013 Update
2696	Issued to a specific, audience not posted to Internet/Intranet due to Sensitivity of Instruction
2697	New Non-Physician Specialty Code for Complimentary Insurer Nonphysician Practitioner, Supplier, and Provider Specialty Codes
2698	Issued to a specific, audience not posted to Internet/Intranet due to Confidentiality of Instruction
2699	Part B Claims Submission under the Indirect Payment Procedure (IPP)
2700	Quarterly Update to the Correct Coding Initiative (CCI) Edits, Version 19.2, Effective July 1, 2013
2701	Issued to a specific, audience not posted to Internet/Intranet due to Confidentiality of Instruction.
2702	Issued to a specific, audience not posted to Internet/Intranet due to Sensitivity of Instruction
2703	Ambulance Payment Reduction for Non-Emergency Basic Life Support (BLS) Transports to and from Renal Dialysis Facilities Payment for Non-Emergency BLS Trips to/from ESRD Facilities CMS Supplied National ZIP Code File and National Ambulance Fee Schedule File
2704	July 2013 Integrated Outpatient Code Editor (I/OCE) Specifications Version 14.2
2705	Common Edits and Enhancements Modules (CEM) Code Set Update
2706	Indian Health Services (IHS) Hospital Payment Rates for Calendar Year 2013
2707	Instructions for Downloading the Medicare ZIP Code File for October 2013

2708	July Update to the CY 2013 Medicare Physician Fee Schedule Database (MPFSDB)
2709	July Quarterly Update for 2013 Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Fee Schedule Durable Medical Equipment Prosthetics, Orthotics and Supplies (DMEPOS) Fee Schedule Quarterly Update Schedule For DMEPOS Fee Schedule Record Layout for DMEPOS Fee Schedule
2710	Autologous Platelet-Rich Plasma (PRP) for Chronic Non-Healing Wounds Autologous Platelet-Rich Plasma (PRP) for Chronic Non-Healing Wounds Policy Healthcare Common Procedure Coding System (HCPCS) Codes and Diagnosis Coding Types of Bill (TOB) Payment Method Place of Service (POS) Professional Claims Medicare Summary Notices (MSNs), Remittance Advice Remark Codes (RARCs), Claim Adjustment Reason Codes (CARCs), and Group Codes
2711	Expedited Determinations for Provider Service Terminations Statutory Authority Scope Exceptions Notice of Medicare Non-Coverage Alterations to the NOMNC Completing the NOMNC Provider Delivery of the NOMNC Required Delivery Timeframes Refusal to Sign the NOMNC Financial Liability for Failure to Deliver a Valid NOMNC Amending the Date of the NOMNC NOMNC Delivery to Representatives Notice Retention for the NOMNC Hours of NOMNC Delivery Expedited Determination Process Beneficiary Responsibilities Timeframe for Requesting an Expedited Determination Provide Information to QIO Obtain Physician Certification of Risk (Home Health and CORF services only) Beneficiary Liability During QIO Review Untimely Requests for Review Provider Responsibilities The Detailed Explanation of Non-Coverage QIO Responsibilities Receive Beneficiary Requests for Expedited Review Notify Providers and Allow Explanation of Why Covered Services Should End Validate Delivery of the NOMNC Solicit the Views of the Beneficiary Solicit the Views of the Provider Make Determination and Notify Required Parties Effect of a QIO Expedited Determination Right to Pursue an Expedited Reconsideration Effect of QIO Determination on Continuation of Care Right to Pursue the Standard Claims Appeal Process Expedited Determination Notice Association with Advance Beneficiary Notices Expedited Determination Notice Association with Advance Beneficiary Notices
2712	Quarterly Update for the Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Competitive Bidding Program (CBP) - October 2013
2713	Claim Status Category and Claim Status Codes Update
2714	Updates to Chapter 12 and Chapter 16 of the Medicare Claims Processing Manual to Revise Instructions Regarding the Technical Component (TC) of Pathology Services Furnished to Hospital Patients Payment for Pathology Services Technical Component (TC) of Physician Pathology Services to Hospital Patients
2715	October 2013 Quarterly Average Sales Price (ASP) Medicare Part B Drug Pricing Files and Revisions to Prior Quarterly Pricing Files
2716	Internet Only Manual (IOM) Update to Payment for Medical or Surgical Services Furnished by CRNAs. This CR rescinds and fully replaces CR 8027. Qualified Nonphysician Anesthetist Services Qualified Nonphysician Anesthetists Entity or Individual to Whom Fee Schedule is Payable for Qualified Nonphysician anesthetists Anesthesia Fee Schedule Payment for Qualified Nonphysician Anesthetists Conversion Factors Used on or After January 1, 1997 for Qualified Nonphysician Anesthetists Anesthesia Time and Calculation of Anesthesia Time Units Billing Modifiers General Billing Instructions Qualified Nonphysician Anesthetist Special Billing and Payment Situations An Anesthesiologist and Qualified Nonphysician Anesthetist Work Together Qualified Nonphysician Anesthetist and an Anesthesiologist in a Single Anesthesia Procedure Payment for Medical or Surgical Services Furnished by CRNAs Conversion Factors for Anesthesia Services of Qualified Nonphysician Anesthetists Furnished on or After January 1, 1992
2717	July 2013 Update of the Ambulatory Surgical Center (ASC) Payment System
2718	July 2013 Update of the Hospital Outpatient Prospective Payment System (OPPS) Billing for Brachytherapy Sources – General Payment for New Brachytherapy Sources
2719	Pass-through Payments for Certified Registered Nurse Anesthetist Anesthesia Services and Related Care Pass-through Payments for Certified Registered Nurse Anesthetist Anesthesia Services and Related Care

	Payment for CRNA Pass-Through Services Payment for Anesthesia Services by a CRNA (Method II CAH only)
2720	Autologous Platelet-Rich Plasma (PRP) for Chronic Non-Healing Wounds Autologous Platelet-Rich Plasma (PRP) for Chronic Non-Healing Wounds Policy Healthcare Common Procedure Coding System (HCPCS) Codes and Diagnosis Coding Types of Bill (TOB) Payment Method Place of Service (POS) Professional Claims Medicare Summary Notices (MSNs), Remittance Advice Remark Codes (RARCs), Claim Adjustment Reason Codes (CARCs), and Group Codes
2721	New Non-Physician Specialty Code for Indirect Payment Procedure (IPP) Non-physician Practitioner, Supplier, and Provider Specialty Codes
2722	Changes to Contractor Designation in Processing Foreign, Emergency and Shipboard Claims Contractors Designated to Process Foreign Claims Source of Part B Claims Designated Contractors
2723	None
2724	July 2013 Integrated Outpatient Code Editor (I/OCE) Specifications Version 14.2
2725	Corrections to the Medicare Claims Processing Manual Foreword Line-Item Modifiers Related to Reporting of Non-covered Charges When Covered and Non-covered Services Are on the Same Outpatient Claim Liability Considerations for Bundled Services Coding That Results from Processing Noncovered Charges Claims Processing Requirements for Financial Limitations Physician Fee Schedule Payment Policy Indicator File Record Layout General Billing Requirements Payment CWF General Information
2726	Coding Requirements for Laboratory Specimen Collection Update
2727	Medicare Contractor Annual Update of the International Classification of Diseases, Ninth Revision, Clinical Modification (ICD-9-CM)
2728	Ocular Photodynamic Therapy (OPT) with Verteporfin for Macular Degeneration Billing Requirements for Ocular Photodynamic Therapy (OPT) with Verteporfin Coding Requirements for OPT with Verteporfin Claims Processing Requirements for OPT with Verteporfin Services on Professional Claims and Outpatient Facility Claims Claims Processing Requirements for OPT with Verteporfin Services on Inpatient Facility Claims Medicare Summary Notice (MSN) and Remittance Advice (RA) Messages
2729	Appeals Revisions-Final Regulation
2730	Coding Requirements for Laboratory Specimen Collection Update Coding Requirements for Specimen Collection
2731	Medicare Part A Skilled Nursing Facility (SNF) Prospective Payment System (PPS) Pricer Update FY 2014
	Medicare Secondary Payer (CMS-Pub. 100-05)
92	Medicare Contractors submission of Prescription Drug Inquiries and Common Working File Assistance Requests to the Coordination of Benefits Contractor through the ECRS Web Portal ECRS Web Quick Reference Card Version 5.2.2 ECRS Web User Guide Version
93	Medicare Contractors submission of Prescription Drug Inquiries and Common Working File Assistance Requests to the Coordination of Benefits Contractor through the ECRS Web Portal ECRS Web Quick Reference Card Version 5.2.2 ECRS Web User Guide Version
	Medicare Financial Management (CMS-Pub. 100-06)
218	Notice of New Interest Rate for Medicare Overpayments and Underpayments -3rd qtr Notfication for FY 2013
219	New Non-Physician Specialty Code for Complimentary Insurer
220	Removal of POR and PSOR instructions and the Glossary of Acronyms from the Internet Only Manual, Publication 100.06, Chapter 3
221	New Non-Physician Specialty Code for Indirect Payment Procedure (IPP) Non-Physician Practitioner/Supplier Specialty Codes
222	Revisions and Deletions to the Internet Only Manual, Publication 100-06, Chapter 3, Overpayments; Section 140.2.3 - Filing Bankruptcy Draws a Line in the Sand Filing Bankruptcy Draws a Line in the Sand
	Medicare State Operations Manual (CMS-Pub. 100-07)
83	Revisions to Appendix E and Chapter 2 sections 2290-2308 of the State Operations Manual (SOM)
84	Revised Appendix A, Interpretive Guidelines for Hospitals, Appendix L, Interpretive Guidelines for Ambulatory Surgical Centers and Appendix W, Interpretive Guidelines for Critical Access Hospitals.
	Medicare Program Integrity (CMS-Pub. 100-08)
457	Model Letter Revisions Denials Model Letter Guidance Model Acknowledgement Letter Acknowledgement Letter Example Development Letter Guidance Model Development Letter Model Rejection Letter Model Returned Application Letter Model Revalidation Letter
458	esMD RC Public Announcement Acceptable Submission Methods
459	Tax Identification Numbers of Foreign Owning and Managing Entities and Individuals
460	Clarify the definition of customized durable medical equipment (DME) items Definition of Customized DME
461	Update to Chapter 15 of the Program Integrity Manual (PIM) Clinical Psychologists

	Practice Location Information Movement of Providers and Suppliers into the High Level Reconsideration Requests
462	Update to Chapter 15 of the Program Integrity Manual (PIM)
463	Model Letter Revisions
Medicare Contractor Beneficiary and Provider Communications (CMS-Pub. 100-09)	
00	None
Medicare End Stage Renal Disease Network Organizations (CMS Pub 100-14)	
00	None
Medicare Managed Care (CMS-Pub. 100-16)	
111	Chapter 9, Employer/Union-Sponsored Group Health Plans
112	Adding MSP Validity Indicator to the CWF to MBD Feed Working Aged Adjustment
113	Chapter 12, Effect of Change of Ownership Entire Chapter
114	Risk Adjustment Entire Chapter
Medicare Business Partners Systems Security (CMS-Pub. 100-17)	
00	None
Demonstrations (CMS-Pub. 100-19)	
00	None
One Time Notification (CMS-Pub. 100-20)	
1205	Incentive Payment Related to Prior Authorization for Power Mobility Devices (PMD).
1207	Direct Mailing to Referral Agents about the DMEPOS Competitive Bidding Program Round 2 and National Mail-Order for Diabetic Testing Supplies
1208	Use of Q6 Modifier for Locum Tenens by Providing Performing Provider NPT "FOR ANALYSIS ONLY"
1209	Recovery of Annual Wellness Visit (AWV) Overpayments
1210	Implementing the Recompetition Award for the Jurisdiction C Durable Medical Equipment (DME) Medicare Administrative Contractor (MAC) Workload
1211	Modification to Change Request (CR)7254
1212	MCS Prepayment Review Report
1213	Updating the Shared Systems and Common Working File (CWF) to no Longer Create Veteran Affairs (VA) "I" records in the Medicare Secondary Payer (MSP) Auxiliary File
1214	Medicare System Update to Include Line Level National Provider Identifier (NPI) Sanction Editing on Critical Access Hospital (CAH) Method II Outpatient Claims
1215	VMS Prepayment Review Report
1216	Applying Multiple Procedure Payment Reductions to Therapy Cap Amounts for Critical Access Hospital Claims
1217	CWF Editing for Vaccines Furnished at Hospice
1218	American Recovery and Reinvestment Act of 2009 Electronic Health Record (EHR) Incentive : New Critical Access Hospital Banking Information File Transfer for Eligible Professional Payment
1219	National Competitive Bidding Program (CBP): Instructions for Processing CBP Oxygen and Capped Rental Item Claims with the Start of the Round One

	Recompete
1220	Health Insurance Portability and Accountability Act (HIPAA) EDI Front End Updates for October 2013
1221	Issued to a specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
1222	Issued to a specific audience, not posted to Internet/ Intranet due to Sensitivity of Instruction
1223	Issued to a specific audience, not posted to Internet/ Intranet due to Sensitivity of Instruction
1224	Phase III ERA Enrollment Operating Rules
1225	Reporting of Principal and Interest when returning previously recouped money – Analysis
1226	Issued to a specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
1227	Update to the Common Working File (CWF) Qualifying Stay Edit for Skilled Nursing Facility (SNF) and Swing Bed (SB) Providers
1228	Debts Referred to Treasury through the Healthcare Integrated General Ledger Accounting System (HIGLAS)
1229	Issued to a specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
1230	Issued to a specific audience, not posted to Internet/Intranet due to Confidentiality of Instruction
1231	Common Working File (CWF) Informational Unsolicited Response (IUR) or Reject for a new patient visit billed by the same physician or physician group within the past three years.
1232	New Healthcare Common Procedure Coding System (HCPCS) Codes for Customized Durable Medical Equipment
1233	Standardizing the standard - Operating Rules for code usage in Remittance Advice
1234	MSP Claims and use of CARC 23 - Analysis and Design
1235	Phase III ERA Enrollment Operating Rules
1236	Standardizing the Standard - Phase I
1237	Analysis and Design of VMS for implementing system changes for handling Bankrupt Suppliers
1238	Issued to a specific audience, not posted to Internet/ Intranet due to Sensitivity of Instruction
1239	New Healthcare Common Procedure Coding System (HCPCS) Codes for Customized Durable Medical Equipment
1240	Issued to a specific audience, not posted to Internet/ Intranet due to Sensitivity of Instruction
1241	Issued to a Specific audience not posted to Internet/Intranet due to Confidentiality of Instruction
1242	Change in Creation Date for CMS Standard Edit/Audit/Reason Code Reports
1243	Implementation of CMS Ruling 1455-R (Medicare Program; Part B Billing in Hospitals)
1244	Common Working File (CWF) Informational Unsolicited Response (IUR) or Reject for a new patient visit billed by the same physician or physician group within the past three years.
1245	Implementing the Recompetition Award for the Jurisdiction L (formerly

	Jurisdiction 12) Part A/Part B Medicare Administrative Contractor (A/B MAC) Workload
1246	Implementation of the Award for the Jurisdiction K (JK) Part A and Part B Medicare Administrative Contractor (A/B MAC) to National Government Services
1247	Implementation of CMS Ruling 1455-R (Medicare Program; Part B Billing in Hospitals)
1248	Multi Carrier System (MCS) Modifications to Liability Assignment Regarding Therapy Cap Claim Denials

Addendum II: Regulation Documents Published in the Federal Register (April through June 2013)

Regulations and Notices

Regulations and notices are published in the daily **Federal Register**. To purchase individual copies or subscribe to the **Federal Register,** contact GPO at www.gpo.gov/fdsys. When ordering individual copies, it is necessary to cite either the date of publication or the volume number and page number.

The **Federal Register** is available as an online database through GPO Access. The online database is updated by 6 a.m. each day the **Federal Register** is published. The database includes both text and graphics from Volume 59, Number 1 (January 2, 1994) through the present date and can be accessed at http://www.gpoaccess.gov/fr/index.html. The following website http://www.archives.gov/federal-register/ provides information on how to access electronic editions, printed editions, and reference copies.

This information is available on our website at: http://www.cms.gov/quarterlyproviderupdates/downloads/Regs-2Q13QPU.pdf

For questions or additional information, contact Terri Plumb (410-786-4481).

Addendum III: CMS Rulings

CMS Rulings are decisions of the Administrator that serve as precedent final opinions and orders and statements of policy and interpretation. They provide clarification and interpretation of complex or ambiguous provisions of the law or regulations relating to Medicare, Medicaid, Utilization and Quality Control Peer Review, private health insurance, and related matters.

The rulings can be accessed at http://www.cms.gov/Rulings/CMSR/list.asp#TopOfPage. For questions or additional information, contact Tiffany Lafferty (410-786-7548).

Addendum IV: Medicare National Coverage Determinations (April through June 2013)

Addendum IV includes completed national coverage determinations (NCDs), or reconsiderations of completed NCDs, from the quarter covered by this notice. Completed decisions are identified by the section of the NCD Manual (NCDM) in which the decision appears, the title, the date the publication was issued, and the effective date of the decision. An NCD is a determination by the Secretary for whether or not a particular item or service is covered nationally under the Medicare Program (title XVIII of the Act), but does not include a determination of the code, if any, that is assigned to a particular covered item or service, or payment determination for a particular covered item or service. The entries below include information concerning completed decisions, as well as sections on program and decision memoranda, which also announce decisions or, in some cases, explain why it was not appropriate to issue an NCD. Information on completed decisions as well as pending decisions has also been posted on the CMS website. For the purposes of this quarterly notice, we list only the specific updates that have occurred in the 3-month period. This information is available at: www.cms.gov/medicare-coverage-database/. For questions or additional information, contact Wanda Belle (410-786-7491).

Title	NCDM Section	Transmittal Number	Issue Date	Effective Date
TAVR Mandatory Clinical Trail Number	NCD20.32	TN2689	05/03/2013	07/1/2013
OPT with Verteporfin for Macular Degeneration	NCD80.3.1	TN155	06/14/2013	04/03/2013
Autologous Platelet-Rich Plasma (PRP) for Chronic Non-Healing Wounds	NCD270.3	TN154	06/10//2013	08/02/2012

Addendum V: FDA-Approved Category B Investigational Device Exemptions (IDEs) (April through June 2013)

Addendum V includes listings of the FDA-approved investigational device exemption (IDE) numbers that the FDA assigns. The listings are organized according to the categories to which the devices are assigned (that is, Category A or Category B), and identified by the IDE number. For the purposes of this quarterly notice, we list only the specific updates to the Category B IDEs as of the ending date of the period covered

by this notice and a contact person for questions or additional information. For questions or additional information, contact John Manlove (410-786-6877).

Under the Food, Drug, and Cosmetic Act (21 U.S.C. 360c) devices fall into one of three classes. To assist CMS under this categorization process, the FDA assigns one of two categories to each FDA-approved investigational device exemption (IDE). Category A refers to experimental IDEs, and Category B refers to non-experimental IDEs. To obtain more information about the classes or categories, please refer to the notice published in the April 21, 1997 **Federal Register** (62 FR 19328).

IDE	Device	Start Date
G130054	Juvederm Volbella XC	04/03/2013
G130056	Sensor Optimization of CRT Response (SOCR) Study	04/03/2013
G130055	Neuroport Array and Neuroport System	04/04/2013
G120243	Abdominal Compression Elastic Support (ACES)	04/11/2013
G120053	Perceval S Heart Valve	04/12/2013
G130007	Model 9005 Lutonix DCB	04/18/2013
G130068	Ulthera System	04/19/2013
G120172	Mguard Prime Micronet Covered Coronary Stent System	04/19/2013
G120266	Angel Catheter	04/19/2013
G130012	9.4 Tesla 80 CM MR Scanner	04/24/2013
G130069	Pantaprazole 13C Breath Test (PTZ-BT)	04/24/2013
G120275	Enlightn Renal Denervation System	04/25/2013
G130073	NRAS Q61 Mutation test	04/26/2013
G130078	Gel-One	04/26/2013
G130077	Brava Systems	04/26/2013
G130084	EPI-Sense-AF Guided Coagulation System with Visitrax	05/03/2013
G130087	Gastric Emptying Breath Test (GEBT)	05/08/2013
G130082	Cortical Recording and Stimulation Array System	05/10/2013
G130048	MECTA 5000Q Feast Drive	05/15/2013
G120160	Direct Flow Medical Trans Catheter Aortic Valve System	05/15/2013
G120254	VORTX RX	05/22/2013
G130046	Magnamosis Magnetic Compression Anastomosis Device	05/23/2013
G130093	Veni RF Plus Endovenous Ablation System	05/24/2013
G130095	Lap-Band & MetFormin	05/28/2013
G130094	Dermaveil	05/29/2013
G130097	Multimodality Image-Guided (MIMIG) System	05/30/2013
G130081	Intuitive Surgical Da Vinci Single-Site Instruments And Accessories	05/31/2013
G120300	GE Datex-Ohmeda AISYS With Smartflow	05/31/2013
G130099	Exablate 2000 MRGHIFU System	06/04/2013
G130141	Cook Cervical Ripening Balloon	06/04/2013
G120263	Portico Transcatheter Aortic Valve Implant	06/05/2013
G120235	Entrainment Based Mechanical Ventilation	06/06/2013
G130108	Rezum Generator, Rezum Delivery Device, Rezum Accessory Pack	06/06/2013
G130100	Neural Prosthetic System 2 (NPS2)	06/12/2013
G130111	Axialif System	06/14/2013
G110072	Perclot Polysacharide Hemostatis System	06/14/2013
G130110	Essure System For Permanent Birth Control	06/14/2013
G130113	Integrated Bracanalysis	06/14/2013
G130024	Perfusion-Induced Systemic-Hyperthermia (PISH)	06/18/2013
G070038	Aethlon GNA Hemopurifier	06/20/2013
G120015	Croma Eyefill Viscoelastic Device	06/20/2013
G130105	Medtronic Application Card For Spinal Cord Stimulation Model 8870	06/20/2013
G130120	Gore Tag Thoracic Branch Endoprosthesis	06/21/2013
G130080	PantoPrazole-C Breath Test (PTZ-BT)	06/27/2013
G130130	DAKO MET 2 Pharmdx Kit	06/27/2013
G130123	Tristan 621 Biomagnetometer	06/28/2013
G130126	Medtronic Symplicity Renal Denervation System	06/29/2013

Addendum VI: Approval Numbers for Collections of Information (April through June 2013)

All approval numbers are available to the public at Reginfo.gov. Under the review process, approved information collection requests are assigned OMB control numbers. A single control number may apply to several related information collections. This information is available at www.reginfo.gov/public/do/PRAMain. For questions or additional information, contact Mitch Bryman (410-786-5258).

Addendum VII: Medicare-Approved Carotid Stent Facilities, (April through June 2013)

Addendum VII includes listings of Medicare-approved carotid stent facilities. All facilities listed meet CMS standards for performing carotid artery stenting for high risk patients. On March 17, 2005, we issued our decision memorandum on carotid artery stenting. We determined that carotid artery stenting with embolic protection is reasonable and necessary only if performed in facilities that have been determined to be competent in performing the evaluation, procedure, and follow-up necessary to ensure optimal patient outcomes. We have created a list of minimum standards for facilities modeled in part on professional society statements on competency. All facilities must at least meet our standards in order to receive coverage for carotid artery stenting for high risk patients. For the purposes of this quarterly notice, we are providing only the specific updates that have occurred in the 3-month period. This information is available at: http://www.cms.gov/MedicareApprovedFacilitie/CASF/list.asp#TopOfPage

For questions or additional information, contact Lori Ashby (410-786-6322).

Facility	Provider Number	Effective Date	State
The following facilities are new listings for this quarter.			
Northside Hospital Atlanta 1000 Johnson Ferry Road, NE Atlanta, GA 30342	1457396079	04/25/2013	GA
Memorial Hospital 3625 University Boulevard South Jacksonville, FL 32216	1447206438	04/25/2013	FL
Saint Mary's Regional Medical Center 235 West Sixth Street Reno, NV 89503	1801152566	04/25/2013	NV
Good Samaritan Regional Health Center 1 Good Samaritan Way Mt. Vernon, IL 62864	441221	04/25/2013	IL
Wayne Memorial Hospital 2700 Wayne Memorial Drive Goldsboro, NC 27534	1750353462	04/25/2013	NC
Lowell General Hospital 295 Varnum Avenue Lowell, MA 01854	220063	05/17/2013	MA
ARH Regional Medical Center 100 Medical Center Drive Hazard, KY 41701	180002	05/17/2013	KY
Providence Holy Cross Medical Center 15031 Rinaldi Street P.O. Box 9600 Mission Hills, CA 91346	1477587632	05/17/2013	CA
Memorial Hospital at Gulfport 4500 13th Street Gulfport, MS 39501	1639401318	06/05/2013	MS
Kaiser Foundation Hospital Redwood City 1150 Veterans Boulevard 901 Marshall Building 3rd Floor Redwood City, CA 94063	050541	06/05/2013	CA
University of South Alabama Medical Center 2451 Fillingim Street Mobile, AL 36617	010087	06/26/2013	AL
Editorial changes (shown in bold) were made to the facilities listed below.			
Wake Forest Baptist Medical Center Medical Center Boulevard Winston-Salem, NC 27157	340047	06/27/2005	NC
Sherman Health **1425 North Randall Road** Elgin, IL 60123	140030	11/18/2005	IL

Addendum VIII: American College of Cardiology's National Cardiovascular Data Registry Sites (April through June 2013)

Addendum VIII includes a list of the American College of Cardiology's National Cardiovascular Data Registry Sites. We cover implantable cardioverter defibrillators (ICDs) for certain clinical indications, as long as information about the procedures is reported to a central registry. Detailed descriptions of the covered indications are available in the NCD. In January 2005, CMS established the ICD Abstraction Tool through the Quality Network Exchange (QNet) as a temporary data collection mechanism. On October 27, 2005, CMS announced that the American College of Cardiology's National Cardiovascular Data Registry (ACC-NCDR) ICD Registry satisfies the data reporting requirements in the NCD. Hospitals needed to transition to the ACC-NCDR ICD Registry by April 2006.

Effective January 27, 2005, to obtain reimbursement, Medicare NCD policy requires that providers implanting ICDs for primary prevention clinical indications (that is, patients without a history of cardiac arrest or spontaneous arrhythmia) report data on each primary prevention ICD procedure. Details of the clinical indications that are covered by Medicare and their respective data reporting requirements are available in the Medicare NCD Manual, which is on the CMS website at http://www.cms.hhs.gov/Manuals/IOM/itemdetail.asp?filterType=none&filterByDID=99&sortByDID=1&sortOrder=ascending&itemID=CMS014961

A provider can use either of two mechanisms to satisfy the data reporting requirement. Patients may be enrolled either in an Investigational Device Exemption trial studying ICDs as identified by the FDA or in the ACC-NCDR ICD registry. Therefore, for a beneficiary to receive a Medicare-covered ICD implantation for primary prevention, the beneficiary must receive the scan in a facility that participates in the ACC-NCDR ICD registry. The entire list of facilities that participate in the ACC-NCDR ICD registry can be found at www.ncdr.com/webncdr/common

For the purposes of this quarterly notice, we are providing only the specific updates that have occurred in the 3-month period. This information is available by accessing our website and clicking on the link for the American College of Cardiology's National Cardiovascular Data Registry at: www.ncdr.com/webncdr/common. For questions or additional information, contact Marie Casey, BSN, MPH (410-786-7861).

Facility	City	State
The following facilities are new listings for this quarter.		
Verdugo Hills Hospital	Glendale	CA
Forest Hills Hospital	Forest Hills	NY
Spring Valley Hospital	Las Vegas	NV
The Hospital at Westlake Medical Center	Austin	TX
Carondelet St Mary's Hospital	Tucson	AZ
Soin Medical Center	Beavercreek	OH
Gulf Breeze Hospital	Gulf Breeze	FL
Florida Hospital Heartland	Sebring	FL
Saint Mary's Health Center	Jefferson City	MO
Women and Children's Hospital	Lake Charles	LA
Palms West Hospital	Loxahatchee	FL
Children's Medical Center of Dallas	Dallas	TX
Sumner Regional Medical Center	Gallatin	TN
Waccamaw Community Hospital	Murrells Inlet	SC
Delnor Hospital	Geneva	IL
Newman Regional Health	Emporia	KS
Health Alliance Hospital	Leominster	MA
Mercy Western Hills	Cincinnati	OH
The following facility is terminated as of this quarter.		
Greene Memorial Hospital	Xenia	OH

Addendum IX: Active CMS Coverage-Related Guidance Documents (April through June 2013)

There are no CMS coverage-related guidance documents published in the April through June 2013 quarter. To obtain the document, visit the CMS coverage website at http://www.cms.gov/medicare-coverage-database/details/medicare-coverage-document-details.aspx?MCDId=23. For questions or additional information, contact Lori Ashby (410-786-6322).

Addendum X: List of Special One-Time Notices Regarding National Coverage Provisions (April through June 2013)

There were no special one-time notices regarding national coverage provisions published in the April through June 2013 quarter. This information is available at www.cms.hhs.gov/coverage. For questions or additional information, contact Lori Ashby (410-786-6322).

Addendum XI: National Oncologic PET Registry (NOPR) (April through June 2013)

Addendum XI includes a listing of National Oncologic Positron Emission Tomography Registry (NOPR) sites. We cover positron emission tomography (PET) scans for particular oncologic indications when they are performed in a facility that participates in the NOPR.

In January 2005, we issued our decision memorandum on **positron emission tomography** (PET) scans, which stated that CMS would cover PET scans for particular oncologic indications, as long as they were performed in the context of a clinical study. We have since recognized the National Oncologic PET Registry as one of these clinical studies. Therefore, in order for a beneficiary to receive a Medicare-covered PET scan, the beneficiary must receive the scan in a facility that participates in the registry. There were no updates to the listing of National Oncologic Positron Emission Tomography Registry (NOPR) in the January through March 2013 quarter. This information is available at http://www.cms.gov/MedicareApprovedFacilitie/NOPR/list.asp#TopOfPage. For questions or additional information, contact Stuart Caplan, RN, MAS (410-786-8564)

New Facility	Provider Number	Effective Date	State
University Radiology Associates, LLP 550 Harrison Street Suite #100; Telephone: 315-464-2226 Syracuse, NY 13202	38874A	05/15/2013	NY
Editorial changes (shown in bold) were made to the facilities listed below.			
Old name: Medcenter One **New name: Sanford Health Bismarck** 300 North 7th Street Bismarck, ND 58506-5525	1538245634	07/24/2013	ND
Old name: Hackensack Medical and Molecular Imaging **New name: American Imaging** 155 State Street Hackensack, NJ 07601	**1306944657**	01/29/2010	NJ

Addendum XII: Medicare-Approved Ventricular Assist Device (Destination Therapy) Facilities (April through June 2013)

Addendum XII includes a listing of Medicare-approved facilities that receive coverage for ventricular assist devices (VADs) used as destination therapy. All facilities were required to meet our standards in order to receive coverage for VADs implanted as destination therapy. On October 1, 2003, we issued our decision memorandum on VADs for the

clinical indication of destination therapy. We determined that VADs used as destination therapy are reasonable and necessary only if performed in facilities that have been determined to have the experience and infrastructure to ensure optimal patient outcomes. We established facility standards and an application process. All facilities were required to meet our standards in order to receive coverage for VADs implanted as destination therapy.

For the purposes of this quarterly notice, we are providing only the specific updates that have occurred to the list of Medicare-approved facilities that meet our standards in the 3-month period. This information is available at http://www.cms.gov/MedicareApprovedFacilitie/VAD/list.asp#TopOfPage. For questions or additional information, contact Marie Casey, BSN, MPH (410-786-7861).

Facility	Provider Number	Date Approved	State
The following facilities are new listings for this quarter.			
Memorial Hermann Hospital 6411 Fannin Street Houston TX 77030	450068	04/10/2013	TX
Editorial changes (shown in bold) were made to the facilities listed below.			
From: University Hospital **To: University Cincinnati Medical Center** 234 Goodman Street Cincinnati, OH 45219	360003	01/11/2012	OH

Addendum XIII: Lung Volume Reduction Surgery (LVRS) (April through June 2013)

Addendum XIII includes a listing of Medicare-approved facilities that are eligible to receive coverage for lung volume reduction surgery. Until May 17, 2007, facilities that participated in the National Emphysema Treatment Trial were also eligible to receive coverage. The following three types of facilities are eligible for reimbursement for Lung Volume Reduction Surgery (LVRS):

- National Emphysema Treatment Trial (NETT) approved (Beginning 05/07/2007, these will no longer automatically qualify and can qualify only with the other programs);
- Credentialed by the Joint Commission (formerly, the Joint Commision on Accreditation of Healthcare Organizations (JCAHO)) under their Disease Specific Certification Program for LVRS; and
- Medicare approved for lung transplants.

Only the first two types are in the list. There were no additions to the listing of facilities for lung volume reduction surgery published in the April through June 2013 quarter. This information is available at www.cms.gov/MedicareApprovedFacilitie/LVRS/list.asp#TopOfPage. For questions or additional information, contact Marie Casey, BSN, MPH (410-786-7861).

Addendum XIV: Medicare-Approved Bariatric Surgery Facilities (April through June 2013)

Addendum XIV includes a listing of Medicare-approved facilities that meet minimum standards for facilities modeled in part on professional society statements on competency. All facilities must meet our standards in order to receive coverage for bariatric surgery procedures. On February 21, 2006, we issued our decision memorandum on bariatric surgery procedures. We determined that bariatric surgical procedures are reasonable and necessary for Medicare beneficiaries who have a body-mass index (BMI) greater than or equal to 35, have at least one co-morbidity related to obesity and have been previously unsuccessful with medical treatment for obesity. This decision also stipulated that covered bariatric surgery procedures are reasonable and necessary only when performed at facilities that are: (1) certified by the American College of Surgeons (ACS) as a Level 1 Bariatric Surgery Center (program standards and requirements in effect on February 15, 2006); or (2) certified by the American Society for Bariatric Surgery (ASBS) as a Bariatric Surgery Center of Excellence (BSCOE) (program standards and requirements in effect on February 15, 2006).

For the purposes of this quarterly notice, we list only the specific updates to Medicare-approved facilities that meet CMS's minimum facility standards for bariatric surgery and have been certified by ACS and/or ASMBS in the 3-month period. This information is available at www.cms.gov/MedicareApprovedFacilitie/BSF/list.asp#TopOfPage. For questions or additional information, contact Kate Tillman, RN, MAS (410-786-9252).

Facility	Provider Number	Date Approved	State
The following facilities are new listings for this quarter.			
MedStar Washington Hospital Center 110 Irving Street NW Washington, DC 20010 Kenneth Alexander (202) 877-3152	1548378235	02/20/2013	DC
Crouse Hospital 736 Irvine Avenue	1033107743	03/19/2013	NY

Syracuse, NY (315) 470-7111; ASMBS			
Crittenton Hospital Medical Center (CHMC) 1101 W. University Drive Rochester, MI 48307 Moe Gamal (248) 643-4646	1437176203	04/11/2013	MI
Cooper University Hospital 1 Cooper Plaza Camden, NJ 08103 ASMBS	310014	04/30/2013	NJ
Herrin Hospital 201 S 14th Street Herrin, IL 62948 ASMBS	1528158573	04/02/2013	IL
Memorial Hospital of Florida LP 12901 Swann Avenue Tampa, FL 33609-4056 ASMBS; (813) 342-1429	100206	08/30/2011	FL
Editorial changes (shown in bold) were made to the facilities listed below.			
St. Vincent's Medical Center **13500 North Meridian Street** **Carmel, IN 46032** **Ted Eads (317) 582-7737**	**1639124134**	**05/18/2010**	IN
Boston Medical Center **732 Harrison Avenue, 2nd Floor** **Boston, MA 02118** **Melody Route (617) 414-6833**	220031/1346218294	**12/19/2012**	MA
The Ohio State University Hospital **410 W. 10th Avenue** **Columbus, OH 43210** **Etene Terrell (614) 293-3504** **Bradley Needleman (614) 293-3504**	360085	**01/01/2010**	OH
University of Alabama at Birmingham Hospital **1813 6th Avenue South, MEB 300, zip 3293** **Birmingham, AL 35294-0016** Deborah Thedford (205) 996-6984	**1154435824**	12/08/2012	AL
St. Vincent's Medical Center 1 Shircliff Way Jacksonville, FL 32204 Katherine Jewell (904) 308-3664	**1134117575**	12/14/20012	FL
Penrose- St. Francis Health Services 2222 North Nevada Avenue Colorado Springs, CO 80907 ASMBS (719) 776-5359	**060031**	02/24/2006	CO
The Methodist Hospital 6565 Fannin, NB1-001 Houston, TX 77030 **Marietta Schmid (713) 441-5970**	450358	**03/23/2013**	TX
Carolinas Medical Center Mercy 2608 E 7th Street Charlotte, NC 28204 Constance Simms (704) 446-4075	1497792550	**04/01/2013**	NC
William Beaumont Hospital- Royal Oak 3601 West Thirteen Mile Road Royal Oak, MI 48073-6769 **Elizabeth Gates (248) 551-9705**	230130/1689653305	**04/21/2013**	MI
The following facility was removed as of this quarter.			
Meriter Hospital (NPI#) 202 South Park Street Madison, WI 53715 ASMBS (608) 890-9996	520089	12/15/2006	WI

Addendum XV: FDG-PET for Dementia and Neurodegenerative Diseases Clinical Trials (April through June 2013)

There were no FDG-PET for Dementia and Neurodegenerative Diseases Clinical Trials published in the April through June 2013 quarter.

This information is available on our website at www.cms.gov/MedicareApprovedFacilitie/PETDT/list.asp#TopOfPage. For questions or additional information, contact Stuart Caplan, RN, MAS (410-786-8564).

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BILLING CODE 4120–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Office of Clinical and Preventive Services National HIV Program: Enhanced HIV/AIDS Screening and Engagement in Care

Announcement Type: New.
Funding Announcement Number: HHS–2013–IHS–OCPS–HIV–0001.
Catalog of Federal Domestic Assistance Number: 93.933.

Key Dates

Application Deadline Date: August 26, 2013.
Review Date: August 29, 2013.
Earliest Anticipated Start Date: September 15, 2013.
Signed Tribal Resolutions Due Date: August 26, 2013.
Proof of Non-Profit Status Due Date: August 26, 2013.

I. Funding Opportunity Description

Statutory Authority

The Indian Health Service (IHS) is accepting competitive cooperative agreement applications for Enhanced HIV/AIDS Screening and Engagement in Care. This program is funded by the Office of the Secretary (OS), Department of Health and Human Services (HHS). Funding for the HIV/AIDS award will be provided by OS via an Intra-Departmental Delegation of Authority dated 07/17/13 to IHS to permit obligation of funding appropriated by the Department of Defense, Military Construction and Veterans Affairs, and Full-Year Continuing Appropriations Act, 2013, Public Law 113–6. This program is described in the Catalog of Federal Domestic Assistance under 93.933.

Background

The IHS Office of Clinical and Preventive Services (OCPS), National Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome (HIV/AIDS) Program serves as the primary source for national education, policy development, budget development, and allocation for clinical, preventive, and public health HIV/AIDS programs for the IHS, Area Offices, and Service Units. It provides leadership in articulating the clinical, preventive, and public health needs of American Indian/Alaska Native (AI/AN) communities and developing, managing, and administering program functions related to HIV/AIDS.

Purpose

The purpose of this cooperative agreement is to meet community needs for the enhancement of HIV/AIDS testing activities and the provision of HIV/AIDS-related services among AI/AN people. Such programs are necessary to reduce the incidence of HIV/AIDS and improve quality of life for People Living with HIV/AIDS (PLWHA). The main goals are to: increase the number of AI/AN with awareness of his/her HIV status; and, improve engagement and retention in care among PLWHA. Awardee activities will seek to: increase access to HIV related services, reduce stigma, make HIV testing routine, and improve engagement in care. Emphasis should be placed on increasing routine HIV screening for adults as per 2006 Centers for Disease Control and Prevention (CDC) guidelines, provide pre- and post-test counseling (when indicated), and developing or deploying strategies for engaging PLWHA in appropriate, culturally responsive HIV-related care.

II. Award Information

Type of Award

Cooperative Agreement.

Estimated Funds Available

The total amount of funding identified for the current fiscal year 2013 is approximately $320,000. Individual award amounts are anticipated to be between $60,000 and $90,000. All competing and continuation awards issued under this announcement are subject to the availability of funds. In the absence of funding, the IHS is under no obligation to make any awards selected for funding under this announcement.

Anticipated Number of Awards

Approximately four awards will be issued under this program announcement. OS and IHS will concur on the final decision as to who will receive awards.

Project Period

The project period will be for five years and will run consecutively from September 1, 2013 to August 31, 2018.

Cooperative Agreement

In the Department of Health and Human Services (HHS), a cooperative agreement is administered under the same policies as a grant. The funding agency (OS) is required to have substantial programmatic involvement in the project during the entire award segment. Below is a detailed description of the level of involvement required for both the funding agency and the grantee. OS, through IHS, will be responsible for activities listed under section A and the awardee will be responsible for activities listed under section B as stated:

Substantial Involvement Description for Cooperative Agreement

A. IHS Programmatic Involvement

Provide funded organizations with ongoing consultation and technical assistance to plan, implement, and evaluate each component of the comprehensive program as described under Grantee Cooperative Agreement Award Activities below. Consultation and technical assistance will include, but not be limited to, the following areas:

(1) Interpretation of current scientific literature related to epidemiology, statistics, surveillance, Healthy People 2020 Objectives, and other HIV disease control activities;

(2) Design and implementation of program components (including, but not limited to, program implementation methods, surveillance, epidemiologic analysis, outbreak investigation, development of programmatic evaluation, development of disease control programs, and coordination of activities);

(3) Implementation of program management best practices;

(4) Conduct site visits to assess program progress and provide programmatic technical assistance as travel funds allow; and

(5) Coordination of these activities with all IHS HIV activities on a national basis.

B. Grantee Cooperative Agreement Award Activities

- Assist AI/AN communities and Tribal organizations in increasing the number of AI/ANs with awareness of their HIV status. The grantee will assist and facilitate reporting of HIV diagnoses to local and State public health authorities in the region as required by applicable law.
- Test at least one previously untested (not tested in the prior five years) patient for every $75.00 in cooperative agreement funds received, inclusive of all ancillary and indirect costs.
- Collaborate with national IHS programs by providing standardized, anonymous HIV surveillance data on a quarterly basis, and in identifying and documenting best practices for implementing routine HIV testing.

• Participate in the development of systems for sharing, improving, and disseminating aggregate HIV data at a national level for purposes of education for AI/AN communities, Government Performance Results Act of 1993 (GPRA), Healthy People 2020 and other national-level activities.

• Develop or deploy services for PLWHA to engage or re-engage (link) them into appropriate medical care, including treatment and prevention services for comorbid conditions.

• Provide a three page mid-year report and no more than a ten page summary annual report at the end of each project year. The report should include the HHS HIV common indicators and establish the impact and outcomes of various methods of implementing routine screening tried during the funding period.

III. Eligibility Information

1. Eligibility

This is a full competition announcement.

Eligible Applicants must be one of the following:

i. An Indian Tribe as defined by 25 U.S.C. 1603(14);

ii. A Tribal organization as defined by 25 U.S.C. 1603(26); or

iii. An Urban Indian organization as defined by 25 U.S.C. 1603(29). Applicants must provide proof of non-profit status with the application, e.g. 501(c)(3).

Note: Please refer to Section IV.2 (Application and Submission Information/ Subsection 2, Content and Form of Application Submission) for additional proof of applicant status documents required such as Tribal resolutions, proof of non-profit status, etc.

2. Cost Sharing or Matching

The IHS does not require matching funds or cost sharing for grants or cooperative agreements.

3. Other Requirements

If application budgets exceed the highest dollar amount outlined under the ''Estimated Funds Available'' section within this funding announcement, the application will be considered ineligible and will not be reviewed for further consideration. If deemed ineligible, IHS will not return the application. The applicant will be notified by email by the Division of Grants Management (DGM) of this decision.

Tribal Resolution

Tribal Resolution—A tribal resolution is not required for Urban Indian organization applicants, however all applying Urban Indian organizations must provide proof of non-profit status and a letter from the Board of Directors authorizing the application. Board of Directors letters are required to accompany the application submission. This can be attached to the electronic application. An Indian Tribe that is proposing a project affecting another Indian Tribe must include resolutions from all affected Tribes to be served. Applications by Tribal organizations will not require a specific Tribal resolution if the current Tribal resolution(s) under which they operate would encompass the proposed grant activities. Draft resolutions are acceptable in lieu of an official resolution. However, an official signed Tribal resolution must be received by the DGM prior to the beginning of the Objective Review. If an official signed resolution is not received by the Review Date listed under the Key Dates section on page one of this announcement, the application will be considered incomplete and ineligible.

Proof of Non-Profit Status

Organizations claiming non-profit status must submit proof. A copy of the 501(c)(3) Certificate must be received with the application submission by the Application Deadline Date listed under the Key Dates section on page one of this announcement.

An applicant submitting any of the above additional documentation after the initial application submission due date is required to ensure the information was received by the IHS by obtaining documentation confirming delivery (i.e. FedEx tracking, postal return receipt, etc.).

IV. Application and Submission Information

1. Obtaining Application Materials

The application package and detailed instructions for this announcement can be found at *http://www.Grants.gov* or *http://www.ihs.gov/NonMedicalPrograms/gogp/index.cfm?module=gogp_funding.* Questions regarding the electronic application process may be directed to Paul Gettys at (301) 443–2114.

2. Content and Form Application Submission

The applicant must include the project narrative as an attachment to the application package. Mandatory documents for all applicants include:

- Table of contents.
- Abstract (one page) summarizing the project.
- Application forms:
  - SF–424, Application for Federal Assistance.
  - SF–424A, Budget Information—Non-Construction Programs.
  - SF–424B, Assurances—Non-Construction Programs.
- Budget Justification and Narrative (must be single spaced and not exceed five pages).
- Project Narrative (must be single spaced and not exceed 15 pages).
  - Background information on the Tribe or organization.
  - Proposed scope of work, objectives, and activities that provide a description of what will be accomplished, including a one-page Timeframe Chart.
- Tribal Resolution or Tribal Letter of Support (Tribal Organizations only).
- Letter of Support from Tribal Council or Organization's Board of Directors.
- 501(c)(3) Certificate (if applicable).
- Biographical sketches for all Key Personnel.
- Contractor/Consultant resumes or qualifications and scope of work.
- Disclosure of Lobbying Activities (SF–LLL).
- Certification Regarding Lobbying (GG-LobbyingForm).
- Copy of current Negotiated Indirect Cost rate (IDC) agreement (required) in order to receive IDC.
- Organizational Chart (optional).
- Documentation of current OMB A–133 required Financial Audit (if applicable).

Acceptable forms of documentation include:

- Email confirmation from Federal Audit Clearinghouse (FAC) that audits were submitted; or
- Face sheets from audit reports. These can be found on the FAC Web site: *http://harvester.census.gov/sac/dissem/accessoptions.html?submit=Go+To+Database.*

Public Policy Requirements: All Federal-wide public policies apply to IHS grants with exception of the Discrimination policy.

Requirements for Project and Budget Narratives

A. Project Narrative: This narrative should be a separate Word document that is no longer than 15 pages and must: be single-spaced, be type written, have consecutively numbered pages, use black type not smaller than 12 characters per one inch, and be printed on one side only of standard size 8½″ x 11″ paper.

Be sure to succinctly answer all questions listed under the evaluation

criteria (refer to Section V.1, Evaluation criteria in this announcement) and place all responses and required information in the correct section (noted below), or they will not be considered or scored. These narratives will assist the Objective Review Committee (ORC) in becoming more familiar with the grantee's activities and accomplishments prior to this grant award. If the narrative exceeds the page limit, only the first 15 pages will be reviewed. The 15-page limit for the narrative does not include the work plan, standard forms, Tribal resolutions, table of contents, budget, budget justifications, narratives, and/or other appendix items.

There are three parts to the narrative: Part A—Program Information; Part B—Program Planning and Evaluation; and Part C—Program Report. See below for additional details about what must be included in the narrative.

Part A: Program Information 3 pages

Section 1: Needs.

Describe how the Indian Tribe or organization has determined it has the administrative infrastructure to support activities to increase HIV/AIDS screening and assist individuals with accessing care. Explain any previous planning activities the Tribe or organization has completed relevant to this or similar goals.

Part B: Program Planning and Evaluation 5 pages

Section 1: Program Plans.

Describe fully and clearly the direction the Indian Tribe or organization plans to take in the implementation of this program, including how the Tribe plans to demonstrate improved health and services to the community it serves. Include proposed timelines. The total timeline should be no longer than one page.

Section 2: Program Evaluation.

Describe fully and clearly the improvements that will be made by the awardee to manage the program and identify the anticipated or expected benefits for the Tribe or AI/AN people served.

Part C: Program Report 7 pages

Section 1: Describe major accomplishments.

Please identify and describe significant program achievements associated with the delivery of quality health services or outreach services in the past 24 months in implementing previous grants, cooperative agreements, or other related activities. Provide a comparison of the actual accomplishments to the goals established for the project period, or if applicable, provide justification for the lack of progress.

Section 2: Describe major activities over the last 24 months.

Please identify and summarize recent major health related project activities of the work done during the project period.

B. Budget Narrative: This narrative must describe the budget requested and match the scope of work described the project narrative. The budget narrative should not exceed five pages.

3. Submission Dates and Times

Applications must be submitted electronically through Grants.gov by 12:00 a.m., midnight Eastern Standard Time (EST) on the Application Deadline Date listed in the Key Dates section on page one of this announcement. Any application received after the application deadline will not be accepted for processing, nor will it be given further consideration for funding. The applicant will be notified by the DGM via email of this decision.

If technical challenges arise and assistance is required with the electronic application process, contact Grants.gov Customer Support via email to *support@grants.gov* or at (800) 518–4726. Customer Support is available to address questions 24 hours a day, 7 days a week (except on Federal holidays). If problems persist, contact Paul Gettys, DGM (*Paul.Gettys@ihs.gov*) at (301) 443–2114. Please be sure to contact Mr. Gettys at least ten days prior to the application deadline. Please do not contact the DGM until you have received a Grants.gov tracking number. In the event you are not able to obtain a tracking number, call the DGM as soon as possible.

If the applicant needs to submit a paper application instead of submitting electronically via Grants.gov, prior approval must be requested and obtained (see Section IV.6 below for additional information). The waiver must be documented in writing (emails are acceptable), before submitting a paper application. A copy of the written approval must be submitted along with the hardcopy that is mailed to the DGM. Once the waiver request has been approved, the applicant will receive a confirmation of approval and the mailing address to submit the application. Paper applications that are submitted without a waiver from the Acting Director of DGM will not be reviewed or considered further for funding. The applicant will be notified via email of this decision by the Grants Management Officer of DGM. Paper applications must be received by the DGM no later than 5:00 p.m., EST, on the Application Deadline Date listed in the Key Dates section on page one of this announcement. Late applications will not be accepted for processing or considered for funding.

4. Intergovernmental Review

Executive Order 12372 requiring intergovernmental review is not applicable to this program.

5. Funding Restrictions

- Pre-award costs are not allowable.
- The available funds are inclusive of direct and appropriate indirect costs.
- Only one grant/cooperative agreement will be awarded per applicant.
- IHS will not acknowledge receipt of applications.

6. Electronic Submission Requirements

All applications must be submitted electronically. Please use the *http://www.Grants.gov* Web site to submit an application electronically and select the ''Find Grant Opportunities'' link on the homepage. Download a copy of the application package, complete it offline, and then upload and submit the completed application via the *http://www.Grants.gov* Web site. Electronic copies of the application may not be submitted as attachments to email messages addressed to IHS employees or offices.

If the applicant receives a waiver to submit paper application documents, they must follow the rules and timelines that are noted below. The applicant must seek assistance at least ten days prior to the Application Deadline Date listed in the Key Dates section on page one of this announcement.

Applicants that do not adhere to the timelines for System for Award Management (SAM) and/or *http://www.Grants.gov* registration or that fail to request timely assistance with technical issues will not be considered for a waiver to submit a paper application.

Please be aware of the following:

- Please search for the application package in *http://www.Grants.gov* by entering the Catalog of Federal Domestic Assistance (CFDA) number or the Funding Opportunity Number. Both numbers are located in the header of this announcement.
- If you experience technical challenges while submitting your application electronically, please contact Grants.gov Support directly at: *support@grants.gov* or (800) 518–4726. Customer Support is available to address questions 24 hours a day, 7 days a week (except on Federal holidays).

• Upon contacting Grants.gov, obtain a tracking number as proof of contact. The tracking number is helpful if there are technical issues that cannot be resolved and a waiver from the agency must be obtained.

• If it is determined that a waiver is needed, the applicant must submit a request in writing (emails are acceptable) to *GrantsPolicy@ihs.gov* with a copy to *Tammy.Bagley@ihs.gov.* Please include a clear justification for the need to deviate from the standard electronic submission process.

• If the waiver is approved, the application should be sent directly to the DGM by the Application Deadline Date listed in the Key Dates on page one of this announcement.

• Applicants are strongly encouraged not to wait until the deadline date to begin the application process through Grants.gov as the registration process for SAM and Grants.gov could take up to fifteen working days.

• Please use the optional attachment feature in Grants.gov to attach additional documentation that may be requested by the DGM.

• All applicants must comply with any page limitation requirements described in this Funding Announcement.

• After electronically submitting the application, the applicant will receive an automatic acknowledgment from Grants.gov that contains a Grants.gov tracking number. The DGM will download the application from Grants.gov and provide necessary copies to the appropriate agency officials. Neither the DGM nor the OCPS will notify the applicant that the application has been received.

• Email applications will not be accepted under this announcement.

Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS)

All IHS applicants and grantee organizations are required to obtain a DUNS number and maintain an active registration in the SAM database. The DUNS number is a unique 9-digit identification number provided by D&B which uniquely identifies each entity. The DUNS number is site specific; therefore, each distinct performance site may be assigned a DUNS number. Obtaining a DUNS number is easy, and there is no charge. To obtain a DUNS number, please access it through *http://fedgov.dnb.com/webform,* or to expedite the process, call (866) 705–5711.

All HHS recipients are required by the Federal Funding Accountability and Transparency Act of 2006, as amended (''Transparency Act''), to report information on subawards. Accordingly, all IHS grantees must notify potential first-tier subrecipients that no entity may receive a first-tier subaward unless the entity has provided its DUNS number to the prime grantee organization. This requirement ensures the use of a universal identifier to enhance the quality of information available to the public pursuant to the Transparency Act.

System for Award Management (SAM)

Organizations that were not registered with Central Contractor Registration (CCR) and have not registered with SAM will need to obtain a DUNS number first and then access the SAM online registration through the SAM home page at *https://www.sam.gov* (U.S. organizations will also need to provide an Employer Identification Number from the Internal Revenue Service that may take an additional 2–5 weeks to become active). Completing and submitting the registration takes approximately one hour to complete and SAM registration will take 3–5 business days to process. Registration with the SAM is free of charge. Applicants may register online at *https://www.sam.gov.*

Additional information on implementing the Transparency Act, including the specific requirements for DUNS and SAM, can be found on the IHS Grants Management, Grants Policy Web site: *http://www.ihs.gov/NonMedicalPrograms/gogp/index.cfm?module=gogp_policy_topics.*

V. Application Review Information

The instructions for preparing the application narrative also constitute the evaluation criteria for reviewing and scoring the application. Weights assigned to each section are noted in parentheses. The 15 page narrative should include only the first year of activities; information for multi-year projects should be included as an appendix. See ''Multi-year Project Requirements'' at the end of this section for more information. The narrative section should be written in a manner that is clear to outside reviewers unfamiliar with prior related activities of the applicant. It should be well organized, succinct, and contain all information necessary for reviewers to understand the project fully. Points will be assigned to each evaluation criteria adding up to a total of 100 points. A minimum score of 60 points is required for funding. Points are assigned as follows:

1. Criteria

A. Introduction and Need for Assistance (15 Points)

(1) Define the project's target population, identify unique characteristics, and describe the impact of HIV on the population.

(2) Describe the gaps/barriers in HIV testing for the population.

(3) Describe challenges to providing HIV care in the population.

(4) Describe the cultural or sociological barriers of the target population in seeking or accessing services.

B. Project Objective(s), Work Plan and Approach (40 points)

(1) Objectives

i. Describe the objectives of the program and how they will increase HIV screening in (self-reported) previously untested clients.

ii. Describe how the objectives of the program will improve linkages to care for PLWHA in the community.

(2) Work Plan

i. Identify the proposed program activities and explain how these activities will increase and sustain HIV screening.

ii. Describe policy and procedure changes anticipated for testing implementation that include:

1. Support of CDC 2006 Revised Testing Recommendations.

2. Increasing community awareness of new HIV testing and support availability. Include activities meant to address and reduce stigma.

3. Reaching a wide range of persons including diverse age and sex categories. If specific groups will receive specific outreach, explain why and how.

4. Provide a clear timeline with quarterly milestones for project activities.

(3) Approach

i. Describe how the program will ensure that clients receive their test results, particularly clients who test positive.

ii. Describe how the program will ensure that individuals with initial HIV positive test results will receive confirmatory tests. If you do not provide confirmatory HIV testing, you must provide a letter of intent or Memorandum of Understanding with an external laboratory documenting the process through which initial HIV positive test results will be confirmed.

iii. Describe the program strategies to linking seropositive patients to care and effectively engaging them in care.

iv. Describe the program procedures for reporting seropositive patients to the

appropriate local and State public health authorities.

v. Describe the program quality assurance strategies.

vi. Describe how the program will ensure client confidentiality.

vii. Describe how the program will ensure that services are culturally sensitive and relevant.

viii. Describe how the program will streamline procedures so as to reduce the overall cost per test administered.

C. Program Evaluation (20 points)

(1) Grantee shall provide a plan for monitoring and evaluating implementation of HIV tests and identify best practices related to engagement and retention in care.

(2) Evaluation planning must include reporting of the following:

i. Facility-level information on gender, age, and race/ethnicity of persons tested, with no personal identifiers.

ii. Number of HIV tests performed.

iii. Number of HIV tests performed in patients who self-report that they have previously been untested (in the last 5 years).

iv. Number of positive tests.

v. Number of positive tests confirmed.

vi. Number of newly diagnosed HIV infections.

vii. Number of persons with positive tests who receive their results.

viii. Number of persons with positive tests who are actively linked to HIV care, as defined by attendance of at least one medical appointment within three months of diagnosis.

ix. Measures in place to protect confidentiality.

(3) Optional Measures:

i. Number of clients refusing testing due to previous knowledge of status.

ii. Sustainability measures undertaken to continue testing following the end of this funding.

D. Organizational Capabilities, Key Personnel and Qualifications (20 points)

This section outlines the broader capacity of the organization to complete the project outlined in the work plan. It includes the identification of personnel responsible for completing tasks and the chain of responsibility for successful completion of the project outlined in the work plan.

(1) Describe the organizational structure.

(2) Describe what equipment (i.e., phone, Web sites, etc.) and facility space (i.e., office space) will be available for use during the proposed project. Include information about any equipment not currently available that will be purchased throughout the agreement.

(3) List key personnel who will work on the project.

i. Identify staffing plan, existing personnel and new program staff to be hired.

ii. In the appendix, include position descriptions and resumes for all key personnel. Position descriptions should clearly describe each position and duties indicating desired qualifications, experience, and requirements related to the proposed project and how they will be supervised. Resumes must indicate that the proposed staff member is qualified to carry out the proposed project activities and who will determine if the work of a contractor is acceptable.

iii. If the project requires additional personnel beyond those covered by the supplemental grant, (i.e., IT support, volunteers, interviewers, etc.), note these and address how these positions will be filled and, if funds are required, the source of these funds.

iv. If personnel are to be only partially funded by this supplemental grant, indicate the percentage of time to be allocated to this project and identify the resources used to fund the remainder of the individual's salary.

(4) Capability

i. Briefly describe the facility and user population.

ii. Describe the Tribe or the organization's ability to conduct this initiative through: Linkages to treatment and care: partnerships established to refer out of the facility as needed for specialized treatment, care, confirmatory testing (if applicable) and counseling services.

E. Categorical Budget and Budget Justification (5 points)

Provide a clear estimate of the project program costs and justification for expenses for the entire grant period. The budget and budget justification should be consistent with the tasks identified in the work plan. The budget focus should be on increasing and sustaining HIV testing services as well as supporting entry and retention into care.

(1) A categorical budget (Form SF 424A, Budget Information Non-Construction Programs) completing each of the budget periods is requested.

(2) Budget narrative that serves as justification for all costs, explaining why each line item is necessary or relevant to the proposed project. Include sufficient details to facilitate the determination of allowable costs.

(3) Budget justifications should include a brief narrative for the second year.

(4) If indirect costs are claimed, indicate and apply the current negotiated rate to the budget. Include a copy of the rate agreement in the appendix.

Multi-Year Project Requirements

Projects requiring second, third, fourth, and/or fifth year must include a brief project narrative and budget (one additional page per year) addressing the developmental plans for each additional year of the project.

Appendix Items

- Work plan, logic model and/or time line for proposed objectives.
- Position descriptions for key staff.
- Resumes of key staff that reflect current duties.
- Consultant or contractor proposed scope of work and letter of commitment (if applicable).
- Current Indirect Cost Agreement.
- Organizational chart(s) highlighting proposed project staff and their supervisors as well as other key contacts within the organization and key community contacts.
- Map of area to benefit project identifying where target population resides and project location(s). Include trails, parks, schools, bike paths and other such applicable information.
- Additional documents to support narrative (i.e. data tables, key news articles, etc.).

2. Review and Selection

Each application will be prescreened by the DGM staff for eligibility and completeness as outlined in the funding announcement. Incomplete applications and applications that are non-responsive to the eligibility criteria will not be referred to the ORC. Applicants will be notified by DGM, via email, to outline minor missing components (i.e., signature on the SF–424, audit documentation, key contact form) needed for an otherwise complete application. All missing documents must be sent to DGM on or before the due date listed in the email of notification of missing documents required.

To obtain a minimum score for funding by the ORC, applicants must address all program requirements and provide all required documentation. If an applicant receives less than a minimum score, it will be considered to be ''Disapproved'' and will be informed via email by the IHS Program Office of their application's deficiencies. A summary statement outlining the strengths and weaknesses of the application will be provided to each disapproved applicant. The summary

statement will be sent to the Authorized Organizational Representative (AOR) that is identified on the face page (SF–424), of the application within 30 days of the completion of the Objective Review.

VI. Award Administration Information

1. Award Notices

The Notice of Award (NoA) is a legally binding document signed by the Grants Management Officer and serves as the official notification of the grant award. The NoA will be initiated by the DGM in our grant system, GrantSolutions (*https://www.grantsolutions.gov*). Each entity that is approved for funding under this announcement will need to request or have a user account in GrantSolutions in order to retrieve their NoA. The NoA is the authorizing document for which funds are dispersed to the approved entities and reflects the amount of Federal funds awarded, the purpose of the grant, the terms and conditions of the award, the effective date of the award, and the budget/project period.

Disapproved Applicants

Applicants who received a score less than the recommended funding level for approval, 60 points, and were deemed to be disapproved by the ORC, will receive an Executive Summary Statement from the IHS program office within 30 days of the conclusion of the ORC outlining the weaknesses and strengths of their application submitted. The IHS program office will also provide additional contact information as needed to address questions and concerns as well as provide technical assistance if desired.

Approved But Unfunded Applicants

Approved but unfunded applicants that met the minimum scoring range and were deemed by the ORC to be ''Approved'', but were not funded due to lack of funding, will have their applications held by DGM for a period of one year. If additional funding becomes available during the course of FY 2013, the approved application may be re-considered by the awarding program office for possible funding. The applicant will also receive an Executive Summary Statement from the IHS program office within 30 days of the conclusion of the ORC.

Note: Any correspondence other than the official NoA signed by an IHS Grants Management Official announcing to the Project Director that an award has been made to their organization is not an authorization to implement their program on behalf of IHS.

2. Administrative Requirements

Cooperative agreements are administered in accordance with the following regulations, policies, and Office of Management and Budget (OMB) cost principles:

A. The criteria as outlined in this Program Announcement.

B. Administrative Regulations for Grants:

- 45 CFR Part 92, Uniform Administrative Requirements for Grants and Cooperative Agreements to State, Local and Tribal Governments.
- 45 CFR Part 74, Uniform Administrative Requirements for Awards and Subawards to Institutions of Higher Education, Hospitals, and other Non-profit Organizations.

C. Grants Policy:

- HHS Grants Policy Statement, Revised 01/07.

D. Cost Principles:

- 2 CFR Part 225—Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A–87).
- 2 CFR Part 230—Cost Principles for Non-Profit Organizations (OMB Circular A–122).

E. Audit Requirements:

- OMB Circular A–133, Audits of States, Local Governments, and Non-profit Organizations.

3. Indirect Costs

This section applies to all grant recipients that request reimbursement of indirect costs (IDC) in their grant application. In accordance with HHS Grants Policy Statement, Part II–27, IHS requires applicants to obtain a current IDC rate agreement prior to award. The rate agreement must be prepared in accordance with the applicable cost principles and guidance as provided by the cognizant agency or office. A current rate covers the applicable grant activities under the current award's budget period. If the current rate is not on file with the DGM at the time of award, the IDC portion of the budget will be restricted. The restrictions remain in place until the current rate is provided to the DGM.

Generally, IDC rates for IHS grantees are negotiated with the Division of Cost Allocation (DCA) *https://rates.psc.gov/* and the Department of Interior (Interior Business Center) *http://www.doi.gov/ibc/services/Indirect_Cost_Services/index.cfm.* For questions regarding the indirect cost policy, please call (301) 443–5204 to request assistance.

4. Reporting Requirements

The grantee must submit required reports consistent with the applicable deadlines. Failure to submit required reports within the time allowed may result in suspension or termination of an active grant, withholding of additional awards for the project, or other enforcement actions such as withholding of payments or converting to the reimbursement method of payment. Continued failure to submit required reports may result in one or both of the following: (1) The imposition of special award provisions; and (2) the non-funding or non-award of other eligible projects or activities. This requirement applies whether the delinquency is attributable to the failure of the grantee organization or the individual responsible for preparation of the reports. Reports must be submitted electronically via GrantSolutions. Personnel responsible for submitting reports will be required to obtain a login and password for GrantSolutions. Please see the Agency Contacts list in section VII for the systems contact information.

The reporting requirements for this program are noted below.

A. Progress Reports

Program progress reports are required semi-annually, within 30 days after the budget period ends. These reports must include a brief comparison of actual accomplishments to the goals established for the period, or, if applicable, provide sound justification for the lack of progress, and other pertinent information as required. A final report must be submitted within 90 days of expiration of the budget/project period.

B. Financial Reports

Federal Financial Report FFR (SF–425), Cash Transaction Reports are due 30 days after the close of every calendar quarter to the Division of Payment Management, HHS at: *http://www.dpm.psc.gov.* It is recommended that the applicant also send a copy of your FFR (SF–425) report to the Grants Management Specialist. Failure to submit timely reports may cause a disruption in timely payments to your organization.

Grantees are responsible and accountable for accurate information being reported on all required reports: the Progress Reports and Federal Financial Report.

C. Federal Subaward Reporting System (FSRS)

This award may be subject to the Transparency Act subaward and executive compensation reporting requirements of 2 CFR Part 170.

The Transparency Act requires the OMB to establish a single searchable

database, accessible to the public, with information on financial assistance awards made by Federal agencies. The Transparency Act also includes a requirement for recipients of Federal grants to report information about first-tier subawards and executive compensation under Federal assistance awards.

IHS has incorporated a Term of Award into all IHS Standard Terms and Conditions, NoAs, and funding announcements regarding the FSRS reporting requirement. This IHS Term of Award is applicable to all IHS grant and cooperative agreements issued on or after October 1, 2010, with a $25,000 subaward obligation dollar threshold met for any specific reporting period. Additionally, all new (discretionary) IHS awards (where the project period is made up of more than one budget period) and where: (1) The project period start date was October 1, 2010 or after and (2) the primary awardee will have a $25,000 subaward obligation dollar threshold during any specific reporting period will be required to address the FSRS reporting. For the full IHS award term implementing this requirement and additional award applicability information, visit the Grants Management Grants Policy Web site at: *http://www.ihs.gov/NonMedicalPrograms/gogp/index.cfm?module=gogp_policy_topics.*

Telecommunication for the hearing impaired is available at: TTY (301) 443–6394.

VII. Agency Contacts

1. Questions on the programmatic issues may be directed to: Lisa C. Neel, MPH, HIV Program Analyst, 801 Thompson Avenue, Suite 200, Rockville, MD 20852, Phone: 301–443–4305 Email: *Lisa.Neel@ihs.gov.*

2. Questions on grants management and fiscal matters may be directed to: Andrew Diggs, Grants Management Officer, 801 Thompson Avenue, TMP Suite 360, Rockville, MD 20852, Phone: 301–443–2262 Email: *Andrew.Diggs@ihs.gov.*

3. Questions on systems matters may be directed to: Paul Gettys, Grant Systems Coordinator, 801 Thompson Avenue, TMP Suite 360, Rockville, MD 20852, Phone: 301–443–2114; or the DGM main line 301–443–5204, Fax: 301–443–9602 E-Mail: *Paul.Gettys@ihs.gov.*

VIII. Other Information

The Public Health Service strongly encourages all cooperative agreement and contract recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. In addition, Public Law 103–227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of the facility) in which regular or routine education, library, day care, health care, or early childhood development services are provided to children. This is consistent with the HHS mission to protect and advance the physical and mental health of the American people.

Dated: June 5, 2013.

Yvette Roubideaux,

Director, Indian Health Service.

[FR Doc. 2013–17929 Filed 7–25–13; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: AIDS and AIDS Related Research.

Date: August 1, 2013.

Time: 3:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Mark P Rubert, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5218, MSC 7852, Bethesda, MD 20892, 301–435–1775, *rubertm@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; Neurotechnology.

Date: August 8, 2013.

Time: 3:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Robert C Elliott, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3130, MSC 7850, Bethesda, MD 20892, 301–435–3009, *elliotro@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Vascular and Hematology 2.

Date: August 14, 2013.

Time: 2:30 p.m. to 4:30 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: Anshumali Chaudhari, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4124, MSC 7802, Bethesda, MD 20892, (301) 435–1210, *chaudhaa@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: July 19, 2013.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–17916 Filed 7–25–13; 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: September 4, 2013.

Closed: 8:30 AM to 10:30 AM.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, Conference Rooms C & D, 6001 Executive Boulevard, Rockville, MD 20852.

Open: 10:30 AM to 4:00 PM.

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, Conference Rooms C & D, 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: Mark Swieter, Ph.D., Acting Director, Office of Extramural Affairs, Branch Chief, Extramural Activities Branch, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Boulevard, Room 4243, 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: July 19, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–17917 Filed 7–25–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Toxicology Program Scientific Advisory Committee on Alternative Toxicological Methods; Announcement of Meeting; Request for Comments

SUMMARY: This notice announces a meeting of the Scientific Advisory Committee on Alternative Toxicological Methods (SACATM). SACATM advises the Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM), the National Toxicology Program (NTP) Interagency Center for the Evaluation of Alternative Toxicological Methods (NICEATM), and the Director of the National Institute of Environmental Health Sciences (NIEHS) and NTP regarding statutorily mandated duties of ICCVAM and activities of NICEATM. Information about the meeting and registration are available at *http://ntp.niehs.nih.gov/go/32822.*

DATES:

Meeting: September 24, 2013, beginning at 9:00 a.m. Eastern Daylight Time and continuing until adjournment at approximately 4:30 p.m.

Written Public Comments Submissions: Deadline is September 10, 2013.

Pre-registration for Meeting and/or Oral Comments: Deadline is September 17, 2013.

ADDRESSES:

Meeting Location: Rodbell Auditorium, Rall Building, NIEHS, 111 T.W. Alexander Drive, Research Triangle Park, NC 27709.

Meeting Web page: The preliminary agenda, registration, and other meeting materials are at *http://ntp.niehs.nih.gov/go/32822.* It is not necessary to preregister for the meeting to view the webcast.

Webcast: A link to access the meeting webcast will be available on the meeting Web page.

FOR FURTHER INFORMATION CONTACT: Dr. Lori White, Designated Federal Officer for SACATM, Office of Liaison, Policy and Review, Division of NTP, NIEHS, P.O. Box 12233, K2–03, Research Triangle Park, NC 27709. Phone: 919–541–9834, Fax: 919–541–0295, Email: *whiteld@niehs.nih.gov.* Hand Deliver/Courier address: 530 Davis Drive, Room K2136, Morrisville, NC 27560.

SUPPLEMENTARY INFORMATION:

Preliminary Agenda and Other Meeting Information: A preliminary agenda, roster of SACATM members, background materials, public comments, and any additional information, when available, will be posted on the SACATM meeting Web site (*http://ntp.niehs.nih.gov/go/32822*) or available upon request from the Designated Federal Officer. Following the meeting, summary minutes will be prepared and available on the SACATM Web site or upon request.

Meeting and Registration: This meeting is open to the public with time scheduled for oral public comments; attendance is limited only by the space available. Individuals who plan to attend and/or provide comments are encouraged to preregister online at the SACATM meeting Web site (*http://ntp.niehs.nih.gov/go/32822*) by September 17, 2013, to facilitate planning for the meeting. Individuals interested in the meeting are encouraged to access this Web site to stay abreast of the most current information regarding the meeting. Visitor and security information for those attending in person is available at *niehs.nih.gov/about/visiting/index.cfm.* Individuals with disabilities who need accommodation to participate in this event should contact Ms. Robbin Guy at phone: (919) 541–4363 or email: *guyr2@niehs.nih.gov.* TTY users should contact the Federal TTY Relay Service at 800–877–8339. Requests should be made at least five business days in advance of the event.

Request for Comments: Both written and oral public inputs on the agenda topics are invited. Written comments received in response to this notice will be posted on the meeting Web site and persons submitting them will be identified by their name and affiliation and/or sponsoring organization, if applicable. Persons submitting written comments should include their name, affiliation (if applicable), and sponsoring organization (if any) with the document. Time is allotted during the meeting for presentation of oral comments and each organization is allowed one time slot per public comment period. At least 7 minutes will be allotted for each speaker, and if time permits, may be extended up to 10 minutes at the discretion of the chair. Registration for oral comments will also be available on-site, although time allowed for presentation by on-site registrants may be less than for pre-registered speakers and will be determined by the number of persons who register at the meeting. In addition to in-person oral comments at the meeting, public comments can be presented by teleconference line. There will be 50 lines for this call; availability will be on a first-come, first-served basis. The lines will be open from 9:00 a.m. until approximately 4:30 p.m., although public comments will be

received only during the formal public comment periods, which will be indicated on the preliminary agenda. The access number for the teleconference line will be provided to registrants by email prior to the meeting.

Persons wishing to present oral comments are encouraged to pre-register on the SACATM meeting registration form (*http://ntp.niehs.nih.gov/go/32822*), indicate whether they will present comments in-person or via the teleconference line, indicate the topic(s) on which they plan to comment, and send a copy of their statement to Dr. White (*whiteld@niehs.nih.gov*) by September 17, to enable review by SACATM, NICEATM, ICCVAM, and NIEHS/NTP staff prior to the meeting. Written statements can supplement and may expand the oral presentation. If registering on-site and reading from written text, please bring 40 copies of the statement for distribution and to supplement the record.

Background Information on ICCVAM, NICEATM, and SACATM: ICCVAM is an interagency committee composed of representatives from 15 Federal regulatory and research agencies that require, use, generate, or disseminate toxicological and safety testing information. ICCVAM conducts technical evaluations of new, revised, and alternative safety testing methods with regulatory applicability and promotes the scientific validation and regulatory acceptance of toxicological and safety-testing methods that more accurately assess the safety and hazards of chemicals and products and that reduce, refine (decrease or eliminate pain and distress), or replace animal use. The ICCVAM Authorization Act of 2000 (42 U.S.C. 285*l*–3) established ICCVAM as a permanent interagency committee of the NIEHS under NICEATM. NICEATM administers ICCVAM, provides scientific and operational support for ICCVAM-related activities, and conducts independent validation studies to assess the usefulness and limitations of new, revised, and alternative test methods and strategies. NICEATM and ICCVAM work collaboratively to evaluate new and improved test methods and strategies applicable to the needs of U.S. Federal agencies. NICEATM and ICCVAM welcome the public nomination of new, revised, and alternative test methods and strategies for validation studies and technical evaluations. Additional information about ICCVAM and NICEATM can be found at *http://iccvam.niehs.nih.gov.*

SACATM was established in response to the ICCVAM Authorization Act [Section 285*l*–3(d)] and is composed of scientists from the public and private sectors. SACATM advises ICCVAM, NICEATM, and the Director of the NIEHS and NTP regarding statutorily mandated duties of ICCVAM and activities of NICEATM. SACATM provides advice on priorities and activities related to the development, validation, scientific review, regulatory acceptance, implementation, and national and international harmonization of new, revised, and alternative toxicological test methods. Additional information about SACATM, including the charter, roster, and records of past meetings, can be found at *http://ntp.niehs.nih.gov/go/167.*

Dated: July 17, 2013.

John R. Bucher,

Associate Director, National Toxicology Program.

[FR Doc. 2013–17919 Filed 7–25–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Biomedical Imaging and Bioengineering Special Emphasis Panel; MSM Program Review.

Date: October 11, 2013.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza 959, 6707 Democracy Boulevard, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Manana Sukhareva, Ph.D., Scientific Review Officer, National Institute of Biomedical Imaging and Bioengineering, 6707 Democracy Boulevard Suite 959, Bethesda, MD 20892, 301–451–3397, *sukharem@mail.nih.gov.*

Dated: July 19, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–17918 Filed 7–25–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 concerning opportunity for public comment on proposed collections of information, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the information collection plans, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Comments are invited on: (a) Whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: SAMHSA Tobacco Prevention, Cessation, and Behavioral Health Message Testing—NEW

The Substance Abuse and Mental Health Services Administration (SAMHSA) is conducting message testing to inform the development and implementation of a tobacco use prevention and cessation campaign aimed at youth with substance use and/or mental health conditions.

The purpose of the project is to inform messaging efforts, through focus groups with youth and in-depth interviews with health care providers, to improve tobacco use prevention and cessation efforts in populations with mental health and substance use concerns, particularly youth and vulnerable populations. The focus groups and interviews are an integral

part of the process to test messages and, ultimately, develop effective campaign materials and efficient implementation plans.

SAMHSA will screen parents (because focus group participants are under the age of consent) and youth, conduct focus groups with youth with substance use and/or mental health conditions, and interview health care professionals who treat youth with these conditions. The screen will be administered by telephone to parents first and, as eligible, to youth and will take 10 minutes to complete for parents and for youth. Questions will include a mix of open-ended and closed-ended responses and are intended to gather information on previous diagnosis and symptomology of mental health conditions and availability to participate in the focus group. The focus groups with youth will be conducted in person and will take up to 90 minutes. Questions are primarily open-ended and intended to gather information on the reasons youth with substance use and/or mental health conditions use tobacco, the barriers and facilitators to tobacco use prevention and cessation, the appeal of various tobacco use prevention and cessation messages, and the best dissemination strategies and communication channels for a future campaign aimed at this specialized group. The interviews with health care professionals who treat youth with mental health and/or substance use conditions will be conducted in person, as feasible, or by telephone and will take up to 45 minutes. Questions are primarily open-ended and intended to gather information to better understand how various health care professionals screen for and address tobacco use in youth receiving care in their practice, identify messages and materials aimed at health care professionals to address tobacco use prevention and cessation in youth with substance use and/or mental health conditions, determine the most efficient communication strategies and channels to disseminate this information. All data collections are voluntary.

Below is the table of the estimated total burden hours:

Respondent	Number of respondents	Responses per respondent	Average burden hour	Total hour burden
Screener (Parent)	576	1	.15	86.4
Screener (Youth)	144	1	.15	21.6
Youth Focus Group	*108	1	1.50	162
Provider Interview	42	1	.75	31.5
Total	762			301.5

*The 108 respondents identified for the youth focus groups are included in the 144 respondents for the youth screener.

Send comments to Summer King, SAMHSA Reports Clearance Officer, Room 2–1057, One Choke Cherry Road, Rockville, MD 20857 *or* email her a copy at *summer.king@samhsa.hhs.gov.* Written comments should be received by September 24, 2013.

Summer King,

Statistician.

[FR Doc. 2013–17971 Filed 7–25–13; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2013–0028]

Homeland Security Science and Technology Advisory Committee (HSSTAC)

ACTION: Notice of Federal Advisory Committee charter renewal.

SUMMARY: The Secretary of Homeland Security has determined that the renewal of the charter of the Homeland Security Science and Technology Advisory Committee (HSSTAC) is necessary and in the public interest in connection with the Department of Homeland Security, Science and Technology Directorate's performance of its duties. This determination follows consultation with the Committee Management Secretariat, General Services Administration.

ADDRESSES: If you desire to submit comments on this action, they must be submitted by August 24, 2013. Comments must be identified by (DHS–2011–0023) and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: mary.hanson@dhs.gov.* Include the docket number in the subject line of the message.
- *Fax:* 202–253–5823.
- *Mail:* Mary Hanson, HSSTAC Executive Director, Science and Technology Directorate, Department of Homeland Security, 245 Murray Lane, Bldg. 410, Washington, DC 20528 .
- *Instructions:* All submissions received must include the words ''Department of Homeland Security'' and DHS–2011–0023, the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov* including any personal information provided.
- *Docket:* For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mary Hanson, HSSTAC Executive Director, Science and Technology Directorate, Department of Homeland Security, 245 Murray Lane, Bldg. 410, Washington, DC 20528, 202–254–5866(O) 202–254–5823 (F), *mary.hanson@dhs.gov.*

SUPPLEMENTARY INFORMATION: The committee addresses areas of interest and importance to the Under Secretary for Science and Technology, such as new developments in systems engineering, cyber-security, knowledge management and how best to leverage related technologies funded by other federal agencies and by the private sector. The committee also advises the Under Secretary on policies, management processes, and organizational constructs as needed. Upon request, the committee provides scientifically- and technically-based advice to the Homeland Security Advisory Council.

Dated: July 18, 2013.

Tara O'Toole,

Under Secretary for Science and Technology.

[FR Doc. 2013–17989 Filed 7–25–13; 8:45 am]

BILLING CODE 9110–9F–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2013–0048]

President's National Security Telecommunications Advisory Committee

AGENCY: National Protection and Programs Directorate, DHS.

ACTION: Committee Management Notice of an Open Federal Advisory Committee Teleconference.

SUMMARY: The President's National Security Telecommunications Advisory Committee (NSTAC) will meet on Tuesday, August 20, 2013, via conference call. The meeting will be open to the public.

DATES: The NSTAC will meet on Tuesday, August 20, 2013, from 2:00 p.m. to 3:00 p.m. Please note that the meeting may close early if the committee has completed its business.

ADDRESSES: The meeting will be held via conference call. For access to the conference bridge, contact Ms. Gallop-Anderson by email at *deirdre.gallop-anderson@hq.dhs.gov* or by telephone at (703) 235–5468 by 5:00 p.m. on Tuesday, August 13, 2013. To facilitate public participation, we are inviting public comment on the issues to be considered by the committee as listed in the **SUPPLEMENTARY INFORMATION** section below. For information on services or facilities for individuals with disabilities or to request special assistance to access the meeting, contact Ms. Gallop-Anderson by email at *deirdre.gallop-anderson@hq.dhs.gov* or by telephone at (703) 235–5468. The documents associated with the topics to be discussed during the conference will be available at *www.dhs.gov/nstac* for review by Monday, August 12, 2013. Written comments must be received by the NSTAC Alternate Designated Federal Officer no later than Friday, August 16, 2013, and may be submitted by any one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting written comments
- *Email: NSTAC@hq.dhs.gov.* Include the docket number in the subject line of the email message.
- *Fax:* (703) 235–5961
- *Mail:* Alternate Designated Federal Officer, Stakeholder Engagement and Critical Infrastructure Resilience Division, National Protection and Programs Directorate, Department of Homeland Security, 245 Murray Lane, Mail Stop 3016B, Arlington, VA 20598–0615.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the docket number for this action. Comments received will be posted with without alteration at *www.regulations.gov,* including any personal information provided.

Docket: For access to the docket, including all documents and comments received by the NSTAC, go to *www.regulations.gov.* A public comment period will be held during the meeting on Tuesday, August 20, 2013, from 2:15 p.m. to 2:30 p.m. Speakers who wish to participate in the public comment period must register in advance no later than Tuesday, August 16, 2013, at 5:00 p.m. by emailing Deirdre Gallop-Anderson at *deirdre.gallop-anderson@hq.dhs.gov.* Speakers are requested to limit their comments to three minutes and will speak in order of registration as time permits. Please note that the public comment period may end before the time indicated, following the last call for comments.

FOR FURTHER INFORMATION CONTACT: Mike Echols, NSTAC Alternate Designated Federal Officer, Department of Homeland Security, telephone (703) 235–5469.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the *Federal Advisory Committee Act* (FACA), 5 U.S.C. App. (Pub. L. 92–463). The NSTAC advises the President on matters related to national security and emergency preparedness (NS/EP) telecommunications policy.

Agenda: The NSTAC members will deliberate and vote on the Draft NSTAC *Report to the President on Secure Government Communications (SGC).* The report examines how commercial-off-the-shelf technologies and private sector best practices can be used to secure unclassified communications between and among Federal civilian departments and agencies. The NSTAC members will also receive a new tasking from the Executive Office of the President.

Dated: July 22, 2013.

Mike Echols,

Alternate Designated Federal Officer for the NSTAC.

[FR Doc. 2013–17988 Filed 7–25–13; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Intent To Request Approval From OMB of One New Public Collection of Information: TSA Pre✓™Trusted Traveler Program; Republication

Republication

Editorial Note: FR Doc. E3–17541 was originally published at page 44140 in the issue of Tuesday, July 23, 2013. In that publication an incorrect version was published. The corrected document is republished below in its entirety. In addition, the heading is corrected to read as set forth above.

AGENCY: Transportation Security Administration, DHS.

ACTION: 60-day Notice.

SUMMARY: The Transportation Security Administration (TSA) invites public comment on a new Information Collection Request (ICR) abstracted below that we will submit to the Office of Management and Budget (OMB) for approval in compliance with the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. The collection involves the submission of biographic and biometric information by individuals seeking to enroll in the TSA Pre✓™ Trusted Traveler Program.

DATES: Send your comments by September 23, 2013.

ADDRESSES: Comments may be emailed to *TSAPRA@dhs.gov* or delivered to the TSA PRA Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011.

FOR FURTHER INFORMATION CONTACT: Susan L. Perkins at the above address, or by telephone (571) 227–3398.

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement 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;

(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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

Purpose and Description of Data Collection

The Transportation Security Administration (TSA) is implementing the TSA Pre✓™ Trusted Traveler Program pursuant to its authority under section 109(a)(3) of the Aviation and Transportation Security Act (ATSA), Public Law 107–71 (115 Stat. 597, 613, Nov. 19, 2001, codified at 49 U.S.C. 114 note). That section authorizes TSA to ''[e]stablish requirements to implement trusted passenger programs and use available technologies to expedite security screening of passengers who participate in such programs, thereby allowing security screening personnel to focus on those passengers who should be subject to more extensive screening.'' In addition, the DHS Appropriations Act, 2006, Public Law 109–90 (119 Stat. 2064, 2088–89, Oct. 18, 2005), authorizes TSA to establish and collect a fee for any registered traveler program by publication of a notice in the **Federal Register**.

Under the TSA Pre✓™ Trusted Traveler Program, individuals may submit information to TSA, which in turn will use the information to conduct a security threat assessment of the individual using existing systems and processes. For those individuals who meet the standards of that assessment, TSA will issue a unique number, called a Known Traveler Number,[1] which individuals may submit to airlines when making flight reservations. Airline passengers who submit Known Traveler Numbers when making airline reservations are eligible for expedited screening on flights originating from U.S. airports with TSA Pre✓™ lanes.[2]

TSA seeks to establish enrollment sites and implement a mobile enrollment capability. Those seeking to become a TSA Pre✓™ Trusted Traveler Program member will have the option to apply online by submitting biographic information and paying the fee using a secure web portal (or by money order at an enrollment center) to TSA's contracted vendor. Applicants then will submit biometric data (*e.g.,* fingerprints) in-person at an enrollment center.

Eligibility for the TSA Pre✓™ Trusted Traveler Program is within the sole discretion of TSA, which will notify applicants who are denied eligibility in writing of the reasons for the denial. If initially deemed ineligible, applicants will have an opportunity to correct cases of misidentification or inaccurate criminal or immigration records. Consistent with 28 CFR 50.12 in cases involving criminal records, and before making a final eligibility decision, TSA will advise the applicant that the FBI criminal record discloses information that would disqualify him or her from the TSA Pre✓™ Trusted Traveler Program.

Within 30 days after being advised that the criminal record received from the FBI discloses a disqualifying criminal offense, the applicant must notify TSA in writing of his or her intent to correct any information he or she believes to be inaccurate. The applicant must provide a certified revised record, or the appropriate court must forward a certified true copy of the information, prior to TSA approving eligibility of the applicant for the TSA Pre✓™ Trusted Traveler Program. With respect to immigration records, within 30 days after being advised that the immigration records indicate that the applicant is ineligible for the TSA Pre✓™ Trusted Traveler Program, the applicant must notify TSA in writing of his or her intent to correct any information believed to be inaccurate. TSA will review any information submitted and make a final decision. If neither notification nor a corrected record is received by TSA, TSA may make a final determination to deny eligibility. Individuals who TSA determines are ineligible for the TSA Pre✓™ Trusted Traveler Program will continue to be screened at airport security checkpoints in the same manner as they would have been had they not applied for the program.

The TSA Pre✓™ Trusted Traveler Program will enhance aviation security by permitting TSA to better focus its limited security resources on passengers who are more likely to pose a threat to civil aviation, while also facilitating and improving the commercial aviation travel experience for the public. Travelers who choose not to enroll in this initiative are not subject to any limitations on their travel because of their choice; they will be processed through normal TSA screening before entering the sterile areas of airports. TSA also retains the authority to perform random screening on TSA Pre✓™ Trusted Traveler Program members and any other travelers authorized for expedited physical screening.

For the initial six months of the program, TSA intends to pilot a limited number of enrollment sites and then add additional locations over time; TSA estimates approximately 88,111 respondents will participate in the pilot. Assuming full program rollout following the pilot phase, TSA estimates in the first year following the pilot there will be approximately 383,131 respondents. TSA estimates the total burden to be 27,466 hours for the pilot, and 119,430 hours in the year following the pilot.

TSA will establish a TSA Pre✓™ Trusted Traveler Program Fee of $85.00 for the TSA Pre✓™ Trusted Traveler Program. This fee will be collected to fund selected activities of the program. As described above, the DHS Appropriations Act of 2006 permits TSA to impose fees for the TSA Pre✓™ Trusted Traveler Program by notice. This notice will be published separately in the **Federal Register**.

Dated: June 16, 2013.

Joanna Johnson,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2013–17541 Filed 7–22–13; 8:45 a.m.]

Editorial Note: FR Doc. 2013–17541 was originally published at page 44140 in the issue of Tuesday, July 23, 2013. The corrected document is republished in its entirety.

[FR Doc. R1–2013–17541 Filed 7–25–13; 8:45 am]

BILLING CODE 1505–01–D

[1] The Known Traveler Number is a component of Secure Flight Passenger Data (SFPD), both of which are defined in the Secure Flight regulations at 49 CFR 1560.3. *See also* the Secure Flight regulations at 49 CFR part 1560.

[2] Passengers who are eligible for expedited screening through a dedicated TSA Pre✓™ lane typically will receive more limited physical screening, *e.g.,* will be able to leave on their shoes, light outerwear, and belt, to keep their laptop in its case, and to keep their 3–1–1 compliant liquids/gels bag in a carry-on. TSA Pre✓™ lanes are available at 40 airports nationwide, with additional expansion planned. *See* ''TSA Pre✓™ Now Available at 40 Airports Nationwide: Expedited Screening Begins at Raleigh-Durham International Airport,'' *http://www.tsa.gov/press/releases/2013/03/28/tsa-pre%E2%9C%93%E2%84%A2-now-available-40-airports-nationwide-expedited-screening-begins.*

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5690–N–08]

60-Day Notice of Proposed Information Collection: Housing Choice Voucher (HCV) Family Self-Sufficiency (FSS) Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* September 24, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB Control number and should be sent to: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410–5000; telephone 202–402–5564 (this is not a toll-free number) or email *Colette.Pollard@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Arlette Mussington, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street SW., (L'Enfant Plaza, Room 2206), Washington, DC 20410; telephone 202–402–4109 This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Mussington.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Family Self-Sufficiency (FSS) Program.

OMB Control Number: 2577–0178.

Type of Request: Revision of currently approved collection.

Agency Form Numbers: HUD–52650, HUD–52651, HUD–52652, HUD–50058, HUD–96011, HUD–96010, HUD–2880, HUD–2994–A, HUD–2991, HUD 52752 HUD 52755, SF–424, SF–LLL, HUD–1044.

Description of the Need for the Information and Proposed Use: The FSS program, which was established in the National Affordable Housing Act of 1990, promotes the development of local strategies that coordinate the use of public housing assistance and assistance under the Section 8 rental certificate and voucher programs (now known as the Housing Choice Voucher Program) with public and private resources to enable eligible families to increase earned income and financial literacy, reduce or eliminate the need for welfare assistance, and make progress toward economic independence and self-sufficiency. Public Housing Agencies consult with local officials to develop an Action Plan, enter into a Contract of Participation with each eligible family that opts to participate in the program, compute an escrow credit for the family, report annually to HUD on implementation of the FSS program, and complete a funding application for the salary of an FSS program coordinator.

Respondents (i.e. affected public): Public Housing Agencies, Tribes/Tribally Designated Housing Entities, State or Local Governments.

ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN

Description of information collection	Number of respondents	Responses per year	Total annual responses	Hours per response	Total hours
SF424—Application for Federal Assistance	1,000	1	1,000	0.75	750
SF LLL—Disclosure of Lobbying Activities	40	1	40	0.17	7
HUD 2880—Applicant/Recipient/Disclosure/Update Form (OMB No. 2510–0011)	1,000	1	1,000	0	0
HUD 96011—Facsimile Transmittal (OMB No. 2535–0118)	1,000	1	1,000	0	0
HUD–2991—Certification of Consistency with the Consolidated Plan (OMB No. 2506–0112)	1,000	1	1,000	0	0
HUD 52752—Certification of Consistency with the Indian Housing Plan	15	1	15	0.25	4
HUD–52755—Sample Contract Admin. Partnership Agreement	40	1	40	0.17	7
HUD–2994—A You are Our Client (OMB no: 2535–0116)	750	1	750	0	0
HUD–52651—FSS Application	1,000	1	1,000	1	1,000
HUD 96010—Logic Model (OMB No. 2535–0114)	1,000	1	1,000	0	0
Subtotal (Application)				2.1	1,768
Action Plan	10	1	10	10	100
HUD–52650—Contract of Participation	900	10	9,000	.25	2,250
HUD–52652—Escrow Account Credit Worksheet	750	50	37,500	.85	31,875
HUD–1044—Grant Agreement*	250	1	250	N/A	N/A
Annual Report (Narrative)	900	1	900	1	900
HUD 96010—Logic Model (OMB No. 2535–0114)	900	1	900	0	0
HUD–50058—Family Report (OMB No. 2577–0083)	900	50	45,000	0	0
Subtotal (Program Reporting/Recordkeeping)				12.1	35,125
Total				14.2	36,893

B. Solicitation of Public Comment

This notice is soliciting comments from members of the pubic and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of burden of the proposed collection of information;

(3) Ways to enhance the quality, utility and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: July 19, 2013.

Merrie Nichols-Dixon,

Deputy Director for Office of Policy, Programs, and Legislative Initiatives.

[FR Doc. 2013–17999 Filed 7–25–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5719–N–02]

60-Day Notice of Proposed Information Collection: Federal Labor Standards Questionnaire(s); Complaint Intake Form

AGENCY: Office of Labor Relations, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* September 24, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Saundra A. Green, Administrative Officer, Office of Labor Relations, Department of Housing and Urban Development, 451 7th Street SW., Room 2124, Washington, DC 20410–5000; telephone 202–402–5537 (this is not a toll-free number) or email at *Saundra.a.Green@hud.gov* or a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Federal Labor Standards Questionnaire; Complaint Intake Form.

OMB Approval Number: 2501–0018.

Type of Request: Extension of currently approved collection.

Form Number: HUD–4730, HUD–4730E, HUD–4730SP and HUD–4731.

Description of the need for the information and proposed use: Information collected on HUD–4730, 4730E and 4730SP, Federal Labor Standards Questionnaires, will be used by HUD and agencies administering HUD programs to collect information from laborers and mechanics employed on HUD-assisted projects. Employers are required to submit weekly certified payroll reports in order to demonstrate and attest to their compliance with Federal labor standards. The information collected on questionnaires is primarily used to determine whether payroll information supplied by employers is valid. Testing employer data can disclose violations that may be concealed or that are otherwise not apparent to the agency.

Information collected on the HUD 4731, Federal Labor Standard Complaint Intake form, will be used by HUD and agencies administering HUD programs to collect information from complainants alleging violations of Federal labor standards on HUD-assisted projects. The information collected is primarily used in the conduct of investigations into the allegations.

Generally, enforcement actions, including investigations, are geared to the respondent's benefit, that is, to determine whether the respondent was underpaid and to ensure the payment of wage restitution to the respondent, if so.

These forms have been crafted to focus on essential information, to make it easy to read and complete, and to best capture the information needed for HUD to competently enforce Federal labor standards and to protect workers' rights to prevailing wages.

Estimated Number of Respondents: 2,000.

Estimated Number of Responses: 2,000.

Frequency of Response: 1.

Average Hours per Response: .5.

Total Estimated Burdens: 1,000.

Note: *Preparer of this notice may substitute the chart for everything beginning with estimated number of respondents above:*

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
HUD–4730, 4730E, 4730SP	2,500	1	1	.5	1250	10.00	12,500
Total							

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: July 18, 2013.

Jacqueline Roundtree,

Acting Director, Office of Labor Relations.

[FR Doc. 2013–18002 Filed 7–25–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5719–N–03]

60-Day Notice of Proposed Information Collection: Semi-annual Labor Standards Enforcement Report- Local Contracting Agencies (HUD Programs)

AGENCY: Office of Labor Relation, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* September 24, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Saundra A. Green, Administrative Officer, Office of labor Relation, Department of Housing and Urban Development, 451 7th Street SW., Room 2124, Washington, DC 20410–5000; telephone 202–402–5537 (this is not a toll-free number) or email at *Saundra.a.Green@hud.gov* for a copy of the proposed forms or other available information. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone 202–402–3400. This is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Semi-annual Labor Standards Enforcement Report-Local Contracting Agencies (HUD Programs).

OMB Approval Number: 2501–0019.

Type of Request: Extension of currently approved collection.

Form Number: HUD–4710.

Description of the need for the information and proposed use: The information collected is used by HUD to compile a report to DOL required by DOL regulations at 29 CFR 5.7(b). HUD consolidates the data collected from respondents and submits the data to DOL in its report.

Estimated Number of Respondents: 4500.

Estimated Number of Responses: 9000.

Frequency of Response: 2.

Average Hours per Response: 2.

Total Estimated Burdens: 18,000.

Note: Preparer of this notice may substitute the chart for everything beginning with estimated number of respondents above:

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
HUD–4710	4500	2	2	2	18000	34.34	618,120
Total							

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Dated: July 18, 2013.

Jacqueline Roundtree,

Acting Director, Office of Labor Relation.

[FR Doc. 2013–18003 Filed 7–25–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5681–N–30]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also

published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, and suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Theresa Ritta, Office of Enterprise Support Programs, Program Support Center, HHS, Room 12–07, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Ann Marie Oliva at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (i.e., acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *Agriculture:* Ms. Brenda Carignan, Department of Agriculture, Reporters Building, 300 7th Street SW., Room 337, Washington, DC 20024, (202) 401–0787; *Air Force:* Mr. Robert Moore, Air Force Real Property Agency, 2261 Hughes Avenue, Suite 156, Lackland AFB, TX 78236–9852, (210) 395–9512; *GSA:* Mr. Flavio Peres, General Services Administration, Office of Real Property Utilization and Disposal, 1800 F Street NW., Room 7040, Washington, DC 20405, (202) 501–0084; *Interior:* Mr. Michael Wright, Acquisition & Property Management, Department of the Interior, MS–4262, 1849 C Street, Washington, DC 20240, (202) 513–0795; *NASA:* Mr. Frank T. Bellinger, Facilities Engineering Division, National Aeronautics & Space Administration, Code JX, Washington, DC 20546, (202) 358–1124; *Navy:* Mr. Steve Matteo, Department of the Navy, Asset Management Division, Naval Facilities Engineering Command, Washington Navy Yard, 1330 Patterson Ave. SW., Suite 1000, Washington, DC 20374; (202) 685–9426; (These are not toll-free numbers).

Dated: July 18, 2013.

Mark Johnston,

Deputy Assistant Secretary for Special Needs.

Title V, Federal Surplus Property Program Federal Register Report for 07/26/2013

Suitable/Available Properties

Building

California

Big Bar Timber Office (2031)
28451 State Hwy 299 West
Big Bar CA 96010
Landholding Agency: Agriculture
Property Number: 15201330001
Status: Excess
Comments: off-site removal only; 1,247 sf.; 9+ months vacant; storage/office; repairs needed; security issues; contact Agriculture for more information

Big Bar Carpenter Shop (2117)
28451 State Hwy 299 West
Big Bar CA 96010
Landholding Agency: Agriculture
Property Number: 15201330002
Status: Excess
Comments: off-site removal only; 488 sf.; storage; 48+ months vacant; repairs needed; security issues; contact Agriculture for more information

Mt. Hebron 4970005
Santa Clara Ave.
Mt. Hebron CA
Landholding Agency: Agriculture
Property Number: 15201330003
Status: Excess
Comments: Off-site removal only, 1,052 sf.; office; poor condition

Mt. Hebron 4970004
Santa Clara Ave.
Mt. Hebron CA
Landholding Agency: Agriculture
Property Number: 15201330004
Status: Excess
Comments: Off-site removal only; 1,460 sf.; barracks; poor condition.

Mt. Hebron 4970002
Santa Clara Ave.
Mt. Hebron CA
Landholding Agency: Agriculture
Property Number: 15201330005
Status: Excess
Comments: Off-site removal only; 1,288 sf.; barracks, poor conditions.

Mt. Hebron
Santa Clara Ave.
Mt. Hebron CA
Landholding Agency: Agriculture
Property Number: 15201330006
Status: Excess
Comments: Off-sit removal only; 820 sf., garage/storage; poor conditions

MT. Hebron; 4970014
Santa Clara Ave.
Mt. Hebron CA
Landholding Agency: Agriculture
Property Number: 15201330007
Status: Excess
Comments: Off-sit removal only; 232 sf., warehouse/storage; poor conditions

Mt. Hebron; 4970023
Santa Clara Ave.
Mt. Hebron CA
Landholding Agency: Agriculture
Property Number: 15201330008
Status: Excess
Comments: Off-sit removal only; 189 sf., storage; 79 yrs. poor conditions

Mt. Hebron; 4970024
Santa Clara Ave.
Mt. Hebron CA
Landholding Agency: Agriculture
Property Number: 15201330010
Status: Excess
Comments: Off-sit removal only; 162 sf., storage; 79 yrs. poor conditions

Indiana

Tract 85–107
910 Wilson Road
Beverly Shores IN 46301
Landholding Agency: Interior
Property Number: 61201330001
Status: Excess
Comments: Off-sit removal only; residential; 2,548 sf., residential; 26+months vacant,

extensive structural damage, asbestos & mold, contact Interior for more info.

Tract 25–111 Slaughter House
206 Prospect
Beverly Shore IN 46301
Landholding Agency: Interior
Property Number: 61201330002
Status: Excess
Comments: Off-site removal only; 1,180 sf.; 18 + month vacant; asbestos. mold & lead; rat-infested; contact interior for more info.

Tract 38–134 Olson House
1449 Hawley Wood Rd.
Chesterton IN 46304
Landholding Agency: Interior
Property Number: 61201330003
Status: Excess
Comments: Off-site removal only; 1,026 sf.; residential; significant repairs; 26+ months vacant; asbestos & lead; contact interior for more info.

Tract 11–250; Lane House
null
Portage IN 46368
Landholding Agency: Interior
Property Number: 61201330004
Status: Excess
Comments: Off-sit removal only; 1,375 sf., residential; 25+months vacant, asbestos; significant repairs need, contact Interior for more info.

Tract 11–101; Defauw House
9736 Maple Place
Gary IN 46401
Landholding Agency: Interior
Property Number: 61201330005
Status: Excess
Comments: offf-site removal only; 1,176 sf.; residential; 25+ months vacant; contact Interior for more information

Tract 35–126 Millet House
null
Porter IN 46304
Landholding Agency: Interior
Property Number: 61201330006
Status: Excess
Comments: Off-site removal only; 1,170 sf.; residential; 25+ months vacant; asbestos & lead; significant repairs; contact interior for more info.

Tract 113–43, Kritlow House
null
Gary IN 46401
Landholding Agency: Interior
Property Number: 61201330007
Status: Excess
Comments: Off-sit removal only; 1,000 sf., residential; 20+months vacant, mold & asbestos; contact Interior for more info.

Tract 64–156, Keys House
275 York Avenue
Beverly Shores IN 46301
Landholding Agency: Interior
Property Number: 61201330008
Status: Excess
Comments: Off-sit removal only; 1,200 sf., residential; 3 yrs., vacant, mold, lead & asbestos; extensive deterioration, contact Interior for more info.

Tract 41–138 Meyer House
230 E 1500 N
Chesterton IN 46304
Landholding Agency: Interior
Property Number: 61201330009
Status: Excess
Comments: Off-site removal only; 1,152 sf.; residential; 24+ months vacant; asbestos & mold; extensive deterioration, contact interior for more info.

Tract 11–228 Mache House
9621 Maple Avenue
Portage IN 46368
Landholding Agency: Interior
Property Number: 61201330010
Status: Excess
Comments: Off-site removal only; 840 sf.; 25+ months vacant; asbestos; structural unsound; contact interior for more info.

Tract 87–141 McClusky House
929 E Holy Place
Beverly Shores IN 46301
Landholding Agency: Interior
Property Number: 61201330011
Status: Excess
Comments: Off-site removal only; 2,688 sf.; residential; 26+ months vacant; mold; extensive damage; contact interior for more info.

Tract 85–100 McPharlin House
9 S Drake
Beverly Shore IN 46301
Landholding Agency: Interior
Property Number: 61201330012
Status: Excess
Comments: Off-site removal only; 1,302 sf.; residential; 3 yrs. + vacant, asbestos; lead; mold; extensive deterioration; contact interior for more info.

Tract 39–145, Tabor House
106 E Pottawatomie Court
Chesterton IN 46304
Landholding Agency: Interior
Property Number: 61201330013
Status: Excess
Comments: Off-sit removal only; 1,351 sf., residential; 26+ months vacant, extensive deterioration contamination; contact Interior for more info.

Tract 39–158 Jones House
1477 NE Pottawatomie
Chesterton IN 46304
Landholding Agency: Interior
Property Number: 61201330014
Status: Excess
Comments: Off-site removal only; 2,046 sf.; residential; 26+ months vacant; extensive deterioration; contact interior for more info.

Tract 40–177 Koehnemann House
1464 N Veden Road
Chesterton IN 46304
Landholding Agency: Interior
Property Number: 61201330015
Status: Excess
Comments: Off-site removal only; 1,347 sf.; residential; 24+ months vacant; mold; extensive deterioration; contact Interior for more info.

Tract 35–134; Willison House
901 W HWY 12
Porter IN 46304
Landholding Agency: Interior
Property Number: 61201330016
Status: Excess
Comments: Off-sit removal only; 576 sf., residential; 25+ months vacant, asbestos & lead; significant repairs; contact Interior for more info.

Tract 13–156 Barnes House
345 S Union
Gary IN 46401
Landholding Agency: Interior
Property Number: 61201330017
Status: Excess
Comments: Off-site removal only; 1,372 sf.; residential; 59 yrs. old; asbestos & lead; significant repairs needed, contact Interior for more info.

Tract 85–199; Zimmerman House
13 S Drake
Beverly Shore IN 46301
Landholding Agency: Interior
Property Number: 61201330018
Status: Excess
Comments: Off-site removal only; 1,133 sf., 3+ yrs. vacant, residential, extensive deterioration, contact Interior for more info.

Tract 39–103 Benson House
1485 Pottawatomie Road
Chesterton IN 46304
Landholding Agency: Interior
Property Number: 61201330019
Status: Excess
Comments: Off-site removal only; 1,305 sf.; residential; 26+ months vacant; significant repairs needed; asbestos & lead; contact interior for more info.

Tract 19–101 Brooks House
1507 N 300 E
Chesterton IN 46304
Landholding Agency: Interior
Property Number: 61201330022
Status: Excess
Comments: Off-site removal only; 865 sf.; residential; 24+ months vacant; asbestos mold & lead extensive damage, contact Interior for more info.

Tract 18–139; Parker House
156 N County Line Road
Gary IN 46401
Landholding Agency: Interior
Property Number: 61201330023
Status: Excess
Comments: Off-sit removal only; 2,406 sf., residential; asbestos; Chimney, damage; structural unsound; contact Interior for more info.

Tract 38–145 Carney House
1451 Hawley Wood Road
Chesterton IN 46304
Landholding Agency: Interior
Property Number: 61201330024
Status: Excess
Comments: Off-site removal only; 1,736 sf.; residential; 26+ months vacant; asbestos; lead & mold; structurally unsound, contact Interior for more info.

Tract 27–146; Periolat House
940 E Valley
Beverly Shores IN 46301
Landholding Agency: Interior
Property Number: 61201330025
Status: Excess
Comments: Off-sit removal only; 1,552 sf., residential; 72+ months vacant, asbestos, mold & lead; contact Interior for more info.

Tract 86–162; Pascale House
909 E. Lakefront Drive
Beverly Shores IN 46301
Landholding Agency: Interior
Property Number: 61201330026
Status: Excess

Comments: Off-sit removal only; 2,100 sf., residential; 26+ months vacant, extensive deterioration; asbestos; contact Interior for more info.

Tract 35–117; Segal House
717 W HWY 12
Porter IN 46304
Landholding Agency: Interior
Property Number: 61201330027
Status: Excess
Comments: Off-sit removal only; 608 sf., residential; 25+ months vacant, asbestos, mold & lead; contact Interior for more info.

Tract 39–175; Peterson House
103 Pottawatomie Trail
Chesterton IN 46304
Landholding Agency: Interior
Property Number: 61201330028
Status: Excess
Comments: Off-sit removal only; 1,305 sf., residential; 25+ months vacant, extensive deterioration; asbestos & lead; contact Interior for more info.

Tract 114–23 Hartford House
3525 Tippecanoe
Gary IN 46401
Landholding Agency: Interior
Property Number: 61201330029
Status: Excess
Comments: Off-site removal only; 1,380 sf.; residential; 12+ months vacant; asbestos; lead & mold; structurally unsound; contact Interior for more info.

Tract 39–169 Goodwin House
114 Pottawatomie Road
Chesterton IN 46304
Landholding Agency: Interior
Property Number: 61201330030
Status: Excess
Comments: Off-site removal only; 2,178 sf.; residential; 25+ months vacant; extensive deterioration; contact Interior for more info.

Tract 87–142 Christphersen Hou
933 Holy Place
Beverly Shore IN 46301
Landholding Agency: Interior
Property Number: 61201330032
Status: Excess
Comments: Off-site removal only; 810 sf.; residential; asbestos; lead & mold; extensive damage; contact Interior for more info.

Tract 39–168 Leazer House
102 Pottawatomie
Chesterton IN 46304
Landholding Agency: Interior
Property Number: 61201330033
Status: Excess
Comments: Off-site removal only; 1,404 sf.; residential; 26+ months vacant; extensive deterioration; mold; roof needs to be replaced; contact Interior for more info.

Track 65–130 Lukas House
224 W Hastings
Beverly Shore IN 46301
Landholding Agency: Interior
Property Number: 61201330034
Status: Excess
Comments: Off-site removal only; 1,160 sf.; residential; 26+ months vacant; extensive deterioration; contact Interior for more info.

Tract 11–253 Grimm House
9655 Oak Place
Portage IN 46368
Landholding Agency: Interior
Property Number: 61201330035
Status: Excess
Comments: Off-site removal only; 1,541 sf.; residential; 25+ months vacant; asbestos; significant repairs needed; contact Interior for more info.

Tract 88–191 Specht House
925 E Beverly Drive
Beverly Shores IN 46301
Landholding Agency: Interior
Property Number: 61201330036
Status: Excess
Comments: Off-site removal only; 1,360 sf.; 30+ months vacant; residential; extensive damage asbestos & mold; contact Interior for more info.

Tract 25–123 Stroker House
270 Arkansas
Beverly Shores IN 46301
Landholding Agency: Interior
Property Number: 61201330037
Status: Excess
Comments: Off-site removal only; 2,640 sf.; 26+ months vacant; residential; asbestos; mold & lead; significant repairs; contact Interior for more info.

Mississippi

Building 112
CRTC GULFPORT. MS
Gulfport MS 39507
Landholding Agency: Air Force
Property Number: 18201330001
Status: Excess
Comments: 90 sf., ATM bldg., good conditions, contact AF for more info.

Land

New York

FAA Radio Communication Link
Adjacent to Babcock Road
Colesville NY 13787
Landholding Agency: GSA
Property Number: 54201330001
Status: Excess
GSA Number: 1–NY–0977–AA
Comments: 6.03 acres; contact GSA for more info.

Unsuitable Properties

Building

California

Building 6168-Equipment Loadin
Marine Corps Air Station Miramar
San Diego CA
Landholding Agency: Navy
Property Number: 77201330005
Status: Excess
Comments: Due to anti-terrorism force protection public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Bldg. 6250 Legal Svcs. Public
Marine Corps Air Station
San Diego CA
Landholding Agency: Navy
Property Number: 77201330006
Status: Excess
Comments: Due to anti-terrorism/force protection public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Connecticut

Building 20
Naval Submarine Base New London
Groton CT 06349
Landholding Agency: Navy
Property Number: 77201330002
Status: Excess
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Florida

Paint Storage Building
66200 Hangar Road
CCAFA FL 32925
Landholding Agency: NASA
Property Number: 71201330001
Status: Unutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Institutional Storage Facility
66220 Scrub Jay Rd.
CCAFS FL 32925
Landholding Agency: NASA
Property Number: 71201330002
Status: Unutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Institutional Storage Facility
66221 Scrub Jay Rd.
CCAFS FL 32925
Landholding Agency: NASA
Property Number: 71201330003
Status: Unutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Boiler Building
66257 Hanger Rd.
CCAFS FL 32925
Landholding Agency: NASA
Property Number: 71201330004
Status: Unutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Sandblast Paint Facility
Schwartz Road
KSC FL 32899
Landholding Agency: NASA
Property Number: 71201330005
Status: Unutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

SLF Optical Tracker Site B
Sharkey Road
KSC FL 32899
Landholding Agency: NASA
Property Number: 71201330006
Status: Unutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Environmental Health Facility

C Ave. NE
KSC FL 32899
Landholding Agency: NASA
Property Number: 71201330007
Status: Unutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

SLF Optical Tracker Site E
Sharkey Rd.
KSC FL 32899
Landholding Agency: NASA
Property Number: 71201330008
Status: Unutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Hawaii

#21418
Joint Base Pearl Harbor Hickam Installation (N62813)
Pearl Harbor HI 62813
Landholding Agency: Navy
Property Number: 77201330001
Status: Unutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

83214H
Joint Base Pearl Harbor Hickam
Pearl Harbor HI 62813
Landholding Agency: Navy
Property Number: 77201330003
Status: Unutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

#83220H
Joint Base Pearl Harbor Hickam Installation
Pearl Harbor HI 62813
Landholding Agency: Navy
Property Number: 77201330004
Status: Unutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Indiana

Tract 114–03 Danskin House
320 S. Union Street
Gary IN 46401
Landholding Agency: Interior
Property Number: 61201330031
Status: Excess
Comments: Documented deficiencies; severe structural damage; bldg. is collapsing; safety hazard; not economically feasible to repair.
Reasons: Extensive deterioration

Mississippi

Building 115
CRTC Gulfport
Gulfport MS 39507
Landholding Agency: Air Force
Property Number: 18201330002
Status: Excess
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

N. Mariana Island

Building 2001/RG CON HSE
Range 123 W.–Prairie
Pueblo West CQ 81007
Landholding Agency: Air Force
Property Number: 18201330005
Status: Underutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

South Dakota

Building 80
1201 W. Algonquin St.
Sioux Falls SD 57104
Landholding Agency: Air Force
Property Number: 18201330003
Status: Excess
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Texas

Building
1304 Andrews Rd. (Lackland AFB)
San Antonio TX 78101
Landholding Agency: Air Force
Property Number: 18201330004
Status: Excess
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

[FR Doc. 2013–17657 Filed 7–25–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–LE–2013–N170; FF09L00200–FX–LE12200900000]

Information Collection Request Sent to the Office of Management and Budget (OMB) for Approval; Captive Wildlife Safety Act

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (U.S. Fish and Wildlife Service, 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 August 31, 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 August 26, 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 ''1018–0129'' 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: 1018–0129.

Title: Captive Wildlife Safety Act, 50 CFR 14.250—14.255.

Service Form Number: None.

Type of Request: Extension of a currently approved collection.

Description of Respondents: Accredited wildlife sanctuaries.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Ongoing.

Estimated Annual Number of Respondents: 750.

Estimated Total Annual Responses: 750.

Estimated Time Per Response: 1 hour.

Estimated Total Annual Burden Hours: 750.

Abstract: The Captive Wildlife Safety Act (CWSA) amends the Lacey Act by making it illegal to import, export, buy, sell, transport, receive, or acquire, in interstate or foreign commerce, live lions, tigers, leopards, snow leopards, clouded leopards, cheetahs, jaguars, or cougars, or any hybrid combination of any of these species, unless certain exceptions are met. There are several exemptions to the prohibitions of the CWSA, including accredited wildlife sanctuaries.

There is no requirement for wildlife sanctuaries to submit applications to qualify for the accredited wildlife sanctuary exemption. Wildlife sanctuaries themselves will determine if they qualify. To qualify, they must meet all of the following criteria:

- Approval by the United States Internal Revenue Service (IRS) as a corporation that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1986, which is

described in sections 501(c)(3) and 170(b)(1)(A)(vi) of that code.

• Do not engage in commercial trade in the prohibited wildlife species, including offspring, parts, and products.

• Do not propagate the prohibited wildlife species.

• Have no direct contact between the public and the prohibited wildlife species.

The basis for this information collection is the recordkeeping requirement that we place on accredited wildlife sanctuaries. We require accredited wildlife sanctuaries to maintain complete and accurate records of any possession, transportation, acquisition, disposition, importation, or exportation of the prohibited wildlife species as defined in the CWSA (50 CFR 14, subpart K). Records must be up to date and include: (1) the names and addresses of persons to or from whom any prohibited wildlife species has been acquired, imported, exported, purchased, sold, or otherwise transferred; and (2) the dates of these transactions. Accredited wildlife sanctuaries must:

• Maintain these records for 5 years.

• Make these records accessible to Service officials for inspection at reasonable hours.

• Copy these records for Service officials, if requested.

Comments: On February 13, 2013, we published in the **Federal Register** (78 FR 10200) 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 April 15, 2013. We received the following comments in response to that notice: *Comment:* The recordkeeping requirement should be expanded to other exempt entities under the CWSA, including Animal and Plant Health Inspection Service (APHIS) licensed facilities and State—licensed wildlife rehabilitators.

Response: The CWSA exempts accredited wildlife sanctuaries, if they meet certain requirements. The recordkeeping requirement enables us to confirm that the sanctuary qualifies for the exemption. The CWSA does not place requirements on the other exempt entities. Therefore, we do not have the authority to establish a recordkeeping requirement on those entities.

Comment: Appropriate records should be made available to the Service on an annual basis.

Response: We believe that the submission of records only on an as needed basis is adequate to substantiate that a particular wildlife sanctuary qualifies as accredited under the CWSA. The submission of records on an annual basis would require an application or other mechanism to receive and evaluate those records. In the development of the regulations to implement the CWSA, we considered options for developing some type of formal accreditation mechanism for wildlife sanctuaries, but concluded that because of a lack of available staff and resources to manage the submission of records on an annual basis, such a step was not practical.

Comment: Records should be made available to the public through an online database or Freedom of Information Act requests.

Response: The Privacy Act has certain requirements pertaining to the release of information that would prohibit us from making these records openly available to the public.

Comment: The Service should develop an electronic recordkeeping system for wildlife sanctuaries that could be accessed and used by other Federal, State or, local agencies to, among other things, reconcile the information obtained under the CWSA with that maintained by APHIS under the Animal Welfare Act. An electronic recordkeeping system for wildlife sanctuaries could alleviate the time required to maintain records.

Response: We considered options for developing some type of formal electronic accreditation mechanism for wildlife sanctuaries that could be accessed by other agencies, but because of a lack of available resources and staff to adequately implement such a mechanism we determined it was not practical.

Comment: Records maintained by an accredited wildlife sanctuary should identify specific prohibited species and include the date of birth, age, and date of death of the specimen, and that ''otherwise transferred,'' as stated in the requirements, should include the disposition of the specimen remains.

Response: We believe that the requirements, as written, are sufficient to confirm the acquisition or disposition of specimens.

Comment: Maintaining records by an accredited wildlife sanctuary should not be considered a ''burden.''

Response: We used the term ''burden'' in our **Federal Register** notice, because that is the term typically used to measure the impact (in time and dollars) of the information collection requirements on respondents.

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: July 22, 2013.

Tina A. Campbell,

Chief, Division of Policy and Directives Management, U.S. Fish and Wildlife Service.

[FR Doc. 2013–17955 Filed 7–25–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLES002000.L1320.DU0000]

Notice of Intent To Prepare a Resource Management Plan Amendment and Associated Environmental Assessment for Coal Lease by Application ALES–55199, AL

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM) is preparing a Resource Management Plan (RMP) Amendment and Associated Environmental Assessment (EA) to consider leasing Federal coal in response to lease application ALES–55199 for Jefferson County, Alabama. Coal industry representatives, State and local governments, and the general public are encouraged to submit information to assist in determining coal development potential and possible environmental consequences, as well as development conflicts with other resources.

DATES: This notice initiates the public scoping process for the Draft RMP Amendment and associated EA for the lease application. Comments on issues may be submitted in writing until August 26, 2013.

ADDRESSES: Comments may be submitted to the Bureau of Land Management, Southeastern States Field Office, 411 Briarwood Drive, Suite 404, Jackson, MS 39206 or via email: *gtaylor@blm.gov* or via fax: 918–621–4130.

FOR FURTHER INFORMATION CONTACT: Gary Taylor or Randall Mills, Southeastern States Field Office at 601–977–5400 or by email at *gtaylor@blm.gov* or *ramills@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The coal lease application, filed by Best Coal, Inc., is located in Jefferson County, Alabama. The lease application area is approximately 5 miles north of Mt. Olive, Alabama, on Glovers Bend Road. The proposed lease area, totaling 160 acres, is described as follows:

Township 15 South, Range 4 West, Huntsville Meridian

Section 24, SW1/4NW1/4, N1/2SW1/4, SE1/2SW1/4.

The applicant proposes to mine the Federal coal in the lease application area by surface methods. The surface estate overlying the lease application area is privately owned. The BLM has the responsibility to address coal lease applications on Federal mineral estate under the Mineral Leasing Act of 1920, as amended. The Office of Surface Mining, in coordination with the State of Alabama, has responsibility to issue Mine Permits under the Surface Mining Control and Reclamation Act.

An interdisciplinary team will prepare the RMP Amendment and associated EA for the lease application. Preliminary issues, subject to change as a result of public input, are (1) Potential impacts of coal development on the surface and subsurface resources; and (2) Consideration of restrictions on lease rights to protect surface resources.

Preliminary planning criteria developed to guide the preparation of the planning analysis, subject to change as a result of public input, are as follows:

1. Land use planning and environmental analysis will be conducted in accordance with laws, regulations, executive orders and manuals. Planning will be conducted for the Federal coal mineral estate (Federal leasable mineral estates such as coal are under the administration of the BLM).

2. A mine plan scenario will be prepared for the Federal coal resource as an analytical tool to inform the National Environmental Policy Act (NEPA) analysis.

3. Resource data needed to evaluate the impacts of coal mining will be collected.

4. The planning team will work cooperatively with (a) Federal, State, county, and local governments and agencies; (b) Tribal governments; (c) Groups and organizations; and (d) Individuals. Comments relating to the preliminary issues and planning criteria should be submitted in writing to the address provided above.

An individual, business entity, or public body may participate in this process by providing information regarding coal or other resource information to assist in determining conflicts that may result from issuance of the coal lease. For other resource information, participants are asked to identify the particular resource value, to provide the reason that the resource would conflict with coal development and provide a map (minimal scale 1:24,000) showing the location of the resource.

The information available to the interdisciplinary team will be considered in addressing the specific resources and uses identified in the 20 Unsuitability Criteria listed at 43 CFR subpart 3461. Screening of the Federal coal lands in the application area through the Unsuitable Criteria will result in a determination as to which lands are (1) Acceptable for further leasing consideration with standard stipulations; (2) Acceptable for further leasing consideration with special stipulations; or (3) Unacceptable for further consideration for leasing.

Written comments should address one or more of the following: (1) Issues to be considered; (2) Whether the preliminary planning criteria are adequate for the issues; (3) Feasible and reasonable alternatives to examine; or (4) Relevant coal or other resource information.

The BLM will utilize and coordinate the NEPA commenting process to satisfy the public involvement process for Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) as provided for in 36 CFR 800.2(d)(3). Native American tribal consultations were conducted in accordance with policy, and tribal concerns will be given due consideration, including impacts on Indian trust assets. Federal, State, and local agencies, along with other stakeholders that may be interested or affected by the BLM's decision on this project, are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate as a cooperating agency.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 CFR 1610.2(c).

John Lyon,

State Director.

[FR Doc. 2013–17977 Filed 7–25–13; 8:45 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNM004410.L16100000.DO0000.LXSSG0 690000]

Notice of Intent To Prepare a Resource Management Plan for the Oklahoma, Kansas, and Texas Planning Area and an Associated Environmental Impact Statement

AGENCIES: Bureau of Land Management, Interior.

ACTION: Notice of Intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) Oklahoma Field Office, Tulsa, Oklahoma, intends to prepare a Resource Management Plan (RMP) with an associated Environmental Impact Statement (EIS) for the Oklahoma, Kansas, and Texas planning area. This notice announces the beginning of the scoping process to solicit public comments and identify issues. The RMP will replace the existing Oklahoma RMP (1994), the Kansas RMP (1991), and the Texas RMP (1996), and the associated EIS for the RMP will also analyze Bureau of Indian Affairs (BIA) management decisions for lands and minerals managed by the BIA in the three states.

DATES: This notice initiates the public scoping process for the RMP with an associated EIS. Comments on issues may be submitted in writing until August 26, 2013]. The dates and locations of any scoping meetings will be announced at least 15 days in advance through local media,

newspapers, and the BLM Web site at *http://www.blm.gov/nm/oktrmp.* In order to be included in the Draft EIS, all comments must be received prior to the close of the 30-day scoping period or 15 days after the last public meeting, whichever is later. The BLM will provide additional opportunities for public participation upon publication of the Draft EIS.

ADDRESSES: You may submit comments on issues and planning criteria related to the Oklahoma/Kansas/Texas RMP by any of the following methods:

- *Web site: http://www.blm.gov/nm/oktrmp.*
- *Email: BLM_NM_OKTRMP@blm.gov.*
- *Fax:* 918–621–4130; Attention: Laurence Levesque.
- *Mail:* Oklahoma Field Office, BLM, 7906 East 33rd Street, Suite 101, Tulsa, OK 74145; Attention: RMP Comments.

Documents pertinent to this proposal may be examined at the Oklahoma Field Office.

FOR FURTHER INFORMATION CONTACT: Laurence Levesque, Planning and Environmental Specialist; telephone 918–621–4136; address 7906 East 33rd Street, Suite 101, Tulsa, OK 74145; email B*LM_NM_OKTRMP@blm.gov.* Contact Mr. Levesque to have your name added to our mailing list. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: This document provides notice that the BLM Oklahoma Field Office, Tulsa, Oklahoma, intends to prepare an RMP with an associated EIS for the Oklahoma, Kansas, and Texas planning area RMP; announces the beginning of the scoping process; and seeks public input on issues and planning criteria. The EIS for the RMP will also analyze decisions for Indian mineral interests administered by the BIA Eastern Oklahoma and Southern Plains Regional Offices. The BLM will be the lead agency in the RMP development effort, and the BIA will participate as a cooperating agency and sign a separate Record of Decision for management decisions for Indian mineral interests administered by the BIA Eastern Oklahoma and Southern Plains Regional Offices.

The planning area encompasses about 100,000 acres of public land; 5,863,000 acres of Federal mineral interests; and 670,000 acres of Indian mineral interests. The BLM and the BIA will work collaboratively with interested parties to identify the management decisions that are best suited to local, regional, and national needs and concerns. The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the planning process.

Preliminary issues for the planning area have been identified by the BLM and BIA personnel; Federal, State, and local agencies; and other stakeholders. The issues include:

1. How should the BLM and the BIA facilitate energy development, both renewable and non-renewable, while allowing for multiple uses and appropriate protection of public lands and resources?

2. What management actions, best management practices, and mitigation measures are necessary to protect or enhance resources, such as, visual, air quality, groundwater, watersheds and riparian areas, recreational areas, vegetation, soils, cultural sites, special designations, wildlife and special status species habitat, and rangeland health?

3. Where are helium resources located and how can these reserves, as well as the Federal Helium Plant, be best managed for the public?

4. How should the BLM address long-term grassland pasture facilities for wild horses and burros transferred from western rangelands?

5. Which public lands should be identified for retention, proposed for withdrawal, disposal, or acquisition to facilitate more efficient land management?

6. Which public lands should be identified as open, limited, or closed to motorized vehicle travel to meet resource and recreational demands?

Preliminary planning criteria include:

1. The RMP will be in compliance with FLPMA, NEPA, and all other applicable laws and regulations.

2. Land use decisions in the RMP will apply to the surface and subsurface estate managed by the BLM and the BIA. The BLM will not make any recommendations or decisions that affect Federal mineral estate beyond its explicit authority under applicable laws and regulations.

3. Public participation and collaboration will be an integral part of the planning process.

4. The BLM and the BIA will work cooperatively and collaboratively with cooperating agencies and all other interested groups, agencies, and individuals.

5. The RMP will incorporate, where applicable, management decisions brought forward from existing planning documents.

6. Identification of any lands for further consideration for coal leasing will be limited to any areas with development potential.

7. Final title analysis has not yet been conducted for all Federal mineral ownership. Although the BLM will plan for these tracts, it will not lease, transfer or otherwise authorize any action(s) prior to verification of title for the properties.

You may submit comments on issues and planning criteria in writing to the BLM at any public scoping meeting, or by using one of the methods listed in the ''**ADDRESSES**'' section above. To be most helpful, you should submit comments by the close of the 30-day scoping period or within 15 days after the last public meeting, whichever is later. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so. The BLM will evaluate identified issues and will place them into one of three categories:

1. Issues to be resolved in the plan;

2. Issues to be resolved through policy or administrative action; or

3. Issues beyond the scope of this plan.

The BLM will provide an explanation in the Draft RMP/EIS as to why an issue was placed in category two or three. The public is also encouraged to help identify any management questions and concerns that should be addressed in the plan. The BLM will work collaboratively with interested parties to identify the management decisions that are best suited to local, regional, and national needs and concerns.

The BLM will use NEPA public participation requirements to assist the agency in satisfying the public involvement requirements under Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470(f)) pursuant to 36 CFR 800.2(d)(3). The information about historic and cultural resources within the area potentially affected by the proposed action will assist the BLM in identifying and evaluating impacts to such

resources in the context of both NEPA and Section 106 of the NHPA.

The BLM will consult with Indian tribes on a government-to-government basis in accordance with Executive Order 13175 and other policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration. Federal, State, and local agencies, along with tribes and other stakeholders that may be interested in or affected by the proposed action that the BLM is evaluating, are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate in the development of the environmental analysis as a cooperating agency.

The BLM will use an interdisciplinary approach to develop the plan in order to consider the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in the planning process: minerals and geology, archaeology, wildlife and fisheries, lands and realty, hydrology, soils, livestock grazing, recreation, sociology, and economics.

Authority: 40 CFR 1501.7; 43 CFR 1610.2

Jesse J. Juen,

State Director.

[FR Doc. 2013–17981 Filed 7–25–13; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCAD07000, L51010000.FX0000.LVRWB10B4050]

Notice of Availability of the San Diego Gas & Electric Ocotillo Sol Solar Project Final Environmental Impact Statement and Proposed California Desert Conservation Area Plan Amendment, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) has prepared a Proposed California Desert Conservation Area (CDCA) Plan Amendment and Final Environmental Impact Statement (EIS) for the San Diego Gas & Electric (SDG&E) Ocotillo Sol Solar Project in Imperial County, California, and by this notice is announcing its availability.

DATES: BLM planning regulations state that any person who meets the conditions as described in the regulations may protest the Proposed CDCA Plan Amendment. A person who meets the conditions and files a protest must file the protest within 30 days of the date that the Environmental Protection Agency publishes its notice of availability for the EIS in the **Federal Register**.

ADDRESSES: Copies of the Ocotillo Sol Solar Project Final EIS/Proposed CDCA Plan Amendment have been sent to affected Federal, State, and local government agencies and to other stakeholders, including tribal governments. Copies are also available in the BLM California Desert District Office at 22835 Calle San Juan de los Lagos, Moreno Valley, CA 92553 and at the El Centro Field Office, 1661 S. 4th Street, El Centro, CA 92243.

Interested persons may also review the Final EIS/Proposed CDCA Plan Amendment on the Internet at *http://www.blm.gov/ca/st/en/fo/elcentro/nepa/ocotillosol.html.* All protests must be in writing and mailed to one of the following addresses:

Regular Mail: BLM Director (210), Attention: Brenda Williams, P.O. Box 71383, Washington, DC 20024–1383.

Overnight Mail: BLM Director (210), Attention: Brenda Williams, 20 M Street SE., Room 2134LM, Washington, DC 20003.

FOR FURTHER INFORMATION CONTACT: Noel Ludwig, Project Manager, telephone 951–697–5368; address 22835 Calle San Juan de Los Lagos, Moreno Valley, CA 92553; or email *CA_BLM_Ocotillo_Sol_Comments@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BLM has received a right-of-way (ROW) application from SDG&E to construct, operate, maintain, and decommission the Ocotillo Sol Solar Project, a solar photovoltaic (PV) power plant facility, on approximately 115 acres of BLM-administered public lands in Imperial County, California. The site for the solar facility would be adjacent to the existing Imperial Valley Substation (IVS), 4 miles south of Interstate 8, approximately 5 miles north of the United States-Mexico border, 5 miles south of Seeley, 9 miles southwest of El Centro, and 82 miles east of San Diego.

The proposed project site is located within the BLM's CDCA, the BLM's Yuha Basin Area of Critical Environmental Concern, and the Yuha Desert Management Area for flat-tailed horned lizard. A portion of the north-south running Juan Bautista de Anza National Historic Trail lies approximately 5 miles southwest of the project site at its closest point. The Jacumba Mountains Wilderness lies 11.7 miles to the west of the project site.

All proposed project components, including a temporary 15-acre construction laydown area, would be located on BLM-administered lands. The proposed Ocotillo Sol project components would include the PV modules and mounting structures, a maintenance building with an associated parking area, internal roads, inverters, transformers, and the combining switchgear. An existing road to the IVS would provide access to the proposed project site. New minor internal roads would be constructed between the module rows. The interconnection to the IVS would be via underground trench. Once approved and operational, the proposed Ocotillo Sol project is expected to have an average generating capacity of 15 to 18 megawatts (MW), depending on the specific technology chosen, with a peak output of up to 20 MW.

In connection with its decision on the proposed Ocotillo Sol project, the BLM will also include potential amendments to the CDCA Plan, as analyzed in the Final EIS. The CDCA Plan, while recognizing the potential compatibility of solar energy facilities on public lands, requires that all sites associated with power generation or transmission not identified in the Plan be considered through the land use plan amendment process. The BLM is deciding whether to amend the CDCA Plan to identify the Ocotillo Sol project site as suitable or unsuitable for solar energy development.

The Final EIS describes the following three alternatives: (1) A No Action/No CDCA Plan Amendment; (2) The Applicant's Proposed Project to construct, operate, maintain, and decommission a 100-acre solar PV facility on BLM-managed lands under an authorized ROW, plus utilization of a 15-acre temporary ROW for construction laydown; and (3) A Reduced Footprint Alternative which would retain the 100-acre facility but reduce the laydown area from 15 acres to 2 acres. All of the alternatives except the No Action/No CDCA Plan Amendment would include an amendment to the CDCA Plan.

Alternative 3 is the BLM's preferred alternative in the Final EIS.

The issues evaluated in the Final EIS include the physical, biological, cultural, socioeconomic, and other resources that have the potential to be affected by the proposed project and alternatives. These issues include air quality, greenhouse gases and climate change, geology and soil resources, water resources, biological resources, cultural resources, paleontological resources, fire and fuels, lands and realty, special designations, lands with wilderness characteristics, recreation, visual resources, transportation and public access, noise and vibration, public health and safety, socioeconomics, and environmental justice.

The BLM hosted two public scoping meetings in El Centro, California, on August 10, 2011. During the public scoping period, two Federal agencies, eight interest groups, and three individuals provided comments. Two public comment meetings for the Ocotillo Sol Draft EIS/Draft CDCA Plan Amendment were held in El Centro on June 4, 2012. The formal comment period commenced with the publication of the Draft EIS/Draft CDCA Plan Amendment on April 20, 2012 and ended 90 days later on July 19, 2012. The BLM received 13 comment letters (including public comment forms from public meetings, postal letters, emails, and faxes) from individuals, agencies, organizations, and groups during the public comment period.

Comments on the Draft EIS/Draft CDCA Plan Amendment received from the public and internal BLM review were considered and incorporated as appropriate into the Final EIS/Proposed CDCA Plan Amendment. Public comments resulted in the addition of clarifying text, but did not significantly change the analysis, alternatives, or proposed land use plan decisions.

Instructions for filing a protest with the Director of the BLM regarding the Proposed CDCA Plan Amendment may be found in the ''Dear Reader'' Letter of the Final EIS/Proposed CDCA Plan Amendment and at 43 CFR 1610.5–2.

All protests must be in writing and mailed to the appropriate address, as set forth in the **ADDRESSES** section above. Emailed protests will not be accepted as valid protests unless the protesting party also provides the original letter by either regular or overnight mail postmarked by the close of the protest period. Under these conditions, the BLM will consider the email as an advance copy and it will receive full consideration. If you wish to provide the BLM with such advance notification, please direct emails to *Bhudgens@blm.gov.*

Before including your address, phone number, email address, or other personal identifying information in your protest, you should be aware that your entire protest—including your personal identifying information—may be made publicly available at any time. While you can ask us in your protest to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6, 40 CFR 1506.10, 43 CFR 1610.2

Thomas Pogacnik,

Deputy State Director.

[FR Doc. 2013–17870 Filed 7–25–13; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR936000–L14300000–ET0000; FUND 13XL1109AF; HAG–13–0199; OROR–66533]

Public Land Order No. 7819; Chetco Wild and Scenic River Withdrawal; Oregon

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order withdraws approximately 5,610 acres of National Forest System lands from location and entry under the United States mining laws, and leasing under the mineral and geothermal leasing laws, for a period of 5 years. This withdrawal will protect the scenic and recreational segments of the Chetco Wild and Scenic River corridor in Curry County, Oregon, while Congress considers a technical correction to the Wild and Scenic Rivers Act.

DATES: *Effective Date:* July 26, 2013.

FOR FURTHER INFORMATION CONTACT: Michael L. Barnes, Bureau of Land Management, Oregon/Washington State Office, 333 SW 1st Avenue, Portland, OR 97204, 503–808–6155, or Dianne Torpin, United States Forest Service, Pacific Northwest Region, 333 SW 1st Avenue, Portland, OR 97204, 503–808–2422. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact either of the above individuals. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with either of the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: On October 28, 1988, 44.5 miles of the Chetco River located in the Siskiyou National Forest was designated a Wild and Scenic River (102 Stat. 2782 (1988)). Of the designated 44.5 river miles, the lower 19 miles were designated scenic and recreational and remained open to location and entry under the United States mining laws. The United States Forest Service requests that, subject to valid existing rights, the lower 19 miles be closed to location and entry under the United States mining laws and to leasing under the mineral and geothermal leasing laws while legislation is being considered to make a technical correction to Section 3(a)(69) of the Wild and Scenic Rivers Act (16 U.S.C. 1274(69)).

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714, it is ordered as follows:

1. Subject to valid existing rights, the following described National Forest System lands are hereby withdrawn from location and entry under the United States mining laws, and from leasing under the mineral and geothermal leasing laws, but not the mineral materials laws, for a 5-year period, to protect the Scenic and Recreational Segment of the Chetco Wild and Scenic River corridor:

Willamette Meridian

Siskiyou National Forest

T. 39 S., R. 12 W.,

The Point of Beginning, being the southwest corner of Section 31; thence S. 83°43′ E., 599.5 ft. along the south section line of Section 31 to a point which is 100 ft. westerly of and perpendicular to the centerline of Forest Service Road (FSR) 1107–650; thence paralleling FSR 1107–650, 100 ft. westerly and northwesterly of centerline to point 100 ft. westerly of and perpendicular to FSR 1107–650 at intersection of the centerline of FSR 1107; thence N. 74°10′ E., 3572.4 ft. to a point at the end point of FSR 1107–632; thence N. 34°33′ E., 1245.8 ft. to a point at the end point of FSR 1107–630; thence N. 73°50′ E., 785.5 ft. to a point on the east section line of Section 30, which is ¼ mile from the ordinary high water line of the Chetco River; thence paralleling the Chetco River ¼ mile from the ordinary high water line to point ¼ mile east of the ordinary high water line of the Chetco River on the north section line of Section 20; thence N. 87°20′ W., 496.3 ft. along the north section line of Section 20 to the southwest corner of the SE¼SE¼ of Section 17; thence N. 02°36′ E., 3,992.9 ft. along the north-south centerline of the SE¼ and NE¼ of Section 17 to the southwest corner of the NE¼NE¼ of Section 17; thence S. 87°40′ E., 1,233.5 ft. along the south line

of the NE¼ of Section 17 to the southeast corner of the NE¼NE¼ of Section 17; thence N. 01°48′ E., 1357.1 ft. along the east line of the NE¼ of Section 17 to the northwest corner of Section 16; thence S. 86°59′ E., 2760.9 ft. along the north line of Section 16 to the south quarter corner of Section 9; thence N. 02°52′ E., 2,655.6 ft. along the north-south centerline of Section 9 to the southwest corner of the NE¼ of Section 9; thence N. 86°48′ W., 2737.2 ft. along the east-west centerline of Section 9 to the west quarter corner of Section 9; thence N. 03° 14′ E., 2,624.8 ft. along the west section line of Section 9 to the southeast corner of Section 5; thence N. 03° 50′ E., 2,603.7 ft. along the east section line of Section 5 to the east quarter corner of Section 5; thence N. 03°40′ E., 2687.8 ft. along the east section line of Section 5 to the northeast corner of Section 5; thence N. 88°01′ W., 351.2 ft. along the north section line of Section 5 to the southeast corner of Section 32, T. 38 S., R. 12 W.; thence N. 02°40′ E., 1936 ft. along the east section line of Section 32 to a point on the east section line of Section 32; thence N. 02°40′ E., 730.3 ft. along the east section line of Section 32 to the west quarter corner of Section 33; thence S. 87°37′ E., 2831.5 ft. along the east-west centerline of Section 33, to the southeast corner of the NW¼ of Section 33; thence N. 02° 27′ E., 932.1 ft. along the north-south centerline of Section 33, to a point on the north-south centerline of Section 33, which is ¼ mile south of the ordinary high water line of the Chetco River; thence paralleling the Chetco River ¼ mile from the ordinary high water line to the boundary of the Kalmiopsis Wilderness; thence along the boundary of the Kalmiopsis Wilderness northerly and across the Chetco River to a point 50 ft. northwesterly of Tin Cup Trail #1117; thence along a line parallel to and offset 50 ft. northwesterly from Tin Cup Trail #1117 to a point at the intersection with FSR 1376–365; thence S. 6° 26′ W., 1,183.9 ft. to a point on a ridge being ¼ mile northwesterly from the northwesterly ordinary high water line of the Chetco River; thence along a line parallel to and offset ¼ mile northwesterly from the northwesterly ordinary high water line to a point on the north section line of Section 5, T. 39 S., R. 12 W., which is ¼ mile from the ordinary high water line of the Chetco River; thence N. 88° 17′ W., 733.6 ft. along the north section line of Section 5 to the northeast corner of the NW¼NW¼ of Section 5, T. 39 S., R. 12 W; thence S. 01° 40′ W., 5,290.4 ft. along the north-south centerline of the NW¼ and SW¼ of Section 5 to the northeast corner of the NW¼NW¼ of Section 8; thence S. 02° 20′ W., 5,169.3 ft. along the north-south centerline of the NW¼ and SW¼ of Section 8 to the northeast corner of the NW¼NW¼ of Section 17; thence S. 01° 51′ W., 5,280 ft. to the northeast corner of the NW¼NW¼ of Section 20; thence S. 01° 51′ W., 2,609.7 ft. along the north-south centerline of the NW¼ of Section 20 to the southeast corner of the SW¼NW¼ of Section 20; thence S. 30° 47′ W., 2,842.2 ft. to the section corner common to Sections 19, 20, 29, and 30; thence S. 67°05′ W., 5,922.9 ft. to the northeast corner of lot 11, Section 30; thence N. 87°23′ W., 2,432.6 ft. along the north lines of lots 11 and 12, Section 30, to the west quarter corner of Section 30; thence S. 02°22′ W., 2,587.9 ft. along the west section line of Section 30 to the common section corner to Section 30 and 31; thence S. 01° 09′W., 745.0 ft. to the common section corner to Sections 1 and 12, T. 39 S., R. 13 W.; thence S. 02° 36′ W., 4,212.8 ft. along the west section line of Section 31; thence S. 02°06′ W., 352.8 ft. along the west section line of Section 31 to the Point of Beginning.

The lands aggregate approximately 5,610 acres, more or less, in Curry County.

2. The withdrawal made by this order does not alter the applicability of those public land laws governing the use of the National Forest System lands under lease, license, or permit, or governing the disposal of the mineral or vegetative resources other than under the mining, mineral, and geothermal leasing laws.

3. This withdrawal will expire 5 years from the effective date of this order, unless as a result of a review conducted prior to the expiration date pursuant to Section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f), the Secretary determines that the withdrawal shall be extended.

Dated: July 19, 2013.

Rhea S. Suh,

Assistant Secretary—Policy, Management and Budget.

[FR Doc. 2013–18021 Filed 7–25–13; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLORM06000.L63340000.XI0000. 13XL1116AF; OR–57811; HAG–13–0222]

Notice of Realty Action; Proposed Modified Competitive Sale of Public Land in Jackson County, Oregon

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The Bureau of Land Management (BLM) proposes to sell a 9.26 acre parcel of public land in Jackson County, Oregon, by modified competitive bidding sale procedures for the approved appraised fair market value of $4,500.

DATES: The BLM must receive comments regarding the proposed sale on or before September 9, 2013.

ADDRESSES: Written comments concerning this proposed sale may be submitted to Ashland Resource Area Field Manager, BLM Medford District Office, 3040 Biddle Road, Medford, OR 97504.

ADDRESSES: Rik Arndt, Supervisory Realty Specialist, 3040 Biddle Road, Medford, OR 97504 or phone at 541–618–2239. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: Pursuant to Sections 203 and 209 of the Federal Land Policy and Management Act of 1976, as amended (FLPMA), (43 U.S.C. 1713 and 1719) and regulations at 43 CFR subpart 2710, this conveyance would be made by modified competitive bidding sale procedures, with bidding limited to the two adjacent landowners identified below:

Kurt Wilkening and Toree Wilkening, Trustees or Their Successors in Trust under the Wilkening Living Trust Dated January 27, 1999, P.O. Box 3396, Applegate, OR 97530 and Leslie C. and Rachel A. Martin, 11777 Highway 238, Jacksonville, OR 97530.

The land to be sold is described as follows:

The following land located in Jackson County.

Willamette Meridian, Oregon

Township 38 South, Range 4 West,
Sec. 25, Lot 7
Containing 9.26 acres, more or less.

The parcel was identified in the Medford District 1995 Resource Management Plan (as amended August 2, 2002) as Land Tenure Zone 3 lands, which are suitable for sale or exchange. Land Tenure Zone 3 lands meet the criteria for disposal as outlined in Section 203 of FLMPA. An environmental assessment for the land sale was made available for a 30-day public comment period from October 12, 2011 through November 11, 2011, and no comments were received. Due to the lack of legal access and the small size and irregular shape of the parcel, Federal management of this parcel would be difficult and uneconomical and would provide minimal benefits in the public's interest if retained in Federal ownership. The public interest would be best served by disposing of this parcel to one of the adjacent landowners since the parcel is landlocked. The parcel is L-shaped, with one leg approximately 1,320 feet in length by 74 feet wide, and the second leg approximately 1,070 feet in length by 246 feet wide. The parcel contains no known mineral, geothermal or oil/gas values, and the parcel will be conveyed with no reservation of minerals. Conveyance of the identified public land will be subject to all valid existing

rights of record and contain the following terms, conditions, and reservations.

a. A reservation of a right-of-way to the United States for ditches and canals constructed by the authority of the United States under the Act of August 30, 1890 (43 U.S.C. 945).

b. An appropriate indemnification clause protecting the United States from claims arising out of the patentee's use, occupancy, or operation on the patented lands.

c. No ground disturbing activities shall be conducted on the conveyed land, such as grazing, motorized vehicle use/storage/maintenance, water development, construction (commercial, residential or recreational), road construction, renovation, or road use, within 150 feet of waters of the State, including, but not limited to, Keeler Creek, unnamed tributaries, springs, and outflow channels.

d. Vegetation shall not be removed from within the identified 150 feet riparian buffer except for the purpose of on-site fisheries enhancement projects to be approved and administered by local fish and wildlife agencies, primarily the Oregon Department of Fish and Wildlife.

On July 26, 2013, the above described land will be segregated from appropriation under the public land laws, including the mining laws, except the sale provisions of FLPMA. Until completion of the sale, the BLM is no longer accepting land use applications affecting the identified public land. The temporary segregation effect will terminate upon issuance of a conveyance document, publication in the **Federal Register** of a termination of the segregation, or July 27, 2015, unless extended by the BLM Oregon/Washington State Director in accordance with 43 CFR 2711.1–2(d) prior to the termination date. Detailed information concerning the proposed land sale—including the appraisal, planning and environmental documents, and mineral potential report—is available for review at the BLM Medford District Office at the location identified in the **ADDRESSES** section above during normal business hours. Normal business hours are 7:45 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays. The Decision Record for the Environmental Analysis is available for review on the BLM Web site at: *http://www.blm.gov/or/districts/medford/plans/index.php.* Public comments regarding the proposed sale must be submitted in writing to the BLM Ashland Resource Area Field Manager (see the **ADDRESSES** section) on or before September 9, 2013. Comments received by telephone or in electronic form, such as email or facsimile, will not be considered. Any adverse comments regarding the proposed sale will be reviewed by the Ashland Field Manager or other authorized officials of the Department of the Interior, who may sustain, vacate, or modify this realty action in whole or in part. In the absence of timely filed objections, this realty action will become the final determination of the Department of the Interior not less than 60 days from July 26, 2013.

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: 43 CFR 2710, 2711 and 2720.

John Gerritsma,

Field Manager, Ashland Resource Area.

[FR Doc. 2013–17978 Filed 7–25–13; 8:45 am]

BILLING CODE 4310–33–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1210–1212 (Preliminary)]

Welded Stainless Steel Pressure Pipe From Malaysia, Thailand, and Vietnam

Determination

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) (the Act), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from Malaysia, Thailand, and Vietnam of welded stainless steel pressure pipe, provided for in subheading 7306.40 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value (LTFV).

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in section 207.21 of the Commission's rules, upon notice from the Department of Commerce (Commerce) of affirmative preliminary determinations in these investigations under section 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in those investigations under section 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. 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 and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Background

On May 16, 2013, a petition was filed with the Commission and Commerce by Bristol Metals, L.P. (Bristol, TN), Felker Brothers Corp. (Marshfield, WI), and Outokumpu Stainless Pipe (Schaumberg, IL), alleging that an industry in the United States is materially injured or threatened with material injury by reason of LTFV imports of welded stainless steel pressure pipe from Malaysia, Thailand, and Vietnam. Accordingly, effective May 16, 2013, the Commission instituted antidumping duty investigation Nos. 731–TA–1210–1212 (Preliminary).

Notice of the institution of the Commission=s investigations and of a public conference to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of May 24, 2013 (78 FR 31574). The conference was held in Washington, DC, on June 6, 2013, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on July 1, 2013. The views of the Commission are contained in USITC Publication 4413 (July 2013), entitled *Welded Stainless Steel Pressure Pipe from Malaysia, Thailand, and Vietnam: Investigation Nos. 731–TA–1210–1212 (Preliminary).*

Issued: July 10, 2013.

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

By order of the Commission.

William R. Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2013–17963 Filed 7–25–13; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–888]

Certain Silicon Microphone Packages and Products Containing Same Institution of Investigation Pursuant to 19 U.S.C. 1337

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on June 21, 2013, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Knowles Electronic, LLC of Itasca, Illinois. A supplement to the complaint was filed on July 9, 2013. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain silicon microphone packages and products containing same by reason of infringement of certain claims of U.S. Patent No. 7,439,616 (''the '616 patent''); U.S. Patent No. 8,018,049 (''the '049 patent''); and U.S. Patent No. 8,121,331 (''the '331 patent''). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained 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 at *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.*

FOR FURTHER INFORMATION CONTACT: The Office of the Secretary, Docket Services Division, U.S. International Trade Commission, telephone (202) 205–1802.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2013).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on July 22, 2013, ORDERED THAT—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain silicon microphone packages and products containing same by reason of infringement of one or more of claims 1, 2, 8, 11–18, and 21 of the '616 patent; claims 1, 15, 16, 19, and 21–26 of the '049 patent; and claims 1, 2, 4, 5, and 11–13 of the '331 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Knowles Electronics, LLC, 1151 Maplewood Drive, Itasca, Illinois 60143.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

GoerTek, Inc., 268 Dongfang Road, Hi-Tech Industry Development District, Weifang, 261031, China.

GoerTek Electronics, Inc., 1230 Midas Way, Suite 210, Sunnyvale, CA 94085.

(3) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations will not participate as a party in this investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

Issued: July 23, 2013.

By order of the Commission.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–17980 Filed 7–25–13; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Third Amendment to Consent Decree Under the Clean Air Act

On July 23, 2013, the Department of Justice lodged a proposed Third Amendment to the Consent Decree with the United States District Court for the Southern District of Illinois in the lawsuit entitled *United States* et al v. *Lafarge North America et al,* Civil Action No. 3:10–cv–44.

Following public notice and opportunity for public comment, on March 18, 2010 the Court entered a Consent Decree resolving certain violations of the federal Clean Air Act, 42 U.S.C. 7401 *et seq.* by Lafarge North America, Lafarge Building Materials, and Lafarge Midwest (collectively, the ''Lafarge Companies'') alleged by Plaintiff United States and Plaintiff-Intervenors the State of Alabama, the State of Illinois, the State of Iowa, the State of Kansas, the State of Michigan, the State of Missouri, the State of New York, the State of Ohio, the Commonwealth of Pennsylvania

Department of Environmental Protection, the South Carolina Department of Health and Environmental Control, the Washington State Department of Ecology, the Oklahoma Department of Environmental Quality, and the Puget Sound Clean Air Agency (collectively, ''State Plaintiffs''). The Court amended the Consent Decree on April 28, 2011 and again on October 4, 2012.

The United States, the State of New York, and the Lafarge Companies have agreed to further amend the Consent Decree to provide the Lafarge Companies with an extension of time of until July 1, 2016 to complete construction of a replacement kiln at the Ravena, New York cement plant in return for commitments by the Lafarge Companies set forth in the proposed Third Amendment to the Consent Decree. In general, those commitments by the Lafarge Companies are that beginning on January 1, 2013, the Lafarge Companies shall comply with stringent emission caps, specified herein, for sulfur dioxide and nitrogen oxides from the Ravena cement plant, and further that the Lafarge Companies shall fund emission reduction projects in the community surrounding the plant.

The publication of this notice opens a period for public comment on the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* et al v. *Lafarge North America* et al, D.J. Ref. No. 90–5–2–1–08221. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By e-mail	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed Third Amendment to the Consent Decree may be examined and downloaded at this Justice Department Web site: *http://www.usdoj.gov/enrd/ConsentDecrees.html.* We will provide a paper copy of the proposed Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $5.75 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without the exhibits and signature pages, the cost is $4.25.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–18015 Filed 7–25–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0038]

Agency Information Collection Activities; Proposed Collection; Comments Requested: Application for Federal Firearms License (Collector of Curios and Relics)

ACTION: 60-Day notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until September 24, 2013. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Tracey Robertson, Chief, Federal Firearms Licensing Center, 244 Needy Road, Martinsburg, WV 25405.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Federal Firearms License (Collector of Curios and Relics.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 7CR (5310.16). Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: None.

Need for Collection

The form is used by the public when applying for a Federal firearms license to collect curios and relics to facilitate a personal collection in interstate and foreign commerce. The information requested on the form establishes eligibility for the license.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 8,817 respondents will complete a 15 minute form.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 2,204 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: July 23, 2013.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2013–18008 Filed 7–25–13; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–NEW]

Agency Information Collection Activities; Proposed Collection; Comments Requested: Application for Alternate Means of Identification of Firearms (Marking Variance)

ACTION: 60-Day notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until September 24, 2013. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Chief, Firearms Industry Programs Branch at *fipb-informationcollection@atf.gov.*

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection

(1) *Type of Information Collection:* New collection.

(2) *Title of the Form/Collection:* Application for Alternate Means of Identification of Firearms (Markings Variance).

(3) Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number: ATF Form 3311.4. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Business or other for-profit. Other: None.

Need for Collection

Licensed firearms manufacturers and licensed firearms importers must legibly mark firearms manufactured or imported with specific identifying information. ATF may authorize other means of identification (marking variance) upon receipt of a letter application showing that such other identification is reasonable and will not hinder the effective administration of the firearms regulations. ATF Form 3311.4 will be used as a letter application for licensed Federal importers and manufacturers to request approval to use an alternate means for identifying firearms.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 641 respondents will take 30 minutes to complete the form.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 321 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: July 23, 2013.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2013–18011 Filed 7–25–13; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0012]

Agency Information Collection Activities; Proposed Collection; Comments Requested: Notice of Firearms Manufactured or Imported

ACTION: 60-Day notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until September 24, 2013. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Gary Schaible, National Firearms Act Branch at *Gary.Schaible@atf.gov.*

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Notice of Firearms Manufactured or Imported.

(3) Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number: ATF F 2 (5320.2). Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Business or other for-profit. Other: State, Local or Tribal Government.

Need for Collection

ATF F 2 (5320.2) is used by a federally qualified firearms manufacturer or importer to report firearms manufactured or imported and to have these firearms registered in the National Firearms Registration and Transfer Record as proof of the lawful existence of the firearm.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 816 respondents will complete a 45 minute form.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 3,750 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: July 23, 2013.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2013–18006 Filed 7–25–13; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0080]

Agency Information Collection Activities; Proposed collection; Comments Requested: Notification of Change of Mailing or Premise Address

ACTION: 60-Day Notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until [insert the date 60 days from the date this notice is published in the **Federal Register**]. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Christopher Reeves, Chief, Federal Explosives Licensing Center at *Christopher.R.Reeves@usdoj.gov* or 244 Needy Road, Martinsburg, WV 25405.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Notification of Change of Mailing or Premise Address.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number:* None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Not-for-profit-institutions. Other: Business or other for-profit.

Need for Collection

Licensees and permittees whose mailing address will change must notify the Chief, Federal Explosives Licensing Center, at least 10 days before the change. The information is used by ATF to identify correct locations of storage of explosives licensees/permittees and location of storage of explosive materials for purposes of inspection, as well as to notify permittee/licensees of any change in regulations or laws that may affect their business activities.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 1,000 respondents will take 10 minutes to respond via letter to the Federal Explosives Licensing Center.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 170 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: July 23, 2013.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2013–18010 Filed 7–25–13; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0053]

Agency Information Collection Activities; Proposed Collection; Comments Requested: Training Registration Request for Non-ATF Employees

ACTION: 60-Day notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to

obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until September 24, 2013. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Gus Jakowitsch, Accreditation and Technical Support Office, 202–648–8386, 99 New York Avenue NE, Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:
whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Training Registration Request for Non-ATF Employees

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: ATF F 6400.1. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State, Local, or Tribal Government. Other: None.

Need for Collection

The Bureau of Alcohol, Tobacco, Firearms and Explosives provides arson and explosives investigative techniques training to State and local investigators. The registration request form will be used by prospective students.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: It is estimated that 500 respondents will complete a 6 minute form.

(6) An estimate of the total public burden (in hours) associated with the collection: There are an estimated 50 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: July 23, 2013.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2013–18009 Filed 7–25–13; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0032]

Agency Information Collection Activities; Proposed Collection; Comments Requested: Records of Acquisition and Disposition, Collectors of Firearms

ACTION: 60-Day Notice.

The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for ''sixty days'' until September 24, 2013. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Chief, Firearms Industry Programs Branch at *fipb-informationcollection@atf.gov,* 99 New York Avenue NE, Washington, DC 20226.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:
—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Enhance the quality, utility, and clarity of the information to be collected; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Summary of Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Records of Acquisition and Disposition, Collectors of Firearms.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: None. Bureau of Alcohol, Tobacco, Firearms and Explosives.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Other: None.

Need for Collection

The record keeping requirement is for the purpose of facilitating ATF's authority to inquire into the disposition of any firearm in the course of a criminal investigation.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated to take 3 hours per year for line by line entry and that approximately 64,327 licensees will participate.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 192,981 annual total burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning

Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: July 23, 2013.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2013–18007 Filed 7–25–13; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Bureau of Prisons

Notice of Intent to Prepare a Draft Environmental Impact Statement (EIS) for Development of a United States Penitentiary (USP) and Federal Prison Camp (FPC) by the U.S. Department of Justice, Federal Bureau of Prisons (Bureau) on Land Under Consideration for Development Located in Letcher County, Kentucky

AGENCY: Federal Bureau of Prisons, U. S. Department of Justice.

ACTION: Notice of intent to prepare a Draft Environmental Impact Statement (EIS).

SUMMARY:

Background

The Bureau was established in 1930 to provide more progressive and humane care for federal inmates, to professionalize the prison service, and to ensure consistent and centralized administration of federal prisons. The mission of the United States (U.S.) Department of Justice, Federal Bureau of Prisons is to protect society by confining offenders in the controlled environments of prison and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens. The Bureau accomplishes its mission through the appropriate use of community correction, detention, and correctional facilities that are: Federally-owned and operated; Federally-owned and non-Federally operated; and non-Federally owned and operated.

The federal inmate population has grown continuously since the 1980s. In 1981, the federal inmate population consisted of approximately 23,800 inmates. By 1986, the federal inmate population had increased to about 38,700, a 63 percent increase. Growth continued at a steady rate through the 1990s, and in 1998 the federal inmate population had grown 280 percent, reaching 108,000 inmates. As of March 30, 2013, the Bureau inmate population reached 218,123; this includes 176,039 inmates being housed in 119 Bureau institutions, 29,075 being housed in privately-managed secure facilities, and 13,009 being housed in other contract care. Of the 176,039 inmates housed in Bureau institutions, 22,651 are high-security inmates. The Bureau houses these 22,651 high-security inmates in 19 USPs located throughout six regions within the US: The Mid-Atlantic Region; North Central Region; Northeast Region; South Central Region; Southeast Region; and Western Region. Each region provides facilities for housing inmates at all security levels. The 19 USPs are rated for a total capacity of 14,909 high-security inmates. Therefore, the Bureau is currently 53 percent overcrowded at their high-security institutions and are operating at above rated capacity for their USPs.

The inmate population is continuing to grow throughout the regions and security levels. To meet the current and projected bed space needs, the Bureau evaluates the bedspace needs of the regions using a geographically balanced program. When considering placement of an individual the Bureau does consider the origin of the inmate and attempts to place the inmate in an institution that is within the region of the inmate's origin. Placing inmates within their region of origin provides greater opportunity for visitation with family, which aids in the rehabilitation process.

Proposed Action

The proposed action being evaluated in this Draft EIS is the acquisition of property and the construction of a federal correctional facility in Letcher County, Kentucky. The Bureau proposes to acquire approximately 800 acres of land to construct a USP (approximately 61,654 square feet) and FPC (approximately 6,063 square feet) in Letcher County. Inmates housed in the USP would be high-security male inmates and those housed in the FPC would be minimum security male inmates. The facilities would house approximately 1,200 total inmates (approximately 1,088 within the USP and approximately 128 within the FPC). In addition to the USP and FPC, several ancillary facilities necessary for the operation of the USP and FPC would be constructed.

These facilities include the following:

- Central Utility Plant—1,217 square feet
- Firing Range—96 square feet
- Outside Warehouse—3,279 square feet
- UNICOR Warehouse—1,375 square feet
- Staff Training Building—910 square feet

Operation of the USP and FPC would employ approximately 300 full-time staff.

The Process

The process of evaluating the potential environmental impacts associated with federal correctional facility development and operation involves the analysis of many factors and features including, but not limited to: Topography, geology, soils, hydrology, biological resources, cultural resources, hazardous materials, visual and aesthetic features, fiscal considerations, population/employment/housing characteristics, community services and facilities, land uses, utility services, transportation systems, air quality, and noise.

Alternatives

The No Action Alternative, other actions considered, but not carried forward, and alternative development areas for the proposed USP and FPC will be analyzed in this Draft EIS. The proposed sites to be examined consist of non-Bureau property near Whitesburg, Letcher County, Kentucky.

Scoping Process

During the preparation of the Draft EIS, there will be opportunities for public involvement in order to determine the issues to be examined. The first opportunity will be during the project scoping period which will begin on July 26, 2013 with the publication of the Notice of Intent to prepare a Draft EIS in the **Federal Register**. Publication in the **Federal Register** will begin the 30-day public scoping period, which will end on August 26, 2013. During this 30-day public scoping period, a public Scoping Meeting will be held between 5:30 p.m. and 8:00 p.m. on August 13, 2013 at the Letcher County Central High School located at 435 Cougar Drive, Whitesburg, Kentucky. The meeting location, date, and time will be well publicized and has been arranged to allow for the public, as well as interested agencies and organizations to attend. The meetings are being held to allow interested persons to formally express their views on the scope and significant issues to be studied as part of the EIS process. The Scoping Meeting will provide for timely public comments and understanding of federal plans and programs with possible environmental consequences as required by the National Environmental Policy Act of 1969, as amended, and the National

Historic Preservation Act of 1966, as amended.

EIS Preparation

Public notice will be given concerning the availability of the Draft EIS for public review and comment.

ADDRESSES: Questions concerning the proposed action and the EIS may be directed to: Bridgette Lyles, Site Selection Specialist, Capacity Planning and Site Selection Branch, U.S. Department of Justice, Federal Bureau of Prisons, 320 First Street NW., Washington, DC 20534, *blyles@bop.gov,siteselection@bop.gov,* Telephone (202) 514–6470, Telefacsimile (202) 616–6024.

All comments regarding the scoping process must be received or postmarked by August 26, 2013 for consideration in the preparation of the EIS.

Dated: July 18, 2013.

Bridgette Lyles,

Site Selection Specialist, Capacity Planning and Site Selection Branch.

[FR Doc. 2013–17810 Filed 7–25–13; 8:45 am]

BILLING CODE P

MISSISSIPPI RIVER COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETINGS: Mississippi River Commission.

TIME AND DATE: 1:00 p.m., August 12, 2013.

PLACE: On board MISSISSIPPI V at Riverside Park Landing, La Cross, WI

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the St. Paul District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 1:00 p.m., August 13, 2013.

PLACE: On board MISSISSIPPI V at City Front, Dubuque, IA.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Rock Island District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 9:00 a.m., August 16, 2013.

PLACE: On board MISSISSIPPI V at City Front, Alton, IL

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the St. Louis District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 9:00 a.m., August 19, 2013.

PLACE: On board MISSISSIPPI V at City Front, New Madrid, MO

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Memphis District, and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 9:00 a.m., August 20, 2013.

PLACE: On board MISSISSIPPI V at Beale Street Landing, Memphis, TN

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Memphis District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 1:00 p.m., August 21, 2013.

PLACE: On board MISSISSIPPI V at City Front, Vicksburg, MS

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Vicksburg District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 9:00 a.m., August 23, 2013.

PLACE: On board MISSISSIPPI V at Port Commission Dock, Morgan City, LA

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the New Orleans District, and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

CONTACT PERSON FOR FURTHER INFORMATION: Mr. Stephen Gambrell, telephone 601–634–5766.

John W. Peabody,

Major General, U.S. Army, President, Mississippi River Commission.

[FR Doc. 2013–18174 Filed 7–24–13; 4:15 pm]

BILLING CODE 3720–58–P

NATIONAL SCIENCE FOUNDATION

Notice of Permit Emergency Provision Under the Antarctic Conservation Act of 1978 (Pub. L. 95–541)

AGENCY: National Science Foundation.

ACTION: Notice of permit emergency provision for hazardous waste stored in Antarctica at South Pole Station for more than 15 months due to an emergency, as specified by § 671.17.

SUMMARY: The Program of Environment Safety and Health (PESH) in the Division of Polar Programs (GEO/PLR), in accordance with § 671.17, is giving notice that an emergency relating to considerations of the safety of human life or of ships, aircraft or other equipment and facilities of high value, or the protection of the environment caused hazardous waste to be stored in at South Pole Station for more than 15 months.

Hazardous waste in the form of batteries, regulated medical waste, non-controlled medicines, laboratory chemical waste, contaminated laboratory glassware, gas cylinders, light bulbs and paint cans, with an aggregate of approximately 2000 lbs. net weight, was segregated and packaged for removal from the station.

The waste was to be removed in February 2013, at the end of 2012–2013 austral summer season. The unusual warming and melting of the ice runway at McMurdo Station resulted in reduced flight availability to the South Pole in late January and early February. Compatibility issues related to flying hazardous cargo and passengers further reduced the available flights to removing the hazardous waste material. During the final week of the season, the temperature conditions resulted in the formation of ground level contrails. The resulting hazy conditions and extremely low visibility prevented safe airplane loading operations. Potential damage to the airplane and/or harm to human life were the considerations which prevented the hazardous waste from leaving the station.

During the early part of the 2013–2104 austral summer season, the priority will be to remove the South Pole hazardous waste to McMurdo Station, where it will be removed from the continent.

FOR FURTHER INFORMATION CONTACT: Dr. Polly A. Penhale at (703) 292–7420.

Nadene G. Kennedy,

Division of Polar Programs.

[FR Doc. 2013–17964 Filed 7–25–13; 8:45 am]

BILLING CODE 7555–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70014; File No. SR–CBOE–2013–072]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule

July 22, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 11, 2013, Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule. First, the Exchange proposes to eliminate the $200-per-month Hybrid Quoting Infrastructure User Fee, which is assessed to Trading Permit Holders (''TPHs'') to help cover the costs associated with hardware and maintenance services to third-party vendors that provide quoting software used by TPHs to trade on the Exchange's Hybrid Trading System (''Hybrid''). This elimination will allow TPHs to avoid paying this fee, and may encourage more market participants to trade on CBOE.

The Exchange also proposes to make an amendment to the Fees Schedule regarding Clearing Trading Permit Holder Proprietary Facilitation fees. On April 10, 2013, the Exchange amended its Fees Schedule to, in part, make more clear the fact that the Exchange will assess no Clearing Trading Permit Holder Proprietary transaction fees for certain types of facilitation orders (as defined in Footnote 11 of the Fees Schedule), including those executed via the Exchange's Automated Execution Mechanism (''AIM''), in certain classes.[3] However, regular (non-AIM) electronic Clearing Trading Permit Holder Proprietary facilitation orders remained subject to transaction fees. The Exchange hereby proposes to cease assessing transaction fees on such orders.[4] This will mean that electronic Clearing Trading Permit Holder Proprietary Facilitation orders will be assessed no fees regardless of whether they are executed via AIM or the Exchange's regular electronic mechanism (placing such executions on the same footing with regard to fees).

Next, the Exchange proposes to amend its Fees Schedule with regard to fees for SPXPM. On February 19, 2013, the Exchange adopted a set of fees for the trading of SPXPM.[5] The Customer SPXPM fees were set at the same rates as the Customer SPX fees. However, SPXPM trades on the Exchange's Hybrid System, while SPX trades on the Exchange's Hybrid 3.0 trading platform. As such, SPXPM is eligible to trade on AIM, while SPX currently does not trade on AIM. Therefore, the Exchange proposes to create separate lines for

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 69422 (April 22, 2013), 78 FR 25112 (April 29, 2013) (SR–CBOE–2013–042).

[4] As such, along with amending the Equity Options Rate Table, the ETF and ETN Options Rate Table, and the Index Options Rate Table—All Index Products Excluding SPX, SPXW, SPXpm, SRO, OEX, XEO, VIX and VOLATILITY INDEXES, to reflect this change, the Exchange also proposes to amend Footnote 11 to state that no Clearing Trading Permit Holder Proprietary transaction fees will be assessed for facilitation orders electronically (including via AIM).

[5] *See* Securities Exchange Act Release No. 69025 (March 4, 2013), 78 FR 15076 (March 8, 2013) (SR–CBOE–2013–025).

Customer rates in SPXPM on the Specified Proprietary Index Options Rate Table—SPX, SPXW, SPXpm, SRO, OEX, XEO, VIX and VOLATILITY INDEXES and remove SPXPM from those lines listing SPX rates in order to eliminate any potential confusion about where SPXPM can trade. The rate amounts for SPXPM AIM trades will be listed as the same as for other SPXPM trades (as they are now; $0.44 per contract for SPXpm Premium > or = $1 and $0.35 per contract for SPXpm Premium < $1). The AIM Agency/Primary and AIM Contra columns, which reference the AIM Agency/Primary and AIM Contra Execution Fees, as well as delineate which securities (and types of transactions) are eligible for AIM executions, will be modified to state ''SPXpm and VIX Only'' to demonstrate that SPXPM is eligible for AIM executions.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[7] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. The Exchange believes that the elimination of the Hybrid Quoting Infrastructure User Fee is reasonable because it will prevent market participants to whom the fee would otherwise apply from having to pay the fee. This change is equitable and not unfairly discriminatory because it will apply to all market participants.

The Exchange believes that the proposed change to cease assessing transaction fees on regular (non-AIM) electronic Clearing Trading Permit Holder Proprietary facilitation orders is reasonable because Clearing Trading Permit Holders who would otherwise have had to pay for such transactions now will not be required to do so. The Exchange believes that this proposed change is equitable and not unfairly discriminatory because it will place regular electronic (non-AIM) Clearing Trading Permit Holder Proprietary facilitation orders on the same footing (with regards to fees) as Clearing Trading Permit Holder Proprietary facilitation orders executed in AIM. Further, the Exchange believes that it is equitable and not unfairly discriminatory to permit Clearing Trading Permit Holders to execute Proprietary Facilitation orders electronically for free and not give this opportunity to other market participants because Clearing Trading Permit Holders have a number of obligations (such as membership with the Options Clearing Corporation), significant regulatory burdens, and financial obligations, that other market participants do not need to take on. Finally, this proposed change applies to all regular electronic (non-AIM) Clearing Trading Permit Holder Proprietary facilitation orders equally.

The Exchange believes that the clarification regarding SPXPM and its eligibility for AIM executions is consistent with the Section 6(b)(5)[8] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitation transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Making the Fees Schedule more clear that SPXPM trades on AIM will remove any potential confusion, thereby removing an impediment to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest.

The Exchange also believes that assessing Customer transactions in SPXPM (Premium < $1) a fee of $0.35 per contract is consistent with Section 6(b)(4) of the Act,[9] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. The Exchange believes this is reasonable, as well as equitable and not unfairly discriminatory, because it is the same amount as is assessed to Customer transactions in SPX (Premium < $1) (SPX and SPXPM are based on the same underlying index, the S&P 500). The Exchange believes that assessing a higher fee for Customer transactions in SPXPM options whose premium is greater than or equal to $1.00 than for Customer transactions in SPXPM options whose premium is less than $1.00 is equitable and not unfairly discriminatory because nearly all options based on the S&P 500 Index are priced at well above $1.00. However, most Customers, at the end of an expiration cycle, desire to continue to hold options based on the S&P 500 Index (including both SPX and SPXPM), and because it is the end of an expiration cycle, such options are priced very low. The Exchange therefore offers lower pricing for Customer SPX and SPXPM options in order to encourage such trading and thus encourage Customers to open SPX and SPXPM options positions in the next cycle. As these new positions will almost certainly be priced above $1.00, offering the lower pricing for SPXPM options whose premium is below $1.00 therefore benefits market participants trading SPXPM options whose premium is at or above $1.00 by encouraging Customers to open up those positions (thereby providing greater liquidity). Further, other options based on the S&P 500 Index, such as SPX, offer higher pricing for options with a premium of greater than or equal to $1.00 than for those with a premium of less than $1.00.

The Exchange believes that it is equitable and not unfairly discriminatory to offer a higher fee for Customer SPXPM transactions (Premium < $1) than for CBOE Market-Maker/DPM/e-DPM/LMM and Clearing Trading Permit Holder Proprietary SPXPM transactions (Premium < $1) because those market participants undertake certain obligations with respect to trading at CBOE, such as quoting obligations (for CBOE Market-Makers/DPMs/e-DPMs/LMMs) and membership with the Options Clearing Corporation, significant regulatory burdens, and financial obligations, (for Clearing Trading Permit Holders) that Customers do not undertake. The Exchange believes that it is equitable and not unfairly discriminatory to offer a lower Customer fee for SPXPM transactions (Premium < $1) than for similar transactions by Joint Back-Office, Broker-Dealer, Non-Trading Permit Holder Market-Maker, Professional, and Voluntary Professional market participants because such market participants often seek to trade with Customers. Further, the lower fee for Customers will encourage more Customer trading, which provides more liquidity and trading opportunities (with this preferred trading partner) for these other market participants. Also, Customers are often not as sophisticated market participants, and there is a long history of permitting preferential pricing

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f(b)(4).

treatment of Customers in the options industry (indeed, in a number of places, the Exchange Fees Schedule offers lower pricing for Customers than for other market participants). Finally, the Exchange believes that it is equitable and not unfairly discriminatory to assess a higher fee for Customer SPXPM transactions (Premium < $1) than for Customer transactions in other index products (including non-proprietary index products) (Premium < $1) because the Exchange has expended significant resources developing SPXPM and desires to recoup some of such costs.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule changes will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change to eliminate the Hybrid Quoting Infrastructure User Fee will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because it applies to all CBOE market participants. The Exchange does not believe that the proposed rule change to cease assessing transaction fees on regular (non-AIM) electronic Clearing Trading Permit Holder Proprietary facilitation orders will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because it places regular (non-AIM) electronic Clearing Trading Permit Holder Proprietary facilitation orders on the same footing (with regards to fees) as Clearing Trading Permit Holder Proprietary facilitation orders executed in AIM. Further, Clearing Trading Permit Holders have a number of obligations (such as membership with the Options Clearing Corporation), significant regulatory burdens, and financial obligations, that other market participants do not need to take on. Finally, this proposed change applies to all regular electronic (non-AIM) Clearing Trading Permit Holder Proprietary facilitation orders equally.

The Exchange does not believe that the proposed clarification regarding SPXPM fees will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because it merely clarifies the Fees Schedule and also applies equally. Further, the Exchange does not believe that assessing Customer transactions in SPXPM (Premium < $1) a higher fee than for CBOE Market-Maker/DPM/e-DPM/LMM and Clearing Trading Permit Holder Proprietary SPXPM transactions (Premium < $1) will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because those market participants undertake certain obligations with respect to trading at CBOE, such as quoting obligations (for CBOE Market-Makers/DPMs/e-DPMs/LMMs) and membership with the Options Clearing Corporation, significant regulatory burdens, and financial obligations, (for Clearing Trading Permit Holders) that Customers do not undertake. The Exchange does not believe that assessing Customer transactions in SPXPM (Premium < $1) a lower fee than for similar transactions by Joint Back-Office, Broker-Dealer, Non-Trading Permit Holder Market-Maker, Professional, and Voluntary Professional market participants because such market participants often seek to trade with Customers. Further, the lower fee for Customers will encourage more Customer trading, which provides more liquidity and trading opportunities (with this preferred trading partner) for these other market participants. Also, Customers are often not as sophisticated market participants, and there is a long history of permitting preferential pricing treatment of Customers in the options industry (indeed, in a number of places, the Exchange Fees Schedule offers lower pricing for Customers than for other market participants).

The Exchange does not believe that the proposed rule changes to eliminate the Hybrid Quoting Infrastructure User Fee and to cease assessing transaction fees on regular (non-AIM) electronic Clearing Trading Permit Holder Proprietary facilitation orders will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because they may encourage other exchanges to adopt fee changes that will provide more attractive pricing on such exchanges (thereby enhancing intermarket competition). Further, all the proposed rule changes apply only to trading on CBOE. Indeed, the Exchange does not believe that assessing Customer transactions in SPXPM (Premium < $1) a fee of $0.35 per contract will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because SPXPM is only traded on CBOE. To the extent that market participants on other exchanges may be attracted to CBOE due to the proposed changes, such market participants may always elect to become CBOE market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and paragraph (f) of Rule 19b–4 [11] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings 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–CBOE–2013–072 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2013–072. 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

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b-4(f).

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–CBOE–2013–072, and should be submitted on or before August 16, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–17974 Filed 7–25–13; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13669 and #13670]

Pennsylvania Disaster #PA–00058

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the Commonwealth of Pennsylvania dated 07/16/2013.

Incident: Severe Storms and Flooding.

Incident Period: 06/27/2013 through 07/12/2013.

Effective Date: 07/16/2013.

Physical Loan Application Deadline Date: 09/16/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 04/16/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Clearfield; Fayette; Jefferson.

Contiguous Counties:

Pennsylvania: Armstrong; Blair; Cambria; Cameron; Centre; Clarion; Clinton; Elk; Forest; Greene; Indiana; Somerset; Washington; Westmoreland.

Maryland: Garrett.

West Virginia: Monongalia; Preston.

The Interest Rates are:

For Physical Damage:	
Homeowners With Credit Available Elsewhere	3.750
Homeowners Without Credit Available Elsewhere	1.875
Businesses With Credit Available Elsewhere	6.000
Businesses Without Credit Available Elsewhere	4.000
Non-Profit Organizations With Credit Available Elsewhere	2.875
Non-Profit Organizations Without Credit Available Elsewhere	2.875
For Economic Injury:	
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000
Non-Profit Organizations Without Credit Available Elsewhere	2.875

The number assigned to this disaster for physical damage is 13669 6 and for economic injury is 13670 0.

The States which received an EIDL Declaration # are Pennsylvania; Maryland; West Virginia.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: July 16, 2013

Karen G. Mills,

Administrator.

[FR Doc. 2013–17943 Filed 7–25–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 13647 and # 13648]

Oklahoma Disaster Number OK–00073

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an Amendment of the Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Oklahoma (FEMA—4117—DR), dated 06/28/2013.

Incident: Severe Storms, Tornadoes and Flooding.

Incident Period: 05/18/2013 through 06/02/2013.

Effective Date: 07/18/2013.

Physical Loan Application Deadline Date: 08/27/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 04/03/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of OKLAHOMA, dated 06/28/2013, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties

Craig, Haskell, McIntosh, Ottawa.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2013–17932 Filed 7–25–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 13586 and # 13587]

Oklahoma Disaster Number OK–00071

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 5.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Oklahoma (FEMA—4117—DR), dated 05/20/2013.

Incident: Severe Storms, Tornadoes and Flooding.

Incident Period: 05/18/2013 through 06/02/2013.

Effective Date: 07/12/2013.

Physical Loan Application Deadline Date: 08/19/2013.

Eidl Loan Application Deadline Date: 02/20/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for the State of Oklahoma, dated 05/20/2013 is hereby amended to extend the deadline for filing applications for physical damages as a result of this disaster to 08/19/2013.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Cynthia G. Pitts,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2013–17934 Filed 7–25–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13674 and #13675]

Missouri Disaster #MO–00066

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Missouri (FEMA—4130—DR), dated 07/18/2013.

Incident: Severe Storms, Straight-line Winds, Tornadoes, and Flooding.

Incident Period: 05/29/2013 through 06/10/2013.

Effective Date: 07/18/2013.

Physical Loan Application Deadline Date: 09/16/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 04/18/2014.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing And Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 07/18/2013, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Barton; Callaway; Cape Girardeau; Chariton; Clark; Howard; Iron; Knox; Lewis; Lincoln; Maries; Marion; Miller; Montgomery; Osage; Perry; Pike; Putnam; Ralls; Saint Charles; Saint Louis; Sainte Genevieve; Shelby; Stoddard; Sullivan; Texas; Webster.

The Interest Rates are:

For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere ...	2.875
Non-Profit Organizations Without Credit Available Elsewhere	2.875
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	2.875

The number assigned to this disaster for physical damage is 13674B and for economic injury is 13675B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera

Associate Administrator for Disaster Assistance.

[FR Doc. 2013–17944 Filed 7–25–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Military Reservist Economic Injury Disaster Loans Interest Rate for Fourth Quarter FY 2013

In accordance with the Code of Federal Regulations 13—Business Credit and Assistance § 123.512, the following interest rate is effective for Military Reservist Economic Injury Disaster Loans approved on or after July 19, 2013.

Military Reservist Loan Program—4.000%

Dated: July 19, 2013.

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2013–17936 Filed 7–25–13; 8:45 am]

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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 one extension and two revisions 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 September 24, 2013. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. Incorporation by Reference of Oral Findings of Fact and Rationale in Wholly Favorable Written Decisions (Bench Decision Regulation)—20 CFR 404.953 and 416.1453—0960–0694. If an administrative law judge (ALJ) makes a wholly favorable oral decision that includes all the findings and rationale for the decision for a claimant of title II benefits or title XVI payments at an administrative appeals hearing, the ALJ sends a Notice of Decision (Form HA–82), as the records from the oral hearing preclude the need for a written decision. We call this the incorporation-by-reference process. In addition, the regulations for this process state that if the involved parties want a record of the oral decision, they may submit a written request for these records. SSA collects

identifying information under the aegis of Sections 20 CFR 404.953 and 416.1453 of the Code of Federal Regulations to determine how to send interested individuals written records of a favorable incorporation-by-reference oral decision made at an administrative review hearing. Since there is no prescribed form to request a written record of the decision, the involved parties send SSA their contact information and reference the hearing for which they would like a record. The respondents are applicants for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) payments, or their representatives, to whom SSA gave a wholly favorable oral decision under the regulations cited above.

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)
HA–82	2,500	1	5	208

2. Request for Proof(s) from Custodian of Records—20 CFR 404.703, 404.704, 404.720, 404.721, 404.723, 404.725, & 404.728—0960–0766. SSA sends Form SSA–L707, Request for Proof(s) from Custodian of Records, to records custodians on behalf of individuals who need help obtaining evidence of death, marriage, or divorce in connection with claims for benefits. SSA uses the information from the SSA–L707 to determine eligibility for benefits. The respondents are records custodians including statistics and religious entities, coroners, funeral directors, attending physicians, and State agencies.

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)
State or Local Government	501	1	10	84
Private Sector	99	1	10	17
Totals	600			101

II. SSA submitted the information collection below to OMB for clearance. Your comments regarding the information collection 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 August 26, 2013. Individuals can obtain copies of the OMB clearance package by writing to *OR.Reports.Clearance@ssa.gov.*

Request to Withdraw a Hearing Request; Request to Withdraw an Appeals Council Request for Review; and Administrative Review Process for Adjudicating Initial Disability Claims—20 CFR Parts 404, 405, and 416—0960–0710. Claimants have a statutory right under the Social Security Act and current regulations to apply for Social Security Disabiltiy Insurance (SSDI) benefits or SSI payments. SSA must collect information at each step of the administrative process to adjudicate claims fairly and efficiently. SSA collects this information to establish a claimant's right to administrative review and the severity of the claimant's alleged impairments. SSA uses the information to determine entitlement or continuing eligibility to DIB or SSI payments and to enable appeals of these determinations. In addition, SSA collects information on Forms HA–85 and HA–86 to allow claimants to withdraw a hearing request or an Appeals Council review request. The respondents are applicants for title II SSDI benefits or title XVI SSI payments; their appointed representatives; legal advocates; medical sources; and schools.

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)
404.961, 416.1461, 405.330, and 405.366	12,220	1	20	4,073
404.950, 416.1450, and 405.332	1,040	1	20	347
404.949 and 416.1449	2,868	1	60	2,868
405.334	20	1	60	20
404.957, 416.1457, and 405.380	21,041	1	10	3,507
405.381	37	1	30	19
405.401	5,310	1	10	885
404.971 and 416.1471 (HA–85; HA–86)	1,606	1	10	268
404.982 and 416.1482	1,687	1	30	844
404.987 & 404.988 and 416.1487 & 416.1488 and 405.601	12,425	1	30	6,213
405.372(c)	5,310	1	10	885
405.1(b)(5) 405.372(b)	833	1	30	417
405.505	833	1	30	417
405.1(c)(2)	5,310	1	10	885

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
405.20	5,310	1	10	885
Totals	75,850			22,533

Dated: July 23, 2013.

Faye Lipsky,

Reports Clearance Director, Social Security Administration.

[FR Doc. 2013–18005 Filed 7–25–13; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 8391]

Certifications Pursuant to Section 609 of Public Law 101–162

SUMMARY: On May 2, 2013, the Department of State certified, pursuant to Section 609 of Public Law 101–162, that 13 nations have adopted programs to reduce the incidental capture of sea turtles in their shrimp fisheries comparable to the program in effect in the United States. The Department also certified that the fishing environments in 26 other countries and one economy do not pose a threat of the incidental taking of sea turtles protected under Section 609.

DATES: *Effective Date:* On Publication.

FOR FURTHER INFORMATION CONTACT: Marlene M. Menard, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State, Washington, DC 20520–7818; telephone: (202) 647–5827; email: menardmm@state.gov.

SUPPLEMENTARY INFORMATION: Section 609 of Public Law 101–162 (''Section 609'') prohibits imports of certain categories of shrimp unless the President certifies to the Congress by May 1, 1991, and annually thereafter, either: (1) That the harvesting nation or economy has adopted a program governing the incidental capture of sea turtles in its commercial shrimp fishery comparable to the program in effect in the United States and has an incidental take rate comparable to that of the United States; or (2) that the fishing environment in the harvesting nation or economy does not pose a threat of the incidental taking of sea turtles. The President has delegated the authority to make this certification to the Department of State (''the Department''). Revised State Department guidelines for making the required certifications were published in the **Federal Register** on July 2, 1999 (Vol. 64, No. 130, Public Notice 3086).

On May 2, 2013, the Department certified 13 nations on the basis that their sea turtle protection programs are comparable to that of the United States: Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Nigeria, Pakistan, Panama, and Suriname. The Department also certified 26 shrimp harvesting nations and one economy as having fishing environments that do not pose a danger to sea turtles. Sixteen nations have shrimping grounds only in cold waters where the risk of taking sea turtles is negligible. They are: Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, the United Kingdom, and Uruguay. Ten nations and one economy only harvest shrimp using small boats with crews of fewer than five that use manual rather than mechanical means to retrieve nets, or catch shrimp using other methods that do not threaten sea turtles. Use of such small-scale technology does not adversely affect sea turtles. The 10 nations and one economy are: the Bahamas, Belize, China, the Dominican Republic, Fiji, Hong Kong, Jamaica, Oman, Peru, Sri Lanka, and Venezuela.

The Department of State has communicated the certifications under Section 609 to the Office of Field Operations of U.S. Customs and Border Protection.

All DS–2031 forms accompanying shrimp imports from uncertified nations or economies must be originals and signed by the competent domestic fisheries authority.

In order for shrimp harvested with turtle excluder devices (TEDs) in an uncertified nation or economy to be eligible for importation into the United States under the DS–2031 section 7(A)(2) provision for ''shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States'', the Department of State must determine in advance that the government of the harvesting nation or economy has put in place adequate procedures to ensure the accurate completion of the DS–2031 forms. At this time, the Department has made such a determination only with respect to Australia, Brazil and France. Thus, the importation of TED-caught shrimp from any other uncertified nation or economy will not be allowed. For Brazil, only shrimp harvested in the northern shrimp fishery are eligible for entry under this provision. For Australia, shrimp harvested in the Exmouth Gulf Prawn Fishery, the Northern Prawn Fishery, the Queensland East Coast Trawl Fishery, and the Torres Strait Prawn Fishery are eligible for entry under this provision. For France, shrimp harvested in the French Guiana domestic trawl fishery are eligible for entry under this provision. An official of the competent domestic fisheries authority for the country or economywhere the shrimp were harvested must sign the DS–2031 form accompanying these imports into the United States.

In addition, the Department has determined that shrimp harvested in the Spencer Gulf region in Australia may be exported to the United States under the DS–2031 section 7(A)(4) provision for ''shrimp harvested in a manner or under circumstances determined by the Department of State not to pose a threat of the incidental taking of sea turtles.'' An official of the Government of Australia must certify the DS–2031 form accompanying these imports into the United States.

Dated: July 22, 2013.

David A. Balton,

Deputy Assistant Secretary of State for Oceans and Fisheries, Department of State.

[FR Doc. 2013–18019 Filed 7–25–13; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 8393]

Culturally Significant Objects Imported for Exhibition Determinations: ''Egypt's Mysterious Book of the Faiyum''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and

Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Egypt's Mysterious Book of the Faiyum,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Walters Art Museum, Baltimore, MD, from on or about October 6, 2013, until on or about January 5, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: July 22, 2013.

Ann Stock,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–18017 Filed 7–25–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8394]

Culturally Significant Objects Imported for Exhibition Determinations: ''Canterbury and St. Albans: Treasures from Church and Cloister''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Canterbury and St. Albans: Treasures from Church and Cloister,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The J. Paul Getty Museum at the Getty Center, Los Angeles, CA, from on or about September 20, 2013, until on or about February 2, 2014; The Metropolitan Museum of Art, New York, NY, from on or about February 24, 2014, until on or about May 18, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: July 22, 2013.

Ann Stock,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–18016 Filed 7–25–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8392]

Overseas Security Advisory Council (OSAC) Meeting Notice Closed Meeting

The Department of State announces a meeting of the U.S. State Department—Overseas Security Advisory Council on August 27—28, 2013. Pursuant to Section 10(d) of the Federal Advisory Committee Act (5 U.S.C. Appendix), 5 U.S.C. 552b(c)(4), and 5 U.S.C. 552b(c)(7)(E), it has been determined that the meeting will be closed to the public. The meeting will focus on an examination of corporate security policies and procedures and will involve extensive discussion of trade secrets and proprietary commercial information that is privileged and confidential, and will discuss law enforcement investigative techniques and procedures. The agenda will include updated committee reports, a strategic planning session, and other matters relating to private sector security policies and protective programs and the protection of U.S. business information overseas.

For more information, contact Marsha Thurman, Overseas Security Advisory Council, U.S. Department of State, Washington, DC 20522–2008, phone: 571–345–2214.

Gregory B. Starr,

Director of the Diplomatic Security Service, U.S. Department of State.

[FR Doc. 2013–18018 Filed 7–25–13; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2013–28]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before August 15, 2013.

ADDRESSES: You may send comments identified by Docket Number FAA–2013–0294 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility 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.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the

individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Keira Jones (202) 267–4025, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on July 23, 2013.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2013–0294.

Petitioner: Republic Airline, Inc.

Section of 14 CFR Affected: 14 CFR 121.500 through 121.505.

Description of Relief Sought: Republic Airline seeks an exemption to conduct supplemental operations in accordance with the flight time limitations and rest requirements prescribed for domestic operations under part 121, Subpart Q.

[FR Doc. 2013–17969 Filed 7–25–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2013–31]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATE: Comments on this petition must identify the petition docket number and must be received on or before August 15, 2013.

ADDRESSES: You may send comments identified by Docket Number FAA–2013–0571 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility 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.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Keira Jones (202) 267–4024, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on July 23, 2013.

Lirio Liu,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2013–0571.

Petitioner: Ameriflight.

Section of 14 CFR Affected: 14 CFR 91.225(a), (b), and (d).

Description of Relief Sought:

Ameriflight requests relief to obtain a 4 year delay to the requirements in 14 CFR § 91.225(a), (b), and (d), Automatic Dependent Surveillance-Broadcast (ADS–B) Out, on all aircraft in its fleet. Specifically, the regulation requires specific operators to be equipped with Extended Squitter (ES) ADS–B and Traffic information Service-Broadcast (TIS–B) operating on the frequency of 1090 Megahertz (MHz) and Universal Access Transceiver (UAT) ADS–B equipment operating on the frequency of 978 MHz by January 1, 2020. The petitioner states the requirement will create an undue burden on its maintenance department, and exceed its capability to remove aircraft from service for the required installation.

[FR Doc. 2013–17970 Filed 7–25–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Limitation on Claims against Proposed Public Transportation Projects

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice.

SUMMARY: This notice announces a final environmental action taken by the Federal Transit Administration (FTA) for a project in New York, NY. The purpose of this notice is to announce publicly the environmental decision by FTA on the subject project and to activate the limitation on any claims that may challenge this final environmental action.

DATES: By this notice, FTA is advising the public of a final agency action subject to Section 139(l) of Title 23, United States Code (U.S.C.). A claim seeking judicial review of the FTA action announced herein for the listed public transportation project will be barred unless the claim is filed on or before December 23, 2013.

FOR FURTHER INFORMATION CONTACT: Nancy-Ellen Zusman, Assistant Chief Counsel, Office of Chief Counsel, (312) 353–2577 or Terence Plaskon, Environmental Protection Specialist, Office of Human and Natural Environment, (202) 366–0442. FTA is located at 1200 New Jersey Avenue SE., Washington, DC 20590. Office hours are from 9:00 a.m. to 5:30 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FTA has taken final agency action by issuing a certain approval for the public transportation project listed below. The action on the project, as well as the laws under which such action was taken, are described in

the documentation issued in connection with the project to comply with the National Environmental Policy Act (NEPA) and in other documents in the FTA administrative record for the project. Interested parties may contact either the project sponsor or the relevant FTA Regional Office for more information on the project. Contact information for FTA's Regional Offices may be found at *http://www.fta.dot.gov.*

This notice applies to all FTA decisions on the listed project as of the issuance date of this notice and all laws under which such action was taken, including, but not limited to, NEPA [42 U.S.C. 4321–4375], Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303], Section 106 of the National Historic Preservation Act [16 U.S.C. 470f], and the Clean Air Act [42 U.S.C. 7401–7671q]. This notice does not, however, alter or extend the limitation period for challenges of project decisions subject to previous notices published in the **Federal Register**. The project and action that are the subject of this notice are:

Project name and location: Second Avenue Subway, New York, NY. *Project sponsor:* Metropolitan Transportation Authority (MTA). *Project description:* The Second Avenue Subway Project is the phased construction of a new 8.5-mile subway line under Second Avenue in Manhattan from 125th Street to Hanover Square in Lower Manhattan. It includes 16 new stations that will be accessible by persons with disabilities. FTA has agreed to partially fund the first phase of the project, which will run between 105th Street and 62nd Street and will connect to the existing F Line at 63rd Street. Various changes to Phase 1 of the project, as well as final design of certain elements of Phase 1 of the project, have been evaluated in a number of technical memoranda. In Technical Memorandum No. 11, the MTA proposed to change the location of the street-level portion of Entrance 1 of the 72nd Street Station from within the building at 301 East 69th Street to the east sidewalk of Second Avenue in front of the building at 301 East 69th Street. This notice only applies to the discrete action taken by FTA at this time, as described below. Nothing in this notice affects FTA's previous decisions, or notice thereof, for this project. *Final agency action:* FTA determination that neither a supplemental environmental impact statement nor a supplemental environmental assessment is necessary. *Supporting documentation:* Technical Memorandum No. 11, Assessing Design Changes: 72nd Street Station, Entrance 1.

Lucy Garliauskas,

Associate Administrator for Planning and Environment, Washington, DC.

[FR Doc. 2013–17995 Filed 7–25–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. MCF 21054]

Frank Sherman, Evergreen Trails, Inc., Cabana Coaches, LLC, TMS West Coast, Inc. and FSCS Corporation—Intra-Corporate Family Transaction Exemption

Frank Sherman, Evergreen Trails, Inc. (Evergreen), Cabana Coaches, LLC (Cabana), TMS West Coast, Inc. (TMS), and FSCS Corporation (FSCS) (collectively, Applicants), have filed a verified notice of exemption under the Board's class exemption procedures at 49 CFR 1182.9.[1] The transaction involves the assignment of assets acquired by Frank Sherman from Coach America Holdings, Inc. (Coach America),[2] specifically, those of Midnight Sun Tours, Inc. (Midnight Sun) and American Coach Lines of Miami, Inc. (ACL Miami), to Evergreen. Frank Sherman is an individual who controls motor passenger carriers Evergreen and Cabana and is the controlling shareholder of noncarrier holding companies FSCS and TMS. Cabana is owned directly by FSCS and Evergreen is owned indirectly by FSCS through TMS.

In Docket No. MCF 21047, Applicants indicated that, under the terms of an asset purchase agreement, TMS would have the right to purchase 12 Coach America subsidiaries and would then assign its right to purchase to either FSCS or to Evergreen and Cabana. If the right to purchase were assigned to Evergreen and Cabana, Cabana would receive the right to purchase and consolidate the assets of Coach-Miami and Midnight Sun into Cabana; Evergreen would receive the right to purchase and consolidate the assets of all of the other Coach America subsidiaries into Evergreen. The Board granted the application by decision served on September 6, 2012.

Applicants subsequently decided that, primarily for insurance reasons, it would be more efficient and cost effective to consolidate the assets of Midnight Sun and ACL Miami into Evergreen rather than Cabana, as had been contemplated at the time the acquisition application was filed. Applicants proceeded to assign the assets to Evergreen and state that the assignment of assets did not affect the ultimate control of the assets, which remains with Frank Sherman.

This is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1182.9. Applicants state that the transaction has not and will not result in any change in service levels, significant operational changes, or any change in the competitive balance with carriers outside the corporate family. Applicants also state that (1) the assets of Midnight Sun and ACL Miami were assigned to Evergreen pursuant to an Assumption and Assignment Agreement, and (2) the only effect on employees is that employees that would have been employed by Cabana are now employed by Evergreen.

The transaction was consummated on October 1, 2012.[3]

If the verified notice contains false or misleading information, the Board shall summarily revoke the exemption and require divestiture. Petitions to revoke the exemption under 49 U.S.C. 13541(d) may be filed at any time. *See* 49 CFR 1182.9(c).

An original and ten copies of all pleadings, referring to Docket No. MCF 21054, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on David H. Coburn, Steptoe & Johnson LLP, 1330 Connecticut Avenue NW., Washington, DC 20036.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: July 18, 2013.

[1] The Board has exempted intra-corporate family transactions of motor carriers of passengers that do not result in significant operational changes, adverse changes in service levels, or a change in the competitive balance with carriers outside the corporate family in *Class Exemption for Motor Passenger Intra-Corporate Family Transactions,* FD 33285 (STB served Feb. 18, 2000).

[2] *See Frank Sherman—Acquisition & Consolidation of Assets—American Charters, Ltd.,* MCF 21047 (STB served Sept. 6, 2012).

[3] Applicants originally notified the Board of this transfer of assets to Evergreen in a letter filed on October 9, 2012. In a decision served on June 6, 2013, the Board, noting that this transfer appeared to be a transaction within a motor carrier family requiring Board approval, directed Applicants to file with the Board a notice of exemption under 49 CFR 1182.9 or explain why such a filing is unnecessary.

By the Board, Richard Armstrong, Acting Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2013–17942 Filed 7–25–13; 8:45 am]

BILLING CODE 4915–01–P

FEDERAL REGISTER

Vol. 78 Friday,

No. 144 July 26, 2013

Part II

Commodity Futures Trading Commission

17 CFR Chapter I

Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations; Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

RIN 3038–AD85

Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations

AGENCY: Commodity Futures Trading Commission.

ACTION: Interpretive Guidance and Policy Statement.

SUMMARY: On July 12, 2012, the Commodity Futures Trading Commission (''Commission'' or ''CFTC'') published for public comment its proposed interpretive guidance and policy statement (''Proposed Guidance'') regarding the cross-border application of the swaps provisions of the Commodity Exchange Act (''CEA''), as added by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'' or ''Dodd-Frank''). On December 21, 2012, the Commission also proposed further guidance on certain aspects of the Proposed Guidance (''Further Proposed Guidance'').

The Commission has determined to finalize the Proposed Guidance with certain modifications and clarifications to address public comments. The Commission's Interpretive Guidance and Policy Statement (''Guidance'') addresses the scope of the term ''U.S. person,'' the general framework for swap dealer and major swap participant registration determinations (including the aggregation requirement applicable to the de minimis calculation with respect to swap dealers), the treatment of swaps involving certain foreign branches of U.S. banks, the treatment of swaps involving a non-U.S. counterparty guaranteed by a U.S. person or ''affiliate conduit,'' and the categorization of the Dodd-Frank swaps provisions as ''Entity-Level Requirements'' or ''Transaction-Level Requirements.''

DATES: *Effective Date:* This Guidance will become effective July 26, 2013.

FOR FURTHER INFORMATION CONTACT: Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, (202) 418–5977, *gbarnett@cftc.gov;* Sarah E. Josephson, Director, Office of International Affairs, (202) 418–5684, *sjosephson@cftc.gov;* Mark Fajfar, Assistant General Counsel, Office of General Counsel, (202) 418–6636, *mfajfar@cftc.gov;* Laura B. Badian, Counsel, Office of General Counsel, (202) 418–5969, *lbadian@cftc.gov;* Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

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I. Introduction

A. The Dodd-Frank Wall Street Reform and Consumer Protection Act

On July 21, 2010, President Obama signed the Dodd-Frank Act,[1] Title VII of which amended the CEA to establish a new regulatory framework for swaps. The legislation was enacted to reduce systemic risk (including risk to the U.S. financial system created by interconnections in the swaps market), 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 [2] and major swap participants (each, an ''MSP''); (2) imposing clearing and trade execution requirements on standardized derivatives products; (3) creating rigorous recordkeeping and data reporting regimes with respect to swaps, including real-time public reporting; and (4) enhancing the Commission's rulemaking and enforcement authorities over all registered entities, intermediaries, and swap counterparties subject to the Commission's oversight.

Section 722(d) of the Dodd-Frank Act amended the CEA by adding section 2(i),[3] which provides that the swaps provisions of the CEA (including any CEA rules or regulations) apply to cross-border activities when certain conditions are met, namely, when such activities have a ''direct and significant connection with activities in, or effect on, commerce of the United States'' or when they contravene Commission rules or regulations as are necessary or appropriate to prevent evasion of the swaps provisions of the CEA enacted under Title VII of the Dodd-Frank Act.[4]

The potential for cross-border activities to have a substantial impact on the U.S. financial system was apparent in the fall of 2008, when a series of large financial institutional failures threatened to freeze foreign and domestic credit markets. In September 2008, for example, U.S.-regulated insurance company American International Group (''AIG'') nearly failed as a result of risk incurred by the London swap trading operations of its subsidiary AIG Financial Products (''AIGFP'').[5] Enormous losses on credit default swaps entered into by AIGFP and guaranteed by AIG led to a credit downgrade for AIG, triggering massive collateral calls and an acute liquidity crisis for both entities. AIG only avoided default through more than $112.5

[1] Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[2] For purposes of this Guidance, the term ''swap dealer'' means any swap dealer registered with the Commission. Similarly, the term ''MSP'' means any MSP registered with the Commission.

[3] 7 U.S.C. 2(i).

[4] *Id.* Section 2(i) of the CEA states that the provisions of the Act relating to swaps that were enacted by the Wall Street Transparency and Accountability Act of 2010 (including any rule prescribed or regulation promulgated under that Act), shall not apply to activities outside the United States unless those activities have a direct and significant connection with activities in, or effect on, commerce of the United States; or contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of this Act that was enacted by the Wall Street Transparency and Accountability Act of 2010.

[5] *See, e.g.,* Congressional Oversight Panel, June Oversight Report, The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy, (Jun. 10, 2010), available at *http://www.gpo.gov/fdsys/pkg/CPRT–111JPRT56698/pdf/CPRT–111JPRT56698.pdf* (''AIG Report''); Office of the Special Inspector General for the Troubled Asset Relief Program, Factors Affecting Efforts to Limit Payments to AIG Counterparties (Nov. 17, 2009), available at *http://www.sigtarp.gov/Audit%20Reports/Factors_Affecting_Efforts_to_Limit_Payments_to_AIG_Counterparties.pdf.* AIGFP was a Delaware corporation based in Connecticut that was an active participant in the credit default swap (''CDS'') market in the years leading up to the crisis. *See id.* at 23. AIGFP's CDS activities benefited from credit support provided by another Delaware corporation, American International Group, Inc., AIGFP's highly-rated parent company. Although both AIG and AIGFP were incorporated and headquartered in the U.S., much of AIGFP's CDS business was conducted through its London office and involved non-U.S. counterparties and credit exposures. *Id.* at 18. See also Office of the Special Inspector General for the Troubled Asset Relief Program, Factors Affecting Efforts to Limit Payments to AIG Counterparties, at 20 (Nov. 17, 2009) (listing AIGFP's CDS counterparties, including a variety of U.S. and foreign financial institutions), available at: *http://www.sigtarp.gov/Audit%20Reports/Factors_Affecting_Efforts_to_Limit_Payments_to_AIG_Counterparties.pdf.*

billion in support from the Federal Reserve Bank of New York and nearly $70 billion from the U.S. Department of the Treasury and the Federal Reserve.

A global, complex, and highly integrated business model also played a role in, and complicated, the bankruptcy of former U.S.-based multinational corporation Lehman Brothers Holding Inc. (''LBHI'') in September 2008. In addition to guaranteeing certain swaps for its subsidiary Lehman Brothers International Europe (''LBIE''), estimated at nearly 130,000 OTC derivatives contracts at the time LBIE was placed into administration on September 15, 2008, LBHI and its global affiliates relied on each other for many of their financial and operational services, including treasury and depository functions, custodial arrangements, trading facilitation, and information management.[6] The complexity of the financial and operational relationships of LBHI and its domestic and international affiliates, including with respect to risk associated with swaps, provides an example of how risks can be transferred across multinational affiliated entities, in some cases in non-transparent ways that make it difficult for market participants and regulators to fully assess those risks.

Even in the absence of an explicit business arrangement or guarantee, U.S. companies may for reputational or other reasons choose, or feel compelled, to assume the cost of risks incurred by foreign affiliates. In 2007, U.S.-based global investment firm Bear Stearns decided to extend loans secured by assets of uncertain value to two Cayman Islands-based hedge funds it sponsored after they suffered substantial losses due to their investments in subprime mortgages, even though Bear Stearns was not legally obligated to support those funds.[7] Shortly thereafter, the funds, filed for bankruptcy protection.[8]

Although the Dodd-Frank Act was enacted in the wake of the 2008 financial crisis, the impact of cross-border activities on the health and stability of U.S. companies and financial markets is not new. A decade before the AIG and Lehman collapses, a Cayman Islands hedge fund managed by Connecticut-based Long-Term Capital Management L.P. (''LTCM'') nearly failed.[9] The hedge fund had a swap book of more than $1 trillion notional and only $4 billion in capital. The hedge fund avoided collapse only after the Federal Reserve Bank of New York intervened and supervised a financial rescue and reorganization by creditors of the fund.[10] While the fund was a Cayman Island partnership, its default would have caused significant market disruption in the United States.[11]

More recently, J.P. Morgan Chase & Co. (''J.P. Morgan''), the largest U.S. bank, disclosed a multi-billion dollar trading loss stemming in part from positions in a credit-related swap portfolio managed through its London Chief Investment Office.[12] The relationship between the New York and London offices of J.P. Morgan that were involved in the credit swaps that were the source of this loss demonstrates the close integration among the various branches, agencies, offices, subsidiaries and affiliates of U.S. financial institutions, which may be located both inside and outside the United States. Despite their geographic expanse, the branches, agencies, offices, subsidiaries and affiliates of large U.S. financial institutions in many cases effectively operate as a single business.[13]

Efforts to regulate the swaps market in the wake of the 2008 financial crisis are underway not only in the United States, but also abroad. In 2009, leaders of the Group of 20 (''G20'')—whose membership includes the European Union (''EU''), the United States, and 18 other countries—agreed that: (i) OTC derivatives contracts should be reported to trade repositories; (ii) all standardized OTC derivatives contracts should be cleared through central counterparties and traded on exchanges or electronic trading platforms, where appropriate, by the end of 2012; and (iii) non-centrally cleared contracts should be subject to higher capital requirements. In line with the G20 commitment, much progress has been made to coordinate and harmonize international reform efforts, but the pace of reform varies among jurisdictions and disparities in regulations remain due to differences in cultures, legal and political traditions, and financial systems.[14]

[6] ''The global nature of the Lehman business with highly integrated, trading and non-trading relationships across the group led to a complex series of inter-company positions being outstanding at the date of Administration. There are over 300 debtor and creditor balances between LBIE and its affiliates representing $10.5B of receivables and $11.0B of payables as of September 15 2008.'' *See* Lehman Brothers International (Europe) in Administration, Joint Administrators' Progress Report for the Period 15 September 2008 to 14 March 2009 (Apr. 14, 2009) (''Lehman Brothers Progress Report''), available at *http://www.pwc.co.uk/en_uk/uk/assets/pdf/lbie-progress-report-140409.pdf.*

[7] *See In re Bear Sterns High-Grade Structured Credit Strategies Master Funds, Ltd.,* 374 B.R. 122 (Bankr. S.D.N.Y. 2007), available at *http://www.nysb.uscourts.gov/opinions/brl/158971_25_opinion.pdf.*

[8] *See id.*

[9] *See* The President's Working Group on Financial Markets, Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management (April 1999), available at *http://www.treasury.gov/resource-center/fin-mkts/Documents/hedgfund.pdf.*

[10] *See id.* at 13.

[11] *See id.* at 17.

[12] *See* Sen. Permanent Subcomm. on Investigations, 113th Cong., Majority and Minority Staff Report, JPMorgan Chase Whale Trades: A Case History of Derivatives Risks and Abuses (March 15, 2013), available at *http://www.levin.senate.gov/download/?id=bfb5cd04-41dc-4e2d-a5e1-ab2b81abfaa8-2560k. See also* Dodd-Frank Statement (''[A]ny suggestion that U.S. financial entities learned enough from AIG's devastating misjudgments are [sic] undercut by the multi-billion dollar loss incurred by a bank generally considered to be among the most careful—J.P.Morgan Chase—in its London derivative trading.'').

[13] *See* Letter from Sen. Carl Levin, Chairman of the Permanent Subcommittee on Investigations at 4 (Apr. 23, 2013) (''Letter from Sen. Levin''), available at *http://www.levin.senate.gov/download/levin_comment_letter_cftc_042313. See also* Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 FR 41214, 41216 (Jul. 12, 2012) (''Proposed Guidance'').

[14] Legislatures and regulators in a number of foreign jurisdictions are undertaking significant regulatory reforms over the swaps market and its participants. *See* CFTC and SEC, Joint Report on International Swap Regulation Required by Section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act at 13 (Jan. 31, 2012), available at *http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/dfstudy_isr_013112.pdf.*

For example, the European Commission released a public consultation on revising the Markets in Financial Instruments Directive (''MiFID'') in December 2010. *See* ''European Commission Public Consultation: Review of the Markets in Financial Instruments Directive'' (Dec. 8, 2010), available at *http://ec.europa.eu/internal_market/consultations/docs/2010/mifid/consultation_paper_en.pdf.*

In October 2011, the European Commission released two public consultations, one to revise MiFID and the other for creating a new regulation entitled the Markets in Financial Instruments Regulation (''MiFIR''). *See* European Commission, Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council, COM (2011) 656 final (Oct. 20, 2011), available at *http://ec.europa.eu/internal_market/securities/docs/isd/mifid/COM_2011_656_en.pdf;* European Commission, Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending regulation [EMIR] on OTC derivatives, central counterparties and trade repositories, COM (2011) 652 final (Oct. 20, 2011), available at *http://ec.europa.eu/internal_market/securities/docs/isd/mifid/COM_2011_652_en.pdf.*

As of March 15, 2013, the majority of the regulatory technical standards (*i.e.,* rulemakings) of the European Market Infrastructure Regulation (''EMIR'') entered into force. The EMIR and the related regulatory technical standards generally regard requirements for clearinghouses, clearing, data repositories, regulatory reporting, and uncleared OTC transactions. Certain technical standards under EMIR have yet to be developed and completed. These standards regard margin and capital for uncleared transactions and contracts that have a ''direct, substantial and foreseeable effect within the [European] Union.'' *See* EMIR Article 11(14)(e).

The Japanese legislature passed the Amendment to the Financial Instruments and Exchange Act

The failures of Lehman Brothers and the Bear Stearns hedge funds, and the near failures of LTCM's hedge fund and AIG (which required intervention by the government and Federal Reserve), and their collateral effects on the broader economy and U.S. commerce,[15] provide examples of how risks that a large financial institution takes abroad in swap transactions or otherwise can result in or contribute to substantial losses to U.S. persons and threaten the financial stability of the entire U.S. financial system. These failures and near failures revealed the vulnerability of the U.S. financial system and economy to systemic risk resulting from, among other things, poor risk management practices of certain financial firms, the lack of supervisory oversight for certain financial institutions as a whole, and the overall interconnectedness of the global swap business.[16] These failures and near failures demonstrate the need for and potential implications of cross-border swaps regulation.

B. The Proposed Guidance and Further Proposed Guidance

To address the scope of the cross-border application of the Dodd-Frank Act, the Commission published the Proposed Guidance on July 12, 2012, setting forth its proposed interpretation of the manner in which it intends that section 2(i) of the CEA would apply Title VII's swaps provisions to cross-border activities.[17] In view of the complex legal and policy issues involved, the Commission published the Proposed Guidance to solicit comments from all interested persons and to further inform the Commission's deliberations. Specifically, the Proposed Guidance addressed the general manner in which the Commission proposed to consider: (1) When a non-U.S. person's swap dealing activities would justify registration as a ''swap dealer,'' [18] as further defined in a joint release adopted by the Commission and the Securities and Exchange Commission (''SEC''); [19] (2) when a non-U.S. person's swaps positions would justify registration as a ''major swap participant,'' [20] as further defined in the Final Entities Rules; and (3) how foreign branches, agencies, affiliates, and subsidiaries of U.S. swap dealers generally should be treated. The Proposed Guidance also generally described the policy and procedural framework under which the Commission would consider compliance with a comparable and comprehensive regulatory requirement of a foreign jurisdiction as a reasonable substitute for compliance with the attendant requirements of the CEA. Last, the Proposed Guidance set forth the manner in which the Commission proposed to interpret section 2(i) of the CEA as it would generally apply to clearing, trading, and certain reporting requirements under the Dodd-Frank Act with respect to swaps between counterparties that are not swap dealers or MSPs.

The public comment period on the Proposed Guidance ended on August 27, 2012. The Commission received approximately 290 comment letters on the Proposed Guidance from a variety of interested parties, including major U.S. and non-U.S. banks and financial institutions that conduct global swap business, trade associations, clearing organizations, law firms (representing international banks and dealers), public interest organizations, and foreign regulators.[21]

The Further Proposed Guidance, issued on December 21, 2012,[22] reflected the Commission's determination that further consideration of public comments regarding the Commission's proposed interpretation of the term ''U.S. person,'' and its proposed guidance regarding aggregation for purposes of swap dealer registration, would be helpful to the Commission in issuing final interpretive guidance. In order to facilitate the Commission's further consideration of these issues, in the Further Proposed Guidance the Commission sought public comment on: (1) An alternative interpretation of the aggregation requirement for swap dealer registration in Commission regulation 1.3(ggg)(4); [23] (2) an alternative ''prong'' of the proposed interpretation of the term ''U.S. person'' in the Proposed Guidance which relates to U.S. owners that are responsible for the liabilities of a non-U.S. entity; and (3) a separate alternative prong of the proposed interpretation of the term ''U.S. person'' which relates to commodity pools and funds with majority-U.S. ownership.

The public comment period on the Further Proposed Guidance ended on February 6, 2013. The Commission received approximately 24 comment letters on the Further Proposed Guidance from interested parties including major U.S. and non-U.S. banks and financial institutions, trade associations, law firms (representing international banks and dealers), public interest organizations, and foreign regulators.[24] With respect to both the Proposed Guidance and the Further Proposed Guidance and throughout the process of considering this Guidance,

(''FIEA'') in May 2010. *See* Japan Financial Services Agency, Outline of the bill for amendment of the Financial Instruments and Exchange Act (May 2010), available at *http://www.fsa.go.jp/en/refer/diet/174/01.pdf.*

[15] On October 3, 2008, President Bush signed the Emergency Economic Stabilization Act of 2008, which was principally designed to allow the U.S. Treasury and other government agencies to take action to restore liquidity and stability to the U.S. financial system (*e.g.,* the Troubled Asset Relief Program—also known as TARP—under which the U.S. Treasury was authorized to purchase up to $700 billion of troubled assets that weighed down the balance sheets of U.S. financial institutions). *See* Public Law 110–343, 122 Stat. 3765 (2008).

[16] *See* Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States at xvi-xxvii (Jan. 21, 2011), available at *http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.*

[17] *See* Proposed Guidance, 77 FR 41214. Simultaneously with publication of the Proposed Guidance, the Commission published a proposed exemptive order providing time-limited relief from certain cross-border applications of the swaps provisions of Title VII and the Commission's regulations. *See* Proposed Exemptive Order Regarding Compliance with Certain Swap Regulations, 77 FR 41110 (July 12, 2012) (''Proposed Order''). The Commission approved a final exemptive order on December 21, 2012, which reflected certain modifications and clarifications to the Proposed Order to address public comments. *See* Final Exemptive Order Regarding Compliance with Certain Swap Regulations, 78 FR 858 (Jan. 7, 2013) (''January Order'').

[18] *See* 7 U.S.C. 1a(49) (defining the term ''swap dealer'').

[19] *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) (''Final Entities Rules'').

[20] *See* 7 U.S.C. 1a(33) (defining the term ''major swap participant'').

[21] The Commission also received approximately 26 comment letters on the Proposed Order. Because the Proposed Guidance and Proposed Order were substantially interrelated, many commenters submitted a single comment letter addressing both proposals. The comment letters submitted in response to the Proposed Order and Proposed Guidance may be found on the Commission's Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1234.*

Approximately 200 individuals submitted substantially identical letters to the effect that oversight of the $700 trillion global derivatives market is the key to meaningful reform. The letters state that because the market is inherently global, risks can be transferred around the world with the touch of a button. Further, according to these letters, loopholes in the Proposed Guidance could allow foreign affiliates of Wall Street banks to escape regulation. Lastly, the letters request that the Proposed Guidance be strengthened to ensure that the Dodd-Frank derivatives protections will directly apply to the full global activities of all important participants in the U.S. derivatives markets.

[22] *See* Further Proposed Guidance Regarding Compliance With Certain Swap Regulations, 78 FR 909, 913 (Jan. 7, 2013) (''Further Proposed Guidance'').

[23] 17 CFR 1.3(ggg)(4). The Commission's regulations are codified at 17 CFR Ch. I.

[24] The comment letters submitted in response to the Further Proposed Guidance are available on the Commission's Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1315.*

the Commission (and Commission's staff) held numerous meetings and discussions with various market participants, domestic bank regulators, and other interested parties.[25]

Further, the Commission's staff closely consulted with the staff of the SEC in an effort to increase understanding of each other's regulatory approaches and to harmonize the cross-border approaches of the two agencies to the greatest extent possible, consistent with their respective statutory mandates.[26] The Commission is cognizant of the value of harmonization by the Commission and the SEC of their cross-border policies to the fullest extent possible. The staffs of the Commission and the SEC have participated in numerous meetings to work jointly toward this objective. The Commission expects that this consultative process will continue as each agency works towards implementing its respective cross-border policy.

The SEC recently published for public comment proposed rules and interpretive guidance to address the application of the provisions of the Exchange Act, added by Subtitle B of Title VII of the Dodd-Frank Act, that relate to cross-border security-based swap activities.[27] The Commission has considered the SEC's cross-border proposal and has taken it into account in the process of considering this Guidance. The SEC's proposal acknowledges the statutory provisions and regulatory precedents that are relevant to security-based swaps by virtue of the fact that security-based swaps are securities.[28] For example, the SEC's proposed rules regarding registration of security-based swap dealers build from the SEC's traditional approach to the registration of brokers and dealers under the Exchange Act.[29] The SEC's proposal also notes the SEC's belief that Congress intended the territorial application of Title VII to entities and transactions in the security-based swaps market to follow similar principles to those applicable to the securities market under the Exchange Act.[30] The Commission believes that one factor in harmonization of the two agencies' approaches is that Congress did not express a similar intent that the application of Title VII to entities and transactions in the swaps market should follow principles that preceded the Dodd-Frank Act, but rather mandated a new regulatory regime for swaps.[31]

The Commission also recognizes the critical role of international cooperation and coordination in the regulation of derivatives in the highly interconnected global market, where risks are transmitted across national borders and market participants operate in multiple jurisdictions. Close cooperative relationships and coordination with other jurisdictions take on even greater importance given that, prior to the recent reforms, the swaps market has largely operated without regulatory oversight, and given that many jurisdictions are in differing stages of implementing their regulatory reform. To this end, the Commission's staff has actively engaged in discussions with their foreign counterparts in an effort to better understand and develop a more harmonized cross-border regulatory framework. The Commission expects that these discussions will continue as it implements the cross-border interpretive guidance and as other jurisdictions develop their own regulatory approaches to derivatives.[32]

In general, many of the financial institutions and law firms (representing financial institutions) that commented on the Proposed Guidance and Further Proposed Guidance stated that the Commission's proposed interpretation of the extraterritorial application of Title VII of the Dodd-Frank Act was overly broad and unnecessarily complex and unclear.[33] Among the issues they raised were concerns relating to the interpretation of the term ''U.S. person,'' aggregation for purposes of swap dealer registration, lack of parity in the treatment of foreign branches and affiliates of U.S. persons, the approach to guaranteed non-U.S. affiliates and non-U.S. affiliate ''conduits,'' and the ''comparability'' assessment for purposes of substituted compliance. The commenters also urged the Commission to allow sufficient time after the publication of the final interpretive guidance for market participants to understand and implement any new policies of the Commission, before the Commission begins to apply such policies.

Other commenters disagreed that the Commission's proposed interpretation of its extraterritorial authority was overly broad, instead arguing that the Commission had not gone far enough.[34]

[25] The records of these meetings and communications are available on the Commission's Web site at *http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/Cross-Border ApplicationofSwapsProvisions/index.htm.*

[26] Sections 722 and 772 of the Dodd-Frank Act establish the scope of the Commission's and SEC's jurisdiction over cross-border swaps and security-based swaps, respectively. CEA section 2(i), which was added by section 722 of the Dodd-Frank Act, is discussed above. Section 30(c) of the Securities Exchange Act of 1934 (''Exchange Act''), which was added by section 772 of the Dodd-Frank Act, provides that the swaps provisions of the Exchange Act added by Title VII do not apply ''to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States, unless such person transacts such business in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate to prevent the evasion of any provision [added by Title VII of the Dodd-Frank Act] . . . '' *See* 15 U.S.C. 78dd(c).

[27] *See* Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, 78 FR 30968 (May 23, 2013) (''SEC Cross-Border Proposal'').

[28] The SEC Cross-Border Proposal notes that the definition of ''security'' in the Exchange Act includes security-based swaps, which raises issues related to the statutory definitions of ''broker'' and ''dealer,'' the statutory exchange registration requirement, and other statutory requirements related to securities. *Id.* at 30972.

[29] *Id.* at 30990.

[30] *Id.* at 30983–84.

[31] One commenter expressed the view that the SEC's proposed rule is entirely inapplicable to the CFTC's statutory mandate to regulate the risks from cross border derivatives trading and related activities. This commenter stated that the SEC was given very limited statutory authority in the Dodd-Frank Act related solely to anti-evasion, in contrast to the Commission, which was given the same anti-evasion authority plus an affirmative statutory mandate to regulate cross-border derivative activities that ''have a direct an significant connection with activities in, or effect on, commerce of the United States.'' This commenter further stated that a broader statutory mandate makes sense because the Commission ''has decades of expertise and jurisdiction for virtually the entire derivatives markets,'' whereas the SEC has ''jurisdiction for no more than 3.5 percent of those markets.'' *See* Better Markets Inc. (''Better Markets'') (Jun. 24, 2013) at 2.

[32] This is one aspect of the Commission's on-going bilateral and multilateral efforts to promote international coordination of regulatory reform. The Commission's staff is engaged in consultations with Europe, Japan, Hong Kong, Singapore, Switzerland, Canada, Australia, Brazil, and Mexico on derivatives reform. In addition, the Commission's staff is participating in several standard-setting initiatives, co-chairs the IOSCO Task Force on OTC Derivatives, and has created an informal working group of derivatives regulators to discuss implementation of derivatives reform. *See also* Joint Press Statement of Leaders on Operating Principles and Areas of Exploration in the Regulation of the Cross-border OTC Derivatives Market, published as CFTC Press Release 6439–12, Dec. 4, 2012, available at *http://www.cftc.gov/PressRoom/PressReleases/pr6439-12;* OTC Derivatives Regulators Group Report to the G–20 Meeting of Finance Ministers and Central Bank Governors of 18–19 April 2013, linked to CFTC Press Release ODRG Report to G–20, Apr. 16, 2013, available at *http://www.cftc.gov/PressRoom/PressReleases/odrg_reporttog20release.*

[33] *See, e.g.,* Securities Industry and Financial Markets Association (''SIFMA'') (Aug. 27, 2012); Institute of International Bankers (''IIB'') (Aug. 27, 2012); Sullivan & Cromwell, on behalf of Bank of America Corp., Citi, and J.P. Morgan (''Sullivan & Cromwell'') (Aug. 13, 2012); Bank of America Merrill Lynch, Barclays Capital, and PNB Paribas et al., submitted by Cleary Gottlieb Steen & Hamilton LLP (''Cleary'') (Aug. 16, 2012).

[34] *See, e.g.,* Americans for Financial Reform, submitted by Marcus Stanley (''AFR'') (Aug. 27, 2012); Better Markets (Aug. 16, 2012); Michael Greenberger, Francis King Cary School of Law,

For example, AFR stated that the Proposed Guidance ''takes some real positive steps in affirming CFTC jurisdiction over a variety of cross-border transactions,'' but ''falls well short of closing potential cross-border loopholes.'' [35] Senator Levin wrote that although ''members of the financial industry have filed comment letters urging the CFTC to weaken its proposals . . . American families and businesses deserve strong protections against the risks posed by derivatives trading, including from cross-border swaps, and . . . the Proposed Guidance should be strengthened rather than weakened.'' [36]

II. Scope of This Guidance

After carefully reviewing and considering the comments on the Proposed Guidance and the Further Proposed Guidance, the Commission has determined to finalize the Proposed Guidance. This Guidance sets forth the general policy of the Commission in interpreting how section 2(i) of the CEA provides for the application of the swaps provisions of the CEA and Commission regulations to cross-border activities when such activities have a ''direct and significant connection with activities in, or effect on, commerce of the United States'' or when they contravene Commission rulemaking.[37] Unlike a binding rule adopted by the Commission, which would state with precision when particular requirements do and do not apply to particular situations, this Guidance is a statement of the Commission's general policy regarding cross-border swap activities [38] and allows for flexibility in application to various situations, including consideration of all relevant facts and circumstances that are not explicitly discussed in the guidance. The Commission believes that the statement of its policy in this Guidance will assist market participants in understanding how the Commission intends that the registration and certain other substantive requirements of the Dodd-Frank Act generally would apply to their cross-border activities.[39]

This release is intended to inform the public of the Commission's views on how it ordinarily expects to apply existing law and regulations in the cross-border context. In determining the application of the CEA and Commission regulations to particular entities and transactions in cross-border contexts, the Commission will apply the relevant statutory provisions, including CEA section 2(i), and regulations to the particular facts and circumstances. Accordingly, the public has the ability to present facts and circumstances that would inform the application of the substantive policy positions set forth in this release.

The Commission understands the complex and dynamic nature of the global swap market and the need to take an adaptable approach to cross-border issues, particularly as it continues to work closely with foreign regulators to address potential conflicts with respect to each country's respective regulatory regime. Although the Commission is issuing the Guidance at this time, the Commission will continue to follow developments as foreign regulatory regimes and the global swaps market continue to evolve. In this regard, the Commission will periodically review this Guidance in light of future developments.

This release is organized into four main sections. Section III sets forth the Commission's interpretation of CEA section 2(i) and the general manner in which it intends to apply the swaps provisions of the Dodd-Frank Act to activities outside the United States. Section IV addresses the public comments and Commission Guidance on: (A) The Commission's interpretation of the term ''U.S. person''; (B) swap dealer and MSP registration; (C) the scope of the term ''foreign branch'' of a U.S. bank and consideration of when a swap should be considered to be with the foreign branch of a U.S. bank; (D) a description of the entity-level requirements and transaction-level requirements under Title VII and the Commission's related regulations (''Entity-Level Requirements'' and ''Transaction-Level Requirements,'' respectively); (E) the categorization of Title VII swaps provisions (and Commission regulations) as either Entity-Level or Transaction-Level Requirements; (F) substituted compliance, including an overview of the principles guiding substituted compliance determinations for Entity-Level and Transaction-Level Requirements, a general description of the process for comparability determinations, and a discussion of conflicts arising under foreign privacy and blocking laws; (G) application of the Entity-Level Requirements and ''Category A'' and ''Category B'' Transaction-Level Requirements to swap dealers and MSPs; and (H) application of the CEA's swaps provisions and Commission regulations where both parties to a swap are neither swap dealers nor MSPs.[40]

In addition, this Guidance includes the following Appendices, which should be read in conjunction with (and are qualified by) the remainder of the Guidance: (1) Appendix A—The Entity-Level Requirements; (2) Appendix B—The Transaction-Level Requirements: (3) Appendix C—Application of the Entity-Level Requirements; (4) Appendix D—Application of the Category A Transaction-Level Requirements to Swap Dealers and MSPs; (5) Appendix E—Application of the Category B Transaction-Level Requirements to Swap Dealers and MSPs; and (6) Appendix F—Application of Certain Entity-Level and Transaction-Level Requirements to Non-Swap Dealer/Non-MSP Market Participants.

III. Interpretation of Section 2(i)

CEA section 2(i) provides that the swaps provisions of Title VII shall not apply to activities outside the United States unless those activities—

- Have a direct and significant connection with activities in, or effect on, commerce of the United States; or
- contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of [the CEA] that was enacted by the [Dodd-Frank Act].

In the Proposed Guidance, the Commission noted that section 2(i) provides the Commission express authority over swap activities outside the United States when certain conditions are met, but it does not require the Commission to extend its reach to the outer bounds of that authorization. Rather, in exercising its authority with respect to swap activities outside the United States, the Commission will be guided by international comity principles.

University of Maryland (''Greenberger'') (Aug. 13, 2012).

[35] AFR (Aug. 27, 2012) at 2.

[36] Letter from Sen. Levin at 3.

[37] *See* 7 U.S.C. 2(i).

[38] The Commission notes that part 23 of its regulations defines ''swaps activities'' to mean, ''with respect to a [registered swap dealer or MSP], such registrant's activities related to swaps and any product used to hedge such swaps, including, but not limited to, futures, options, other swaps or security-based swaps, debt or equity securities, foreign currency, physical commodities, and other derivatives.'' *See* 17 CFR 23.200(j); 23.600(a)(7).

[39] In this regard, the Commission notes that it would consider codifying certain aspects of the Guidance in future rulemakings, as appropriate; but at this time, this guidance is intended to provide an efficient and flexible vehicle to communicate the agency's current views on how the Dodd-Frank swap requirements would apply on a cross-border basis.

[40] Certain provisions of Title VII apply regardless of whether a swap dealer or MSP is a counterparty to the swap. These provisions include the clearing requirement (7 U.S.C. 2(h)(1)), the trade execution requirement (2(h)(8)), reporting to SDRs (2(a)(13)(G)), and real-time public reporting (2(a)(13)).

A. Comments

Some commenters addressing the interpretation of section 2(i) in the Proposed Guidance stated that the activities of the non-U.S. branches and subsidiaries of U.S. persons outside the United States with respect to swaps with non-U.S. persons should not be subject to Dodd-Frank requirements. Sullivan & Cromwell asserted that the non-U.S. branches and subsidiaries generally do not enter into swaps with U.S. persons and therefore the jurisdictional nexus with the United States that would justify application of the Dodd-Frank Act is absent.[41] Sullivan & Cromwell stated that there are legitimate business reasons for U.S. persons to establish non-U.S. branches and subsidiaries, so doing so should not be interpreted to mean that the U.S. person is using the branch to evade application of the Dodd-Frank Act.[42] Sullivan & Cromwell argued that the Dodd-Frank Act's application outside the United States should be narrowly construed because it includes only specific exceptions to the judicial precedent that U.S. laws should be interpreted to apply outside the United States only when such application is clearly expressed in the law.[43] Similarly, SIFMA argued that the Commission's proposal asserted a broad jurisdictional scope that is inconsistent with the congressional intent expressed in section 2(i) of the CEA.[44]

Sullivan & Cromwell cited past instances where the Commission has not applied its regulations to firms that deal solely with foreign customers and do not conduct business in or from the United States or to the non-U.S. subsidiaries of entities registered with the Commission.[45] Sullivan & Cromwell and SIFMA stated that the application of Dodd-Frank requirements to non-U.S. swap activities would be contrary to principles of international comity and cooperation with foreign regulators, would lead to less efficient use of regulatory resources, and would subject the affected entities to potentially conflicting regulations and increased costs of compliance.[46] SIFMA asserted that the jurisdictional scope in the Commission's proposal is not necessary to prevent evasive activity, because the Commission already has broad authority to address evasion.[47] Sullivan & Cromwell and SIFMA also argued that imposing the Dodd-Frank requirements on non-U.S. branches and subsidiaries of U.S. persons would put those entities at a disadvantage compared to competitors in foreign jurisdictions, while other federal laws and banking regulations (such as the Edge Act[48]) indicate that Congress wishes to promote such entities' ability to compete in foreign jurisdictions.[49]

By contrast, Senator Levin stated that the J.P. Morgan ''whale trades'' provide an example of how major U.S. financial institutions have integrated their U.S. and non-U.S. swap activities, and therefore supports the application of the swaps provisions of Title VII and Commission regulations to the non-U.S. offices of U.S. financial institutions.[50] He explained that a Senate investigation found that J.P. Morgan personnel in London executed the ''whale trades'' using money from the U.S. bank's excess deposits, and while traders in London conducted the trades, the trades were attributed to a U.S. affiliate of J.P. Morgan through back-to-back arrangements between the London branch and New York branch.[51] He also stated the whale trades were entered into with counterparties including major U.S. banks and J.P. Morgan's own investment bank.[52] Senator Levin concluded that because of the integration of U.S. and non-U.S. offices and affiliates of U.S. financial institutions, it is critical that the non-U.S. offices and affiliates of U.S. financial institutions follow the same Dodd-Frank requirements as are applicable to the U.S. financial institutions.[53]

B. Statutory Analysis

In interpreting the phrase ''direct and significant,'' the Commission has examined the plain language of the statutory provision, similar language in other statutes with cross-border application, and the legislative history of section 2(i).

The statutory language in new CEA section 2(i) is structured similarly to the statutory language in the Foreign Trade Antitrust Improvements Act of 1982 (the ''FTAIA''),[54] which provides the standard for the cross-border application of the Sherman Antitrust Act.[55] The FTAIA, like CEA section 2(i), excludes certain non-U.S. commercial transactions from the reach of U.S. law. It provides that the antitrust provisions of the Sherman Act ''shall not apply to [anti-competitive] conduct involving trade or commerce . . . with foreign nations.''[56] However, like paragraph (1) of CEA section 2(i), the FTAIA also creates exceptions to the general exclusionary rule and thus brings back within antitrust coverage any conduct that: (1) has a ''direct, substantial, and reasonably foreseeable effect'' on U.S. commerce;[57] and (2) ''such effect gives rise to a [Sherman Act] claim.''[58] In *F. Hoffman-LaRoche, Ltd.* v. *Empagran S.A.,* the Supreme Court stated that ''this technical language initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.,* it has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.,* the 'effect' must 'giv[e] rise to a [Sherman Act] claim.' ''[59]

It is appropriate, therefore, to read section 2(i) of the CEA as a clear expression of congressional intent that the swaps provisions of Title VII of the Dodd-Frank Act apply to activities beyond the borders of the United States when certain circumstances are present. These circumstances include, pursuant to paragraph (1) of section 2(i), when activities outside the United States meet the statutory test of having a ''direct and significant connection with activities in, or effect on,'' U.S. commerce.

An examination of the language in the FTAIA, however, does not provide an unambiguous roadmap for the Commission in interpreting section 2(i) of the CEA. There are both similarities, and a number of significant differences, between the language in CEA section 2(i) and the language in the FTAIA. Further, the Supreme Court has not provided definitive guidance as to the meaning of the ''direct, substantial, and reasonably foreseeable'' test in the FTAIA, and the lower courts have interpreted the individual terms in the FTAIA differently.

Although a number of courts have interpreted the various terms in the

[41] Sullivan & Cromwell (Aug. 13, 2012) at 6–7.

[42] *Id.* at 8.

[43] *Id.* at 9.

[44] SIFMA (Aug. 27, 2012) at 2.

[45] Sullivan & Cromwell (Aug. 13, 2012) at 10.

[46] *Id.* at 11; SIFMA (Aug. 27, 2012) at 3 and A55.

[47] SIFMA (Aug. 27, 2012) at 3.

[48] 12 U.S.C. 611–31.

[49] *Id.;* Sullivan & Cromwell (Aug. 13, 2012) at 12–14.

[50] Letter from Sen. Levin at 4.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 7. *See also* Dodd-Frank Statement (''An exemption for foreign derivatives activity by the [ ] affiliates of American institutions is a free pass no matter where that activity is located.'').

[54] 15 U.S.C. 6a.

[55] 15 U.S.C. 1–7.

[56] 15 U.S.C. 6a.

[57] 6a(1).

[58] 6a(2).

[59] 542 U.S. 155, 162 (2004) (emphasis in original).

FTAIA, only the term ''direct'' appears in both CEA section 2(i) and the FTAIA. Relying upon the Supreme Court's definition of the term ''direct'' in the Foreign Sovereign Immunities Act (''FSIA''),[60] the U.S. Court of Appeals for the Ninth Circuit construed the term ''direct'' in the FTAIA as requiring a ''relationship of logical causation,''[61] such that ''an effect is 'direct' if it follows as an immediate consequence of the defendant's activity.''[62] However, in an en banc decision, the U.S. Court of Appeals for the Seventh Circuit held that ''the Ninth Circuit jumped too quickly on the assumption that the FSIA and the FTAIA use the word 'direct' in the same way.''[63] After examining the text of the FTAIA as well as its history and purpose, the Seventh Circuit found persuasive the ''other school of thought [that] has been articulated by the Department of Justice's Antitrust Division, which takes the position that, for FTAIA purposes, the term 'direct' means only 'a reasonably proximate causal nexus.' ''[64] The Seventh Circuit rejected interpretations of the term ''direct'' that included any requirement that the consequences be foreseeable, substantial, or immediate.[65]

Other terms in the FTAIA differ from the terms used in section 2(i) of the CEA. First, the FTAIA test explicitly requires that the effect on U.S. commerce be a ''reasonably foreseeable'' result of the conduct.[66] Section 2(i) of the CEA, by contrast, does not provide that the effect on U.S. commerce must be foreseeable. Second, whereas the FTAIA solely relies on the ''effects'' on U.S. commerce to determine cross-border application of the Sherman Act, section 2(i) of the CEA refers to both ''effect'' and ''connection.'' ''The FTAIA says that the Sherman Act applies to foreign 'conduct' with a certain kind of harmful domestic effect.''[67] Section 2(i), by contrast, applies more broadly—not only to particular instances of conduct that have an effect on U.S. commerce, but also to activities that have a direct and significant ''connection with activities in'' U.S. commerce. Unlike the FTAIA, section 2(i) applies the swaps provisions of the CEA to activities outside the United States that have the requisite connection with activities in U.S. commerce, regardless of whether a ''harmful domestic effect'' has occurred.

As the foregoing textual analysis indicates, Congress crafted section 2(i) differently from its analogue in the antitrust laws. Congress delineated the cross-border scope of the Sherman Act in section 6a of the FTAIA as applying to conduct that has a ''direct'' and ''substantial'' and ''reasonably foreseeable'' ''effect'' on U.S. commerce. In section 2(i), on the other hand, Congress did not include a requirement that the effects or connections of the activities outside the United States be ''reasonably foreseeable'' for the Dodd-Frank swaps provisions to apply. Further, Congress included language in section 2(i) to apply the Dodd-Frank swaps provisions in circumstances in which there is a direct and significant connection with activities in U.S. commerce, regardless of whether there is an effect on U.S. commerce. The different words that Congress used in paragraph (1) of section 2(i), as compared to its closest statutory analogue in section 6a of the FTAIA, inform the Commission in construing the boundaries of its cross-border authority over swap activities under the CEA.[68] Accordingly, the Commission believes it is appropriate to interpret section 2(i) such that it applies to activities outside the United States in circumstances in addition to those that would be reached under the FTAIA standard.

As further described in the Proposed Guidance, one of the principal rationales for the enactment of the Dodd-Frank derivatives reforms was the need for a comprehensive scheme of regulation to prevent systemic risk in the U.S. financial system.[69] More particularly, a primary purpose of Title VII of the Dodd-Frank Act is to address risk to the U.S. financial system created by interconnections in the swaps market.[70] Title VII of the Dodd-Frank Act gave the Commission new and broad authority to regulate the swaps market to address and mitigate risks arising from swap activities that in the future could cause a financial crisis.

In global markets, the source of such risk is not confined to activities within U.S. borders. Due to the interconnectedness between firms, traders, and markets in the U.S. and abroad, a firm's failure, or trading losses overseas, can quickly spill over to the United States and affect activities in U.S. commerce and the stability of the U.S. financial system. Accordingly, Congress did not limit the application of the Dodd-Frank Act to activities within the United States. Rather, in recognition of the global nature of the swaps market, and the fact that risks to the U.S. financial system may arise from activities outside the United States, as well as from activities within the United States, Congress explicitly provided for cross-border application of Title VII to activities outside the United States that pose risks to the U.S. financial system.[71]

[60] *See* 28 U.S.C. 1605(a)(2).

[61] *United States* v. *LSL Biotechnologies,* 379 F.3d 672, 693 (9th Cir. 2004). ''As a threshold matter, many courts have debated whether the FTAIA established a new jurisdictional standard or merely codified the standard applied in [*United States* v. *Aluminum Co. of Am.,* 148 F.2d 416 (2d Cir. 1945)] and its progeny. Several courts have raised this question without answering it. The Supreme Court did as much in *[Harford Fire Ins. Co.* v. *California,* 509 U.S. 764 (1993)].'' *Id.* at 678.

[62] *Id.* at 692–3, *quoting Republic of Argentina* v. *Weltover, Inc.,* 504 U.S. 607, 618 (1992) (providing that, pursuant to the FSIA, 28 U.S.C. 1605(a)(2), immunity does not extend to commercial conduct outside the United States that ''causes a direct effect in the United States'').

[63] *Minn-Chem, Inc.* v. *Agrium, Inc.,* 683 F.3d 845, 857 (7th Cir. 2012) (en banc).

[64] *Id.*

[65] *Id.* at 856–57.

[66] *See, e.g., Animal Sciences Products.* v. *China Minmetals Corp.,* 654 F.3d 462, 471 (3d Cir. 2011) (''[T]he FTAIA's 'reasonably foreseeable' language imposes an objective standard: the requisite 'direct' and 'substantial' effect must have been 'foreseeable' to an objectively reasonable person.'').

[67] *Hoffman-LaRoche,* 452 U.S. at 173.

[68] The provision that ultimately became section 722(d) of the Dodd-Frank Act was added during consideration of the legislation in the House of Representatives. *See* 155 Cong. Rec. H14685 (Dec. 10, 2009). The version of what became Title VII that was reported by the House Agriculture Committee and the House Financial Services Committee did not include any provision addressing cross-border application. *See* 155 Cong. Rec. H14549 (Dec. 10, 2009). The Commission finds it significant that, in adding the cross-border provision before final passage, the House did so in terms that, as discussed in text, were different from, and broader than, the terms used in the analogous provision of the FTAIA.

[69] *See* Proposed Guidance, 77 FR at 41215–41216.

[70] *Cf.* 156 Cong. Rec. S5818 (July 14, 2010) (statement of Sen. Lincoln) (''In 2008, our Nation's economy was on the brink of collapse. America was being held captive by a financial system that was so interconnected, so large, and so irresponsible that our economy and our way of life were about to be destroyed.''), available at *http://www.gpo.gov/fdsys/pkg/CREC-2010-07-14/pdf/CREC-2010-07-14.pdf;* 156 Cong. Rec. S5888 (July 15, 2010) (statement of Sen. Shaheen) (''We need to put in place reforms to stop Wall Street firms from growing so big and so interconnected that they can threaten our entire economy.''), available at *http://www.gpo.gov/fdsys/pkg/CREC-2010-07-15/pdf/CREC-2010-07-15-senate.pdf;* 156 Cong. Rec. S5905 (July 15, 2010) (statement of Sen. Stabenow) (''For too long the over-the-counter derivatives market has been unregulated, transferring risk between firms and creating a web of fragility in a system where entities became too interconnected to fail.''), available at *http://www.gpo.gov/fdsys/pkg/CREC-2010-07-15/pdf/CREC-2010-07-15-senate.pdf.*

[71] The legislative history of the Dodd-Frank Act shows that in the fall of 2009, neither the Over-the-Counter Derivatives Markets Act of 2009, H.R. 3795, 111th Cong. (1st Sess. 2009), reported by the Financial Services Committee chaired by Rep. Barney Frank, nor the Derivatives Markets Transparency and Accountability Act of 2009, H.R. 977, 111th Cong. (1st Sess. 2009), reported by the Agriculture Committee chaired by Rep. Collin Peterson, included a general territoriality limitation that would have restricted Commission regulation of transactions between two foreign persons located outside of the United States. During the House Financial Services Committee markup on October 14, 2009, Rep. Spencer Bachus offered an

Continued

Therefore, upon consideration of the statutory language, as well as the prophylactic purpose of the CEA and the amendments made to it by Title VII, the Commission construes section 2(i) to apply the swaps provisions of the CEA to activities outside the United States that have either: (1) A direct and significant effect on U.S. commerce; or, in the alternative, (2) a direct and significant connection with activities in U.S. commerce, and through such connection present the type of risks to the U.S. financial system and markets that Title VII directed the Commission to address. The Commission interprets section 2(i) in a manner consistent with the overall goals of the Dodd-Frank Act to reduce risks to the U.S. financial system and avoid future financial crises.[72]

Consistent with this overall interpretation, the Commission believes that the term ''direct'' in CEA section 2(i) should be interpreted in a manner consistent with the position of the Department of Justice Antitrust Division with respect to the meaning of the same term in the FTAIA, and as recently adopted by the Seventh Circuit.[73] The Commission therefore interprets the term ''direct'' in section 2(i) so as to require ''a reasonably proximate causal nexus'' and not to require foreseeability, substantiality, or immediacy.[74]

Consistent with the purpose of Title VII to protect the U.S. financial system against the build-up of systemic risks, the Commission does not read section 2(i) so as to require a transaction-by-transaction determination that a specific swap outside the United States has a ''direct and significant connection with activities in, or effect on, commerce of the United States'' in order to apply the swaps provisions of the CEA to such transactions. Rather, it is the connection of swap activities, viewed as a class or in the aggregate, to activities in commerce of the United States that must be assessed to determine whether application of the CEA swaps provisions is warranted.[75]

This conclusion is bolstered by similar interpretations of other federal statutes regulating interstate commerce. Recently, the Supreme Court reaffirmed a similar ''aggregate effects'' approach in *Nat'l Fed'n of Indep. Bus.* v. *Sebelius.*[76] In that case, the Court phrased the holding in the seminal ''aggregate effects'' decision, *Wickard* v. *Filburn,*[77] in this way: ''[The farmer's] decision, when considered in the aggregate along with similar decisions of others, would have had a substantial effect on the interstate market for wheat.'' [78] In another recent case, *Gonzales v Raich,*[79] the Court adopted similar reasoning to uphold the application of the Controlled Substance Act [80] to prohibit the intrastate use of medical marijuana for medicinal purposes. In *Raich,* the Court held that Congress could regulate purely intrastate activity if the failure to do so would ''leave a gaping hole'' in the federal regulatory structure. These cases support the Commission's cross-border authority over swap activities that as a class, or in the aggregate, have a direct and significant connection with activities in, or effect on, U.S. commerce—whether or not an individual swap may satisfy the statutory standard.[81]

C. Principles of International Comity

The case law in the antitrust area also teaches the importance of recognizing the laws and interests of other countries in applying an ambiguous federal statute across borders; in such circumstances, principles of international comity counsel courts and agencies to act reasonably in exercising jurisdiction with respect to activity that takes place elsewhere. In *Hoffman-LaRoche,* an antitrust class action lawsuit alleging an international price-fixing conspiracy by foreign and domestic vitamin manufacturers and distributors, the Supreme Court held that ambiguous statutes should be construed to ''avoid unreasonable interference with the sovereign authority of other nations.'' [82] The Court explained that this rule of construction ''reflects customary principles of international law'' and ''helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world.'' [83]

In determining whether the exercise of jurisdiction by one nation over activities in another nation would be reasonable, the courts and agencies are guided by the Restatement (Third) of Foreign Relations Law of the United States (the ''Restatement''). Drawing upon traditional principles of international law, the Restatement provides bases of jurisdiction to prescribe law, as well as limitations on the exercise of jurisdiction. In addition

amendment that would have restricted the jurisdiction of the Commission over swaps between non-U.S. resident persons transacted without the use of the mails or any other means or instrumentality of interstate commerce. Chairman Frank opposed the amendment, noting that there may well be cases where non-U.S. residents are engaging in transactions that have an effect on the United States and that are insufficiently regulated internationally and that he would not want to prevent U.S. regulators from stepping in. Chairman Frank expressed his commitment to work with Rep. Bachus going forward, and Rep. Bachus withdrew the amendment. *See* H. Fin. Serv. Comm. Mark Up on Discussion Draft of the Over-the-Counter Derivatives Markets Act of 2009, 111th Cong., 1st Sess. (Oct. 14, 2009) (statements of Rep. Bachus and Rep. Frank), available at *http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=231922.*

[72] The Commission also notes that the Supreme Court has indicated that the FTAIA may be interpreted more broadly when the government is seeking to protect the public from anticompetitive conduct than when a private plaintiff brings suit. *See Hoffman-LaRoche,* 452 U.S. at 170 (''A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out its mission.'').

[73] See note 63 and accompanying text, *supra.*

[74] The Seventh Circuit's rationale for rejecting the Ninth Circuit's interpretation applies with at least equal, if not greater, force to the interpretation of the word ''direct'' in section 2(i) of the CEA. As discussed in note 68 and the accompanying text, *supra,* Congress expressly declined to import the FTAIA standards of substantiality, immediacy, or foreseeability into section 2(i). The Commission believes that the terms included in section 2(i) that are the same as the terms in the FTAIA should be interpreted in a manner consistent with Congress's determination to not import other, different standards from the FTAIA into section 2(i). Where Congress has included in a new statute one term but not another from an existing statute, it is reasonable to conclude that Congress did not want the other existing standards included in the new statute.

[75] The Commission believes this interpretation is supported by Congress's use of the plural term ''activities'' in CEA section 2(i), rather than the singular term ''activity.'' The Commission believes it is reasonable to interpret the use of the plural term ''activities'' in section 2(i) to require not that each particular activity have the requisite connection with U.S. commerce, but rather that such activities in the aggregate, or a class of activity, have the requisite nexus with U.S. commerce. This interpretation is consistent with the overall objectives of Title VII, as described above. Further, the Commission believes that a swap-by-swap approach to jurisdiction would be ''too complex to prove workable.'' *See Hoffman-LaRoche,* 542 U.S. at 168.

[76] 132 S. Ct. 2566 (2012).

[77] 317 U.S. 111 (1942).

[78] 132 S. Ct. 2566, 2588 (2012). At issue in *Wickard* was the regulation of a farmer's production and use of wheat even though the wheat was ''not intended in any part for commerce but wholly for consumption on the farm.'' 317 U.S. at 118. The Supreme Court upheld the application of the regulation, stating that although the farmer's ''own contribution to the demand for wheat may be trivial by itself,'' the federal regulation could be applied when his contribution ''taken together with that of many others similarly situated, is far from trivial.'' *Id.* at 128–29. The Court also stated it had ''no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose . . . .'' *Id.*

[79] 545 U.S. 1 (2005).

[80] 21 U.S.C. 801 *et seq.*

[81] In *Sebelius,* the Court stated, ''Where the class of activities is regulated, and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.'' 132 S. Ct. at 2587 (*quoting Perez* v. *United States,* 402 U.S. 146, 154 (1971).

[82] 542 U.S. at 164.

[83] *Id.* at 165.

to recognizing territoriality and nationality as bases for jurisdiction, the Restatement expressly provides that a country has jurisdiction to prescribe law with respect to ''conduct outside its territory that has or is intended to have substantial effect within its territory.'' [84]

The Restatement also provides that even where a country has a basis for jurisdiction, it should not prescribe law with respect to a person or activity in another country when the exercise of such jurisdiction is unreasonable.[85] The reasonableness of such an exercise of jurisdiction, in turn, is to be determined by evaluating all relevant factors, including certain specifically enumerated factors where appropriate:

(a) the link of the activity to the territory of the regulating state, *i.e.,* the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.[86]

Notably, the Restatement does not preclude concurrent regulation by multiple jurisdictions. However, where concurrent jurisdiction by two or more jurisdictions creates conflict, the Restatement recommends that each country evaluate both its interests in exercising jurisdiction and those of the other jurisdiction, and where possible, to consult with each other.[87]

Consistent with the Restatement, in determining the extent to which the Dodd-Frank swaps provisions apply to activities abroad, the Commission has strived to protect U.S. interests as determined by Congress in Title VII, and minimize conflicts with the laws of other jurisdictions. The Commission has carefully considered, among other things, the level of the home jurisdiction's supervisory interests over the subject activity and the extent to which the activity takes place within the foreign territory.[88] At the same time, the Commission has also considered the potential for cross-border activities to have substantial connection to or impact on the U.S. financial system and the global, highly integrated nature of today's swap business; to fulfill the purposes of the Dodd-Frank swaps reform, the Commission's supervisory oversight cannot be confined to activities strictly within the territory of the United States.

The Commission believes that the Guidance strikes the proper balance between these competing factors to ensure that the Commission can discharge its responsibilities to protect the U.S. markets, market participants, and financial system, consistent with the traditions of the international system and comity principles, as set forth in the Restatement. Of particular relevance is the Commission's approach to substituted compliance, which would be expected to mitigate any burden associated with potentially conflicting foreign regulations and would generally be appropriate in light of the supervisory interests of foreign regulators in entities domiciled and operating in its jurisdiction.[89]

In addition, recognizing that close cooperation and coordination with other jurisdictions is vital to the regulation of derivatives in the highly interconnected global market, the Commission's staff expects to remain actively engaged in discussions with foreign regulators as the Commission implements the cross-border interpretive guidance and as other jurisdictions develop their own regulatory requirements for derivatives. The Commission recognizes that conflicts of law may exist and is ready to address those issues as they may arise. In that regard, where a real conflict of laws exists, the Commission strongly encourages regulators and registrants to consult directly with its staff.

IV. Guidance

A. Interpretation of the Term ''U.S. Person''

1. Proposed Interpretation

Under the Proposed Guidance, the term ''U.S. person'' identifies those persons who, under the Commission's interpretation, could be expected to satisfy the jurisdictional nexus under section 2(i) of the CEA based on their swap activities either individually or in the aggregate.[90] As proposed, the Commission's interpretation of the term ''U.S. person'' would generally encompass: (1) persons (or classes of persons) located within the United

[84] *See* Restatement sec. 402(1)(c). A comment to the Restatement also identifies jurisdiction with respect to activity outside the country, but having or intended to have substantial effect within the country's territory, as an aspect of jurisdiction based on territoriality. *See* Restatement sec. 402 cmt. d.

[85] Restatement sec. 403(1).

[86] Restatement sec. 403(2).

[87] With regard to conflicting exercises of jurisdiction, section 403(3) of the Restatement states:

(3) When it would not be unreasonable for each of the two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, including those set out in Subsection (2), a state should defer to the other state if that state's interest is clearly greater.

Comment e. to section 403 of the Restatement states:

Conflicting exercises of jurisdiction. Subsection (3) applies when an exercise of jurisdiction by each of two states is not unreasonable, but their regulations conflict. In that case, each state is required to evaluate both its interests in exercising jurisdiction and those of the other state. When possible, the two states should consult with each other. If one state has a clearly greater interest, the other should defer, by abandoning its regulation or interpreting or modifying it so as to eliminate the conflict. When neither state has a clearly stronger interest, states often attempt to eliminate the conflict so as to reduce international friction and avoid putting those who are the object of the regulations in a difficult situation. Subsection (3) is addressed primarily to the political departments of government, but it may be relevant also in judicial proceedings.

Subsection (3) applies only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise impossible. It does not apply where a person subject to regulation by two states can comply with the laws of both; for example, where one state requires keeping accounts on a cash basis, the other on an accrual basis. It does not apply merely because one state has a strong policy to permit or encourage an activity which another state prohibits, or one state exempts from regulation an activity which another regulates. Those situations are governed by Subsection (2), but do not constitute conflict within Subsection (3).

[88] For purposes of this Guidance, the terms ''home jurisdiction'' or ''home country'' are used interchangeably and refer to the jurisdiction in which the person or entity is established, including the European Union.

[89] As discussed in section IV.F, *infra,* the Commission's recognition of substituted compliance would be based on an evaluation of whether the requirements of the foreign jurisdiction are comparable and comprehensive compared to the applicable requirement(s) under the CEA and Commission regulations, based on a consideration of all relevant factors, including among other things: (i) the comprehensiveness of the foreign regulator's supervisory compliance program, and (ii) the authority of such foreign regulator to support and enforce its oversight of the registrant's branch or agency with regard to such activities to which substituted compliance applies.

[90] *See* Proposed Guidance, 77 FR at 41218. The discussion of the term ''U.S. person'' in this Guidance is limited to the relevance of this term for purposes of the Commission regulations promulgated under Title VII. The Commission does not intend that this discussion would apply to other uses of the term ''person'' in the CEA.

States; and (2) persons that may be domiciled or operate outside the United States but whose swap activities nonetheless have a ''direct and significant connection with activities in, or effect on, commerce of the United States'' within the meaning of CEA section 2(i).

Specifically, as set forth in the Proposed Guidance, the Commission's interpretation of the term ''U.S. person'' would generally include, but not be limited to:

(i) any natural person who is a resident of the United States;

(ii) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, in each case that is either (A) organized or incorporated under the laws of the United States or having its principal place of business in the United States (legal entity) or (B) in which the direct or indirect owners thereof are responsible for the liabilities of such entity and one or more of such owners is a U.S. person;

(iii) any individual account (discretionary or not) where the beneficial owner is a U.S. person;

(iv) any commodity pool, pooled account, or collective investment vehicle (whether or not it is organized or incorporated in the United States) of which a majority ownership is held, directly or indirectly, by a U.S. person(s);

(v) any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator under the CEA;

(vi) a pension plan for the employees, officers or principals of a legal entity with its principal place of business inside the United States; and

(vii) an estate or trust, the income of which is subject to U.S. income tax regardless of source.

Under the proposed interpretation, a ''U.S. person'' would include a foreign branch of a U.S. person; on the other hand, a non-U.S. affiliate guaranteed by a U.S. person would not be within the Commission's interpretation of the term ''U.S. person.''

The Further Proposed Guidance included alternatives for two ''prongs'' of the proposed interpretation of the term ''U.S. person'' in the Proposed Guidance: prong (ii)(B), which relates to U.S. owners that are responsible for the liabilities of a non-U.S. entity; and prong (iv), which relates to commodity pools and funds with majority-U.S. ownership.

The alternative version of prong (ii)(B) in the Further Proposed Guidance would limit its scope to a non-U.S. legal entity that is directly or indirectly majority-owned by one or more natural persons or legal entities that meet prong (i) or (ii) of the interpretation, in which such U.S. person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity. This alternative prong (ii)(B) would generally not include an entity that is a corporation, limited liability company or limited liability partnership where shareholders, members or partners have limited liability. Further, the Commission stated in the Further Proposed Guidance that the majority-ownership criterion would be intended to avoid capturing those legal entities that have negligible U.S. ownership interests. Unlimited liability corporations where U.S. persons have majority ownership and where such U.S. persons have unlimited liability for the obligations and liabilities of the entity generally would be covered under this alternative to prong (ii)(B).

The alternative prong (ii)(B) in the Further Proposed Guidance was as follows:

(ii) A corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing, in each case that is either (A) organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States or (B) directly or indirectly majority-owned by one or more persons described in prong (i) or (ii)(A) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity (other than a limited liability company or limited liability partnership where partners have limited liability);

The Further Proposed Guidance explained that this alternative proposed prong would generally treat an entity as a U.S. person if one or more of its U.S. majority owners has unlimited responsibility for losses of, or nonperformance by, the entity. This prong would reflect that when the structure of an entity is such that the U.S. direct or indirect owners are ultimately liable for the entity's obligations and liabilities, the connection to activities in, or effect on, U.S. commerce would be expected to satisfy the requisite jurisdictional nexus. This ''look-through'' requirement also would serve to discourage persons from creating such indirect ownership structures for the purpose of engaging in activities outside of the Dodd-Frank regulatory regime. Under the Further Proposed Guidance, this alternative proposed prong generally would not render a legal entity organized or domiciled in a foreign jurisdiction a ''U.S. person'' simply because the entity's swaps obligations are guaranteed by a U.S. person.

With respect to prong (iv) of the interpretation of the term ''U.S. person'' in the Proposed Guidance, the Further Proposed Guidance set forth an alternative under which any commodity pool, pooled account, investment fund or other collective investment vehicle generally would be within the interpretation of the term ''U.S. person'' if it is (directly or indirectly) majority-owned by one or more natural persons or legal entities that meet prong (i) or (ii) of the interpretation of the term ''U.S. person.'' The Further Proposed Guidance explained that for purposes of this alternative prong (iv), the Commission would interpret ''majority-owned'' to mean the beneficial ownership of 50 percent or more of the equity or voting interests in the collective investment vehicle. Similar to the alternative prong (ii)(B) discussed above, the Commission generally would not interpret the collective investment vehicle's place of organization or incorporation to be determinative of its status as a U.S. person. The Further Proposed Guidance clarified that under alternative prong (iv), the Commission would interpret the term ''U.S. person'' to include a pool, fund, or other collective investment vehicle that is publicly traded only if it is offered, directly or indirectly, to U.S. persons.

The alternative prong (iv) in the Further Proposed Guidance was as follows:

(iv) A commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (ii) and that is directly or indirectly majority-owned by one or more persons described in prong (i) or (ii), except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly-traded but not offered, directly or indirectly, to U.S. persons;

The Further Proposed Guidance explained that this alternative proposed prong (iv) is intended to capture collective investment vehicles that are created for the purpose of pooling assets from U.S. investors and channeling these assets to trade or invest in line with the objectives of the U.S. investors, regardless of the place of the vehicle's organization or incorporation. These collective investment vehicles may serve as a means to achieve the investment objectives of their beneficial owners, rather than being separate, active operating businesses. As such, the beneficial owners would be directly exposed to the risks created by the swaps that their collective investment vehicles enter into.

2. Comments

In general, commenters stated that the proposed ''U.S. person'' interpretation presented significant interpretive issues and implementation challenges.[91] The commenters contended that it would be difficult to determine U.S. person status because of the breadth of the proposed interpretation, potential ambiguities it contains, and the collection of information its application may require. The commenters, therefore, urged the Commission to consider how the proposed interpretation could be stated in a simpler and more easily applied manner.[92] While a number of commenters stated that the Commission's construction of the term ''U.S. person'' in the Proposed Guidance was overbroad,[93] several commenters on the Further Proposed Guidance advocated for a broader reading of the term than any of those proposed by the Commission.[94]

a. Phase-in Interpretation

A number of commenters requested that the Commission adopt an interim interpretation of ''U.S. person'' that would allow firms to rely on their existing systems and classifications and avoid the need to develop systems to follow a temporary interpretation of the term ''U.S. person'' that may change in the near future.[95] IIB explained that applying any interpretation of ''U.S. person'' that departs from status based on residence or jurisdiction of organization, and in some cases principal place of business, will require sufficient time to implement relevant documentation conventions and diligence procedures.[96] IIB, therefore, requested that the Commission implement a phased-in approach to the ''U.S. person'' interpretation that would encompass, in general, (1) a natural person who is a U.S. resident and (2) a corporate entity that is organized or incorporated under the laws of the United States or has its place of business in the United States.[97]

SIFMA also urged the Commission to phase in the ''U.S. person'' interpretation, citing the implementation difficulties identified by IIB. Specifically, SIFMA recommended that the Commission allow market participants to apply an interim interpretation of ''U.S. person'' until 90 days after the final interpretation of ''U.S. person'' is published.[98] SIFMA stated that the interim interpretation—which was identical to IIB's interim interpretation—should identify ''core'' U.S. persons and would allow its members to phase in compliance with the Dodd-Frank requirements without building new systems that might have to be changed when the Commission states a final interpretation of the term.[99]

b. Comments on Particular Prongs of the Proposed Interpretation of the Term ''U.S. Person''

Commenters' concerns were primarily (though not exclusively) directed to three prongs of the proposed ''U.S. person'' interpretation: prong (ii)(B) relating to U.S. owners that are responsible for the liabilities of a non-U.S. company; prong (iv) relating to commodity pools and funds with majority-U.S. ownership; and prong (v) relating to registered commodity pool operators. Below, the Commission describes the main comments to all the prongs of the proposed interpretation of ''U.S. person'' in greater detail.

Commenters generally did not comment on prong (i).

With respect to prong (ii)(A), the Investment Industry Association of Canada (IIAC) stated that the Commission should look to the location of a legal entity's management (or the majority of its directors and executive officers), instead of the location of organization.[100] Two commenters stated that the ''principal place of business'' element of the interpretation was ambiguous and difficult to administer and thus recommended that it be removed.[101]

On the other hand, Senator Levin supported an inclusive interpretation of the term ''U.S. person'' that would encompass foreign offices and affiliates of U.S. financial institutions and corporations, because requiring a case-by-case analysis of whether they should be subject to the Dodd-Frank Act would be complicated, burdensome, and susceptible to gamesmanship.[102] He also suggested that, since it appears that typically foreign affiliates and subsidiaries operate not as independent actors but are closely integrated with their parent corporations, obtaining from them the financial backing needed for their derivative trades, the Commission's interpretation should presume that a foreign affiliate engaged in swap activity is an extension of the parent corporation, unless the parent can demonstrate that the foreign affiliate should be treated as independent.[103] Senator Levin also stated that the Commission's interpretation should include as a U.S. person any foreign affiliate under common control with a U.S. person, based on factors such as common management, funding, systems, and financial reporting.[104]

With respect to prong (ii)(B) of the interpretation, which addresses situations where the direct or indirect owners of an entity are responsible for its liabilities, several commenters stated that the phrase ''responsible for the liabilities'' was vague. For example, the Committee on Capital Markets Regulation (''Capital Markets'') stated that the phrase ''responsible for the liabilities'' was open to interpretation and requested that the Commission provide more details regarding its interpretation of this phrase.[105] SIFMA sought clarification on whether the Commission intended to capture partnerships where the partners have unlimited liability.[106] The International Swaps and Derivatives Association Inc. (''ISDA'') stated that it was not clear whether the concept includes

[91] *See* SIFMA (Aug. 27, 2012) at 5; Societe Generale (''SocGen'') (Aug. 8, 2012) at 4; IIB (Aug. 27, 2012) at 4–14; Deutsche Bank AG (''Deutsche Bank'') (Aug. 27, 2012) at 1–4; Goldman Sachs ''(Goldman'') (Aug. 27, 2012) at 3; The Hong Kong Association of Banks (''Hong Kong Banks'') (Aug. 27, 2012) at 3–4; Australian Bankers' Association Inc. (''Australian Bankers'') (Aug. 27, 2012) at 4.

[92] SIFMA (August 27, 2012) at A10.

[93] *See, e.g.,* European Commission (Aug. 24, 2012) at 1–2; Hong Kong Banks (Aug. 27, 2012) at 4; J.P. Morgan (Aug. 13, 2012) at 9.

[94] *See* Better Markets (Feb. 15, 2013) at 4–8; Michael Greenberger and Brandy Bruyere, University of Maryland, and AFR (''Greenberger/AFR'') (Feb. 6, 2013) at 3 (stating that none of the definitions of U.S. person proposed by the CFTC are sufficient to protect U.S. taxpayers from the risks of foreign subsidiaries and affiliates of U.S. financial institutions). *See also* Letter from Sen. Levin at 7–8.

[95] *See, e.g.,* Cleary (Aug. 16, 2012) at 6; SIFMA (Aug. 27, 2012) at A8–9; IIB (Aug. 9, 2012) at 4; Deutsche Bank (Aug. 13, 2012) at 2; State Street Corporation (''State Street'') (Aug. 27, 2012) at 2; Goldman (Aug. 27, 2012) at 3.

[96] *See* IIB (Aug. 9, 2012) at 4.

[97] For purposes of IIB's definition, a foreign branch of a U.S. swap dealer would be considered a non-U.S. person. IIB added that it believes that the Commission should adopt a final definition of ''U.S. person'' that is consistent with its proposed interim definition. *Id.*

[98] *See* SIFMA (Aug. 25, 2012) at A8.

[99] *Id.* at A8.

[100] *See* IIAC (Aug. 27, 2012) at 3–5.

[101] *See* Lloyds Banking Group (''Lloyds'') (Aug. 24, 2012) at 3; Managed Fund Association and Alternative Investment Management Association (''MFA/AIMA'') (Aug. 28, 2012) at 6.

[102] *See* Letter from Sen. Levin at 7–8.

[103] *Id.* (stating that it ''makes little economic sense, given the insubstantial reality of many foreign affiliates and subsidiaries in the financial industry'' to ''view a foreign affiliate or subsidiary as a non-U.S. person even if it were fully integrated with its U.S. parent, operated as a wholly owned shell operation with no offices or employees of its own, and functioned in the same way as a branch or agency office'').

[104] *Id.* at 8.

[105] *See* Capital Markets (Aug. 24, 2012) at 5.

[106] *See* SIFMA (Aug. 27, 2012) at A13 and A19.

guarantees, sureties, simple risk of loss of equity, or other type of exposure.[107] Deutsche Bank further noted that the language in prong (ii)(B) could be read to include an entity guaranteed by a U.S. person, which appears at odds with possibly varying policies elsewhere in the Proposed Guidance for entities guaranteed by U.S. persons.[108]

Commenters also expressed concerns about the lack of a minimum U.S.-ownership threshold. For example, Sumitomo Mitsui Trust Bank Ltd. (''Sumitomo'') stated that there should be a minimum level of ownership of the entity in question by one or more U.S. persons for this prong to apply, and suggested that the majority ownership threshold used in prong (iv) apply here as well.[109] ISDA emphasized a different point, stating that without clear thresholds, a non-U.S. business would be within the Commission's interpretation of the term ''U.S. person'' by virtue of even negligible ownership interests by U.S. persons.[110] The Financial Services Roundtable (''FSR'') stated that prong (ii) is overbroad because it would cover even minority-U.S. owned institutions based only on a pro-rata (or less) parent liability guarantee.[111]

Capital Markets raised a concern that whether a conclusion that the direct or indirect owners of a U.S. legal entity are ''responsible for the liabilities'' of such entity requires knowledge of each counterparty's legal and ownership structure.[112] FSR stated that interpretation of prong (ii)(B) would depend on a reevaluation of most, if not all, counterparty relationships in order to determine what type of liability guarantees exist between an entity and its parent.[113] Both Capital Markets and FSR stated that firms do not currently have any reasonable means to obtain information necessary to assess this element of the interpretation, particularly within the short time frame prior to the registration date.

One commenter supported finalization of the alternative prong (ii)(B) in the Further Proposed Guidance, with minor clarifying changes. The Commercial Energy Working Group (''CEWG'') stated that the words ''all of'' should be added to clarify that this prong would generally apply when U.S. persons that are majority owners bear ''unlimited responsibility for all of the obligations and liabilities of the legal entity . . .''[114] The CEWG also stated that the Guidance should reaffirm that a guarantee of a non-U.S. person by a U.S. person, in and of itself, generally would not invoke U.S. person status.[115] Other commenters that supported the principles of the alternative prong (ii)(B) thought that the interpretation of ''U.S. person'' in this regard should be restructured. The Investment Company Institute (''ICI'') stated that the Commission should clarify that collective investment vehicles would not fall within the alternative prong (ii)(B) because the investors' liabilities are limited to the amount of their investment.[116] Thus, ICI stated that it believes the alternative prong (ii)(B) would be superfluous with respect to collective investment vehicles because the alternative prong (iv) in the Further Proposed Guidance would address these entities if they are majority-owned by U.S. persons.[117] MFA/AIMA, on the other hand, supported the combination of majority ownership and unlimited liability elements in the alternative prong (ii)(B) and recommended that collective investment vehicles be considered under that prong.[118]

Other commenters stated that the Commission should clarify that the language at the end of the proposed alternative prong (ii)(B), which refers to limited liability companies and limited liability partnerships, would generally also apply to other types of entities where owners have limited liability but where the entities have different names in foreign legal jurisdictions.[119] MFA/AIMA and SIFMA AMG stated that the Commission should clarify how frequently an entity should consider (*e.g.,* annually) whether U.S. persons are its direct or indirect majority owners, and provide for a transition period after an entity falls within this prong of the interpretation for the first time.[120]

Other commenters were critical of the alternative prong (ii)(B). Greenberger/AFR and Better Markets stated that this proposed prong is too narrow, because it appears to require that U.S. persons be both the majority owners of an entity and bear unlimited responsibility for the entity's obligations and liabilities, in order for the entity to be within the Commission's interpretation of the term ''U.S. person'' based solely on ownership by U.S. persons.[121] Greenberger/AFR pointed out that a U.S. person could be the majority owner of an entity organized outside the United States, and be responsible for 99% of the entity's obligations, yet the entity would not fall within the Commission's interpretation under the proposed prong.[122]

Other commenters suggested that the alternative prong (ii)(B) is too broad, recommending that the ownership element be limited to when a majority of the direct owners of an entity are U.S. persons, because considering the indirect ownership of an entity will be unworkable for many entities.[123] ISDA also stated that the concept of ''unlimited responsibility'' is too amorphous to be a basis for the Commission's interpretation, because it could turn on fact-sensitive and

[107] *See* ISDA (Aug. 27, 2012) at 9; MFA/AIMA (Aug. 28, 2012) at 6.

[108] *See* Deutsche Bank (Aug. 27, 2012) at 3. *See also* Peabody Energy Corporation (''Peabody'')(Aug. 28, 2012) at 2–3 (''By contrast, a foreign affiliate or subsidiary of a U.S. person would be considered a non-U.S. person, even where such an affiliate or subsidiary has certain or all of swap-related obligations guaranteed by the U.S. person.'') (citing Proposed Guidance, 77 FR at 41218); SIFMA (Aug. 27, 2012) at A2 (stating that the Commission should clarify that prong (ii)(B) of the interpretation is not meant to capture an entity merely because it is guaranteed by a U.S. person).

[109] *See* Sumitomo (Aug. 24, 2012) at 2.

[110] *See* ISDA (Aug. 10, 2012) at 8 (recommending that regardless of the nature of the ''responsibilities for the liabilities,'' only direct owners of apparent non-U.S. persons should be considered, and that the Commission adopt a presumptive control threshold of 25% direct ownership for distinguishing between control persons and owners that need not be considered in assessing the status of an entity as a U.S. person).

[111] *See* FSR (Aug. 27, 2012) at 3.

[112] *See* Capital Markets (Aug. 24, 2012) at 5.

[113] *See* FSR (Aug. 27, 2012) at 3.

[114] *See* CEWG, submitted by Sutherland Asbill & Brennan LLP (Feb. 25, 2013) at 5.

[115] *Id.*

[116] *See* ICI (Feb. 6, 2013) at 3.

[117] *See id.* at 2. *See also* IIB (Feb 6, 2013) at 10–11 (collective investment vehicles should be excluded from prong (ii) and addressed only in prong (iv)).

[118] *See* MFA/AIMA (Feb. 6, 2013) at 7–8. Thus under MFA/AIMA's approach, the status of collective investment vehicles would be determined by reference to only the tests in alternative prong (ii)(B).

[119] *Id.* at 10–11; Asociación Bancaria y de Entidades Financieras de Colombia (''Colombian Bankers'') (Feb. 6, 2013) at 1–2; IIB (Feb. 6, 2013) at 10; ISDA (Feb. 6, 2013) at 5–6.

[120] *See* MFA/AIMA (Feb. 6, 2013) at 12; SIFMA/AMG (Feb. 14, 2013) at 6. ISDA stated that the Commission should clarify how the prong would apply to an entity where some but not all of the owners have unlimited responsibility. In this case, the Commission should clarify whether the U.S. owners with majority ownership of the entity also each must bear unlimited responsibility for the entity's obligations and liabilities or, rather, whether it suffices that a single U.S. owner has unlimited responsibility once U.S. majority ownership is established. *See* ISDA (Feb. 6, 2013) at 5–7.

[121] *See* Greenberger/AFR (Feb. 6, 2013) at 7; Better Markets (Feb. 15, 2013) at 7–8.

[122] *See* Greenberger/AFR (Feb. 6, 2013) at 7.

[123] *See* MFA/AIMA (Feb. 6, 2013) at 7; SIFMA, The Clearing House, Association LLC (''The Clearing House''), and FSR (''SIFMA/CH/FSR'') (Feb. 6, 2013) at 2, A8–9; ISDA (Feb. 6, 2013) at 5. IIB and SIFMA/AMG made similar comments and questioned whether extending this prong to entities where a majority of indirect owners are U.S. persons would be consistent with the ''direct and significant connection'' language in CEA section 2(i). *See* IIB (Feb. 6, 2013) at 10; SIFMA/AMG (Feb. 14, 2013) at 3–4.

uncertain legal judgments under doctrines such as ''veil-piercing'' or ''alter ego'' entities.[124] Moreover, ISDA asserted that the Commission has not justified the treatment of unlimited liability entities in the proposed alternative prong (ii)(B) by demonstrating how such entities are more susceptible to being used to evade Dodd-Frank regulations or otherwise raise the concerns addressed by the Commission's regulations.[125]

Commenters were also critical of the element of the alternative prong (ii)(B) that would treat a collective investment vehicle as a U.S. person if its principal place of business is in the United States. They stated that application of this element would be very unclear and difficult on an operational level.[126] Commenters also stated that a collective investment vehicle should be treated as a U.S. person if it is organized in the U.S., not if its manager or operator is in the U.S.[127]

Peabody Energy Corporation (''Peabody'') and SIFMA/AMG stated the Commission should adopt the interpretation of U.S. person in the January Order, which does not include all the elements of the proposed alternative prong (ii)(B).[128]

Commenters generally did not comment on prong (iii) of the proposed interpretation of the term ''U.S. person.''

With respect to prong (iv) relating to majority direct- or indirect-owned commodity pools, pooled accounts, or collective investment vehicles, several commenters stated that this prong was unworkable because the proposed interpretation would require potentially unascertainable information.[129] According to SIFMA, reliance on representations would be the only practical way to consider the status of counterparties as U.S. persons under this prong since other types of information, such as the direct and indirect ownership of any commodity pool, pooled account or collective investment vehicle with which a market participant transacts, may be unavailable, non-public or otherwise sensitive.[130] Moreover, a fund would be required to monitor its level of U.S. ownership on an on-going basis, and this prong could result in frequent changes in the fund's U.S. person status.[131] The Clearing House argued that the interpretation should not look through direct investors to indirect investors, unless there is evidence of evasion.[132] Other commenters questioned whether the proposed interpretation of ''U.S. person'' for commodity pools, pooled accounts, and collective investment vehicles meets the ''direct and significant'' jurisdictional nexus applicable to the Commission's application of Title VII to transactions with such persons.[133]

Cleary urged that the Commission not adopt an interpretation of ''U.S. person'' based on the composition of fund ownership, at least prior to finalizing the interpretation.[134] As it explained, even if the Commission's interpretation would allow for reasonable reliance on counterparty representations, fund counterparties would not be able to provide any representation except with respect to funds formed after the finalization of the interpretation for which the fund's subscription materials could have been modified to capture the relevant information.[135] If the Commission nevertheless decided to adopt an interpretation based on investor composition, Cleary argued against including a fund in the interpretation on the basis of indirect ownership at any level less than a majority-ownership.[136]

Consideration of majority-ownership is particularly problematic with respect to funds that are publicly traded, according to several commenters.[137] For example, ICI explained that U.S. persons typically purchase shares in non-U.S. funds through intermediaries, and that such shares are registered and held in nominee/street name accounts.[138] In such cases, the fund manager/operator would not have information regarding the underlying investors.[139] SIFMA recommended that publicly offered and listed commodity pools organized in foreign jurisdictions be excluded from the interpretation.[140] Credit Suisse stated that a fund should not be considered a U.S person to the extent that it is organized outside the United States and is subject to foreign regulation that is comparable to U.S. law. To the extent the fund is not so regulated, then the fund would be within the U.S. person interpretation only where it is organized under the laws of the United States or marketed to U.S. residents.[141]

One commenter strongly supported the alternative prong (iv) in the Further Proposed Guidance. Citadel stated that since the Dodd-Frank clearing and reporting requirements will mitigate systemic risk, increase transparency and promote competition, the U.S. person interpretation should encompass offshore collective investment vehicles that have a sufficient U.S. nexus.[142] If it did not, then a core, active portion of the swaps market would fall outside the scope of the transaction level requirements, including clearing, which would undermine central objectives of Dodd-Frank, create opportunities for regulatory arbitrage, and risk fragmenting the swaps markets.[143]

Other commenters argued that the entities that would be covered by the alternative prong (iv) should not be covered by the interpretation of ''U.S. person,'' which should cover only entities that are directly majority-owned by U.S. persons. For example, SIFMA/

[124] *See* ISDA (Feb. 6, 2013) at 6. ISDA also stated that the Commission should make clear that the reference to ''unlimited responsibility'' does not include responsibility arising out of separate contractual arrangements or extraordinary circumstances, such as conduct by owners that results in veil piercing or limited partner participation in management of a partnership. *See id.* SIFMA/CH/FSR made similar points and stated that this prong is not necessary because market participants have not used unlimited liability entities to avoid Dodd-Frank regulations. *See* SIFMA/CH/FSR (Feb. 6, 2013) at A12.

[125] *See* ISDA (Feb. 6, 2013) at 6.

[126] *Id.* at 6–7; SIFMA/CH/FSR (Feb. 6, 2013) at A1, A5–6, B5; IIB (Feb. 6, 2013) at 7–8, 10.

[127] *See* MFA/AIMA (Feb. 6, 2013) at 8–9; SIFMA/AMG (Feb. 6, 2013) at A7–8. The Japanese Bankers Association made similar comments and stated that the Commission should clarify whether the location of the principal place of business of a subsidiary that is controlled by its parent is the location of the subsidiary's headquarters or the parent's headquarters. Japanese Bankers Association (Feb. 6, 2013) at 7.

[128] *See* Peabody (Feb. 5, 2013) at 1–2; SIFMA/AMG (Feb. 6, 2013) at 1–3.

[129] *See, e.g.,* ISDA (Aug. 10, 2012) at 8; SIFMA (Aug. 27, 2012) at A17; Credit Suisse (Aug. 27, 2012) at 3–4; The Clearing House Association LLC (''The Clearing House'') (Aug. 27, 2012) at 12–13; Cleary (Aug. 16, 2012) at 7; IIB (Aug. 27, 2012) at 6–7.

[130] *See* SIFMA (Aug. 27, 2012) at A17–18. *See also* IIB (Aug. 27, 2012) at 7 (arguing that since pools cannot ascertain or control the status of their indirect investors, the reference to indirect ownership should be removed).

[131] SIFMA (Aug. 27, 2012) at A17.

[132] *See* The Clearing House (Aug. 13, 2012) at 15 n. 20.

[133] *See, e.g.,* SIFMA/AMG (Aug. 27, 2012) at 2–3; MFA/AIMA (Aug. 28, 2012) at 4–5; ICI (Aug. 23, 2012) at 4.

[134] *See* Cleary (Aug. 16, 2012) at 6–7.

[135] *Id.*

[136] *Id.* IIB also noted that fund sponsors/operators verify investor status through subscription materials provided at the time of initial investment. Therefore, they request that any test based on fund ownership apply only to funds formed after the effective date of the final ''U.S. person'' interpretation. IIB also agreed that majority ownership is the minimum threshold under which a foreign fund should be included in the interpretation of the term ''U.S. person.'' *See* IIB (Aug. 27, 2012) at 6–7.

[137] *See, e.g.,* SIFMA (Aug. 27, 2012) at A20; ICI (Aug. 23, 2012) at 3–7; MFA/AIMA (Aug. 28, 2012) at 4; Credit Suisse (Aug. 27, 2012) at 3–4.

[138] *See* ICI (Aug. 23, 2012) at 3.

[139] ICI also noted that certain jurisdictions may prohibit disclosure by intermediaries of beneficial owner information. *Id.*

[140] *See* SIFMA (Aug. 27, 2012) at A19–20.

[141] *See* Credit Suisse (Aug, 27, 2012) at 3–4.

[142] *See* Citadel (Feb. 6, 2013) at 1.

[143] *See id.*

CH/FSR stated that consideration of indirect ownership could require ongoing monitoring of ownership, which is burdensome or even impossible, and would not necessarily reflect a sufficient jurisdictional nexus to the United States.[144] SIFMA/CH/FSR also stated that if consideration of majority ownership is included in the interpretation, it should reflect an objective statement of the ownership level that the Commission would consider relevant to U.S.-person status, so as to exclude entities that are owned by U.S. persons only to a de minimis extent and allow an annual consideration of ownership.[145] MFA/AIMA and the Investment Adviser Association (''IAA'') also provided reasons that there is not a sufficient jurisdictional nexus with the United States to include in the Commission's interpretation of the term ''U.S. person'' collective investment vehicles that are indirectly majority-owned by U.S. persons.[146]

Some commenters stated that whether a collective investment vehicle would be included in the interpretation of U.S. person should depend on whether the fund or other collective investment vehicle is being offered to U.S. persons, arguing that the interpretation should cover collective investment vehicles that are targeted to the U.S. market or to U.S. investors by focusing on activities within the control of the vehicle's manager.[147]

Commenters also stated that regardless of the policy adopted in this regard, in the consideration of whether an entity is a U.S. person, only information that is available to third parties or other parties should be considered relevant, and the Commission's policy should contemplate that market participants would rely on a representation of U.S. person status. Also, the Commission's policy should clarify how it would apply during the transition period immediately after expiration of the January Order.[148]

Addressing prong (v) relating to registered commodity pool operators, many commenters stated that the Commission should not adopt an interpretation that looks to the registration status of a fund's operator, because this interpretation could capture a non-U.S. fund that does not itself trigger registration as a commodity pool operator and has a minimal U.S. nexus.[149] A number of commenters urged the Commission not to adopt an interpretation that looks to the nationality of the fund's manager/operator since this would place U.S.-based investment managers at a competitive disadvantage, without addressing the Commission's regulatory objectives.[150] IIB generally agreed with these commenters and stated that the commodity pool operator registration prong would be over-inclusive because, under the Commission's current rules, an operator of a foreign pool may be required to register as a commodity pool operator with less than 50 percent U.S. ownership; at the same time, the prong also would be under-inclusive because it would not cover funds whose operators are eligible for relief from commodity pool operator registration.

ICI recommended that the Commission, instead, interpret the term ''U.S. person'' to include a commodity pool, pooled account, or collective investment vehicle that is ''offered publicly, directly or indirectly'' by the manager/sponsor to U.S. persons.[151] As ICI explained, this alternative approach would base a fund's U.S. person status on more workable considerations, and not on changes in investor status that are beyond the control of a fund or its manager/operator. In the consideration of whether a fund is making a public offering to U.S. persons, ICI recommended that the Commission look to SEC Regulation S.[152]

IIAC recommended that prong (vi) relating to pension plans be modified so that pension plans designed exclusively for foreign employees of a U.S.-based entity are not within the interpretation of the term ''U.S. person.'' Further, IIAC urged the Commission to clarify that U.S. investment advisers or other fiduciaries not be considered to be within the interpretation of the term ''U.S. person'' when they are acting on behalf of non-U.S. accounts.[153]

IIB stated that prong (vii) relating to an estate or trust should be replaced, explaining that market participants do not typically identify an estate's or trust's regulatory status on the basis of its tax status. Instead, it recommended that the Commission's interpretation look to the status of the executor, administrator, or trustee. Specifically,

[144] *See* SIFMA/CH/FSR (Feb. 6, 2013) at A8–9. *See also* IIB (Feb. 6, 2013) at 11 (systems to track indirect ownership would be difficult and expensive to implement).

[145] *See* SIFMA/CH/FSR (Feb. 6, 2013) at A8–9. ISDA stated that the lack of an objective policy regarding the interpretation of majority ownership would lead to arbitrary or indeterminate results for many collective investment vehicles due to their varied capital structures (citing, for example, structured finance vehicles, which merit further analysis due not only to their complex capital structures but also to practical difficulties in monitoring ownership of their securities), and the practical consequences of the alternative interpretations can be considered only following a more concrete proposal offered for public comment. *See* ISDA (Feb. 6, 2013) at 6–7.

[146] MFA/AIMA stated that since interactions between collective investment vehicles and registered swap dealers are expected to be covered by Dodd-Frank requirements or comparable foreign regulations, the inclusion of collective investment vehicles as ''U.S. persons'' is less important to achieve regulatory coverage. *See* MFA/AIMA (Feb. 6, 2013) at 7–8. MFA/AIMA also disputed whether the pooling of assets in a collective investment vehicle is a fundamental difference that denotes a greater U.S. nexus than the pooling of assets by corporations or other financial entities, and therefore it is problematic that alternative prong (iv) is more onerous (in MFA/AIMA's view) for non-U.S collective investment vehicles than alternative prong (ii) is for corporate or other financial entities. *See id.* IAA stated that it is inappropriate to define an entity as a U.S. person based on characteristics of investors in the entity rather than the characteristics of the entity itself. *See* IAA (Feb. 6, 2013) at 4.

[147] *See* Invesco Advisers Inc. (''Invesco'') (Feb. 6, 2013) at 11 (manager of collective investment vehicle determines whether to make offering in the United States; subsequent purchases by non-U.S. persons who have relocated to the U.S. should not alone constitute offering in the U.S.); IIB (Feb. 6, 2013) at 11. Invesco, ICI and IAA each stated that the language at the end of alternative prong (iv) (if it is adopted) should be interpreted to cover collective investment vehicles that are ''publicly-offered'' only to non-U.S. persons, even if the vehicles are not publicly-traded. *See* Invesco (Feb. 6, 2013) at 2; ICI (Feb. 6, 2013) at 3; IAA (Feb. 6, 2013) at 4. *See also* ICI (Jul. 5, 2013) at 3 n. 9 (''There is an important distinction between publicly-traded funds and publicly-offered funds: publicly-offered funds are those that are broadly available to retail investors; publicly-traded funds are simply a subset of publicly-offered funds that trade on exchanges or other secondary markets. Excluding from the U.S. person definition only publicly-traded funds would capture only a subset of non-U.S. regulated funds. We note that, by contrast, hedge funds are neither publicly offered nor publicly traded and, unlike non-U.S. retail funds, are not subject to substantive government regulation and oversight similar in scope to that provided by the U.S. Investment Company Act.'').

ICI and IAA stated that the Commission should interpret whether an offer is made to U.S. persons in accordance with precedents under the SEC's Regulation S. *See* ICI (Feb. 6, 2013) at 4–5 n. 14; IAA (Feb. 6, 2013) at 4. ISDA stated that the Commission's interpretation should specifically exclude any collective investment vehicle that offers its securities in accordance with local law and customary documentation practices in a local market, as well as offerings conducted in accordance with the Regulation S. *See* ISDA (Feb. 6, 2013) at 7.

[148] *See* SIFMA/AMG (Feb. 14, 2013) at 4 n. 8; IIB (Feb. 6, 2013) at 7; ISDA (Feb. 6, 2013) at 7; Japanese Bankers Association (Feb. 6, 2013) at 5.

[149] *See, e.g.,* SIFMA (Aug. 27, 2012) at A21; ICI (Aug. 23, 2012) at 3–7; IIB (Aug. 9, 2012) at 3; MFA/AIMA (Aug. 28, 2012) at 4–5; IIAC (Aug. 27, 2012) at 4, 5. As IIB explained, even a fund that lacks a sufficient U.S. connection can be considered a U.S. person where its commodity pool operator is required to register. IIB (Aug. 9, 2012) at 3. Under Commission regulation 3.10, the operator of a non-U.S. fund with even one U.S.-based owner is required to register as a commodity pool operator.

[150] *See* SIFMA (Aug. 27, 2012) at A13; ICI (Aug, 23, 2012) at 4; Cleary (Aug. 16, 2012) at 7; The Clearing House (Aug. 27, 2012) at 13–14.

[151] *See* ICI (Aug. 23, 2012) at 5–6.

[152] *Id.* at 6–7. Regulation S is codified at 17 CFR 230.901 through 230.905.

[153] IIAC (Aug. 27, 2012) at 4.

IIB recommended that the Commission's interpretation of the term ''U.S. person'' include an estate or trust that is organized in the United States ''unless (A) an executor, administrator or trustee that is not a U.S. person has sole or shared investment discretion with respect to the assets of the trust or estate, (B) in the case of an estate, the estate is governed by foreign law and (C) in the case of a trust, no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person . . . .'' [154]

c. Commenters' Proposed Alternatives

A number of commenters provided substantially different alternative interpretations of the term ''U.S. person.'' [155] Most notably, the commenters' alternatives would not encompass persons by virtue of ''indirect'' U.S. ownership. For example, SIFMA's proposed ''U.S. person'' interpretation would include only those commodity pools or collective investment vehicles that are organized or incorporated under U.S. law or are (1) directly majority owned by ''U.S. persons'' or, in the case of ownership by a pool, a pool that is organized in the United States and (2) not publicly offered.[156] IIB submitted an alternative ''U.S. person'' interpretation that generally tracked SIFMA's proposed interpretation.[157]

d. Due Diligence

Many commenters stated that the Commission's policy in this regard should contemplate that a firm would reasonably rely on counterparty representations regarding their U.S. person status.[158] For example, SIFMA stated that the Commission's policy should be consistent with a determination by the swap counterparty itself of its U.S.-person status, but in the alternative, SIFMA recommended that the Commission's policy contemplate reasonable reliance on counterparty representations.[159] According to these commenters, counterparty representations are the only practical means of determining counterparty status as firms do not currently collect the information necessary to evaluate counterparty status under the proposed interpretation. The commenters also were concerned that certain prongs of the proposed interpretation (*e.g.,* ''look-through'' obligations associated with the ''direct and indirect ownership'' criterion in prong (iv)) would render it difficult, if not impossible, for market participants to directly consider whether their counterparties would be within the Commission's interpretation of the term ''U.S. person.'' SIFMA and Cleary further pointed out that the Commission has accepted reasonable reliance on counterparty representations in the context of the external business conduct standards.[160]

e. Non-U.S. Person That Is Affiliated, Guaranteed, or Controlled by U.S. Person

Viewed as a whole, the proposed interpretation of the term ''U.S. person,'' would generally not include a non-U.S. affiliate of a U.S. person, even if all of such affiliate's swaps are guaranteed by the U.S. person.[161] The Commission, nevertheless, raised a concern regarding risks associated with a U.S. person providing a guarantee to its non-U.S. affiliates and requested comments on whether the term ''U.S. person'' should, in fact, be interpreted to generally include a non-U.S. affiliate guaranteed by a U.S. person.[162] In addition, the Commission sought comments on whether the term ''U.S. person'' also should be interpreted to generally include any non-U.S. persons controlled by or under common control with a U.S. person.[163]

Responding to the Commission's request for comments on this issue, many commenters stated that Title VII requires the Commission to interpret the term ''U.S. person'' to include foreign affiliates of U.S. persons, and U.S. affiliates of foreign persons, in order to protect U.S. taxpayers from the risks posed by the global swaps market.[164] Senator Levin urged that ''[a]t a minimum, it is essential that [the Guidance] . . . include as a U.S. person any foreign affiliate or subsidiary under common control with a U.S. person.'' [165] He also agreed with statements in the Proposed Guidance that non-U.S. affiliates guaranteed by U.S. persons effectively transfer the risks of their swaps to the U.S. guarantor, and therefore the guaranteed non-U.S. affiliates should be subject to U.S. safeguards.[166] Public Citizen stated that not interpreting the term ''U.S. person'' to include a foreign affiliate of a U.S. person ''hides the rabbit in the hat'' for Title VII purposes.[167] It argued that Congress intended financial entities that are controlled by U.S. financial institutions or that could adversely impact the U.S. economy to be regulated as U.S. persons under Title VII in order to fully protect American taxpayers from the threat of ''future financial bailouts.''

Greenberger also expressed support for including foreign swap entities controlled by U.S. parents in the interpretation of the term ''U.S. person.'' In his view, the Commission's distinction between guaranteed and non-guaranteed foreign subsidiaries is arbitrary, as the absence of a U.S. guarantee does not insulate the U.S. parent from risk exposure.[168] Other commenters argued that the Commission's interpretation of the term ''U.S. person'' should include foreign affiliates whose swaps are guaranteed by a U.S. person.[169]

Other commenters objected to including a non-U.S. entity in the interpretation of the term ''U.S. person'' solely on the basis of affiliation with a U.S. person or having its swaps guaranteed by a U.S. person. Sullivan & Cromwell argued that foreign operations of a U.S.-based bank do not have a ''direct and significant connection with activities in, or effect on,'' U.S. commerce based solely on affiliation with or guarantee by a U.S. parent bank.[170] It stated that overseas operations usually have a non-U.S. orientation (*i.e.,* transactions with non-U.S. counterparties for non-U.S. business purposes), and thus the connection to U.S. commerce is indirect and, further, transactions with non-U.S. counterparties will not have a significant effect on U.S. commerce. Other commenters raised similar concerns about the lack of jurisdictional nexus. For example, The Clearing House stated that the Commission must conclude that the risk to the U.S. entity is ''significant'' before designating a non-U.S. guaranteed entity a ''U.S. person,'' and further stated that a non-U.S. entity that is subject to local capital

[154] IIB (Aug. 27, 2012) at 14.

[155] *See, e.g.,* SIFMA (Aug. 27, 2012); IIB (Aug. 27, 2012); The Clearing House (Aug. 27, 2012).

[156] *See* SIFMA (Aug. 27, 2012) at A10–11.

[157] *See* IIB (Aug. 27, 2012) at 13–14.

[158] *See, e.g.,* SIFMA (Aug. 27, 2012) at A16–17; Deutsche Bank (Aug. 27, 2012) at 4; Capital Markets (Aug. 24, 2012) at 5; SIFMA/AMG (Aug. 27, 2012) at 4–5.

[159] SIFMA (Aug. 27, 2012) at A16–18.

[160] SIFMA/AMG (Aug. 27, 2012) at 4–5; Cleary (Aug. 16. 2012) at 6.

[161] *See* Proposed Guidance, 77 FR at 41218. For purposes of this Guidance, the Commission generally interprets the term ''affiliates'' to include an entity's parent entity and subsidiaries, if any, unless stated otherwise.

[162] *Id.*

[163] *Id.*

[164] *See* Public Citizen's Congress Watch (''Public Citizen'') (Aug. 14, 2012) at 9–10; IATP (Aug. 27, 2012) at 4; Better Markets (Aug. 27, 2012) at 6.

[165] *See* Letter from Sen. Levin at 8.

[166] *See id.* (citing Proposed Guidance, 77 FR at 41218).

[167] Public Citizen (Aug. 14, 2012) at 3.

[168] Greenberger (Aug. 27, 2012) at 6–7.

[169] *See* Better Markets (Aug. 27, 2012) at 6–7; Public Citizen (Aug. 14, 2012) at 3.

[170] *See* Sullivan & Cromwell (Aug. 13, 2012) at A2–3. *See also* Hong Kong Banks (Aug. 27, 2012) at 4.

rules or swap dealer registration should be excluded from the interpretation of ''U.S. person.'' [171] SIFMA, addressing the control issue, objected to including a non-U.S. person that is controlled by, or under common control with, such person in the interpretation of the term ''U.S. person'' since such control is insufficient to satisfy the jurisdictional nexus required by section 2(i).[172]

Japanese Bankers Association did not agree that these situations effect a risk transfer to the U.S. person, arguing that the risk would ultimately be incurred by the non-U.S. person and not by the U.S. guarantor; thus, it believed that the term ''U.S. person'' should not be interpreted to include a non-U.S. person guaranteed by a U.S. person.[173] The Coalition for Derivatives End-Users (''End-Users Coalition'') expressed concerns about competitive implications, stating that imputing U.S. status to a non-U.S. person guaranteed by a U.S. person may disadvantage the non-U.S. affiliates of U.S. end-users, since those non-U.S. affiliates may need to be guaranteed to enter into swaps with non-U.S. counterparties.[174]

f. Foreign Branch of U.S. Person

In the Proposed Guidance, the Commission stated that a foreign branch of a U.S. swap dealer should be included in the Commission's interpretation of the term ''U.S. person'' because it is a part, or an extension, of a U.S. person.[175] Several commenters agreed with the Commission's interpretation.[176] Senator Levin asserted that the ''JP Morgan whale trades provide strong factual support for an inclusive definition of U.S. person, in particular when it comes to the foreign branch or agency of a U.S. corporation.''[177] Other commenters recommended that a foreign branch of a U.S. swap dealer be excluded from the interpretation. Sullivan & Cromwell argued that a foreign branch should not be included in the interpretation solely on the basis that it is a part of a U.S. bank.[178] Citi recommended that the Commission's policy should be that a foreign branch of a U.S. swap dealer is generally considered a non-U.S. person, so long as the branch remains subject to Entity-Level Requirements and obtains substituted compliance for Transaction-Level Requirements for transactions with non-U.S. persons.[179] In Citi's view, this would address comments by the foreign branch's non-U.S. clients that they would have to register as swap dealers or MSPs, while assuring that such non-U.S. clients' swaps with the foreign branch would generally be covered by the Transaction-Level Requirements or substituted compliance.

g. Regulation S

Some commenters believed that the Commission's policy should explicitly adopt the SEC's Regulation S definition of a ''U.S. person.'' MFA/AIMA stated that Regulation S eliminates problems and inconsistencies in the Commission's proposed interpretation.[180] J.P. Morgan stated that Regulation S would facilitate compliance by non-U.S. market participants since they are familiar with the SEC's approach.[181] On the other hand, the Institute for Agriculture and Trade Policy (''IATP'') argued against incorporating the Regulation S definition, stating that it predates the prominence of the swaps market.[182]

h. Other Clarifications

A number of commenters voiced concerns regarding potential expansion of the Commission's interpretation of the term ''U.S. person,'' which they thought could result from the prefatory phrase ''includes, but is not limited to,'' and requested that the Commission affirmatively state that non-U.S. persons are any persons that would not be covered by the interpretation of the term ''U.S. person.'' [183] A non-exhaustive ''U.S. person'' interpretation, they contended, would create unnecessary uncertainty.

A number of commenters further stated that the interpretation of the term ''U.S. person'' should be applied only for purposes of the registration and regulation of swap dealers and MSPs.[184] The Futures Industry Association (''FIA'') argued that the interpretation of the term ''U.S. person'' should not extend to those provisions of the CEA governing the activities of futures commission merchants (''FCMs'') with respect to either exchange-traded futures (whether executed on a designated contract market or a foreign board of trade) or cleared swaps.[185] SIFMA similarly requested that the Commission clarify that the final interpretation of the term ''U.S. person'' does not override existing market practice as it relates to futures or FCMs, including with respect to clearing.[186] SIFMA also requested that the Commission clarify that the final interpretation of the term ''U.S. person'' for cross-border swaps regulation is the single interpretation for all Dodd-Frank swaps regulation purposes.[187] Finally, SIFMA requested that supranational organizations, such as the World Bank and International Monetary Fund (and their affiliates) be excluded from the interpretation.[188]

3. Commission Guidance

The Commission has carefully reviewed and considered the comments received and is finalizing a policy that will generally set forth an interpretation of the term ''U.S. person,'' as used in this Guidance, with certain modifications to the proposed definition as described below. As explained in the Proposed Guidance, the term ''U.S. person,'' as used in the context of CEA section 2(i), generally encompasses those persons whose activities—either individually or in the aggregate—have the requisite ''direct and significant'' connection with activities in, or effect on, U.S. commerce within the meaning of section 2(i).[189] The various prongs of

[171] *See* The Clearing House (Aug. 27, 2012) at 17.

[172] *See* SIFMA (Aug. 27. 2012) at A20. *See also* Australian Bankers (Aug. 27, 2012) at 4 (stating that the control concept should not be relevant in the definition of ''U.S. person,'' and while common control may potentially indicate common risk, the Commission's focus on the ultimate location of the risk is a more relevant to the interpretation of the term ''U.S. person.'').

[173] *See* Japanese Bankers Association (Aug. 27. 2012) at 8.

[174] *See* End-Users Coalition (Aug. 27, 2012) at 3 (urging the Commission to exclude a foreign affiliate of a U.S. end-user, guaranteed by that end-user, from its interpretation).

[175] *See* Proposed Guidance, 77 FR at 41218.

[176] *See, e.g.,* Public Citizen (Aug. 27, 2012) at 5; Greenberger (Aug. 27, 2012) at 3; Better Markets (Aug. 27, 2012) at 2, 6–7.

[177] *See* Letter from Sen. Levin at 7.

[178] *See* Sullivan & Cromwell (Aug. 13, 2012) at A6–7.

[179] *See* Citi (Aug. 27, 2012) at 2–4 (stating that foreign branches of U.S.-based swap dealers should not be considered ''U.S. persons,'' but should still be subject to the Commission's Entity-Level and Transactional-Level Requirements). *See also* State Street (Aug. 27, 2012) at 3; IIB (Aug. 27, 2012) at 8.

[180] *See* MFA/AIMA (Aug. 28, 2012) at 8–9.

[181] *See* J.P. Morgan (Aug. 13, 2012) at 9.

[182] *See* IATP (Aug. 27, 2012) at 4.

[183] *See* SIFMA (Aug. 27, 2012) at A15; IIB (Aug. 27, 2012) at 11–12; EC (Aug. 24, 2012) at 1–2; Australian Bankers (Aug. 27, 2012) at 4.

[184] *See, e.g.,* The Futures and Options Association Ltd. (''FOA'') (Aug. 13, 2012) at 10–11; SIFMA (Aug. 27, 2012); IIB (Aug. 27, 2012); EC (Aug. 24, 2012).

[185] *See* FIA (Aug. 27, 2012) at 2–3.

[186] *See* SIFMA (Aug. 27, 2012) at A14–15.

[187] *Id.*

[188] *Id.* at A21.

[189] For purposes of this Guidance, the Commission interprets the term ''U.S. person'' by reference to the extent to which swap activities or transactions involving one or more such persons have the relevant jurisdictional nexus. For example, this interpretation would help determine whether non-U.S. persons engaging in swap dealing transactions with ''U.S. persons'' in excess of the de minimis level would be required to register and be regulated as a swap dealer. In addition, for the same reasons, the term ''U.S. person'' can be helpful in determining the level of U.S. interest for purposes

the Commission's interpretation are intended to identify persons for which, in practice, the connection or effects required by section 2(i) are likely to exist and thereby inform the public of circumstances in which the Commission expects that the swaps provisions of the CEA and the Commission's regulations would apply pursuant to the statute. In this respect, the Commission will consider not only a person's legal form and its domicile (or location of operation), but also the economic reality of a particular structure or arrangement, along with all other relevant facts and circumstances, in order to identify those persons whose activities meet the ''direct and significant'' jurisdictional nexus. Below, the Commission discusses each prong of its proposed interpretation of the term ''U.S. person.''

First, the Commission will include in its consideration the elements in prongs (i) and (ii)(A), as proposed, renumbered as prongs (i) and (iii).[190] These prongs of the ''U.S. person'' interpretation generally incorporate a ''territorial'' concept of a U.S. person.[191] That is, these are natural persons and legal entities that are physically located or incorporated within U.S. territory and, consequently, the Commission would generally consider swap activities involving such persons to satisfy the ''direct and significant'' test under section 2(i).[192] The Commission clarifies that it expects that prong (iii) would encompass legal entities that engage in non-profit activities, as well as U.S. state, county and local governments and their agencies and instrumentalities. Under prong (iii), the Commission would generally interpret the term ''U.S. person'' to include also a legal entity that is not incorporated in the United States if it has its ''principal place of business'' in the United States. The Commission intends that this interpretation would generally include those entities that are organized outside the United States but have the center of direction, control, and coordination of their business activities in the United States.

The concept of an operating company having a principal place of business has been addressed by the Supreme Court. In a recent case, the Supreme Court described a corporation's principal place of business as the ''place where the corporation's high level officers direct, control, and coordinate the corporation's activities.'' [193] The Supreme Court explained that '''principal place of business' is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's 'nerve center.' And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control and coordination, *i.e.,* the 'nerve center,' and not simply an office where the corporation holds its board meetings.'' [194] The Commission notes that commenters on the Proposed Guidance and Further Proposed Guidance generally did not object to the inclusion in the interpretation of the term ''U.S. person'' of an entity that has its principal place of business in the United States.

The Commission is of the view that the application of the principal place of business concept to a collective investment vehicle may require consideration of additional factors beyond those applicable to operating companies. A collective investment vehicle is an entity or group of related entities created for the purpose of pooling assets of one or more investors and channeling these assets to trade or invest to achieve the investment objectives of the investor(s), rather than being a separate, active operating business.[195] In this context, the determination of where the collective investment vehicle's ''high level officers direct, control, and coordinate the [vehicle's] activities''—to apply the *Hertz* decision noted above—can involve several different factors.[196]

The Commission is aware that the formation and structure of collective investment vehicles involve a great deal of variability, including with regard to the formation of the legal entities that will hold the relevant assets and enter into transactions (including swaps) in order to achieve the investors' objectives. Legal, regulatory, tax and accounting considerations may all play a role in determining how the collective investment vehicle is structured and the jurisdictions in which the legal entities will be incorporated.[197] Many legal jurisdictions around the world have promulgated specialized regimes for the formation of collective investment vehicles, which offer various legal, regulatory, tax and accounting efficiencies.[198]

In view of these circumstances, the Commission believes that for a collective investment vehicle, the locations where the relevant legal entities have registered offices, hold board meetings or maintain books and records are generally not relevant in determining the principal place of business of the collective investment vehicle. Instead, as stated in the *Hertz* case cited above, the determination should generally depend on the location of the ''actual center of direction, control and coordination,'' *i.e.,* the ''nerve center,'' of the collective investment vehicle.

Hertz focuses on the place where the ''high level officers direct, control, and coordinate'' the entity's activities.[199] In this regard, the Commission believes that the focus should not necessarily be

of analyzing and applying principles of international comity when considering the extent to which U.S. transaction-level requirements should apply to swap transactions.

[190] For clarity, the Commission has reordered the prongs of its interpretation of the term ''U.S. person.''

[191] For purposes of this Guidance, the Commission would interpret the term ''United States'' to include the United States, its states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and any other territories or possessions of the United States government, or enclave of the United States government, its agencies or instrumentalities.

[192] In this respect, the Commission declines to adopt a commenter's recommendation that IRS regulations should be relevant in considering whether a person is included in the interpretation of the term ''U.S. person.'' The Commission believes that adopting the IRS's approach in the Commission's policy would be inappropriate; rather, consistent with CEA section 2(i), the Commission's interpretation of the term ''U.S. person'' focuses on persons whose swap activities meet the ''direct and significant'' nexus.

[193] *See Hertz Corp.* v. *Friend,* 559 U.S. 77, 80 (2010) (determining a corporation's principal place of business for purposes of diversity jurisdiction).

[194] *Id.* at 92–93.

[195] *See* Further Proposed Guidance, 78 FR at 913.

[196] As mentioned in the Introduction, Long-Term Capital Portfolio LP, a Cayman Islands hedge fund advised by LTCM, collapsed in 1998, leading a number of creditors to provide LTCM substantial financial assistance under the supervision of the Federal Reserve Bank of New York. High level officers at LTCM's offices in Greenwich, Connecticut, directed, controlled and coordinated the activities of Long-Term Capital Portfolio LP. This hedge fund, with approximately $4 billion in capital and a balance sheet of just over $100 billion had a swap book in excess of $1 trillion notional. Federal Reserve Chairman Alan Greenspan testified that ''[h]ad the failure of LTCM triggered the seizing up of markets, substantial damage could have been inflicted on many market participants, including some not directly involved with the firm, and could have potentially impaired the economies of many nations, including our own.'' Systemic Risks to the Global Economy and Banking System from Hedge Fund Operations: Hearing Before the House Banking and Fin. Services Comm., 105th Cong., 2nd sess. (Oct. 1, 1998) (statement of Alan Greenspan, Chairman, Federal Reserve), available at 1998 WL 694498.

[197] This discussion regarding the location of a collective investment vehicle's principal place of business is solely for purposes of applying Commission swaps regulations promulgated under Title VII. The Commission does not intend to address here the interpretation of ''principal place of business'' for any other purpose.

[198] *See* Gerald T. Lins, et al., Hedge Funds and Other Private Funds: Regulation and Compliance § 9:1 (Thomson Reuters 2012–2013 ed. 2012).

[199] *See* note 193 and accompanying text, *supra.*

on the persons who are named as directors or officers of the legal entities that comprise the collective investment vehicle.[200] As noted above, these legal entities are merely the legal structure through which the investment objectives of the collective investment vehicle are implemented. Rather, the analysis should focus on the persons who are the equivalent for the collective investment vehicle to the ''high level officers'' of an operating company because they direct, control and coordinate key functions of the vehicle, such as formation of the vehicle or its trading and investment.

The ''high level officers [who] direct, control and coordinate'' the collective investment vehicle may be those senior personnel who implement the investment and trading strategy of the collective investment vehicle and manage its risks, and the location where they conduct the activities necessary to implement the investment strategies of the vehicle may be its center of direction, control and coordination. In this regard, the Commission notes that the achievement of the investment objectives of a collective investment vehicle typically depends upon investment performance and risk management. Investors in a collective investment vehicle seek to maximize the return on their investment while remaining within their particular tolerance for risk. Thus, the key personnel relevant to this aspect of the analysis are those senior personnel responsible for implementing the vehicle's investment strategy and its risk management. Depending on the vehicle's investment strategy, these senior personnel could be those responsible for investment selections, risk management decisions, portfolio management, or trade execution.[201]

The achievement of a collective investment vehicle's investment objectives may be closely linked to its formation. Decisions made in the structuring and formation of the collective investment vehicle may have a significant effect on the performance of the vehicle. Thus, for purposes of identifying the vehicle's principal place of business, the Commission may also consider the location of the senior personnel who direct, control and coordinate the formation of the vehicle (*i.e.,* the promoters).[202] The location of the promoters of the collective investment vehicle is relevant, particularly where the vehicle has a specialized structure or where the promoters of the vehicle continue to be integral to the ongoing success of the fund, including by retaining overall control of the vehicle. The location where the promoters of the collective investment vehicle act to form the vehicle and bring it to commercial life is relevant in determining the center of direction, control and coordination of the vehicle, and those promoters may be the ''high level officers'' of the vehicle referred to in *Hertz.*[203]

Accordingly, the Commission will generally consider the principal place of business of a collective investment vehicle to be in the United States if the senior personnel responsible for either (1) the formation and promotion of the collective investment vehicle or (2) the implementation of the vehicle's investment strategy are located in the United States, depending on the facts and circumstances that are relevant to determining the center of direction, control and coordination of the vehicle.

Since the Commission recognizes that the structures of collective investment vehicles vary greatly, the Commission believes it is useful to provide examples to illustrate how the Commission's approach could apply to a consideration of whether the ''principal place of business'' of a collective investment vehicle is in the United States in particular hypothetical situations. However, because of variations in the structure of collective investment vehicles as well as the factors that are relevant to the consideration of whether a collective investment vehicle has its principal place of business in the United States under this Guidance, these examples are for illustrative purposes only. In addition, these examples are not intended to be exclusive or to preclude a determination that any particular collective investment vehicle has its principal place of business in the United States.

Example 1. An asset management firm located in the United States establishes a collective investment vehicle outside the United States (''Fund A'').[204] Typically, the formation of the collective investment vehicle by the personnel of the asset management firm involves the selection of firms to be the administrator, prime broker, custodian and placement agent for the

[200] In many cases, the entities that comprise the collective investment vehicle may not have ''high level officers'' as contemplated by *Hertz,* and the directors of the entities may be individuals who are affiliated with a firm that is the legal counsel or administrator of the collective investment vehicle and who may serve as directors for many different vehicles. *See* Lins, *supra* note 198, at § 9:4.

[201] The Commission understands that the collective investment vehicle may obtain the services of the relevant personnel through a variety of arrangements, including contracting with an asset manager that employs the personnel, contracting with other employers, or retaining the personnel as independent contractors. Thus, in this analysis, the Commission would generally expect to consider the location of the personnel who undertake the relevant activities, regardless of their particular employment arrangements.

[202] The promoters who form a collective investment vehicle may be integral to the ongoing success of the collective investment vehicle. In fact, the importance of the role played by the promoters of a legal entity has long been recognized. *See generally* 1A Fletcher Cyc. Corp. § 189. For example, in *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow,* the court drew upon English law in describing the promoters as follows:

In a comprehensive sense promoter includes those who undertake to form a corporation and to procure for it the rights, instrumentalities and capital by which it is to carry out the purposes set forth in its charter, and to establish it as fully able to do its business. Their work may begin long before the organization of the corporation, in seeking the opening for a venture and projecting a plan for its development, and it may continue after the incorporation by attracting the investment of capital in its securities and providing it with the commercial breath of life.

203 Mass. 159, 177 (1909), *aff'd,* 225 U.S. 111 (1912).

Modern law continues to refer to the responsibility of promoters of legal entities. *See, e.g.,* SEC Form D, instructions to Item 3 (requiring information regarding the ''promoters'' of a securities issuer). *See also In Re Charles Schwab Corp. Sec. Litig.,* 2010 WL 1261705 (N.D. Cal. Mar. 30, 2010) (discussing responsibility of ''fund managers and promoters'' to operate a collective investment vehicle in accordance with its formation documents).

The Commission generally does not intend that when the promoters of a collective investment vehicle serve an administrative, purely ministerial function of handling the flow of funds from investors into the vehicle, the location of these personnel would be relevant in this context.

[203] The Commission is aware that the boards of directors (or equivalent corporate bodies) of the legal entities that comprise a collective investment vehicle typically have the authority to appoint or remove the legal entity's investment manager, administrator, and auditor, and to approve major transactions involving the legal entity and the legal entity's audited financial statements. But since these functions are not key to the actual implementation of the investment objectives of the collective investment vehicle, and noting that *Hertz* focuses on the ''high level officers'' of the entity rather than its directors, the Commission would generally not view the boards of directors of the legal entities to be key personnel for the collective investment vehicle.

[204] The collective investment vehicle could be a hedge fund, a private equity fund, or other type of investment fund. The Commission is aware that the asset management firm may use any of a variety of structures to form the collective investment vehicle, which may involve one or more legal entities. In a common hedge fund structure, the asset management firm forms a legal entity outside the United States which holds the collective investment vehicle's assets and is the legal counterparty in its investment transactions, including swaps (a ''master fund''). If this structure is used, then typically the equity of the master fund is held by several ''feeder funds,'' each of which is a separate legal entity formed by the asset management firm with characteristics that are important to a different type of investor. Each investor in the collective investment vehicle obtains an equity interest in one of the feeder funds and thereby holds an indirect interest in the master fund. The Commission intends that this Example 1 would encompass, but not be limited to, a collective investment vehicle using a master/feeder structure such as this.

collective investment vehicle.[205] The legal entities comprising the collective investment vehicle enter into agreements retaining the asset management firm as investment manager. Personnel of the asset management firm who are located in the United States will be responsible for implementing Fund A's investment and trading strategy and its risk management. Based on the above facts, the Commission would be inclined to view the principal place of business of Fund A as being in the United States,[206] and therefore each of the legal entities that comprise Fund A would be within the interpretation of the term ''U.S. person.''

Example 2. An asset management firm located outside the United States establishes a collective investment vehicle located outside the United States (''Fund B''). Personnel of the asset management firm who are located outside the United States will be responsible for implementing Fund B's investment and trading strategy and its risk management. However, personnel in two offices of the asset management firm—one of which is located outside the United States and the other of which is located in the United States—will be involved in managing Fund B's investment portfolio. Although the personnel in the U.S. office may act autonomously on a day-to-day basis, they will be under the direction of senior personnel in the non-U.S. office regarding how they are implementing the investment objectives of Fund B. In terms of the asset management firm's internal organization, the personnel in the U.S. office report to the personnel in the non-U.S. office, who also generally hold higher positions within the firm. Because the personnel located inside the United States merely facilitate the implementation of the investment objectives of Fund B, for which senior personnel outside the United States are responsible, the Commission would be inclined to view the principal place of business of Fund B as not being in the United States.[207] As a result, assuming that Fund B is not majority-owned by U.S. persons (as discussed further below), Fund B would not be within the interpretation of the term ''U.S. person,'' and none of the legal entities that comprise Fund B would be U.S. persons (unless the legal entity was actually incorporated or organized in the United States).

Example 3. A financial firm located in the United States establishes a collective investment vehicle outside the United States (''Fund C''). The collective investment vehicle includes a single legal entity organized outside the United States, the assets of which are segregated into several separate classes.[208] The U.S. financial firm arranges with several unaffiliated investment management firms to manage the assets in the various classes; an investment management firm affiliated with the U.S. financial firm may also manage the assets in one or more of the classes. Some of these investment management firms are located in, and others outside, the United States. Under the terms of the contracts between Fund C, the U.S. financial firm and these investment management firms, Fund C has delegated responsibility for the overall control of its investment strategies to the U.S. financial firm that established Fund C, and the U.S. financial firm will have rights to reallocate Fund C's assets among the investment management firms for various reasons, including the U.S. financial firm's discretion regarding Fund C's investment strategies. Based on the above facts, the Commission would be inclined to view the principal place of business of Fund C as being in the United States, even though some of the investment managers involved in implementing Fund C's investment and trading strategy are located outside the United States. Therefore, Fund C (including each of the legal entities that comprise Fund C) would be within the interpretation of the term ''U.S. person.''[209]

The Commission recognizes that the structures of collective investment vehicles are complex and varied, and it does not intend to establish bright line tests for when the principal place of business of a collective investment vehicle would or would not be within the United States. Rather, the Commission's examples above are intended to illustrate the considerations that would be relevant to whether a collective investment vehicle's principal place of business is in the United States, within the framework of reviewing all the relevant facts and circumstances.[210]

The Commission also understands that non-U.S. individuals, institutions, pension plans or operating companies may retain asset management firms in the United States to provide a range of asset management and other investment-related services. Where the individual, institution, pension plan or operating company is not within any

[205] The collective investment vehicle's administrator generally handles day-to-day administrative activities, such as operating the vehicle's bank account, issuing payment instructions, providing net asset calculations, calculating fees, receiving and processing subscriptions, preparing accounts, maintaining the shareholder register, arranging payments of redemption proceeds, coordinating communications with shareholders, and overseeing anti-money laundering compliance. *See id.* at § 9:6. The prime broker facilitates the execution of the vehicle's investment transactions, including swaps. The custodian is responsible for holding the vehicle's assets. The placement agent markets and sells shares to investors.

The Commission generally considers all of these functions, although important to the collective investment vehicle, to be ministerial functions that are generally not relevant to the determination of the location of a collective investment vehicle's principal place of business. Thus, even if all of these firms and all the personnel performing these functions were outside the United States, the Commission would nonetheless be inclined to view the principal place of business of Fund A as within the United States.

Additional elements that could be relevant to the determination include the location of the collective investment vehicle's primary assets, and the location of the collective investment vehicle's counterparties. However, the Commission believes that the location of these additional elements outside the United States should generally not preclude an interpretation that the collective investment vehicle's principal place of business is in the United States.

[206] The Commission notes that elements of Example 1 are similar to the facts of a recent court case involving a similar issue—the location of a collective investment vehicle's ''center of main interest'' for purposes of bankruptcy law. *See Bear Stearns,* note 7 and accompanying text, *supra.* In *Bear Stearns,* the collective investment vehicle's ''center of main interest'' was found to be in the United States even though its registered office was in the Cayman Islands, because it had no employees or managers in the Cayman Islands, and its investment manager was located in New York. *Id.,* 374 B.R. at 129–30. The court further observed that the administrator that ran the back-office operations was in the United States, the collective investment vehicle's books and records were in the United States before the foreign proceedings began, and all of its liquid assets were located in the United States. *Id.* at 130. In addition, investor registries were maintained in Ireland; accounts receivables were located throughout Europe and the United States; and counterparties to master repurchase and swap agreements were based both inside and outside the United States—but none were claimed to be in the Cayman Islands. *Id.*

The Commission believes that *Bear Stearns* aligns with its view that the principal place of business of a collective investment vehicle should not be determined based on where it is organized or has its registered office, but rather should be based on an analysis of the relevant facts and circumstances. However, the Commission notes that under bankruptcy law various factors, particularly factors relating to the debtor's assets and creditors, may be relevant to the determination of where a debtor has its ''center of main interest'' for purposes of determining whether a U.S. bankruptcy court has jurisdiction over the matter. *See, e.g., In re SPhinX, Ltd.,* 351 B.R. 103 (Bankr. S.D.N.Y. 2006) (including various factors in the determination of center of main interest, including the location of the debtor's primary assets and the location of the majority of the debtor's creditors). The Commission believes that the factors that are relevant in such bankruptcy jurisdictional cases differ from those that are relevant to the consideration of whether a collective investment vehicle has its principal place of business in the United States for purposes of this Guidance.

[207] The Commission expects that in this example, this result would be the same if the asset management firm entered into a subadvisory agreement with an independent firm that employed the personnel in the U.S. office described in this example. That is, regardless of whether the U.S. personnel are employed by the asset management firm or a third party employer, the relevant issue is whether the personnel who fulfill the key functions relating to its formation or the achievement of its investment objectives are located in, or outside of, the United States.

[208] Legal entities that may be formed with separate classes are known in various jurisdictions as segregated portfolio companies, protected cell companies or segregated accounts companies. A collective investment vehicle with a structure such as this is typically referred to as a ''hedge fund platform'' or an ''umbrella'' or ''multi-series'' hedge fund.

[209] The Commission expects that the result would generally be the same where the assets of Fund C are not segregated into separate classes.

[210] The Commission believes that Commission regulation 140.99, which provides for persons to request that the staff of the Commission provide written advice or guidance, would be an appropriate mechanism for a collective investment vehicle to seek guidance as to whether the principal place of business of the vehicle is in the United States for purposes of applying the Commission swaps regulations promulgated under Title VII.

prong of the interpretation of the term ''U.S. person'' described in this Guidance (including prongs (iii) and (vi) which relate to collective investment vehicles), then the Commission generally believes that the person would not come within the ''U.S. person'' interpretation solely because it retains an asset management firm located in the United States to manage its assets or provide other financial services.[211]

Second, the Commission will include in its consideration the elements in the alternative version of prong (ii)(B) that was described in the Further Proposed Guidance (and renumbered in the Guidance as prong (vii)). The relevant elements in the alternative version are whether a legal entity is directly or indirectly majority-owned by one or more U.S. persons,[212] in which one or more of these U.S. person(s) bears unlimited responsibility for the obligations and liabilities of such legal entity, and the entity is not a corporation, limited liability company, limited liability partnership or similar entity where shareholders, members or partners have limited liability.

In response to comments on the Proposed Guidance, the Commission intends that this prong would cover entities that are directly or indirectly majority-owned by U.S. person(s), but not those legal entities that have negligible U.S. ownership interests. In the Commission's view, where the structure of an entity is such that the U.S. owners are ultimately liable for the entity's obligations and liabilities, the connection to activities in, or effect on, U.S. commerce would generally satisfy section 2(i), irrespective of the fact that the ownership is indirect. The Commission expects that this ''look-through'' aspect of the interpretation also would serve to discourage persons from engaging in activities outside of the Dodd-Frank regulatory regime by creating such indirect ownership structures.

In the Commission's view, where one or more U.S. owners has unlimited responsibility for losses or nonperformance by its majority-owned affiliate, there is generally a direct and significant connection with activities in, or effect on, commerce of the United States within the meaning of section 2(i). Therefore, for purposes of section 2(i), the majority-owned entity would appropriately be considered a ''U.S. person.''[213] Unlimited liability corporations where U.S. persons have direct or indirect majority ownership and any such U.S. persons have unlimited liability for the obligations and liabilities of the entity would generally be covered under this prong.[214] By contrast, a limited liability corporation or limited liability partnership would generally not be covered under this prong; the Commission also clarifies, in response to comments on the Further Proposed Guidance, that it intends that entities in other jurisdictions that are similar to limited liability corporations or limited liability partnerships in that none of the owners of such entities bear unlimited liability for the entity's obligations and liabilities would generally be excluded from this prong.

The Commission has considered the comments requesting that the interpretation include consideration of whether the U.S. person majority owners have unlimited responsibility for ''all of'' the obligations and liabilities of the entity in connection with this prong of the interpretation. The Commission believes that even if there are some potential obligations and liabilities of the entity that may not flow to the U.S. persons, the risk of unlimited responsibility for other obligations and liabilities would generally be a sufficient nexus to the United States for purposes of section 2(i). Similarly, it would generally not be necessary for all the U.S. persons who are majority owners to bear unlimited responsibility (as some commenters suggested). Rather, if any of the U.S. persons who are direct or indirect majority owners bears unlimited responsibility for the obligations and liabilities of the entity, it would generally be covered by this prong of the interpretation.

In response to requests from commenters on the Proposed Guidance, the Commission clarifies that it does not intend that prong (vii) would cover legal entities organized or domiciled in a foreign jurisdiction but whose swaps obligations are guaranteed by a U.S. person.[215] To be clear, the Commission remains concerned, as explained in the Proposed Guidance, about the risks to a U.S. guarantor that flow from its guarantee of the swaps obligations of an entity that is organized or domiciled abroad.[216] Yet, a guarantee does not necessarily provide for ''unlimited responsibility for the obligations and liabilities of the guaranteed entity'' in the same sense that the owner of an unlimited liability corporation bears such unlimited liability.[217] The Commission believes, therefore, that its concern regarding the risks associated with guarantee arrangements can, consistent with CEA section 2(i) and in the interests of international comity, appropriately be addressed in a more targeted fashion without broadly treating such guaranteed entities as U.S. persons at this time.

Thus, for example, as set forth below, where a non-U.S. affiliate of a U.S. person has its swap dealing obligations with non-U.S. counterparties guaranteed by a U.S. person,[218] the guaranteed affiliate generally would be required to count those swap dealing transactions with non-U.S. counterparties (in addition to its swap dealing transactions with U.S. persons) for purposes of

[211] However, this policy (that non-U.S. persons generally do not become U.S. persons solely by retaining U.S. asset management firms) would not apply to the legal entities comprising a collective investment vehicle that is within the interpretation of the term ''U.S. person.'' Rather, those legal entities would be within the interpretation of the term ''U.S. person'' for other reasons (*e.g.,* because the vehicle has its principal place of business in the United States or a majority of its direct or indirect owners are U.S. persons)—not solely because they had retained a U.S. asset management firm.

[212] In this context, the term ''U.S. person'' refers to those natural persons or legal entities that meet prong (i), (ii), (iii), (iv), or (v) of the interpretation of ''U.S. person.''

[213] When Lehman Brothers collapsed in 2008, it had a complex web of affiliates. This included LBIE, an unlimited liability company in London. At that time, it had more than 300 outstanding creditor and debtor balances with its affiliates amounting to more than $21 billion in total. What happened to LBIE is directly relevant to the current discussions about cross-border application of swaps reforms, as LBIE had more than 130,000 swaps contracts outstanding when it failed. Many of the Lehman Brothers entities were guaranteed by the parent, Lehman Brothers Holdings, in the United States. More than $28 billion in client assets and money were caught up in the bankruptcy of the UK entity. This uncertainty led, further, to a run on many other financial institutions when customers feared for their positions and collateral housed in overseas affiliates of other U.S. financial institutions. *See* Lehman Brothers Progress Report, note 6 and accompanying text, *supra.*

[214] Unlimited liability corporations include, solely by way of example, entities such as an unlimited company formed in the U.K., *see* Brian Stewart, Doing Business in the United Kingdom § 18.02[2][c], or an unlimited liability company formed under the law of Alberta, British Columbia, or Nova Scotia, *see* Richard E. Johnston, Doing Business in Canada § 15.04[5].

[215] Also, the Commission does not interpret section 2(i) to require that it treat a non-U.S. person as a ''U.S. person'' solely because it is controlled by or under common control with a U.S. person.

[216] *See, e.g.,* Letter from Sen. Levin at 10 (''If a U.S.-based parent company provides an implicit or explicit guarantee, regardless of the form of the guarantee, to a non-U.S. subsidiary or affiliate, the risk is effectively transferred to the U.S. person. In such circumstances, the exact form of the guarantee should not prevent the CFTC from demanding compliance with the CFTC's derivatives safeguards.'').

[217] Since a guarantee is treated in law as a contract, a guarantor may be protected by legal defenses to the enforcement of the contract. Also, in some circumstances, a guarantee may not be enforceable with respect to underlying obligations that are materially altered without the guarantor's consent. *See, e.g.,* Debtor-Creditor Law § 44.04 (Theodore Eisenberg ed., Matthew Bender 2005).

[218] See note 267 and accompanying text, *supra,* for guidance regarding the Commission's interpretation of the term ''guarantee.''

determining whether the affiliate exceeds a de minimis amount of swap dealing activity and must register as a swap dealer. The Commission notes that where a non-U.S. affiliate of a U.S. person has its swap dealing obligations with non-U.S. counterparties guaranteed by a U.S. person, the guarantee creates a significant risk transfer into the United States. In the absence of such guarantees, non-U.S. counterparties may be unwilling to enter into swaps with such non-U.S. affiliates. As for the substantive swaps requirements, as discussed below, Transaction-Level Requirements generally would apply to swaps between a non-U.S. swap dealer or non-U.S. MSP on the one hand, and a U.S.-guaranteed affiliate on the other hand, though such swaps may be subject to substituted compliance, as appropriate. The Commission generally expects that, in considering international comity and the factors set forth in the Restatement (*e.g.,* the character of the activity to be regulated, the existence of justified expectations, the likelihood of conflicts with regulation by foreign jurisdictions), this approach would strike a reasonable balance in assuring that the swaps market is brought under the new regulatory regime as directed by Congress, consistent with section 2(i) of the CEA.

Third, the Commission will include in its interpretation of the term ''U.S. person'' the elements in prong (iii), (renumbered as prong (viii)), substantially as proposed. Commenters did not comment on, nor object to, this prong. The Commission clarifies that it expects that this prong would encompass a joint account where any one of the beneficial owners is a U.S. person.

Fourth, the Commission will include in its interpretation of the term ''U.S. person'' the elements in the alternative prong (iv) that was described in the Further Proposed Guidance (renumbered in the Guidance as prong (vi)), with some modifications. The Commission understands from commenters that the determination by some collective investment vehicles of whether they are majority-owned by U.S. persons may pose practical difficulties. In response to these practical difficulties, the Commission has eliminated the reference to ''indirect'' majority ownership in this prong. As revised, this prong no longer refers to ''direct or indirect'' majority ownership by U.S. persons.

Under alternative prong (vi), any commodity pool, pooled account, investment fund or other collective investment vehicle that is majority-owned by one or more U.S. person(s) [219] would be deemed a U.S. person. For purposes of this prong, majority-owned means the beneficial ownership of more than 50 percent of the equity or voting interests in the collective investment vehicle. The Commission expects that the collective investment vehicle would: (1) Determine whether its direct beneficial owners are U.S. persons described in prong (i), (ii), (iii), (iv), or (v) of the term ''U.S. person,'' and (2) ''look-through'' the beneficial ownership of any other legal entity invested in the collective investment vehicle that is controlled by or under common control with the collective investment vehicle in determining whether the collective vehicle is majority-owned by U.S. persons.

For example, a limited company is formed under the laws of the Cayman Island as a collective investment vehicle that engages in swap transactions. It has a single investor, which is an investment company registered with the Securities and Exchange Commission under the Investment Company Act of 1940. Shares in the registered investment company are only owned by United States persons and both the Cayman Island limited company and the registered investment company are sponsored by the same investment adviser. The Cayman Island limited company would be viewed as a ''controlled foreign corporation'' of the registered investment company. Because the Cayman Island limited company is controlled by the same investment adviser as the investor registered investment company, the Cayman Island limited company would be required to ''look through'' the registered investment company and would be considered majority owned by U.S. persons. Therefore, under revised prong (vi), the Cayman Island limited company generally would be a U.S. person, subject to consideration of all the facts and circumstances.

As another example, a limited company is formed under the laws of the Cayman Island by an investment manager as a collective investment vehicle that engages in swap transactions as part of its investment strategy (''Master Fund''). It has two investors, which are also collective investment vehicles that were formed by the same investment manager for the purpose of investing in the Master Fund. One investor collective investment vehicle is formed under the laws of the state of Delaware and the other investor collective investment vehicle is a limited company formed under the laws of the Cayman Island. Because Master Fund and the two investor collective investment vehicles are under common control by the investment manager, the Master Fund is required to ''look through'' the two investor vehicles to their beneficial owners to determine whether it is majority owned by U.S. persons. Whether the Master Fund is a U.S. person will require the assessment of whether the majority of its equity is held indirectly by U.S. persons through the two investor vehicles.

However, where a collective investment vehicle is owned in part by an unrelated investor collective investment vehicle, the collective investment vehicle need not ''look through'' the unrelated investor entity, but may reasonably rely upon written, bona fide representations from the unrelated investor entity regarding whether it is a U.S. person,[220] unless the investee collective investment vehicle has reason to believe that such unrelated investor entity was formed or is operated principally for the purpose of avoiding looking through to the ultimate beneficial owners of that entity.[221] The Commission expects that the collective investment vehicle would take reasonable ''due diligence'' steps with respect to its investors in making this determination, along the lines of the verifications that the collective investment vehicle may conduct in connection with other regulatory requirements.[222]

The Commission is also including a minor modification to clarify that it expects that the interpretation in prong (vi) would apply irrespective of whether the collective investment vehicle is organized or incorporated in the United States. Similar to the Commission's analysis with respect to prong (vii) discussed above, the Commission's

[219] The term ''U.S. person,'' as used in this context, refers to those natural persons or legal entities that meet (i), (ii), (iii), (iv), or (v) of the interpretation of ''U.S. person.''

[220] The ability of the collective investment vehicle to rely on the bona fide representation of the unrelated investor entity does not affect the due diligence that the unrelated investor entity should conduct in order to make such representation to the collective investment vehicle.

[221] The Commission has applied similar anti-evasion standards in other contexts. *See, e.g.,* 17 CFR 4.7(a)(1)(iv)(D) (providing that a passive investment vehicle will be considered a non-U.S. person for purposes of section 4.7 under certain circumstances provided that the entity was ''not formed principally for the purpose of facilitating investment by persons who do not qualify as Non-United States persons in a pool'' whose operator is claiming relief under that section).

[222] *See* the discussion of due diligence below, which the Commission believes is generally applicable to the ''due diligence'' required by the collective investment vehicle in this context.

policy is that the place of a collective investment vehicle's organization or incorporation would not necessarily be determinative of its status as a ''U.S. person'' for purposes of CEA section 2(i). As noted above, collective investment vehicles are created for the purpose of pooling assets from investors and channeling these assets to trade or invest in line with the objectives of the investors. In the Commission's view, these are generally passive investment vehicles that serve as a means to achieve the investment objectives of their beneficial owners, rather than being separate, active operating businesses. As such, the beneficial owners would be directly exposed to the risks created by the swaps that their collective investment vehicles enter into.[223] Therefore, the Commission's policy is that if U.S. persons beneficially own more than 50 percent of the equity or voting interests in a collective investment vehicle, then the collective investment vehicle would ordinarily satisfy the ''direct and significant'' standard of CEA section 2(i).

The Commission is also revising its interpretation in prong (vi) to exclude non-U.S. publicly-offered, as opposed to publicly-traded, collective investment vehicles. That is, a collective investment vehicle that is publicly offered to non-U.S. persons, but not offered to U.S. persons, would generally not be included within the interpretation of the term U.S. person. This revision is intended to address comments that publicly-traded funds are only a subset of non-U.S. regulated collective investment vehicles and that ownership verification is expected to be particularly difficult for pools, funds, and other collective investment vehicles that are publicly offered.[224]

In addition, a collective investment vehicle that is publicly offered only to non-U.S. persons and not offered to U.S. persons generally would not fall within any of the prongs of the interpretation of the term ''U.S. person.''

Fifth, the Commission will not include in its interpretation of the term ''U.S. person'' the elements in proposed prong (v), which related to registered commodity pool operators. The Commission agrees with commenters that neither the location (nor the nationality), nor the registration status, of the pool operator would normally, without more, be determinative of whether the underlying pool(s) should be included in its interpretation of the term ''U.S. person.'' The Commission has further considered that, as discussed above, the relevant elements for a commodity pool or other collective investment vehicle would generally be whether or not its principal place of business is in the United States or it is majority owned by U.S. persons. The Commission believes that proposed prong (v) could be overly broad and have the effect of capturing commodity pools with minimal participation of U.S. persons and a minimal U.S. nexus.

Sixth, the Commission will include in its interpretation of the term ''U.S. person'' the elements in prong (vi) (renumbered as prong (iv)) relating to pension plans. In response to comments, though, the Commission is clarifying that it does not intend that its interpretation encompass pension plans that are primarily for foreign employees of U.S.-based entities described in prong (iii) of the interpretation. Also, as noted above in the discussion of collective investment vehicles, the Commission does not generally expect that a pension plan which is not a U.S. person would become a U.S. person simply because some of the individuals or entities that manage the investments of the pension plan are located or organized in the United States.

Finally, the Commission will include in its interpretation of the term ''U.S. person'' the elements in prong (vii) (renumbered as prongs (ii) and (v)) pertaining to an estate or trust, with certain modifications to take into account the views of commenters who addressed this issue, and the legal and practical considerations that are relevant to the treatment of estates and trusts for purposes of the Dodd-Frank Act. The Commission agrees with the commenters who stated that treatment of an estate or trust should generally not depend on whether the income of the estate or trust is subject to U.S. tax. The Commission understands that whether income is subject to U.S. tax can depend on a variety of factors, including the source of the income, which may not be relevant to whether the Dodd-Frank Act should apply to swaps entered into by the estate or trust.

After further consideration, the Commission will include in its interpretation of the term ''U.S. person'' (a) an estate if the decedent was a U.S. person at the time of death and (b) a trust if it is governed by the law of a state or other jurisdiction in the United States and a court within the United States is able to exercise primary supervision over the administration of the trust. For what it expects to be the relatively few estates that would use swaps (most likely for purposes of investment hedging), the Commission believes that the treatment of such swaps should generally be the same as for swaps entered into by the decedent during life. If the decedent was a party to any swaps at the time of death, then those swaps should generally continue to be treated in the same way after the decedent's death, when the swaps would most likely pass to the decedent's estate. Also, the Commission expects that this element of the interpretation will be predictable and easy to apply for natural persons planning for how their swaps will be treated after death, for executors and administrators of estates, and for the swap counterparties to natural persons and estates.

With respect to trusts, the Commission expects that its approach would be in line with how trusts are treated for other purposes under law. The Commission has considered that each trust is governed by the laws of a particular jurisdiction, which may depend on steps taken when the trust was created or other circumstances surrounding the trust. The Commission believes that if a trust is governed by U.S. law (*i.e.,* the law of a state or other jurisdiction in the United States), then it would generally be reasonable to treat the trust as a U.S. person for purposes of the Dodd-Frank Act. Another relevant element in this regard would be whether a court within the United States is able

[223] A collective investment vehicle is an arrangement pursuant to which funds of one or more investors are pooled together and invested on behalf of such investors by a manager. Typically, investors do not have day-to-day control over the management or operation of the vehicle and are essentially passive, beneficial owners of the vehicle's assets. Prior to participating in a collective investment vehicle, an investor enters into an arrangement with the vehicle which governs the fees collected by the manager of the vehicle and the investor's payout from the vehicle, which may include periodic payments. Typically a limited liability entity such as a corporation, limited partnership or limited liability company is used as part of the arrangement so that investor liability is limited to the investor's beneficial interest in the vehicle's assets.

With respect to a swap between a collective investment vehicle and a non-U.S. swap dealer, the Commission believes that losses borne by the vehicle upon a default by the non-U.S. swap dealer are better seen as losses incurred by the investors in the collective investment vehicle rather than by the vehicle itself. In contrast with a collective investment vehicle, when an operating company enters into a swap with a non-U.S. swap dealer, losses borne by the operating company upon a default by the non-U.S. swap dealer are better seen as losses incurred by the operating company and only indirectly by its shareholders. Therefore, prong (vi) only relates to collective investment vehicles and does not extend to operating companies.

[224] The publicly-offered collective investment vehicle could be a UCITS (Undertakings for Collective Investment in Transferable Securities). *See* Directive 2009/65/EC of the European Parliament and of the Council (Jul. 13, 2009), available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:302:0032:0096:EN:PDF*. Under the Commission's interpretation of section 2(i), a UCITS would not be included in the term ''U.S. person,'' provided it is not offered, directly or indirectly, to U.S. persons.

to exercise primary supervision over the administration of the trust.[225] The Commission expects that including this element of the interpretation would generally align the treatment of the trust for purposes of the Dodd-Frank Act with how the trust is treated for other legal purposes. For example, the Commission expects that if a person could bring suit against the trustee for breach of fiduciary duty in a U.S. court (and, as noted above, the trust is governed by U.S. law), then treating the trust as a U.S. person would generally be in line with how it is treated for other purposes.

The Commission disagrees with commenters that the status of an estate or trust should be based solely on the status of the executor, administrator or trustee.[226] For one thing, this would mean that the treatment of the estate or trust could change if, for example, the executor or trustee relocates its offices. The Commission also does not believe it would be appropriate that the treatment of a trust would depend solely on the identity of the beneficiaries to the trust because, among other reasons, the beneficiaries may be described as a class of persons, rather than particular persons. In the Commission's view, more important considerations in formulating its policy are whether the treatment of the estate or trust is predictable and whether it is in line with how the entity is treated for other purposes. The Commission would also consider other facts and circumstances related to the estate or trust that could be relevant to whether the entity should be within the interpretation of the term ''U.S. person'' in the context of section 2(i).

a. Due Diligence

As described above, many commenters indicated that the information necessary to accurately assess the status of their counterparties as U.S. persons may not be available, or may be available only through overly burdensome due diligence, particularly where the interpretation includes a ''look-through'' element that considers ''direct and indirect'' ownership. For this reason, these commenters requested that the Commission's policy contemplate reasonable reliance on counterparty representations as to the relevant elements of the interpretation of the term ''U.S. person.''

The Commission agrees with the commenters that a party to a swap should generally be permitted to reasonably rely on its counterparty's written representation in determining whether the counterparty is within the Commission's interpretation of the term ''U.S. person.'' In this context, the Commission's policy is to interpret the ''reasonable'' standard to be satisfied when a party to a swap conducts reasonable due diligence on its counterparties, with what is reasonable in a particular situation to depend on the relevant facts and circumstances. The Commission notes that under the External Business Conduct Rules, a swap dealer or MSP generally meets its due diligence obligations if it reasonably relies on counterparty representations, absent indications to the contrary.[227] As in the case of the External Business Rules, the Commission believes that allowing for reasonable reliance on counterparty representations encourages objectivity and avoids subjective evaluations, which in turn facilitates a more consistent and foreseeable determination of whether a person is within the Commission's interpretation of the term ''U.S. person'' and the extent to which the Title VII requirements apply to certain cross-border activities.[228]

b. Foreign Branch of U.S. Person

The Commission is confirming its interpretation, as proposed, that a foreign branch of a U.S. person is itself a ''U.S. person.'' As the Commission explained in the Proposed Guidance, a branch does not have a legal identity separate from that of its principal entity. In this respect, the Commission notes that branches are neither separately incorporated nor separately capitalized and, more generally, the rights and obligations of a branch are the rights and obligations of its principal entity (and vice versa). Under these circumstances, the Commission views the activities of a foreign branch as the activities of the principal entity, and thus a foreign branch of a U.S. person is a U.S. person.

Accordingly, the Commission declines to recognize foreign branches of U.S. persons separately from their U.S. principal for purposes of registration. That is, if the foreign branch were to be a swap dealer or MSP, as discussed further below, the U.S. person would be required to register, and the registration would encompass the foreign branch. Upon consideration of principles of international comity and the factors set forth in the Restatement, though, the Commission has calibrated the requirements otherwise applicable to such foreign branches in respects other than broadly excluding them from the U.S. person interpretation. For example, as discussed further below, foreign branches of U.S. persons may comply with Transaction-Level Requirements through substituted compliance, where appropriate, with respect to swaps with foreign counterparties, as well as with a foreign branch of another U.S. person. Further, non-U.S. persons may exclude swaps with foreign branches of registered swap dealers for purposes of determining whether they have exceeded the de minimis level of swap dealing activity under the swap dealer definition.

The types of offices the Commission would consider to be a ''foreign branch'' of a U.S. bank, and the circumstances in which a swap is with such foreign branch, are discussed further below in section C below.

[225] The Commission is aware that one element applied by the Internal Revenue Service to determine if a trust is a U.S. person for tax purposes depends on whether a court within the United States is able to exercise primary supervision over the administration of the trust. *See* 26 CFR 301.7701–7(a)(1)(i). The Commission believes that precedents developed under tax law could be relevant, as appropriate, in applying this aspect of its interpretation of the term ''U.S. person.'' However, the Commission does not intend to formally adopt the Internal Revenue Service test for this purpose.

[226] The Commission does not intend to preclude considerations relating to the trustee in determining whether the trust is governed by U.S. law or subject to the jurisdiction of U.S. courts, if any such considerations are relevant. Rather, the Commission believes that the status of the trustee would generally not be directly relevant to determining if a trust should be treated as a U.S. person.

[227] *See* Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 FR 9734 (Feb. 17, 2012) (''External Business Conduct Rules''). Consistent with the ''reasonable reliance'' standard in the External Business Conduct Rules, a swap dealer or MSP may rely on the written representations of a counterparty to satisfy its due diligence requirements. However, a swap dealer or MSP should not rely on a written representation if it has information that would cause a reasonable person to question the accuracy of the representation. In other words, a swap dealer or MSP should not ignore red flags when relying on written representations to satisfy its due diligence obligations. Further, if agreed to by the counterparty, the written representations may be included in counterparty relationship documentation. However, a swap dealer or MSP may only rely on such representations in the counterparty relationship documentation if the counterparty agrees to timely update any material changes to the representations. In addition, the Commission expects swap dealers and MSPs to review the written representations on a periodic basis to ensure that they remain appropriate for the intended purpose.

[228] This approach is generally consistent with suggestions provided by commenters. For example, SIFMA suggested that the determination of whether a counterparty is a U.S. person should be made at the inception of the swap transaction based on the most recent representation from the counterparty, which should be renewed by the counterparty once per calendar year. *See* SIFMA (Aug. 27, 2012) at A17.

c. Regulation S

The Commission has considered the recommendation by several commenters that the Commission follow, entirely or to some extent, the definition of ''U.S. person'' in the SEC's Regulation S.[229] With respect to the treatment of foreign branches in particular, Regulation S excludes from its definition of ''U.S. person'' any agency or branch of a U.S. person located outside the United States if (1) the agency or branch operates for valid business reasons; and (2) the agency or branch is engaged in the business of insurance or banking, and is subject to substantive insurance or banking regulation in the jurisdiction where it is located.[230] As the Commission noted in the Proposed Guidance, however, Regulation S addresses the level of activities (*i.e.,* offerings of securities) conducted within the United States, and related customer protection issues.[231] As such, the regulation's territorial approach to determining U.S. person status is, in the Commission's view, unsuitable for purposes of interpreting section 2(i), which addresses the connection with activities in and the risks to U.S. commerce arising from activities outside the United States.

Similarly, Regulation S and the Dodd-Frank swaps provisions also serve fundamentally different regulatory objectives with respect to the treatment of collective investment vehicles. Under Regulation S, the SEC will consider certain investment funds and securities issuers that are organized in foreign jurisdictions, but owned by U.S. investors, to be U.S. persons unless the U.S. investors are accredited investors.[232] The accredited investor condition provides a level of assurance that U.S. investors are entities that understand the consequences of investing through a foreign entity and, in effect, may be deemed to have waived the benefits of the U.S. securities laws. In contrast, the focus of Title VII is not limited to customer protection. Whether or not the investors in a collective investment vehicle are accredited investors, in the Commission's view, is irrelevant; rather, under section 2(i), the focus is whether the swap activities of a collective investment vehicle have a direct and significant connection with activities in, or effect on, U.S. commerce.

The Commission understands that the Regulation S definition of ''U.S. person'' is generally understood and applied by market participants. However, as the foregoing examples demonstrate, the Regulation S definition of ''U.S. person'' could fail to capture persons whose activities, the Commission believes, meet the ''direct and significant'' jurisdictional test of CEA section 2(i)—and whose activities present the type of risk that Congress addressed in Title VII. This potential for underinclusion, together with the fact that the Commission has addressed commenter concerns by providing further details and guidance about its interpretation of the term ''U.S. person,'' which the Commission expects will facilitate a more consistent understanding of that term among market participants, provides the basis for not importing the Regulation S definition into the Commission's interpretation of CEA section 2(i).

d. Other Clarifications

The Commission continues to include the prefatory phrase ''include, but not be limited to'' in its interpretation of the term ''U.S. person,'' as it appeared in the Proposed Guidance. While the Commission's policy generally is to limit its interpretation of this term, for purposes of this Guidance, to persons encompassed within the several prongs discussed above, the Commission also expects that there may be circumstances that are not fully addressed by those prongs, or other situations where the interpretation discussed above does not appropriately resolve whether a person should be included in the interpretation of the term ''U.S. person.'' Thus, the Commission continues to include the prefatory phrase to indicate that there may be situations where a person not fully described in the interpretation above is appropriately treated as a ''U.S. person'' for purposes of this Guidance in view of the relevant facts and circumstances and a balancing of the various regulatory interests that may apply. In these situations, the Commission anticipates that the relevant facts and circumstances may generally include the strength of the connections between the person's swap-related activities and U.S. commerce; the extent to which such activities are conducted in the United States; the importance to the United States (as compared to other jurisdictions where the person may be active) of regulating the person's swap-related activities; the likelihood that including the person within the interpretation of ''U.S. person'' could lead to regulatory conflicts; and considerations of international comity.[233] The Commission anticipates that it would also likely be helpful to consider how the person (and in particular its swap activities) is currently regulated, and whether such regulation encompasses the person's swap activities as they relate to U.S. commerce.

Finally, in response to commenters' requests for clarification regarding the scope of the applicability of the ''U.S. person'' interpretation,[234] the Commission confirms that its policy is to apply its interpretation of the term ''U.S. person'' only to swaps regulations promulgated under Title VII, unless provided otherwise in any particular regulation. Therefore, for example, the Commission does not intend that this Guidance address how the term ''person'' or ''U.S. person'' should be interpreted in connection with any other CEA provisions or Commission regulations promulgated thereunder.

4. Summary

In summary, for purposes of the application of CEA section 2(i), the Commission will interpret the term ''U.S. person'' generally to include, but not be limited to:[235]

(i) Any natural person who is a resident of the United States;

(ii) any estate of a decedent who was a resident of the United States at the time of death;

(iii) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing (other than an entity described in prongs (iv) or (v), below) (a ''legal entity''), in each case that is organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States;

(iv) any pension plan for the employees, officers or principals of a legal entity described in prong (iii), unless the pension

[229] *See, e.g.,* MFA/AIMA (Aug. 28, 2012) at 4, 8–9; IIAC (Aug. 27, 2012) at 3; J.P. Morgan (Aug. 27, 2012) at 3, 8–9; SocGen (Aug. 8, 2012) at 5; ISDA (Aug. 10, 2012) at 9. *See also* IIB (Aug. 9, 2012) at 3 (noting that the proposed interpretation is more expansive than other Commission and SEC definitions of ''U.S. person'' and makes it difficult to assess U.S. person status). Regulation S is codified at 17 CFR 230.901 through 230.905.

[230] *See* 17 CFR 230.902(k)(2)(v).

[231] *See* Offshore Offers and Sales, 55 FR 18306 (May 2, 1990).

[232] *See* 17 CFR 230.902(k)(1)(viii). Also, the exception from the Regulation S definition of ''U.S. person'' is not available if any of such accredited investors are natural persons, estates or trusts. *Id.*

[233] These factors are among those relevant to whether a country has a basis to assert jurisdiction over an activity under the Restatement. *See generally* note 86 and accompanying text, *supra.*

[234] *See, e.g.,* Goldman (Aug. 27, 2010) at 3, FOA (Aug. 13, 2012) at 10–11; SIFMA (Aug. 27, 2012) at A14–15, FIA (Aug. 27, 2012) at 2–5.

[235] The Commission believes that Commission regulation 140.99, which provides for persons to request that the staff of the Commission provide written advice or guidance, would be an appropriate mechanism for a person to seek guidance as to whether it is a U.S. person for purposes of applying the Commission swaps regulations promulgated under Title VII.

plan is primarily for foreign employees of such entity;

(v) any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust;

(vi) any commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (iii) and that is majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v), except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly offered only to non-U.S. persons and not offered to U.S. persons;

(vii) any legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) that is directly or indirectly majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity; and

(viii) any individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in prong (i), (ii), (iii), (iv), (v), (vi), or (vii).

Under this interpretation, the term ''U.S. person'' generally means that a foreign branch of a U.S. person would be covered by virtue of the fact that it is a part, or an extension, of a U.S. person.

For convenience of reference, this Guidance uses the terms ''U.S. swap dealer'' and ''U.S. MSP'' to refer to swap dealers and MSPs, respectively, that are within the Commission's interpretation of the term ''U.S. person'' under this Guidance. The terms ''non-U.S. swap dealer'' and ''non-U.S. MSP'' refer to swap dealers and MSPs, respectively, that are not within the Commission's interpretation of the term ''U.S. person'' under this Guidance; and the term ''non-U.S. person'' refers to a person that is not within the Commission's interpretation of the term ''U.S. person'' under this Guidance.

B. Registration

1. Proposed Guidance

Under section 2(i) of the CEA, the Dodd-Frank swaps provisions, including the swap dealer and MSP registration provisions, do not apply to activities overseas unless such activities have a ''direct and significant connection with activities in, or effect on,'' U.S. commerce. In the Proposed Guidance, the Commission addressed the general manner in which a person's overseas swap dealing activities or positions may require registration as a swap dealer or MSP, respectively. Specifically, under the Proposed Guidance, the Commission would expect that a non-U.S. person whose swap dealing transactions with U.S. persons exceed the de minimis threshold would register as a swap dealer.[236] Likewise, under the Proposed Guidance, the Commission would expect that a non-U.S. person who holds swaps positions where one or more U.S. persons are counterparties above the specified MSP thresholds would register as an MSP.[237] As explained in the Proposed Guidance, the Commission believes that, consistent with section 2(i), the level of swap dealing or positions that is sufficient to require a person to register as a swap dealer or MSP when conducted by a person located in the United States would generally also meet the ''direct and significant'' nexus when such activities are conducted by a non-U.S. person with a U.S. person and in some other limited circumstances.

In the consideration of whether a non-U.S. person is engaged in more than a de minimis level of swap dealing, the Proposed Guidance would generally include the notional value of any swaps between such non-U.S. person (or any of its non-U.S. affiliates under common control) and a U.S. person (other than a foreign branch of a registered swap dealer).[238] Further, where the potential non-U.S. swap dealer's obligations are guaranteed by a U.S. person, the Commission would expect that the non-U.S. person would register with the Commission as a swap dealer when the aggregate notional value of its swap dealing activities (along with the swap dealing activities of its non-U.S. affiliates that are under common control and also guaranteed by a U.S. person) with U.S. persons and non-U.S. persons exceeds the de minimis threshold. Additionally, the Proposed Guidance clarified that the Commission would not expect a non-U.S. person without a guarantee from a U.S. person to register as a swap dealer if it does not engage in swap dealing with U.S. persons as part of ''a regular business'' with U.S. persons, even if the non-U.S. person engages in dealing with non-U.S. persons.

Following a similar rationale, under the Proposed Guidance if a non-U.S person holds swaps positions above the requisite threshold, the Commission would expect such non-U.S. person to register as an MSP. In considering whether a non-U.S. person that is a potential MSP meets the applicable threshold, under the Proposed Guidance, the non-U.S. person would have included the notional value of: (1) any swaps entered into between such non-U.S. person and a U.S. person (provided that if the non-U.S. person's swaps are guaranteed by a U.S. person, then such swaps will be attributed to the U.S. guarantor and not the potential non-U.S. MSP); and (2) any swaps between another non-U.S. person and a U.S. person if the potential non-U.S. MSP guarantees the obligations of the other non-U.S. person thereunder.[239]

2. Comments

In general, commenters on the Proposed Guidance did not raise concerns or objections to the Commission's interpretation that non-U.S. persons who engage in more than a de minimis level of swap dealing with U.S. persons should be expected to register as swap dealers.[240] A number of commenters argued, however, that a non-U.S. person should not be expected to register as a swap dealer solely by reason of being guaranteed by a U.S. person.[241] SIFMA stated that the ''connection between a non-U.S. swap dealing entity and its U.S. guarantor creates too tenuous a nexus to justify registration on the basis of this relationship alone.'' [242] As an alternative, SIFMA posited that only guarantees by a U.S. person for which there is a material likelihood of payment by the U.S. guarantor should be counted towards the de minimis calculation. To implement this recommendation, SIFMA suggested that the Commission establish how to determine whether the likelihood of payment is remote, such as a comparison of the aggregate contingent liability of the U.S. person

[236] *See* Proposed Guidance, 77 FR at 41218–41219.

[237] *Id.*

[238] *Id.* at 41218–20.

[239] *Id.* at 41221.

[240] One commenter, Japanese Bankers Association, stated that the cross-border application of Dodd-Frank is overbroad because it would capture even hedging transactions made by a non-U.S. swap dealer with a U.S. swap dealer that is making a market. The definition of ''dealing activity'' is ambiguous, this commenter asserted, and might require the non-U.S. swap dealer to register. *See* Japanese Bankers Association (Aug. 27, 2012) at 1.

[241] *See, e.g.,* Goldman (Aug. 27, 2012) at 5; ISDA (Aug. 10, 2012) at 12 (stating that, in the typical case, an intra-group guarantee allocates risks and activities within the corporate group and is not a dealing activity of the non-U.S. person); CEWG (Aug. 27, 2012) at 6–7 (stating that the Proposed Guidance should not include swap guarantees for aggregation purposes because it is contrary to the Final Entities Rules; jurisdiction should not be extended to transactions between two non-U.S. persons if the swaps obligations of one party are guaranteed by a U.S. person because U.S. jurisdiction in these circumstances is not supported by law or existing conventions of international jurisdiction).

[242] SIFMA (Aug. 27, 2012) at A29.

guarantor to the net equity of that guarantor.[243]

Similarly, Goldman argued that it would be inconsistent with the Dodd-Frank Act to expect non-U.S. persons to register as swap dealers solely on the basis of guarantees by a U.S. parent, absent any showing of a ''direct and significant'' jurisdictional nexus. Goldman recommended that any concerns regarding potential evasion of the registration requirement be addressed through the Commission's exercise of its anti-evasion authority.[244] ISDA agreed, suggesting that rather than protecting the U.S. guarantor by encouraging swap dealer registration of the guaranteed non-U.S. person, a better course is addressing the question of when (if ever) the U.S. guarantor must register as a swap dealer.[245] Australian Bankers stated that the considerations relevant to whether a non-U.S. person (without a guarantee from a U.S. affiliate) is expected to register as a swap dealer should relate to the aggregate notional amount of swap dealing activities with U.S. persons within a particular asset class.[246]

IIAC requested that the Commission confirm that a guarantee by a foreign holding company would not be deemed to be a guarantee by all of its subsidiaries, including U.S. entities, solely as a result of the indirect ownership.[247] J.P. Morgan raised concerns regarding the scope of the interpretation of the term a ''guarantee.'' Specifically, it argued that the term ''guarantee'' should not be interpreted to include keepwells and liquidity puts because these agreements do not create the same types of third-party rights as traditional guarantees and may be unenforceable by third parties.[248] CEWG objected to the broader interpretation of the term ''guarantee'' in the Proposed Guidance than under the Final Product Definitions Rules,[249] stating that the Commission ''must undertake a more thorough regulatory analysis with respect to guarantees of swaps obligations.'' [250]

On the other hand, Senator Levin stated that guarantees are central to concerns regarding cross-border swaps, and that any guarantee, implicit or explicit, by a U.S. parent company to its non-U.S. affiliates effectively transfers risk to the U.S. parent.[251] Therefore, Senator Levin stated that the exact form of the guarantee should not limit compliance with Dodd-Frank requirements, and the list of relevant guarantee arrangements should be expanded to include arrangements involving total return swaps, credit default swaps or customized options that result in the foreign affiliate's activities creating off balance sheet liabilities for a U.S. person.[252] Eight Senators commented that focusing on whether affiliates are explicitly ''guaranteed'' by a U.S. affiliate does not go far enough. They expressed concern that market pressures cause U.S. parent firms to stand behind their foreign affiliates even if explicit guarantees are not in place. The Senators suggested that other factors be considered to determine whether risk is effectively guaranteed such as: limitations on permissible transactions between the parent and affiliate; explicit non-guarantee disclosures to investors, regulators and counterparties; restrictions on operating under a common name or sharing employees and officers; and whether comprehensive resolution protocols exist in the foreign jurisdiction.[253]

AFR stated that the Commission's failure to clarify its interpretation of when affiliates of a ''U.S. person'' would be treated as guaranteed, or to capture ''the large grey area'' between explicit and informal guarantees, among other things, creates opportunities to escape Dodd-Frank regulations by shifting business overseas.[254] AFR stressed that the Commission should clarify in the guidance that it ''intends to follow through on properly implementing these principles and will not enable a 'race to the bottom' in which incentives are created for derivatives affiliates of global banks . . . to relocate to areas of lax regulation to take advantage of an inadequate 'substituted compliance' regime.'' [255]

3. Commission Guidance

a. Registration Thresholds for U.S. Persons and Non-U.S. Persons, Including Those Guaranteed by U.S. Persons

Under the Final Entities Rules, a person is required to register as a swap dealer if its swap dealing activity activities over the preceding 12 months exceeds the de minimis threshold of swap dealing. In addition, Commission regulation 1.3(ggg)(4) requires that a person include, in determining whether its swap dealing activities exceed the de minimis threshold, the aggregate notional value of swap dealing transactions entered by its affiliates under common control.[256]

For purposes of determining whether a U.S. person is required to register as a swap dealer, a U.S. person should count all of its swap dealing activity, whether with U.S. or non-U.S. counterparties. This interpretation reflects that swaps markets are global, and therefore, in the Commission's view, all of a U.S. person's swap dealing activities, whether with U.S. persons or non-U.S. persons, have the requisite jurisdictional nexus and potential to impact the U.S. financial system. Similarly, the Commission believes that all of the swap dealing activities of a non-U.S. person that is an affiliate of a U.S. person and that is guaranteed by a U.S. person (a ''guaranteed affiliate''),[257] or that is an ''affiliate conduit'' of a U.S. person,[258] have the requisite statutory

[243] *Id.* at A29–30.

[244] Goldman (Aug 27, 2012) at 5. *See also* CEWG (Aug. 27, 2012) 6–7 (stating that because there is no legal basis under section 2(i) for asserting jurisdiction based on a guaranty, the Commission should amend the Proposed Guidance to clarify that a non-U.S. person is not subject to Commission regulation, even where a U.S. person guarantees either counterparty; swap dealing activity outside the United States that does not involve a U.S. person should not be subject to the Commission's jurisdiction; guarantees do not alter the location of activity, nor should they alter a participant's residency); Hong Kong Banks (Aug. 27, 2012) at 8 (arguing that swaps between non-U.S. persons should be excluded from the de minimis determination regardless of whether a counterparty is guaranteed).

[245] ISDA (Aug. 10, 2012) at 12.

[246] Australian Bankers (Aug. 27, 2012) at 4.

[247] IIAC (Aug. 27, 2012) at 6, 8.

[248] J.P. Morgan (Aug. 27, 2012) at 10.

[249] *See* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule, 77 FR 48208 (Aug. 13, 2012) (''Final Swap Definition'').

[250] CEWG (Aug. 27, 2012) at 5.

[251] Letter from Sen. Levin at 10.

[252] *Id.* at 11.

[253] Letter from Senators Blumenthal, Boxer, Feinstein, Harkin, Levin, Merkley, Shaheen, and Warren (Jul. 3, 2013).

[254] AFR (Aug. 27, 2012) at 4.

[255] *Id.* at 4.

[256] As discussed in greater detail below, in light of the global nature of the swaps markets, the Commission's policy is to interpret the aggregation requirement in Commission regulation 1.3(ggg)(4) in a manner that applies the same aggregation principles to all affiliates in a corporate group, whether they are U.S. or non-U.S. persons.

[257] See note 267 and accompanying text, *supra,* for guidance regarding the Commission's interpretation of the term ''guarantee.''

[258] When a non-U.S. person generally would be considered to be an affiliate conduit is discussed below in section G. As discussed below, for the purposes of the Commission's interpretation of CEA section 2(i), the Commission believes that certain factors are relevant to considering whether a non-U.S. person is an ''affiliate conduit.'' Such factors include whether: The non-U.S. person is a majority-owned affiliate of a U.S. person; the non-U.S. person is controlling, controlled by or under common control with the U.S. person; the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person; and the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third-parties for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s), and enters into

nexus and potential to impact the U.S. financial system. Therefore, under the Commission's interpretation of 2(i), a guaranteed or conduit affiliate [259] should count swap dealing transactions towards the de minimis threshold for swap dealer registration in the same manner as a U.S. person. That is, in light of the global nature of the swaps markets, a guaranteed or conduit affiliate should count all of its swap dealing transactions, whether with U.S. or non-U.S. counterparties, towards the de minimis threshold for swap dealer registration.

However, under the Commission's interpretation of section 2(i), a more circumscribed registration policy applies to non-U.S. persons that are not guaranteed or conduit affiliates. In this case, the Commission believes that the non-U.S. person should count only its swap dealing transactions with U.S. persons (other than foreign branches of swap dealers that are registered with the Commission), and with guaranteed affiliates towards the de minimis thresholds for swap dealer registration, with three exceptions, which are described below. Non-U.S. persons that are not guaranteed or conduit affiliates are not required to count swaps with a conduit affiliate towards the swap dealer de minimis calculation.

Similarly, for purposes of determining whether a U.S. person is required to register as an MSP, as the Commission interprets section 2(i), a U.S. person and a guaranteed or conduit affiliate should include all of swap positions with counterparties, whether they are U.S. or non-U.S. persons. With respect to whether a non-U.S. person must calculate whether its swap positions create exposures above the relevant MSP thresholds, the Commission believes, for policy reasons and consistent with principles of international comity, that CEA section 2(i) should not be interpreted to require non-U.S. persons that are not financial entities to include for MSP calculation purposes certain swap positions as explained below.

As the Commission explained in the Proposed Guidance, in the event of a default or insolvency of a non-U.S. swap dealer with more than a de minimis level of swap dealing with U.S. persons, or a non-U.S. MSP with more than the threshold level of swaps positions with U.S. persons, the swap dealer's or MSP's U.S. counterparties could be adversely affected. Such an event may adversely affect numerous persons engaged in commerce within the United States, disrupt such commerce, and increase the risk of a widespread disruption to the financial system in the United States.

Similar effects on U.S. persons and on the U.S. financial system may occur in the event of a default or insolvency of certain non-U.S. person with respect to swap dealing transactions in excess of the de minimis level, or swaps positions above the MSP threshold, entered into such non-U.S. persons with other non-U.S. persons whose swaps obligations are guaranteed by a U.S. person. The Commission interprets section 2(i) of the CEA to encompass swaps entered into by guaranteed or conduit affiliates in addition to encompassing swaps entered into by U.S. persons. In the final rule to further define the term ''swap,'' the Commission found that a guarantee of a swap is a term of that swap that affects the price or pricing attributes of that swap, and that when a swap has the benefit of a guarantee, the guarantee is an integral part of that swap.[260] The Commission therefore interprets the term ''swap'' (that is not a security-based swap or mixed swap) ''to include a guarantee of such swap, to the extent that a counterparty to a swaps position would have recourse to the guarantor in connection with the position.'' [261] Because a guarantee of a swap is an integral part of the swap, and counterparties may not otherwise be willing to enter into a swap with the guaranteed affiliate, the affiliate would not have significant swap business if not for the guarantee. The Commission believes that swap activities outside the United States that are guaranteed by U.S. persons would generally have a direct and significant connection with activities in, or effect on, U.S. commerce in a similar manner as the underlying swap would generally have a direct and significant connection with activities in, or effect on, U.S. commerce if the guaranteed counterparty to the underlying swap were a U.S. person.[262] Similarly, the Commission believes that swap activities outside the United States of an affiliate conduit would generally have a direct and significant connection with activities in, or effect on, U.S. commerce in a similar manner as would be the case if the affiliate conduit's U.S. affiliates entered into the swaps directly.

Accordingly, under section 2(i), the Commission intends to interpret section 2(i) as applying the swaps provisions of the CEA to swaps that are entered into by guaranteed or conduit affiliates in a manner similar to how section 2(i) would apply if a U.S. person had entered into the swap (subject to appropriate considerations of international comity for non-guaranteed, non-U.S. persons facing such guaranteed or conduit affiliates, as discussed below).

Thus, in the case of a guaranteed or conduit affiliate, the Commission interprets CEA section 2(i) to provide that the guaranteed or conduit affiliate is expected to count toward the swap dealer de minimis threshold all of its swap dealing activities.[263] Following a

offsetting swaps or other arrangements with its U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with third-parties to its U.S. affiliates. The term ''conduit affiliate'' generally would not include swap dealers or affiliates thereof.

[259] This Guidance uses the term ''guaranteed or conduit affiliate'' to refer to a non-U.S. person whose swap obligations are guaranteed by a U.S. person or that is an affiliate conduit.

[260] *See* Final Swap Definition, 77 FR at 48225–48226. The Commission explained that when a swap counterparty typically uses a guarantee as credit support for its swaps obligations, the guarantor's resources are added to the analysis of the swap because ''the market will not trade with that counterparty at the same price, on the same terms, or at all without the guarantee.'' *Id.* The Commission stated that it viewed a guarantee as, generally, ''a collateral promise by a guarantor to answer for the debt or obligation of a counterparty obligor under a swap.'' *Id.*

[261] *Id.* at 48226 n. 187. In response to a comment that guarantees are contingent obligations that do not necessarily replicate the economics of the underlying swap, the Commission stated:

The CFTC is persuaded that when a swap (that is not a security-based swap or mixed swap) has the benefit of a guarantee, the guarantee and related guaranteed swap must be analyzed together. The events surrounding the failure of [AIGFP] highlight how guarantees can cause major risks to flow to the guarantor. The CFTC finds that the regulation of swaps and the risk exposures associated with them, which is an essential concern of the Dodd- Frank Act, would be less effective if the CFTC did not interpret the term ''swap'' to include a guarantee of a swap.

Id. at 48226.

[262] Congress has recognized the significance of guarantees of swaps obligations with respect to the activities of financial entities in section 210(c)(16) of the Dodd-Frank Act. There, Congress specifically addressed guarantees in the context of a Title II resolution proceeding. Section 210(c)(16) provides that, where a financial institution is in FDIC receivership, a ''qualified financial contract'' (or ''QFC,'' which includes swaps) with a subsidiary of that financial institution that is guaranteed by the financial institution cannot be terminated by a counterparty facing that subsidiary pursuant to the QFC based solely on the insolvency or receivership of the financial institution if certain conditions are satisfied.

[263] The Commission notes that the SEC Cross-Border Proposal agrees that ''[i]n a security-based swap transaction between two non-U.S. persons where the performance of at least one side of the transaction is guaranteed by a U.S. person, . . . the guarantee creates risk to the U.S. financial system and counterparties (including U.S. guarantors) to the same degree as if the transaction were entered into directly by a U.S. person.'' SEC Cross-Border Proposal, 78 FR at 30986. However, the SEC does not propose to address the risk posed by the guarantee through requiring the non-U.S. guaranteed affiliate to register as a security-based swap dealer, but rather through the application of principles of attribution in the major security-based swap participant definition. *See id.* at 31006.

Continued

similar rationale, the Commission interprets CEA section 2(i) to provide that a guaranteed or conduit affiliate, in calculating whether the applicable MSP threshold is met, would be expected to include, and attribute to the U.S. guarantor, the notional value of: (1) All swaps with U.S. and non-U.S. counterparties, and (2) any swaps between another non-U.S. person and a U.S. person or guaranteed affiliate, if the potential non-U.S. MSP guarantees the obligations of the other non-U.S. person thereunder.

In the Final Swap Definition, the Commission also acknowledged that a ''full recourse'' guarantee would have a greater effect on the price of a swap than a ''limited'' or ''partial recourse'' guarantee, yet nevertheless determined that the presence of any guarantee with recourse, no matter how robust, is price forming and an integral part of a guaranteed swap.[264] Moreover, as the recent financial crisis has demonstrated, in a moment of crisis—whether at the firm-level or more generally, market-wide—it matters little whether the parent guarantees are capped or otherwise qualified. In the face of solvency concerns, the parent guarantor will find it necessary to assume the liabilities of its affiliates.[265] For these reasons, the Commission declines to incorporate in the Guidance commenters' suggestions that only certain types of guarantees (*e.g.,* under which there is a material likelihood of liability) should be considered for purposes of registration determinations for non-U.S. persons.

Finally, with respect to the Japanese Bankers Association's concern about potential constraints on their hedging activities, the Commission contemplates that swaps that are between foreign branches of U.S. swap dealers and dealing non-U.S. persons generally will be excluded from the swap dealer registration determination, as further described below. The Commission believes that under section 2(i) of the CEA, it would generally be appropriate for non-U.S. market participants, such as members of the Japanese Bankers Association, to engage in hedging activities with foreign branches of U.S. swap dealers without being expected to count such transactions for purposes of the swap dealer registration determination.

The Commission also is affirming that, for purposes of this Guidance, the Commission would interpret the term ''guarantee'' generally to include not only traditional guarantees of payment or performance of the related swaps, but also other formal arrangements that, in view of all the facts and circumstances, support the non-U.S. person's ability to pay or perform its swap obligations with respect to its swaps.[266] The Commission believes that it is necessary to interpret the term ''guarantee'' to include the different financial arrangements and structures that transfer risk directly back to the United States. In this regard, it is the substance, rather than the form, of the arrangement that determines whether the arrangement should be considered a guarantee for purposes of the application of section 2(i).[267]

b. Aggregation

Commission regulation 1.3(ggg)(4) requires that a person include, in determining whether its swap dealing activities exceed the de minimis threshold, the aggregate notional value of swap dealing transactions entered by its affiliates under common control.[268] Additionally, under the Proposed Guidance, a non-U.S. person, in determining whether its swap dealing transactions exceed the de minimis threshold, would include the aggregate notional value of swap dealing transactions entered into by its non-U.S. affiliates under common control but would not include the aggregate notional value of swap dealing transactions entered into by its U.S. affiliates.

Numerous commenters objected to the aggregation interpretation regarding swap dealer registration in the Proposed Guidance.[269] IIB and Cleary, while acknowledging the Commission's evasion concerns, contended that the aggregation interpretation in the Proposed Guidance would effectively eliminate the de minimis exemption for any affiliate of a registered swap dealer.[270] IIB further stated that the proposed aggregation interpretation would require a significant amount of coordination among entities within a corporate group in order to gather the relevant information and to reconfigure their registration plans. These difficulties, according to IIB, would be compounded by uncertainties in the proposed interpretation of the term ''U.S. person.''[271]

Cleary argued that the positions of a registered swap dealer should be excluded from the de minimis calculation by its affiliate and further added that such aggregation relief should be available to any U.S. or non-U.S. affiliates of any U.S.- or non-U.S. registered swap dealer.[272] FOA recommended that the Commission consider a policy that would permit non-U.S. persons to not aggregate the swap dealing activities of their non-U.S. swap dealing affiliates under common control and to require aggregation only

The Commission believes that while the SEC's proposed approach may be appropriate for the securities-based swaps market, it would not be desirable to follow a similar approach for the swaps markets within the Commission's jurisdiction. Due to the differing characteristics of the markets, such as the involvement of a much larger and more diverse number of commercial companies using swaps as compared to security-based swaps, the risks that may be transmitted through the interconnected financial system from the non-U.S. guaranteed affiliate operating as a swap dealer to the U.S. swaps market may not be adequately managed by the MSP structure, which has relatively high exposure thresholds before registration is required.

[264] Final Swap Definition, 77 FR at 48226.

[265] According to one commenter, these concerns may be present even where a guarantee is implicit, but not explicitly provided:

A recent example of the importance of implicit guarantees is the collapse of Bear Stearns, which was brought down by the failure of non-guaranteed hedge fund affiliates. These hedge funds were foreign affiliates technically not guaranteed by the parent, and the investment by the parent company in the funds was minimal. However, the firm was forced to try to save the funds for reputational reasons and also because a fire sale of subsidiary assets could have seriously impacted correlated positions held by the parent company. . . . The example of Bear Stearns is only one among many instances where parent companies have been forced to rescue failing affiliates even in the absence of an explicit guarantee.

AFR (Aug. 27, 2012) at 8. *See also* Letter from Sen. Levin, note 216, *supra.*

[266] *See* Proposed Guidance, 77 FR at 41221 n. 47.

[267] Thus, for example, while keepwells and liquidity puts, certain types of indemnity agreements, master trust agreements, liability or loss transfer or sharing agreements, and any other explicit financial support arrangements may provide for different third-party rights and/or address different risks than traditional guarantees, the Commission does not believe that these differences would generally be relevant for purposes of section 2(i). Under these agreements or arrangements, one party commits to provide a financial backstop or funding against potential losses that may be incurred by the other party, either from specific contracts or more generally. In the Commission's view, this is the essence of a guarantee.

[268] For purposes of this Guidance regarding the application of Commission regulation 1.3(ggg)(4), the Commission construes the phrase ''affiliates under common control'' with respect to affiliates as stated in the Final Entities Rules, which defines control as ''the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise.'' *See* Final Entities Rules, 77 FR at 30631 n. 437. Thus, for purposes of this Guidance, a reference to ''affiliates under common control'' with a person includes affiliates that are controlling, controlled by, or under common control with such person.

[269] *See, e.g.,* Cleary (Aug. 16, 2012) at 9–10; IIB (Aug. 27, 2012) at 22–24; FOA (Aug. 13, 2012) at 11–12; ISDA (Aug. 10, 2012) at 11–12; SocGen (Aug. 8, 2012) at 8; Deutsche Bank (Aug. 27, 2012) at 4–5, FSR (Aug. 27, 2012) at 4–6.

[270] Cleary (Aug. 16, 2012) at 9–10; IIB (Aug. 27, 2012) at 22.

[271] IIB (Aug. 9, 2012) at 6.

[272] Cleary (Aug. 16, 2012) at 9–10.

where there is evidence that a group of non-U.S. swap dealing affiliates sufficiently coordinate their swap dealing activities.[273] ISDA asserted that the proposed asymmetric application of aggregation (*i.e.,* U.S. affiliates aggregate the entire worldwide group, but non-U.S. affiliates aggregate only non-U.S. affiliates) would produce arbitrary results, citing, as an example, a group that has a U.S. affiliate with $500 million of swaps and a non-U.S. affiliate with $7.6 billion of swaps with non-U.S. persons. In that scenario, the U.S. affiliate must register; the non-U.S. affiliate is not required to register.[274]

In the Further Proposed Guidance, the Commission proposed an alternative interpretation of the aggregation requirement in Commission regulation 1.3(ggg)(4). Under this alternative, a non-U.S. person would be expected, in the consideration of whether its swap dealing transactions exceed the de minimis threshold, to include the aggregate notional value of swap dealing transactions entered into by all its affiliates under common control (*i.e.,* both non-U.S. affiliates and U.S. affiliates), but not include the aggregate notional value of swap dealing transactions of any non-U.S. affiliate under common control that is registered as a swap dealer.[275] The Commission noted that the application of the aggregation requirement in Commission regulation 1.3(ggg)(4) to non-U.S. affiliates of non-U.S. swap dealers may, in certain circumstances, impose significant burdens on such non-U.S. affiliates without advancing significant regulatory interests of the Commission. Because the conduct of swap dealing business through locally-organized affiliates may in some cases be required in order to comply with legal requirements or business practices in foreign jurisdictions, such non-U.S. affiliates may be numerous and it could be impractical to require all such non-U.S. affiliates to register as swap dealers. Further, the Commission's interest in registration may be reduced for a non-U.S. affiliate of a registered non-U.S. swap dealer where the non-U.S. affiliate (or group of such affiliates) engages in only a small amount of swap dealing activity with U.S. persons.

On the other hand, the Commission also noted in the Further Proposed Guidance that, given the borderless nature of swap dealing activities, a swap dealer may conduct swap dealing activities through various affiliates in different jurisdictions, which suggests that its interpretation should take into account the applicable swap dealing transactions entered by all of a non-U.S. person's affiliates under common control worldwide. Otherwise, affiliated persons may not register solely because their swap dealing activities are divided, such that each affiliate falls below the de minimis level. The Commission noted its concern that a policy under which such affiliates whose swap dealing activities individually fall below the de minimis level, but whose swap dealing activities in the aggregate exceed the de minimis level, would not register as swap dealers could provide an incentive for firms to spread their swap dealing activities among several unregistered affiliates rather than centralize their swap dealing in registered firms. Such a result would increase systemic risks to U.S. market participants and impede the Commission's ability to protect U.S. markets.

Two commenters supported the alternative interpretation of the aggregation requirement set out in the Further Proposed Guidance. Greenberger/AFR stated that the aggregation requirement helps to prevent the spreading of risk, because without aggregation U.S. persons could avoid registration as swap dealers by routing their swap activity through non-U.S. affiliates and thereby remain under the de minimis threshold.[276] Better Markets supported the alternative interpretation in the Further Proposed Guidance because it contemplates that non-U.S. persons would aggregate all swap dealing of all affiliates, including U.S. affiliates, except where the affiliate is registered as a swap dealer.[277]

Other commenters were opposed to the alternative interpretation in the Further Proposed Guidance. SIFMA/CH/FSR stated that aggregation of swap dealing activity across affiliates is not appropriate in any circumstance.[278] ISDA stated that application of the aggregation principle to non-U.S. affiliates may impose significant burdens on the non-U.S. affiliates without advancing significant regulatory interests, and expanding the scope of aggregation to include swaps of U.S. affiliates would exacerbate this disproportionality.[279]

Mitsubishi UFJ Financial Group Inc. (''Mitsubishi UFJ'') asked the Commission to clarify its interpretation of the term ''control'' in the context of a non-U.S. joint venture where only one owner controls and operates, and financially consolidates, the joint venture entity.[280] Mitsubishi UFJ stated that in this case the joint venture should be linked for aggregation purposes to the owner that has operational control, provided that the owner has at least one affiliate that is a registered swap dealer.[281]

In the Further Proposed Guidance, the Commission asked commenters to address several questions regarding the aggregation provision. In particular, the Commission asked whether the alternative interpretation of the aggregation requirement should apply to non-U.S. persons that are guaranteed by a U.S. person with respect to their swaps obligations in the same way that it applies to non-U.S. persons that are not so guaranteed, and if so, should the Commission continue to construe the term ''guarantee'' for this purpose to mean any collateral promise by a guarantor to answer for the debt or obligation of an obligor under a swap and should the term include arrangements such as keepwells and liquidity puts.

Greenberger/AFR replied to this question affirmatively, stating that the Commission should establish a rebuttable presumption that foreign affiliates are guaranteed by the parent company, and require clear evidence that the market has been explicitly informed that the parent will not stand behind affiliate liabilities in the event of

[273] FOA (Aug. 13, 2012) at 11–12. FOA argued that the Proposed Guidance would have a disproportionate effect by providing that a non-U.S. person engaging in a de minimis amount of U.S.-facing swap dealing activities should register as a swap dealer simply because its other non-U.S. affiliates under common control, in the aggregate, exceed the de minimis threshold, even though there is no coordinated effort. *Id.*

[274] ISDA (Aug. 10, 2012) at 12 (noting that if an exclusion from aggregation for an affiliated swap dealer's swaps were in place, then the group in the above example could decide which entity registers and thereby bring the swaps attributable to the other entity under the threshold).

[275] Also, under this alternative approach, a non-U.S. person would not be expected to include the aggregate notional value of swap dealing transactions of any of its non-U.S. affiliates under common control where the counterparty to such affiliate is also a non-U.S. person.

[276] Greenberger/AFR (Feb. 6, 2013) at 8–9.

[277] Better Markets (Feb. 15, 2013) at 8–9.

[278] SIFMA/CH/FSR (Feb. 6, 2013) at A2–3

[279] ISDA (Feb. 6, 2013) at 3–4 (relevant affiliates are unlikely to have systems to monitor U.S. person status of swap counterparties). *See also* European Federation of Energy Traders (''EFET'') (Feb. 6, 2013) at 3–4 (arguing that cost of system to monitor aggregation would be substantial and relative benefits of requiring aggregation are small, given that equivalent regulation already applies, or soon will apply, in non-U.S. jurisdictions). ISDA, IIB and CEWG all stated that the treatment in the January Order of grandfathered affiliates (*i.e.,* those affiliates engaged in swap dealing with U.S. persons on December 21, 2012) should be made permanent in order to avoid disrupting established transactional relationships. *See* ISDA (Feb. 6, 2013) at 3; IIB (Feb. 6, 2013) at 6; CEWG (Feb. 25, 2013) at 2–4.

[280] Mitsubishi UFJ (Feb. 1, 2013) at 3–4.

[281] *Id.* at 5.

a default or bankruptcy.[282] To do otherwise, they stated, would encourage swap activity through non-U.S. affiliates rather than U.S. persons.[283]

Other commenters stated that the alternative interpretation should not apply to non-U.S. persons that are guaranteed by a U.S. person in the same way that it applies to non-U.S. persons that are not so guaranteed. SIFMA/CH/FSR stated that a guarantee by a U.S. person is not, in itself, a sufficient nexus for jurisdiction under section 2(i) of the CEA, since swaps may be guaranteed for a number of reasons that do not necessarily implicate U.S. jurisdiction.[284] Thus, there may be no importation of risk to the United States through the guarantee and, in any event, concern about importation of risk is appropriately addressed where the guarantor is a prudentially regulated entity, and the Commission should rely on its anti-evasion authority to prevent use of guarantees to evade registration requirements.[285] ISDA also stated that a guarantee constitutes an insufficient jurisdictional nexus, and that it would be consistent with international comity and regulatory reciprocity to regulate swaps between two non-U.S. persons primarily under non-U.S. regulation.[286] Regarding the potential for risk transfer across borders, ISDA stated that much of the regulation applicable to swap dealers is not relevant to this concern—external and internal business conduct rules, for example, cannot assure the ultimate solvency of a swap dealer, and it is unclear that encouraging further capitalization of overseas affiliates of a U.S. guarantor, causing financial resources to be contributed overseas, would advance the stability of the U.S. financial system.[287] The Financial Services Agency, Government of Japan (''Japan FSA'') also thought that a guarantee from a U.S. person should not, in itself, cause swaps with a non-U.S. person to be included in the de minimis calculation.[288]

The Commission also asked if non-U.S. persons should not be expected to include in the de minimis calculation the swap dealing transactions of their U.S. affiliates under common control, or, alternatively, should the policy of the Commission contemplate that they would exclude from the de minimis calculation the swap dealing transactions of their U.S. affiliates under common control that are registered as swap dealers.

Responding to this question, Greenberger/AFR stated it is important in any case to require aggregation across all non-U.S. affiliates of a global bank, in order to effectively capture transactions spread across multiple foreign affiliates; otherwise, it would be much easier to avoid registration as a swap dealer.[289] They believe that the second alternative—excluding only the swap dealing transactions of U.S. affiliates that are registered as swap dealers—is much preferable to the first, because the first alternative would permit two groups of affiliates, one within the U.S. and another non-U.S., to both engage in swap dealing up to the de minimis level, which would create an incentive to split a swap dealing business between U.S. and non-U.S. affiliates.[290] The second alternative would effectively allow a group of affiliates that individually and collectively fall below the de minimis threshold to forego registration, which they believed could be a sensible compromise, so long as aggregation across foreign affiliates is maintained.[291]

Several commenters were opposed to a policy under which non-U.S. persons would aggregate the swap dealing activities of U.S. affiliates that are registered swap dealers. CEWG argued that this policy could lead to registration of non-U.S. persons as swap dealers because of the activities of their U.S. affiliates, which it asserted would be contrary to the separation sometimes maintained between U.S. and non-U.S. affiliates and unsupported by any policy rationale.[292] ISDA and SIFMA/CH/FSR were of the view that all persons (both U.S. and non-U.S.) should be able to exclude from their de minimis calculations the swaps of any affiliate (whether U.S. or non-U.S.) that is registered with the Commission as a swap dealer, because swaps by a registered swap dealer are subject to Dodd-Frank protections and no purpose would be served by attributing them to affiliated entities in order to impose swap dealer registration on those affiliates.[293]

The Mizuho Corporate Bank, Ltd. (''Mizuho'') and Sumitomo submitted a joint letter arguing that the swap dealing activity of U.S. affiliates that are registered as swap dealers should be excluded from aggregation because otherwise the de minimis exception would be effectively unavailable to non-U.S. based firms that conduct U.S.-facing swap dealing activity through a U.S. affiliate that is registered as a swap dealer.[294] This result, in turn, would inappropriately disfavor these firms as compared to firms that conduct the same business through non-U.S. affiliates registered as swap dealers; the Commission's interpretation should encourage, rather than disfavor, registration of U.S. affiliates as swap dealers.[295] IIB stated that the policy reasons for allowing the exclusion of swap dealing by non-U.S. affiliates registered as swap dealers also applies to the dealing activity of U.S affiliates that are registered.[296]

Other commenters went further, stating that non-U.S. persons should not be required to aggregate the swap dealing activities of any of their U.S. affiliates. The Japanese Bankers Association stated U.S. affiliates should be excluded from the non-U.S. person's calculations because the U.S. persons are already subject to Dodd-Frank regulation as warranted by their activities.[297] EDF Trading stated that non-U.S. persons that maintain minimal contacts with the United States should not be required to register as swap dealers due to the activities of their U.S. affiliates, because such a requirement would be inconsistent with the jurisdictional limitation in section 2(i) of the CEA; result in duplicative and potentially inconsistent regulatory requirements of multiple jurisdictions applying to the same swap activity; and encourage commercial firms to cease potential swap dealing activity in the U.S., resulting in reduced U.S. swaps market liquidity and fragmentation of the global swaps markets.[298]

Last, the Commission solicited commenters' views on whether a person

[282] Greenberger/AFR (Feb. 6, 2013) at 5–6.

[283] *Id.* at 6.

[284] SIFMA/CH/FSR (Feb. 6, 2013) at A4.

[285] *Id.*

[286] ISDA (Feb. 6, 2013) at 2–3.

[287] *Id.* at 3.

[288] Japan FSA (Feb. 6, 2013) at 2.

[289] Greenberger/AFR (Feb. 6, 2013) at 9.

[290] *Id.*

[291] *Id.*

[292] CEWG (Feb. 25, 2013) at 2–4.

[293] ISDA (Feb. 6, 2013) at 4; SIFMA/CH/FSR (Feb. 6, 2013) at B11–12. CEWG and ISDA also both stated that U.S. persons should in no event be required to aggregate swaps of non-U.S. affiliates with non-U.S. persons, because such swaps have insufficient nexus to the United States. CEWG (Feb. 25, 2013) at 2; ISDA (Feb. 6, 2013) at 4.

[294] Mizuho/Sumitomo (Feb. 6, 2013) at 3.

[295] *Id. See also* Japan FSA (Feb. 6, 2013) at 2 (arguing that the swap dealing activity of U.S. affiliates that are registered as swap dealers should be excluded because the affiliates are subject to supervision by the Commission).

[296] IIB (Feb. 6, 2013) at 5–6.

[297] Japanese Bankers Association (Feb. 6, 2013) at 2–3. *See also* Japan FSA (Feb. 6, 2013) at 2 (arguing that all affiliates of Japanese financial institutions should be excluded from the de minimis calculation because the affiliates are supervised by Japan FSA on a consolidated basis).

[298] EDF Trading (Feb. 6, 2013) at 1–4. *See also* Brigard & Urrutia Abogados (Feb. 6, 2013) at 2 (non-U.S. persons should be allowed to exclude from the de minimis calculation the swap dealing activities of U.S. affiliates, and of any affiliate (U.S. or non-U.S.) that is a registered swap dealer).

engaged in swap dealing activities could take advantage of an interpretation of the aggregation provision that allows a person to exclude the swap dealing activities of one or more of its affiliates under common control. The Commission asked whether, under such an interpretation, a person could spread its swap dealing activities into multiple affiliates, each under the de minimis threshold, and therefore avoid the registration requirement, even though the aggregate level of swap dealing by the affiliates exceeds the de minimis threshold. In this regard, the Commission asked if any such interpretation should include any conditions or limits on the overall amount of swap dealing engaged in by unregistered persons within an affiliated group.

Greenberger/AFR opined that any approach that did not require significant aggregation of swap dealing activities across affiliates would create the danger of risk spreading outlined in the Further Proposed Guidance.[299] They stated that financial institutions could easily remain under the de minimis threshold and thereby avoid registration by routing swaps through their non-U.S. affiliates.[300]

The Japanese Bankers Association stated that while the approach in the Further Proposed Guidance could potentially prevent evasion, it would do so at the cost of requiring multiple non-U.S. affiliates to register as swap dealers even if the group of affiliates concentrated its U.S. swap dealing activity in one U.S. entity.[301] In fact, they argued, concentrating U.S. swap dealing activity in a U.S. entity should be encouraged because it facilitates Commission supervision of that activity.[302] Further, they stated that to expect non-U.S. persons to register as swap dealers as a result of dealing activity by their U.S. affiliates undermines the regulatory independence of different jurisdictions and international understandings on regulatory harmonization.[303] Similarly, EDF Trading stated that expecting multiple entities within a corporate group to register as swap dealers would be burdensome and may not advance regulatory interests, and the alternative in the Further Proposed Guidance would merely increase economic and regulatory burdens without achieving a significant reduction in systemic risk, because it would encourage the concentration of swap dealing activity in non-U.S affiliates.[304]

SIFMA/CH/FSR were of the view that it would be burdensome for market participants to use multiple affiliates to avoid swap dealer registration, because moving swap dealing activity between affiliates requires a significant legal, technological and operational investment, and fragmenting the activity among affiliates may make it harder for a multinational institutions to manage risk efficiently.[305] Along the same lines, IIB stated that where one entity in a corporate group is registered as a swap dealer, there are substantial commercial and credit risk incentives to centralize swap dealing in the registered entity, because doing so maximizes the potential to net offsetting transactions, uses capital more efficiently, and is operationally efficient.[306] On the other hand, IIB stated that using unregistered entities for swap dealing would not reduce the fixed costs incurred in registration and that the unregistered entities in the group would still be subject to swap costs such as clearing, reporting and trade execution.[307]

Based on the comments received on the Proposed Guidance and the Further Proposed Guidance, and its further review of issues related to the aggregation requirement, the Commission's policy is to interpret the aggregation requirement in Commission regulation 1.3(ggg)(4) in a manner that applies the same aggregation principles to all affiliates in a corporate group, whether they are U.S. or non-U.S. persons. Further, the Commission will generally apply the aggregation principle (as articulated in the Final Entities Rules) such that, in considering whether a person is engaged in more than a de minimis level of swap dealing, a person (whether U.S. or non-U.S.) should generally include all relevant dealing swaps of all its U.S. and non-U.S. affiliates under common control,[308] except that swaps of an affiliate (either U.S. or non-U.S.) that is a registered swap dealer are excluded, as discussed below. The Commission notes that this policy would ensure that the aggregate notional value of applicable swap dealing transactions of all such unregistered U.S. and non-U.S. affiliates does not exceed the de minimis level.

Stated in general terms, the Commission's interpretation allows both U.S. persons and non-U.S. persons in an affiliated group to engage in swap dealing activity up to the de minimis threshold. When the affiliated group meets the de minimis threshold in the aggregate, one or more affiliate(s) (inside or outside the United States) would generally have to register as swap dealer(s) so that the relevant swap dealing activity of the unregistered affiliates remains below the threshold.

The Commission recognizes the borderless nature of swap dealing activities, in which a dealer may conduct swap dealing business through its various affiliates in different jurisdictions, and the Commission believes that its policy on aggregation outlined above addresses the concern that an affiliated group of U.S. and non-U.S. persons with significant swap dealing transactions with U.S. persons or guaranteed affiliates may not be required to register solely because such swap dealing activities are divided between affiliates that each fall below the de minimis level.

c. Exclusion of Certain Swaps by Non-U.S. Persons From the Swap Dealer De Minimis Threshold

The Proposed Guidance would generally allow a non-U.S. person to exclude from its de minimis threshold calculation its swaps with foreign branches of U.S. swap dealers. This exclusion was intended to allow non-U.S. persons to continue their inter-dealer swap activities with foreign branches of U.S. swap dealers without exceeding the de minimis threshold, thereby triggering a requirement to register as a swap dealer.

Commenters on the Proposed Guidance, such as Goldman Sachs, argued that the rationale for this exclusion is equally applicable when non-U.S. persons that are banks or broker-dealers engage in swap dealing transactions with U.S. swap dealers that do not conduct overseas business through foreign branches. Absent a similar interpretation in these circumstances, the commenters argued, U.S. swap dealers would be at a

[299] Greenberger/AFR (Feb. 6, 2013) at 8–9.

[300] *See id.* (citing press reports that U.S. banks such as Morgan Stanley and Goldman Sachs are using foreign entities ''in seriatim fashion to avoid going over the $ 8 billion test''). Making a similar point, Better Markets emphasized that market participants may be expected to implement the lowest-cost structure, considering all regulatory costs. Better Markets (Feb. 6, 2013) at 15.

[301] Japanese Bankers Association (Feb. 6, 2013) at 3.

[302] *Id.*

[303] *Id.* at 3–4.

[304] EDF Trading (Feb. 6, 2013) at 5.

[305] SIFMA/CH/FSR (Feb. 6, 2013) at A3.

[306] IIB (Feb. 6, 2013) at 3.

[307] *Id.*

[308] For purposes of this Guidance, the Commission clarifies that a reference to ''affiliates under common control'' with a person includes affiliates that are controlling, controlled by, or under common control with such person. *See* note 268, *supra.* Further, in response to a question from a commenter, the Commission clarifies that for this purpose, the term ''affiliates under common control'' includes parent companies and subsidiaries, and is not limited to ''sister companies'' at the same organizational level. *See* David Mu (Jan. 8, 2013).

competitive disadvantage vis-à-vis foreign branches of U.S. swap dealers since non-U.S. persons would be incentivized to limit their dealing activities to foreign branches of U.S. swap dealers.[309]

The Commission's policy is to generally allow non-U.S. persons that are not guaranteed or conduit affiliates of U.S. persons not to count toward their de minimis thresholds their swap dealing transactions with (i) A foreign branch of a U.S. swap dealer, (ii) a guaranteed affiliate of a U.S. person that is a swap dealer, and (iii) a guaranteed or conduit affiliate that is not a swap dealer and itself engages in de minimis swap dealing activity and which is affiliated with a swap dealer.[310] The Commission believes that where the guaranteed affiliate of a U.S. person is registered as a swap dealer, or where the foreign branch is included within the swap dealer registration of its U.S. home office, then it is appropriate to generally permit such non-U.S. not to count its swap dealing transactions with those entities against the non-U.S. person's de minimis threshold, because in these cases one counterparty to the swap is a swap dealer subject to comprehensive swap regulation and operating under the oversight of the Commission.

The Commission understands that commenters are concerned that foreign entities, in order to avoid swap dealer status, may decrease their swap dealing business with foreign branches of U.S. registered swap dealers and guaranteed affiliates that are swap dealers. Therefore, the Commission's policy, based on its interpretation of section 2(i) of the CEA, will be that swap dealing transactions with a foreign branch of a U.S. swap dealer or with guaranteed affiliates that are swap dealers should generally be excluded from the de minimis calculations of non-U.S. persons that are not guaranteed or conduit affiliates.[311] However, the Commission is not persuaded that similar concerns arise regarding foreign entities that may engage in swap dealing business with such persons.[312]

With regard to non-U.S. persons that are not guaranteed or conduit affiliates of U.S. persons, such non-U.S. persons also generally would not count toward their de minimis thresholds their swap dealing transactions with a guaranteed affiliate that is not a swap dealer and itself engages in de minimis swap dealing activity and which is affiliated with a swap dealer. This interpretation reflects the Commission's view that when the aggregate level of swap dealing by a non-U.S. person that is not a guaranteed affiliate, considering both swaps with U.S. persons and swaps with unregistered guaranteed affiliates (together with any swap dealing transactions that the non-U.S. person aggregates for purposes of the de minimis calculation as described below) exceeds the de minimis level of swap dealing, the non-U.S. person's swap dealing transactions have the requisite ''direct and significant connection with activities in, or effect on, commerce of the United States.'' [313] The Commission believes, however, that where the counterparty to a swap is a guaranteed affiliate and is not a registered swap dealer, the Commission's regulatory concerns are addressed because the guaranteed affiliate engages in a level of swap dealing below the de minimis threshold and is part of an affiliated group with a swap dealer.

In addition, non-U.S. persons that are not guaranteed or conduit affiliates of U.S. persons also generally would not count toward their de minimis thresholds their swap dealing transactions with a guaranteed affiliate where the guaranteed affiliate is guaranteed by a non-financial entity.[314] This exception is appropriate given that the risks to the U.S. financial markets are mitigated because the U.S. guarantor is a non-financial entity.

The Commission notes that under its interpretation of section 2(i), a non-U.S. person that is not a guaranteed or conduit affiliate would not have to count its swap dealing transactions with other non-U.S. persons that are not guaranteed affiliates because, in the Commission's view, such swap dealing activity would not have the requisite ''direct and significant connection with activities in, or effect on, U.S. commerce.''

d. Exclusion of Certain Swaps by Non-U.S. Persons From the MSP Calculation

Related to their discussion of the swap dealer de minimis threshold, some commenters, such as SIFMA and Citi, stated that a non-U.S. person should not have to include swaps with foreign branches of U.S. swap dealers towards the MSP calculation.[315]

The Commission has considered whether, under section 2(i), the swaps that a non-U.S. person that is not a guaranteed or conduit affiliate enters into with a foreign branch of a U.S. swap dealer or a guaranteed affiliate that is a swap dealer should be excluded from the calculation of the non-U.S. person's MSP registration threshold. The Commission notes that its policy regarding such swaps for purposes of the MSP registration may reasonably be distinguished from its policy for purposes of the swap dealer registration threshold calculation. As described in the Final Entities Rules, MSP registration is required for non-dealers with swaps positions so large as to pose systemic risk. This is in contrast to swap dealer registration, which is a functional test focused on the nature of activities conducted by a potential registrant. Consequently, if all swaps between a non-U.S. person and foreign branches of U.S. swap dealers or swap dealers that are guaranteed affiliates were generally excluded under the Commission's policy with respect to MSP registration, a market participant that poses systemic risk within the meaning of the MSP definition could potentially be relieved of the requirement to register as an MSP. The Commission believes that such an outcome could undermine the MSP registration scheme. However, the Commission is persuaded that it is possible to control the potential risk of the non-U.S. person's risk with foreign branches of U.S. swap dealers and guaranteed affiliates that are swap dealers under certain limited circumstances and therefore that limited interpretive relief from the MSP calculation requirement is appropriate.[316] Thus, a non-U.S. person that is not a guaranteed affiliate of a U.S. person and is a financial entity generally does not have to count toward

[309] Goldman (Aug. 27, 2012) at 5–6.

[310] Note that if a non-U.S. person that is not a guaranteed or conduit affiliate of a U.S. person engages in a swap dealing transaction with another non-U.S. person that is not a guaranteed affiliate of a U.S. person (including such non-U.S. person that is a swap dealer), then such swap dealing transaction does not count toward the de minimis threshold of the unregistered, swap dealing party.

[311] The types of offices the Commission would generally consider in this regard to be a ''foreign branch'' of a U.S. bank, and the circumstances in which a swap would generally be treated as being with such foreign branch, are discussed further in section C, *infra.*

[312] *See* Goldman (Aug. 27, 2012) at 3–4.

[313] In the Proposed Guidance, the Commission asked whether the place of execution or clearing is relevant to the determination of whether a non-U.S. person should be required to register as a swap dealer. The Commission's policy is that a person generally would not be required to register as a swap dealer if the person's only connection to the United States is that the person uses a U.S.-registered swap execution facility (''SEF'')or designated contract market (''DCM'') in connection with its swap dealing activities.

[314] *See* CEA section 2(h)(7)(C) for a definition of financial entity.

[315] *See* SIFMA (Aug. 27, 2012) at A28–29; Citi (Aug. 27, 2012) at 2–3.

[316] The interpretation applies to non-U.S. persons that are not guaranteed by U.S. persons. Non-U.S. financial entities would be required to include swaps positions with foreign branches and guaranteed affiliates of U.S. persons unless they choose to comply with voluntary margining requirements, discussed below.

its MSP threshold its exposure under swaps with foreign branches of a U.S. swap dealer or guaranteed affiliates that are swap dealers; provided, that the swap is either cleared, or the documentation of the swap requires the foreign branch or guaranteed affiliate to collect daily variation margin, with no threshold, on its swaps with such non-U.S. person. When this condition is met, the Commission believes that it would generally be appropriate for the non-U.S. person not to count its exposure under such swaps against its MSP threshold.

The Commission notes that a non-U.S. person's swaps positions with guaranteed affiliates that are swap dealers and foreign branches of U.S. swap dealers must be addressed in the latter entities' risk management programs. Such programs must account for, among other things, overall credit exposures to non-U.S. persons.[317] Second, the Commission notes that a non-U.S. person's swaps with a guaranteed affiliate that is a swap dealer would be included in exposure calculations and attributed to the U.S. guarantor for purposes of determining whether the U.S. guarantor's swap exposures are systemically-important on a portfolio basis and therefore require the protections provided by MSP registration.[318]

Finally, a non-U.S. person that is not a guaranteed affiliate and is not a financial entity [319] would generally not have to count toward its MSP thresholds its exposure under swaps with a foreign branch of a U.S. swap dealer or guaranteed affiliate that is a swap dealer. This exclusion reflects the Commission's recognition of the more modest risk to the U.S. financial markets from swaps activities with non-financial entities organized outside the United States.[320] Further, the Commission notes that the Basel Committee on Banking Supervision (''BCBS'') and the International Organization of Securities Commissions (''IOSCO'') have recently issued a second consultative document under which, if finalized, would not apply margin requirements to the non-centrally cleared derivatives of non-financial entities, given that such transactions are viewed as posing little or no systemic risk and are exempt from clearing mandates in most jurisdictions.[321]

e. Exclusion of Certain Swaps Executed Anonymously on a SEF, DCM, or Foreign Board of Trade (''FBOT'') and Cleared

The Commission believes that when a non-U.S. person that is not a guaranteed or conduit affiliate enters into swaps anonymously on a registered DCM, SEF, or FBOT [322] and such swaps are cleared, the non-U.S. person would generally not have to count such swaps against its de minimis threshold. The Commission understands that in these circumstances, the non-U.S. person would not have any prior information regarding its counterparty to the swap. Also, as discussed below, the Commission is interpreting CEA section 2(i) such that, where a swap between such a non-U.S. person and a U.S. person is executed anonymously on a registered DCM, SEF, or FBOT and cleared the non-U.S. person generally will satisfy all of the applicable Category A Transaction-Level Requirements [323] that pertain to such a swap transaction. The Commission believes that the regulatory interest in including such swaps in the non-U.S. person's de minimis calculation is outweighed by the practical difficulties involved in determining whether the non-U.S. person should include the swap in the calculation, given that the non-U.S. person would have no information regarding its swap counterparty prior to execution of the swap.

The Commission also believes that when a non-U.S. person that is not a guaranteed or conduit affiliate clears a swap through a registered derivatives clearing organization (''DCO''), such non-U.S. person would generally not have to count the resulting swap (*i.e.,* the novated swap) against its swap dealer de minimis threshold or MSP threshold.[324] Where a swap is created by virtue of novation, such swap does not implicate swap dealing, and therefore it would not be appropriate to include such swaps in determining whether a non-U.S. person should register as a swap dealer.

f. MSP-Parent Guarantees

While under the Proposed Guidance swaps conducted by a non-U.S. person, where guaranteed by a U.S. person, would generally be attributed only to the U.S. person in determining who must register as an MSP, the Commission did not expressly address a guarantee by a non-U.S. person of the swaps obligations of its U.S. subsidiary. In SIFMA's view, the Proposed Guidance created ambiguity as to the treatment of guarantees between other types of entities (*e.g.,* where a U.S. person is guaranteed by a non-U.S. person or where a non-U.S. person is guaranteed by a non-U.S. person).[325] In

[317] *See* Commission regulation 23.600(c)(4)(ii), requiring swap dealers and MSPs to have credit risk policies and procedures that account for daily measurement of overall credit exposure to comply with counterparty credit limits, and monitoring and reporting of violations of counterparty credit limits performed by personnel that are independent of the business trading unit. *See also* Commission regulation 23.600(c)(1)(i), requiring the senior management and the governing body of each swap dealer and MSP to review and approve credit risk tolerance limits for the swap dealer or MSP.

[318] *See* Final Entities Rules at 30689, stating the Commission's interpretation that ''an entity's swap . . . positions in general would be attributed to a parent, other affiliate or guarantor for purposes of the major participant analysis to the extent that the counterparties to those position would have recourse to that other entity in connection with the position.'' The Commission stated further that ''entities will be regulated as major participants when they pose a high level of risk in connection with the swap . . . positions they guarantee.''

[319] *See* CEA section 2(h)(7)(C) for a definition of financial entity.

[320] Based on data the Bank for International Settlements obtained from thirteen reporting countries (Australia, Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom and the United States), at the end of December 2012, notional amounts outstanding for OTC foreign exchange derivatives, interest rate derivatives, and credit default swaps with non-financial customers accounted for an average of less than 8 percent of the total aggregate amounts outstanding for these asset classes. *See* Bank for International Settlements, Statistical release: OTC derivatives statistics at end-December 2012 (May 2013), available at *http://www.bis.org/publ/otc_hy1305.pdf.*

[321] *See* BCBS IOSCO, Margin Requirements for Non-Centrally Cleared Derivatives, Second Consultative Document, at 7 (issued for comment March 15, 2013), available at *http://www.bis.org/publ/bcbs242.pdf.*

[322] As used herein, a registered FBOT means an FBOT that is registered with the Commission pursuant to part 48 of the regulations in order to permit direct access to the FBOT's order entry and trade matching system from within the U.S. Among others, 16 FBOTs that currently permit direct access for the trading of futures and option contracts, but not swaps, pursuant to no-action relief letters issued by Commission staff have submitted complete applications for registration. In light of the fact that registered FBOTs can also list swaps for trading by direct access and in view of the time required to properly assess registration applications and the interest on the part of certain FBOTs operating pursuant to the no-action relief in listing swaps for trading by direct access, the Division of Market Oversight has determined to amend the 16 no-action letters to permit those FBOTs, subject to certain conditions, to also list swaps for trading by direct access. Accordingly, all provisions in this document that apply to registered FBOTs also apply to the 16 FBOTs permitting trading by direct access pursuant to the amended no-action relief.

[323] The Commission notes that while the real-time reporting requirement will be satisfied for cleared swaps executed anonymously on a DCM or SEF, absent further affirmative actions by an FBOT, the requirement will not be satisfied through FBOT execution alone. *See* section G, *infra.*

[324] A swap that is submitted for clearing is extinguished upon novation and replaced by new swap(s) that result from novation. *See* Commission regulation 39.12(b)(6). *See also* Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69334, 69361 (Nov. 8, 2011).

[325] SIFMA (Aug. 27, 2012) at A32. Along similar lines, IIB commented that there might be

Continued

addition, Cleary noted that the Commission determined in the Final Entities Rules not to include a parental guarantee of a subsidiary's swaps in the computation of the parent's outward exposure under the MSP definition where the subsidiary is subject to capital oversight by the Commission, SEC, or an appropriate banking regulator. They asked that the Commission consider extending comparable treatment for parental guarantees where the non-U.S. subsidiary is subject to Basel-compliant capital oversight by another G20 prudential supervisor.[326]

Under the Commission's interpretation of section 2(i) of the CEA, the discussion in the Final Entities Rules regarding attribution of swaps positions of guaranteed persons for purposes of the MSP definition should generally apply to non-U.S. persons. That is, as applied to non-U.S. persons, where there is no guarantee or recourse to another person under the swap, the swap should generally be attributed to the person who enters into the swap, and there generally would be no attribution or aggregation of the swaps position with the swaps positions of the person's affiliates.[327] On the other hand, where the counterparty to the swap would have recourse to another person, such as a parent guarantor, the swap should generally be attributed to the person to whom there is recourse. Thus, if a U.S. person enters into a swap guaranteed by a non-U.S. person, the swap should generally be attributed to the non-U.S. person, and if a non-U.S. person enters into a swap guaranteed by a U.S. person, the swap should generally be attributed to the U.S. person.

However, the Commission is also cognizant that, as a matter of international comity, regulation of non-U.S. persons can be less preferable where the same regulatory outcomes can be achieved by regulating an affiliated U.S. person. So where the swaps of a U.S. person are guaranteed by a non-U.S. person, the Commission would consider the possibility that registration of the non-U.S. person would not be required if the U.S. person registers as an MSP, and there may be circumstances where registration of the U.S. person would be preferable. Also, the same considerations of international comity suggest that regulation of non-U.S. persons should be effected in a manner that generally does not interfere with non-U.S. regulation. Thus, the Commission would be willing to consider that the swaps positions of non-U.S. persons that are guaranteed by other non-U.S. persons may be attributed to either the non-U.S. guarantor or the guaranteed non-U.S. person so long as all of the swaps positions that would trigger MSP registration are subject to the MSP registration and regulatory requirements. Thus, in IIB's scenario, the non-U.S.-based bank may consult with the Commission and decide to register itself—or its subsidiaries—as an MSP. The Commission would generally not expect both the parent guarantor bank and the guaranteed bank to register as MSPs. In the Commission's view, the related risk concerns should be adequately addressed by requiring either the guarantor or the guaranteed person to register, provided that the swap activities giving rise to MSP registration are regulated under Dodd-Frank.

As to Cleary's request regarding comparable treatment for certain parental guarantees, the Commission agrees that, as a matter of policy, it would generally be appropriate to extend similar treatment to parental guarantees of a subsidiary that is subject to comparable and comprehensive capital oversight by a G20 prudential supervisor. In this respect, the Commission views Basel-compliant capital standards as sufficiently comparable and comprehensive to capital oversight by the Commission, SEC, or banking regulator. Thus, where a subsidiary is subject to Basel-compliant capital standards and oversight by a G20 prudential supervisor, the subsidiary's positions would generally not be attributed to a parental guarantor in the computation of the parent's outward exposure under the MSP definition.

4. Summary

The Commission's policy under this Guidance may be summarized as follows.

The Commission will generally apply the aggregation principle (as articulated in the Final Entities Rules) such that, in considering whether a person is engaged in more than a de minimis level of swap dealing, a person (whether U.S. or non-U.S.) should generally include all relevant dealing swaps of all its U.S. and non-U.S. affiliates under common control, except that swaps of an affiliate (either U.S. or non-U.S.) that is a registered swap dealer are excluded. For this purpose, consistent with the Commission's policy on counting swap transactions towards the de minimis threshold for swap dealer registration detailed above, the dealing swaps of an affiliate under common control with such person would include:

(i) In the case of a U.S. person or a guaranteed or conduit affiliate, all its swap dealing transactions; and

(ii) in the case of a non-U.S. person that is not a guaranteed or conduit affiliate:

a. all dealing swaps with counterparties who are U.S. persons (other than foreign branches of U.S. swap dealers); and

b. all dealing swaps with guaranteed affiliates except:

i. guaranteed affiliates that are swap dealers;

ii. guaranteed affiliates that are not swap dealers but which are affiliated with a swap dealer and where the guaranteed affiliate itself engages in de minimis swap dealing activity;

iii. guaranteed affiliates that are guaranteed by a non-financial entity.

In addition, a non-U.S. affiliate that is not a guaranteed or conduit affiliate may exclude any swaps that are entered into anonymously on a registered DCM, SEF, or FBOT and cleared, as more fully discussed above.

The Commission's interpretation would allow both U.S. persons and non-U.S. persons in an affiliated group to engage in unregistered swap dealing activity up to the de minimis level for the entire group. When the affiliated group nears the de minimis threshold in the aggregate, it would have to register a number of affiliates (inside or outside the United States) as swap dealers sufficient to maintain the relevant dealing swaps of the unregistered affiliates below the threshold.

In determining whether a non-U.S. person holds swap positions above the MSP thresholds, the non-U.S. person should consider the aggregate notional value of:

(i) Any swap position between it and a U.S. person;

(ii) any swap position between it and a guaranteed affiliate (but its swap positions where its own obligations thereunder are guaranteed by a U.S. person should be attributed to that U.S. person and not included in the non-U.S. person's determination); and

(iii) any swap position between another (U.S. or non-U.S.) person and a U.S. person or guaranteed affiliate, where it guarantees the obligations of the other person thereunder.

A non-U.S. person that is not a guaranteed affiliate of a U.S. person and is a financial entity would generally not have to count toward its MSP thresholds its exposure under swaps with foreign branches of U.S. swap dealers or guaranteed affiliates that are swap dealers, provided that the swap is either cleared, or the documentation of the

circumstances under which a wholly-owned subsidiary of a person already registered as a swap dealer enters into swaps with U.S. persons where its obligations are guaranteed by the swap dealer. IIB (Aug. 27, 2012) at 25.

[326] Cleary (Aug. 16, 2012) at 12.

[327] *See* Final Entities Rules, 77 FR at 30689.

swap requires the foreign branch or guaranteed affiliate to, and the swap dealer actually does, collect daily variation margin, on its swaps with the non-U.S. person.

In addition, a non-U.S. person that is not a guaranteed affiliate and is not a financial entity [328] would generally not have to count toward its MSP thresholds its exposure under swaps with a foreign branch or guaranteed affiliate, in each case that is a swap dealer.

C. Interpretation of the Term ''Foreign Branch;'' When a Swap Should Be Considered To Be With the Foreign Branch of a U.S. Person That Is a Swap Dealer or MSP

1. Interpretation of the Term ''Foreign Branch'' and Treatment of Foreign Branches

As discussed above, the Commission considers a foreign branch of a U.S. person to be a part of the U.S. person. Thus, in the Proposed Guidance, the Commission proposed that the U.S. person would be legally responsible for complying with all applicable Entity-Level Requirements. Under this approach, the foreign branch of the U.S. person would not register separately as a swap dealer. The Commission believes that this approach is appropriate because a foreign branch of a U.S. swap dealer is an integral part of a U.S. swap dealer and not a separate legal entity.

In the Proposed Guidance, the Commission also proposed interpreting 2(i) so that where a swap is with a foreign branch of a U.S.-based swap dealer, irrespective of whether the counterparty is a U.S. person or non-U.S. person, the foreign branch would be expected to comply with most of the Transaction-Level Requirements. The Commission stated that this proposed approach is appropriate in light of the Commission's strong supervisory interests in entities that are a part or an extension of a U.S.-based swap dealer. The Commission also proposed interpreting 2(i) so that swaps between a foreign branch of a U.S. person and a non-U.S. person counterparty (irrespective of whether that non-U.S. person counterparty's obligations under the swap are guaranteed by a U.S. person or not) would be eligible for substituted compliance with respect to Category A Transaction-Level Requirements. As discussed further below, where the counterparty to a swap with a foreign branch is a non-U.S. person (whether or not swaps such non-U.S. person is guaranteed or otherwise supported by, or is an affiliate conduit of, a U.S. person), the Commission continues to be of the view that the swap should be eligible for substituted compliance with respect to Category A Transaction-Level Requirements, to the extent applicable, in light of the supervisory interest of the foreign jurisdiction in the execution and clearing of trades occurring in that jurisdiction. As discussed further in section F below, the Commission's recognition of substituted compliance would be based on an evaluation of whether the requirements of the home jurisdiction are comparable and comprehensive to the applicable requirement(s) under the CEA and Commission regulations based on a consideration of all relevant factors, including among other things: (i) The comprehensiveness of the foreign regulator's supervisory compliance program and (ii) the authority of such foreign regulator to support and enforce its oversight of the registrant's branch or agency with regard to such activities to which substituted compliance applies.

In the January Order, the Commission gave exemptive relief from Transaction-Level Requirements during the pendency of the January Order for swaps between a foreign branch of a U.S. swap dealer or U.S. MSP and a non-U.S. counterparty (including a non-U.S. swap dealer or non-U.S. MSP). Thus, notwithstanding the Commission's view that the foreign branch of a U.S. swap dealer is a U.S. person, the Commission granted temporary relief during the pendency of the January Order for swaps between a foreign branch of a U.S. registrant and a non-U.S. swap dealer, allowing the non-U.S. swap dealer to treat the foreign branch as a non-U.S. person.

In the January Order, the Commission also stated that because it believes a swap between two foreign branches of U.S. registrants is a swap between two U.S. persons, such swaps are fully subject to the Transaction-Level Requirements. Nevertheless, during the pendency of the January Order, the Commission determined it would be appropriate to permit foreign branches of U.S. registrants to comply only with transaction-level requirements required in the location of the foreign branch while the Commission further considered, and worked with international regulators regarding, the treatment of foreign branches of U.S. registrants. However, for purposes of this relief, the Commission stated that for a swap between foreign branches of U.S. registrants, the swap would be treated as with the foreign branch of a U.S. person when: (i) The personnel negotiating and agreeing to the terms of the swap are located in the jurisdiction of such foreign branch; (ii) the documentation of the swap specifies that the counterparty or ''office'' for the U.S. person is such foreign branch; and (iii) the swap is entered into by such foreign branch in its normal course of business (collectively the ''January Order Criteria''). If the swap failed to satisfy all three of the January Order Criteria, the Commission stated that the swap would be treated as a swap of the U.S. person and not as a swap of the foreign branch of the U.S. person, and would not be eligible for relief from transaction-level requirements under the January Order.[329]

The Commission also stated in the January Order that as part of the Commission's further consideration of this issue, additional factors may be relevant to the consideration of whether a swap is with the foreign branch of a U.S. person. These factors could include, for example, that:

(i) The foreign branch is the location of employment of the employees negotiating the swap for the U.S. person or, if the swap is executed electronically, the employees managing the execution of the swap;

(ii) the U.S. person treats the swap as a swap of the foreign branch for tax purposes,

(iii) the foreign branch operates for valid business reasons and is not only a representative office of the U.S. person; and

(iv) the branch is engaged in the business of banking or financing and is subject to substantive regulation in the jurisdiction where it is located (collectively the ''Additional Factors'').[330]

The Commission also sought comment from market participants and other interested parties regarding whether it is appropriate to include these or other factors in the consideration of when a swap is with the foreign branch of a U.S. person.

2. Comments

The Commission received several comments on how the Commission should determine whether a swap is ''with a foreign branch,'' both with regard to swaps between a foreign branch and a non-U.S. swap dealer and swaps between two foreign branches of U.S. swap dealers. In addition, several organizations commented on the term ''foreign branch'' of a U.S. bank.

Commenters stated that in determining whether a swap between a non-U.S. swap dealer and a non-U.S. branch of a U.S. bank is bona fide with the non-U.S. branch, the Commission should look to whether the swap is booked in the foreign branch (as defined in Regulation K), and that the four

[328] *See* CEA section 2(h)(7)(C) for a definition of financial entity.

[329] *See* the January Order, 78 FR at 873 n. 123.

[330] *Id.* at 873.

additional factors that the Commission stated it was considering are unnecessary.[331] These commenters stated that the first Additional Factor being considered (*i.e.,* that the foreign branch is the location of employment of the employees negotiating the swap for the U.S. person or, if the swap is executed electronically, the employees managing the execution of the swap) should be deleted because employees that negotiate and agree to the terms of a swap may be located outside of the non-U.S. branch that books the trade for a variety of valid reasons.[332] Similar arguments were made with regard to the first prong of the January Order Criteria (*i.e.,* that the personnel negotiating and agreeing to the terms of the swap are located in the jurisdiction of such foreign branch).[333] As noted above, State Street stated that in a global economy, foreign exchange swaps are negotiated 24 hours a day, by parties in various locations. Therefore, the physical location of employees has little connection to the legal jurisdiction of the branch in which the swaps are booked. Determination of the branch in which the swap is booked is influenced by a number of factors, including the convenience of the swap counterparty and agreements between counterparties to book swaps to mutually agreeable and preferred locations. State Street further stated that limiting the ability to book transactions to a foreign branch would be inappropriate for U.S. dealers in foreign exchange because foreign exchange transactions are typically negotiated in large blocks, which combine the orders of a variety of asset owners, and which can include both U.S. persons and non-U.S. persons. Once negotiated and executed, these blocks are allocated to the various asset owners, and booked to the location preferred by the asset owner or in some cases the dealer's non-U.S. branch. This allows managers to trade foreign exchange more efficiently, using a single point of dealer contact, and ensures that all asset owners on whose behalf they are trading receive the same price. State Street also stated that the approach outlined in proposal would place U.S. businesses at a competitive disadvantage, as non-U.S. owners would be unwilling to do business that would subject them to the U.S. regulatory requirements.[334]

A commenter stated that it does not strongly object to prongs 2, 3 and 4 of the Additional Factors (that the swap is treated as a swap of the foreign branch for tax purposes, that the branch operates for valid business reasons and is not only a representative office, and that the branch is engaged in banking or financing and subject to substantive local regulation) since they could ''be reasonable indicia of a *bona fide* non-U.S. branch of a U.S. swap dealer.'' However, this commenter stated that each of these prongs may be challenging to properly define and evaluate.[335]

With respect to the proposed tax prong (prong 2 of the Additional Factors), other commenters stated that the income from a swap that is booked in a foreign branch of a U.S. person is subject to taxation in the local jurisdiction in which the foreign branch is resident, which demonstrates that such swaps are bona fide with the non-U.S. branch. The commenters further noted that a foreign tax credit is generally allowed for income taxes paid locally.[336]

With regard to prong 3 of the Additional Factors (that the branch operates for valid business reasons and is not only a representative office), as noted earlier, SIFMA/CH/FSR argued that the only criteria that is relevant in determining whether a swap is bona fide with a foreign branch of a U.S. swap dealer is whether the swap is booked in the foreign branch (as reflected in the trade confirm), with the term ''foreign branch'' defined with reference to Regulation K. These commenters stated that the definition of a foreign branch in Regulation K makes it clear that a foreign branch of a U.S. bank is not a ''representative office.'' In addition, Regulation K is a comprehensive regulation of the Federal Reserve Board that ensures that foreign branches operate for valid reasons.[337]

With regard to prong 4 of the Additional Factors (that the branch is engaged in banking or financing and subject to substantive local regulation), SIFMA/CH/FSR argue that this prong is unnecessary because, in addition to being regulated under Regulation K by the Federal Reserve, foreign branches are also subject to substantive local regulation and supervision, including licensing requirements and potentially local derivatives rules that the Commission could find to constitute substituted compliance. Although these commenters acknowledged that the nature and scope of these regulations will vary by jurisdiction, they state that many foreign jurisdictions require the same level of compliance with local regulations that U.S. regulators require of U.S. branches of foreign banks with regards to U.S. laws and regulations. They also stated that requiring foreign branches to show that they are subject to substantive regulation in their local jurisdiction so as to determine whether each swap they enter into is bona fide would be overly burdensome and unnecessary. In their view, the only relevant factor that the Commission should consider is whether the swap has been booked into the foreign branch, which the trade confirm would reflect.[338]

Conversely, one commenter argued that, consistent with clear evidence from the last crisis that the risks accrued by foreign branches, guaranteed subsidiaries, and even non-guaranteed subsidiaries all flow back to the parent entity, foreign branches of U.S. persons should under no circumstances be subject to weaker regulation than the parent company. This commenter also argues that there is no substantive difference between a branch and a subsidiary of a U.S. person in terms of covering derivatives losses, and that both must be held to the same high standards as apply to the U.S. person itself. Otherwise, the U.S. taxpayer will be exposed to the risk of another massive bailout.[339] In addition, this commenter stated that claims made by industry groups that foreign branches of U.S. entities should not be classified as U.S. persons or they will find no foreign counterparties willing to do business with them are absurd and unsubstantiated, and taken literally, seem to suggest that the Commission should exempt all overseas swap activity from the requirements of Title VII of the Dodd-Frank Act, which would directly violate Congress's clear intent.

3. Commission Guidance

In preparing the Guidance, the Commission has carefully considered commenters' concerns and recommendations related to both the appropriate scope of the term ''foreign branch'' for purposes of this Guidance and Commission consideration of when a swap should be considered to be ''with the foreign branch'' of a U.S. bank that is a swap dealer or MSP.

a. Scope of the Term ''Foreign Branch''

The Commission notes that foreign branches of a U.S. bank are part of a

[331] *See* SIFMA/CH/FSR (Feb. 6, 2013) at B18–20; State Street (Feb. 6, 2013) at 2–4.

[332] *See, e.g.,* SIFMA/CH/FSR (Feb. 6, 2013) at B18.

[333] *Id.* at B17.

[334] State Street (Feb. 6, 2013) at 3–4.

[335] State Street (Feb. 6, 2013) at 2.

[336] *See* SIFMA/CH/FSR (Feb. 6, 2013) at B18; State Street (Feb. 6, 2013) at 2.

[337] *See* SIFMA/CH/FSR (Feb. 6, 2013) at B19.

[338] *See id.* at B19–20.

[339] Better Markets (Feb. 15, 2013) at 2, 4–5.

U.S. bank rather than a separate legal entity, and are therefore ''U.S. persons.'' Nevertheless, as a policy matter, the Commission believes that CEA section 2(i) should be interpreted so as to exclude swap dealing transactions with a foreign branch of a U.S. swap dealer from the de minimis calculations for swap dealer or MSP registration. In addition, the Commission believes that CEA section 2(i) should be interpreted so that swaps between a foreign branch of a U.S. swap dealer or MSP and a non-U.S. person should be eligible for substituted compliance with regard to Category A Transaction-Level Requirements.[340] The Commission believes that CEA section 2(i) should be interpreted in this manner in order to avoid the potential result that foreign entities would cease doing swap dealing business with foreign branches of U.S. registered swap dealers. However, the Commission notes that interpreting CEA section 2(i) in this manner creates a distinction between swaps with foreign branches of U.S. banks and swaps with the U.S. principal bank. Therefore, the Commission also believes that Commission consideration of both the scope of the term ''foreign branch'' and when a swap is with the foreign branch of a U.S. bank should be construed under CEA section 2(i) in a manner that does not create unnecessary distinctions between otherwise similar activities.

Therefore, the Commission interprets CEA section 2(i) such that, for purposes of this Guidance, the Commission will generally consider a ''foreign branch'' of a U.S. swap dealer or U.S. MSP to be any ''foreign branch'' (as defined in the applicable banking regulation) of a U.S. bank that is: (i) Subject to Regulation K[341] or the FDIC International Banking Regulation,[342] or otherwise designated as a ''foreign branch'' by the U.S. bank's primary regulator, (ii) maintains accounts independently of the home office and of the accounts of other foreign branches with the profit or loss accrued at each branch determined as a separate item for each foreign branch,[343] and (iii) subject to substantive regulation in banking or financing in the jurisdiction where it is located (the ''Foreign Branch Characteristics''). However, in addition to the foregoing Foreign Branch Characteristics, the Commission will consider other relevant facts and circumstances in considering whether a foreign office of a U.S. bank is a ''foreign branch'' of a U.S. bank for purposes of this Guidance.

Further, for purposes of this Guidance, the Commission interprets CEA section 2(i) so that generally a foreign branch of a U.S. bank could include an office of a foreign bank that satisfies the foregoing Foreign Branch Characteristics. However, a foreign branch of a U.S. bank would generally not include an affiliate of a U.S. bank that is incorporated or organized as a separate legal entity.

In considering the scope of the term ''foreign branch,'' the Commission agrees with commenters that stated that Regulation K of the Federal Reserve Board's regulations provides a useful reference because Regulation K provides a comprehensive regime for regulation of foreign branches that ensures that foreign branches of U.S. banks operate for valid reasons and are not ''representative offices.'' Similarly, the Commission believes that the FDIC International Banking Regulation provides a useful reference for U.S. banks that have foreign branches which are subject to FDIC jurisdiction.[344]

In addition, regardless of a foreign branch of a U.S. bank is subject to Regulation K or the FDIC International Banking Regulation or is otherwise designated as a ''foreign branch'' by the U.S. bank's primary regulator, the Commission believes that CEA section 2(i) should be interpreted so that, for purposes of this Guidance, a foreign branch of a U.S. bank should generally also be subject to substantive regulation in banking or financing in the jurisdiction where it is located. Finally, the Commission believes that in order for a foreign office of a U.S. bank to be viewed as a ''foreign branch'' for purposes of this Guidance, another factor should generally be present—the foreign branch should maintain its accounts independently of the home office and of the accounts of other foreign branches, and at the end of each fiscal period the U.S. bank should transfer to its general ledger the profit or loss accrued at each branch as a separate item.[345]

b. Commission Consideration of Whether a Swap Is With a Foreign Branch of a U.S. Bank

With regard to Commission consideration of whether a swap by a U.S. bank through a foreign office should be considered to be ''with a foreign branch'' of the U.S. person for purposes of the de minimis calculations for swap dealer and MSP registration[346] or application of the Transaction-Level Requirements[347] under this Guidance, the Commission has carefully considered the comments submitted on this question.

SIFMA/CH/FSR stated that the only criteria that is relevant in determining whether a swap is bona fide with a foreign branch of a U.S. swap dealer is whether the swap is booked in the foreign branch (as reflected in the trade confirmation), with the term ''foreign branch'' defined with reference to Regulation K. However, the

[340] As discussed further in section G, under the Commission's interpretation of 2(i), in the case of a swap with a U.S. swap dealer or U.S. MSP (including an affiliate of a non-U.S. person, and including a foreign branch of a U.S. bank that is a swap dealer or MSP), the parties to the swap generally would not be not eligible for substituted compliance with one exception—where the swap is between the foreign branch of a U.S. bank that is a swap dealer or MSP and a non-U.S. person (regardless of whether the non-U.S. person is guaranteed or otherwise supported by, or is an affiliate conduit of, a U.S. person).

[341] Regulation K is a regulation issued by the Board of Governors of the Federal Reserve (''Federal Reserve Board'') under the authority of the Federal Reserve Act (''FRA'') (12 U.S.C. 221 *et seq.*); the Bank Holding Company Act of 1956 (''BHC Act'') (12 U.S.C. 1841 *et seq.*) and the International Banking Act of 1978 (''IBA'') (12 U.S.C. 3101 *et seq.*). Regulation K sets forth rules governing the international and foreign activities of U.S. banking organizations, including procedures for establishing foreign branches to engage in international banking.

Under Regulation K, 12 CFR part 211, a ''foreign branch'' is defined as ''an office of an organization (other than a representative office) that is located outside the country in which the organization is legally established and at which a banking or financing business is conducted.'' *See* 17 CFR 211.2(k).

[342] 12 CFR part 347 is a regulation issued by the Federal Deposit Insurance Corporation under the authority of the Federal Deposit Insurance Act (12 U.S.C. 1828(d)(2)), which sets forth rules governing the operation of foreign branches of insured state nonmember banks (''FDIC International Banking Regulation''). Under 12 CFR 347.102(j), a ''foreign branch'' is defined as ''an office or place of business located outside the United States, its territories, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Virgin Islands, at which banking operations are conducted, but does not include a representative office.''

[343] The Commission notes that national banks operating foreign branches are required under section 25 of the Federal Reserve Act, 12 U.S.C. 604a, to conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and are required at the end of each fiscal period to transfer to its general ledger the profit or loss accrued at each branch as a separate item.

[344] *See* notes 341 and 342 above and accompanying text for additional information regarding the definition of a ''foreign branch'' in Regulation K and the FDIC International Banking Regulation.

[345] The Commission notes that section 25 of the Federal Reserve Act, 12 U.S.C. 604a, states that national banking associations with $1 million or more in capital and surplus may file an application with the Board of Governors of the Federal Reserve System for permission to exercise certain powers, including establishment of foreign branches. In addition, section 25(9) requires that every national banking association operating foreign branches conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item.

[346] *See* section B, *supra.*

[347] *See* section G, *infra.*

Commission's view is that the trade confirmation generally is not relevant for purposes of determining whether to treat a swap as being with a foreign branch of a U.S. bank rather than with the U.S. principal bank. In reality, because the foreign branch of a U.S. bank is not a separate legal entity, the U.S. principal bank would generally be the party that is ultimately responsible for a swap with its foreign branch. The Commission's view is that a foreign branch of a U.S. bank should be considered a ''U.S. person'' under this Guidance because it is a part of the U.S. bank. Moreover, Better Markets has argued that foreign branches of U.S. banks as well as foreign subsidiaries and affiliates should be treated exactly the same as U.S. persons in all respects under this Guidance.

However, in light of principles of international comity and giving consideration to comments that state that foreign branches of U.S. banks will be at a competitive disadvantage if foreign branches of U.S. banks are not treated the same as non-U.S. persons, the Commission believes that in considering whether a swap should be considered as being with the foreign branch of a U.S. bank under this Guidance, all of the facts and circumstances are relevant. In particular, the Commission's view is that if all of the following factors are present, generally the swap should be considered to be with the foreign branch of a U.S. bank for purposes of this Guidance:

(i) The employees negotiating and agreeing to the terms of the swap (or, if the swap is executed electronically, managing the execution of the swap), other than employees with functions that are solely clerical or ministerial, are located in such foreign branch or in another foreign branch of the U.S. bank;

(ii) the foreign branch or another foreign branch is the office through which the U.S. bank makes and receives payments and deliveries under the swap on behalf of the foreign branch pursuant to a master netting or similar trading agreement, and the documentation of the swap specifies that the office for the U.S. bank is such foreign branch;

(iii) the swap is entered into by such foreign branch in its normal course of business;

(iv) the swap is treated as a swap of the foreign branch for tax purposes; and

(v) the swap is reflected in the local accounts of the foreign branch.

However, if material terms of the swap are negotiated or agreed to by employees of the U.S. bank located in the United States, the Commission believes that generally the swap should be considered to be with the U.S. principal bank, rather than its foreign branch, for purposes of this Guidance.

The Commission also believes that the factors enumerated above would be relevant both to an analysis of whether a swap should be considered to be between a foreign branch of a U.S. bank and a non-U.S. swap dealer and an analysis of whether a swap should be considered to be between two foreign branches of U.S. banks. The Commission discusses each of the enumerated factors in more detail below.

The first of the five factors enumerated above is similar to prong 1 of the Additional Factors (whether the employees negotiating the swap for the U.S. person are located in the foreign branch, or if the swap is executed electronically, the employees managing the execution of the swap); however, the first factor above considers whether the employees negotiating and agreeing to the terms of the swap are located in any foreign branch of the U.S. bank. This modification addresses the objection of commenters that stated that employees that negotiate and agree to swaps are often located outside the foreign branch for bona fide reasons.[348] However, to the extent that material terms of the swap are negotiated or agreed by employees of the U.S. bank located in the United States, the Commission believes that generally the swap should be considered to be with the U.S. principal bank for purposes of this Guidance.

The second factor above is similar to prong (ii) of the January Order Criteria (that the documentation of the swap specifies that the counterparty or ''office'' for the U.S. person is such foreign branch). However, because a foreign branch of a U.S. bank is not a separate legal entity, the Commission believes that the U.S. principal bank generally should be considered to be the counterparty for purposes of this Guidance irrespective of whether the foreign branch is named as the counterparty in the swap documentation. Therefore, the Commission has modified the second factor, consistent with its other interpretations of section 2(i), so that it makes no reference to the foreign branch as counterparty. Rather, the second factor above relates to whether the foreign branch or another foreign branch is the office through which the U.S. bank makes and receives payments and deliveries under the swap on behalf of the foreign branch pursuant to a master netting or similar trading agreement, and whether the documentation of the swap specifies that the office for the U.S. bank is such foreign branch. This modification is consistent with the ISDA Master Agreement, which requires that each party specify an ''office'' for each swap, which is where a party ''books'' a swap and/or the office through which the party makes and receives payments and deliveries.

The third factor above (whether the swap is entered into by such foreign branch in its normal course of business) is the same as prong (iii) in the January Order Criteria discussed above. The Commission is concerned about the material terms of a swap being negotiated or agreed by employees of the U.S. bank that are located in the United States and then routed to a foreign branch in order for the swap to be treated as a swap with the foreign branch for purposes of the de minimis calculations for swap dealer and MSP registration or application of the Transaction-Level Requirements under this Guidance.

The fourth factor above (whether the swap is treated as a swap of the foreign branch for tax purposes) is the same as prong 2 of the Additional Factors. The Commission notes that State Street stated that it does not strongly object to prongs 2, 3 and 4 of the Additional Factors (that the swap is treated as a swap of the foreign branch for tax purposes, that the branch operates for valid business reasons and is not only a representative office, and that the branch is engaged in banking or financing and subject to substantive local regulation) since they could ''be reasonable indicia of a bona fide non-U.S. branch of a U.S. swap dealer.'' However, State Street stated that each of these prongs may be challenging to properly define and evaluate.[349] Other commenters stated that the income from a swap that is booked in a foreign branch of a U.S. person is subject to taxation in the local jurisdiction in which the foreign branch is resident, which demonstrates that such swaps are bona fide with the non-U.S. branch.[350] The Commission notes that the fourth factor above only refers to whether the tax treatment of the swap is consistent with the swap being treated as a swap of the foreign branch for tax purposes.

The fifth factor above focuses on whether the swap is reflected in the accounts of the foreign branch. The Commission believes that where a swap is bona fide with the foreign branch of a U.S. bank, it generally would be

[348] *See, e.g.,* SIFMA/CH/FSR (Feb. 6, 2013) at B18; State Street (Feb. 6, 2013) at 2–4.

[349] *See* State Street (Feb. 6, 2013) at 2.

[350] *See, e.g.,* SIFMA/CH/FSR (Feb. 6, 2013) at B18.

reflected in the foreign branch's accounts.

D. Description of the Entity-Level and Transaction-Level Requirements

Title VII of the Dodd-Frank Act establishes a comprehensive new regulatory framework for swap dealers and MSPs that Congress enacted with the goal of reducing systemic risk and enhancing market transparency. Under this framework, a swap dealer or MSP must, among other things, comport with certain standards (and regulations as the Commission may promulgate) governing risk management, internal and external business conduct, and reporting. Further, swap dealers and MSPs are required to comply with all of the requirements applicable to swap dealers and MSPs for all their swaps, not just the swaps that make them a swap dealer or MSP.

Even before the Commission published the Proposed Guidance, a number of commenters recommended that the Commission, in interpreting the cross-border applicability of the Dodd-Frank Act swaps provisions, should distinguish between requirements that apply at an entity level (*i.e.,* to the firm as a whole) as compared to those that apply at a transactional level (*i.e.,* to the individual swap transaction or trading relationship).[351] These commenters argued that requirements that relate to the core operations of a firm and should be applied to the entity as a whole would include the capital and related prudential requirements and recordkeeping, as well as certain risk mitigation requirements (*e.g.,* information barriers and the designation of a chief compliance officer). The commenters stated that other requirements, such as margin, should apply on transaction-by-transaction basis and only to swaps with U.S. counterparties.

Commenters on the Proposed Guidance generally supported the division of Dodd-Frank's swaps provisions (and Commission regulations thereunder) into Entity-Level and Transaction-Level Requirements.[352] Certain of these commenters, however, made specific recommendations for reclassification of some of these Requirements, which are discussed in section E below.

The Commission agrees with the commenters that the various Dodd-Frank Act swaps provisions applicable to swap dealers and MSPs can be conceptually separated into Entity-Level Requirements, which apply to a swap dealer or MSP firm as a whole, and Transaction-Level Requirements, which apply on a transaction-by-transaction basis. Descriptions of each of the Entity-Level Requirements under this Guidance are set out immediately below, followed by descriptions of the Transaction-Level Requirements. Additional information related to the categorization of Entity-Level and Transaction-Level Requirements is discussed in section E.

1. Description of the Entity-Level Requirements

The Entity-Level Requirements under Title VII of the Dodd-Frank Act and the Commission's regulations promulgated thereunder relate to: (i) Capital adequacy; (ii) chief compliance officer; (iii) risk management; (iv) swap data recordkeeping; (v) swap data repository reporting (''SDR Reporting''); and (vi) physical commodity large swaps trader reporting (''Large Trader Reporting''). The Entity-Level Requirements apply to registered swap dealers and MSPs across all their swaps without distinctions as to the counterparty or the location of the swap (although under this Guidance in some circumstances the availability of substituted compliance may vary based on whether the counterparty is a U.S. person or a non-U.S. person).

The Entity-Level Requirements are split into two categories. The first category of Entity-Level Requirements includes capital adequacy, chief compliance officer, risk management, and swap data recordkeeping under Commission regulations 23.201 and 23.203 (except certain aspects of swap data recordkeeping relating to complaints and sales materials) (''First Category''). The second category of Entity-Level Requirements includes SDR Reporting, certain aspects of swap data recordkeeping relating to complaints and marketing and sales materials under Commission regulations 23.201(b)(3) and 23.201(b)(4) and Large Trader Reporting (''Second Category'').

Each of the Entity-Level Requirements is discussed in the subsections that follow.

a. First Category of Entity-Level Requirements

i. Capital Adequacy

Section 4s(e)(2)(B) of the CEA specifically directs the Commission to set capital requirements for swap dealers and MSPs that are not subject to the capital requirements of U.S. prudential regulators (hereinafter referred to as ''non-bank swap dealers or MSPs'').[353] With respect to the use of swaps that are not cleared, these requirements must: ''(1) [h]elp ensure the safety and soundness of the swap dealer or major swap participant; and (2) [be] appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant.'' [354] Pursuant to section 4s(e)(3), the Commission proposed regulations, which would require non-bank swap dealers and MSPs to hold a minimum level of adjusted net capital (*i.e.,* ''regulatory capital'') based on whether the non-bank swap dealer or MSP is: (i) Also a FCM; (ii) not an FCM, but is a non-bank subsidiary of a bank holding company; or (iii) neither an FCM nor a non-bank subsidiary of a bank holding company.[355] The primary

[351] *See, e.g.,* SIFMA (Feb. 3, 2011); ISDA (Jan. 24, 2011); Cleary (Sept. 20, 2011); Barclays Bank PLC, BNP Paribas S.A., Deutsche Bank AG, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Societe Generale, and UBS AG (Jan. 11, 2011); Barclays Bank PLC, BNP Paribas S.A., Credit Suisse AG, Deutsche Bank AG, HSBC, Nomura Securities International, Inc., Rabobank Nederland, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Societe Generale, The Toronto-Dominion Bank, and UBS AG (Feb. 17, 2011).

[352] *See, e.g.,* SocGen (Aug. 8, 2012) at 6; IIB (Aug. 27, 2012) at 2; Clearing House (Aug. 27, 2012) at 22.

[353] *See* 7 U.S.C. 6s(e)(2)(B). Section 4s(e) of the CEA explicitly requires the adoption of rules establishing capital and margin requirements for swap dealers and MSPs, and applies a bifurcated approach that requires each swap dealer and MSP for which there is a U.S. prudential regulator to meet the capital and margin requirements established by the applicable prudential regulator, and each swap dealer and MSP for which there is no prudential regulator to comply with the Commission's capital and margin regulations. *See* 7 U.S.C. 6s(e). Further, systemically important financial institutions (''SIFIs'') that are not FCMs would be exempt from the Commission's capital requirements, and would comply instead with Federal Reserve Board requirements applicable to SIFIs, while nonbank (and non-FCM) subsidiaries of U.S. bank holding companies would calculate their Commission capital requirement using the same methodology specified in Federal Reserve Board regulations applicable to the bank holding company, as if the subsidiary itself were a bank holding company. The term ''prudential regulator'' is defined in CEA section 1a(39) as the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency. *See* 7 U.S.C. 1a(39). In addition, in the proposed capital regulations for swap dealers and MSPs, the Commission solicited comment regarding whether it would be appropriate to permit swap dealers and MSPs to use internal models for computing market risk and counterparty credit risk charges for capital purposes if such models had been approved by a foreign regulatory authority and were subject to periodic assessment by such foreign regulatory authority. *See* Capital Requirements of Swap Dealers and Major Swap Participants, 76 FR 27802 (May 12, 2011) (''Proposed Capital Requirements'').

[354] *See* 7 U.S.C. 6s(e)(3)(A).

[355] *See* 7 U.S.C. 6s(e). *See also* Proposed Capital Requirements, 76 FR at 27817 (''The Commission's capital proposal for [swap dealers] and MSPs

Continued

purpose of the capital requirement is to reduce the likelihood and cost of a swap dealer's or MSP's default by requiring a financial cushion that can absorb losses in the event of the firm's default.

ii. Chief Compliance Officer

Section 4s(k) requires that each swap dealer and MSP designate an individual to serve as its chief compliance officer (''CCO'') and specifies certain duties of the CCO.[356] Pursuant to section 4s(k), the Commission adopted regulation 3.3, which requires swap dealers and MSPs to designate a CCO who would be responsible for administering the firm's compliance policies and procedures, reporting directly to the board of directors or a senior officer of the swap dealer or MSP, as well as preparing and filing with the Commission a certified report of compliance with the CEA. The chief compliance function is an integral element of a firm's risk management and oversight and the Commission's effort to foster a strong culture of compliance within swap dealers and MSPs.

iii. Risk Management

Section 4s(j) of the CEA requires each swap dealer and MSP to establish internal policies and procedures designed to, among other things, address risk management, monitor compliance with position limits, prevent conflicts of interest, and promote diligent supervision, as well as maintain business continuity and disaster recovery programs.[357] The Commission adopted implementing regulations 23.600, 23.601, 23.602, 23.603, 23.605, and 23.606).[358] The Commission also adopted regulation 23.609, which requires certain risk management procedures for swap dealers or MSPs that are clearing members of a DCO.[359] Collectively, these requirements help to establish a robust and comprehensive internal risk management program for swap dealers and MSPs, which is critical to effective systemic risk management for the overall swaps market.

iv. Swap Data Recordkeeping (Except Certain Aspects of Swap Data Recordkeeping Relating to Complaints and Sales Materials)

CEA section 4s(f)(1)(B) requires swap dealers and MSPs to keep books and records for all activities related to their business.[360] Sections 4s(g)(1) and (4) require swap dealers and MSPs to maintain trading records for each swap and all related records, as well as a complete audit trail for comprehensive trade reconstructions.[361] Pursuant to these provisions, the Commission adopted regulations 23.201and 23.203, which require swap dealers and MSPs to keep records including complete transaction and position information for all swap activities, including documentation on which trade information is originally recorded. Pursuant to Commission regulation 23.203, records of swaps must be maintained for the duration of the swap plus 5 years, and voice recordings for 1 year, and records must be ''readily accessible'' for the first 2 years of the 5 year retention period. Swap dealers and MSPs also must comply with Parts 43, 45 and 46 of the Commission's regulations, which, respectively, address the data recordkeeping and reporting requirements for all swaps subject to the Commission's jurisdiction, including swaps entered into before the date of enactment of the Dodd-Frank Act (''pre-enactment swaps'') and swaps entered into on or after the date of enactment of the Dodd-Frank Act but prior to the compliance date of the swap data reporting rules (''transition swaps'').[362]

b. Second Category of Entity-Level Requirements

i. SDR Reporting

CEA section 2(a)(13)(G) requires all swaps, whether cleared or uncleared, to be reported to a registered SDR.[363] CEA section 21 requires SDRs to collect and maintain data related to swaps as prescribed by the Commission, and to make such data electronically available to particular regulators under specified conditions related to confidentiality.[364] Part 45 of the Commission's regulations (and Appendix 1 thereto) sets forth the specific swap data that must be reported to a registered SDR, along with attendant recordkeeping requirements; and part 46 addresses recordkeeping and reporting requirements for pre-enactment and transition swaps (''historical swaps''). The fundamental goal of part 45 of the Commission's regulations is to ensure that complete data concerning all swaps subject to the Commission's jurisdiction is maintained in SDRs where it will be available to the Commission and other financial regulators for fulfillment of their various regulatory mandates, including systemic risk mitigation, market monitoring and market abuse prevention. Part 46 supports similar goals with respect to pre-enactment and transition swaps and ensures that data needed by regulators concerning ''historical'' swaps is available to regulators through SDRs. Among other things, data reported to SDRs will enhance the Commission's understanding of concentrations of risks within the market, as well as promote a more effective monitoring of risk profiles of market participants in the swaps market. The Commission also believes that there are benefits that will accrue to swap dealers and MSPs as a result of the timely reporting of comprehensive swap transaction data and consistent data standards for recordkeeping, among other things. Such benefits include more robust risk monitoring and management capabilities for swap dealers and MSPs, which in turn will improve the monitoring of their current swaps market positions.

includes a minimum dollar level of $20 million. A non-bank [swap dealer] or MSP that is part of a U.S. bank holding company would be required to maintain a minimum of $20 million of Tier 1 capital as measured under the capital rules of the Federal Reserve Board. [A swap dealer] or MSP that also is registered as an FCM would be required to maintain a minimum of $20 million of adjusted net capital as defined under [proposed] section 1.17. In addition, [a swap dealer] or MSP that is not part of a U.S. bank holding company or registered as an FCM would be required to maintain a minimum of $20 million of tangible net equity, plus the amount of the [swap dealer's] or MSP's market risk exposure and OTC counterparty credit risk exposure.'').

[356] *See* 7 U.S.C. 6s(k).

[357] 7 U.S.C. 6s(j).

[358] 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) (''Final Swap Dealer and MSP Recordkeeping Rule'') (relating to risk management program, monitoring of position limits, business continuity and disaster recovery, conflicts of interest policies and procedures, and general information availability, respectively).

[359] Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management, 77 FR 21278 (Apr. 9, 2012) (''Final Customer Documentation Rules''). Also, swap dealers must comply with Commission regulation 23.608, which prohibits swap dealers providing clearing services to customers from entering into agreements that would: (i) disclose the identity of a customer's original executing counterparty; (ii) limit the number of counterparties a customer may trade with; (iii) impose counterparty-based position limits; (iv) impair a customer's access to execution of a trade on terms that have a reasonable relationship to the best terms available; or (v) prevent compliance with specified time frames for acceptance of trades into clearing.

[360] 7 U.S.C. 6s(f)(1)(B).

[361] 7 U.S.C. 6s(g)(1).

[362] *See* 17 CFR part 46; Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps, 76 FR 22833 (Apr. 25, 2011) (''Proposed Data Rules'').

[363] 7 U.S.C. 2(a)(13)(G).

[364] 7 U.S.C. 24a.

ii. Swap Data Recordkeeping Relating to Complaints and Marketing and Sales Materials

CEA section 4s(f)(1) requires swap dealers and MSPs to ''make such reports as are required by the Commission by rule or regulation regarding the transactions and positions and financial condition of the registered swap dealer or MSP.'' [365] Additionally, CEA section 4s(h) requires swap dealers and MSPs to ''conform with such business conduct standards . . . as may be prescribed by the Commission by rule or regulation.'' [366] Pursuant to these provisions, the Commission promulgated final rules that set forth certain reporting and recordkeeping for swap dealers and MSPs.[367] Commission Regulation 23.201 states that ''[e]ach swap dealer and major swap participant shall keep full, complete, and systematic records of all activities related to its business as a swap dealer or major swap participant.'' Such records must include, among other things, ''[a] record of each complaint received by the swap dealer or major swap participant concerning any partner, member, officer, employee, or agent,'' [368] as well as ''[a]ll marketing and sales presentations, advertisements, literature, and communications.'' [369]

iii. Physical Commodity Large Swaps Trader Reporting (Large Trader Reporting)

CEA section 4t authorizes the Commission to establish a large trader reporting system for significant price discovery swaps (of which the economically equivalent swaps subject to part 20 of the Commission's regulations are a subset).[370] Pursuant thereto, the Commission adopted its Large Trader Reporting rules (part 20 of the Commission's regulations), which require routine reports from swap dealers, among other entities, that hold significant positions in swaps that are linked, directly or indirectly, to a prescribed list of U.S.-listed physical commodity futures contracts.[371] Additionally, Large Trader Reporting requires that swap dealers, among other entities, comply with certain recordkeeping obligations.

2. Description of the Transaction-Level Requirements

The Transaction-Level Requirements include: (i) Required clearing and swap processing; (ii) margining (and segregation) for uncleared swaps; (iii) mandatory trade execution; (iv) swap trading relationship documentation; (v) portfolio reconciliation and compression; (vi) real-time public reporting; (vii) trade confirmation; (viii) daily trading records; and (ix) external business conduct standards.

The Transaction-Level Requirements—with the exception of external business conduct standards—relate to both risk mitigation and market transparency. Certain of these requirements, such as clearing and margining, serve to lower a firm's risk of failure. In that respect, these Transaction-Level Requirements could be classified as Entity-Level Requirements. Other Transaction-Level Requirements—such as trade confirmation, swap trading relationship documentation, and portfolio reconciliation and compression—also serve important risk mitigation functions, but are less closely connected to risk mitigation of the firm as a whole and thus are more appropriately applied on a transaction-by-transaction basis. Likewise, the requirements related to trade execution, trade confirmation, daily trading records, and real-time public reporting have a closer nexus to the transparency goals of the Dodd-Frank Act, as opposed to addressing the risk of a firm's failure.

As a result, whether a particular requirement of Title VII should apply on a transaction-by-transaction basis in the context of cross-border activity for purposes of section 2(i) of the CEA requires the Commission to exercise some degree of judgment. Nevertheless, in the interest of comity principles, the Commission believes that the Transaction-Level Requirements may be applied on a transaction-by-transaction basis. The Transaction-Level Requirements are split into two categories. All of the Transaction-Level Requirements except external business conduct standards are in Category A. The external business conduct standards are in Category B.

Each of the Transaction-Level Requirements is discussed below.

a. Category A: Risk Mitigation and Transparency

i. Required Clearing and Swap Processing

Section 2(h)(1) of the CEA requires a swap to be submitted for clearing to a DCO if the Commission has determined that the swap is required to be cleared, unless one of the parties to the swap is eligible for an exception from the clearing requirement and elects not to clear the swap.[372] Clearing via a DCO mitigates the counterparty credit risk between swap dealers or MSPs and their counterparties.

Commission regulations implementing the first designations of swaps for required clearing were published in the **Federal Register** on December 13, 2012.[373] Under Commission regulation 50.2, all persons executing a swap that is included in a class of swaps identified under Commission regulation 50.4 must submit such swap to an eligible DCO for clearing as soon as technologically practicable after execution, but in any event by the end of the day of execution.

Regulation 50.4 establishes required clearing for certain classes of swaps. Currently, those classes include, for credit default swaps: Specified series of untranched North American CDX indices and European iTraxx indices; and for interest rate swaps: Fixed-to-floating swaps, basis swaps, forward rate agreements referencing U.S. Dollar, Euro, Sterling, and Yen, and overnight index swaps referencing U.S. Dollar, Euro, and Sterling. Each of the six classes is further defined in Commission regulation 50.4. Swaps that have the specifications identified in the regulation are required to be cleared and must be cleared pursuant to the rules of any eligible DCO [374] unless an exception or exemption specified in the CEA or the Commission's regulations applies.

Generally, if a swap is subject to CEA section 2(h)(1)(A) and part 50 of the Commission's regulations, it must be cleared through an eligible DCO, unless: (i) One of the counterparties is eligible for and elects the end-user exception

[365] 7 U.S.C. 6s(f)(1).

[366] 7 U.S.C. 6s(h)(1); *see* 7 U.S.C. 6s(h)(3).

[367] Final Swap Dealer and MSP Recordkeeping Rule, 77 FR 20128.

[368] 17 CFR 23.201(b)(3)(i).

[369] 17 CFR 23.201(b)(4).

[370] 7 U.S.C. 6t.

[371] Large Trader Reporting for Physical Commodity Swaps, 76 FR 43851 (July 22, 2011). The rules require routine position reporting by clearing organizations, as well as clearing members and swap dealers with reportable positions in the covered physical commodity swaps. The rules also establish recordkeeping requirements for clearing organizations, clearing members and swap dealers, as well as traders with positions in the covered physical commodity swaps that exceed a prescribed threshold. In general, the rules apply to swaps that are linked, directly or indirectly, to either the price of any of the 46 U.S. listed physical commodity futures contracts the Commission enumerates (Covered Futures Contracts) or the price of the physical commodity at the delivery location of any of the Covered Futures Contracts.

[372] 7 U.S.C. 2(h)(1), (7).

[373] Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284 (Dec. 13, 2012) (''Clearing Requirement Determination'').

[374] A DCO's eligibility to clear swaps that are required to be cleared pursuant to section 2(h)(1)(A) of the CEA and part 50 of the Commission's regulations is governed by regulation 39.5(a), relating to DCO eligibility.

under Commission regulation 50.50;[375] or (ii) both counterparties are eligible for and elect an inter-affiliate exemption under Commission regulation 50.52.[376] To elect either the End-User Exception or the Inter-Affiliate Exemption, the electing party or parties and the swap must meet certain requirements set forth in the regulations.

Closely connected with the clearing requirement are the following swap processing requirements: (i) Commission regulation 23.506, which requires swap dealers and MSPs to submit swaps promptly for clearing; and (ii) Commission regulations 23.610 and 39.12, which establish certain standards for swap processing by DCOs and/or swap dealers and MSPs that are clearing members of a DCO.[377] Together, required clearing and swap processing requirements promote safety and soundness of swap dealers and MSPs, and mitigate the credit risk posed by bilateral swaps between swap dealers or MSPs and their counterparties.[378]

ii. Margin and Segregation Requirements For Uncleared Swaps

Section 4s(e) of the CEA requires the Commission to set margin requirements for swap dealers and MSPs that trade in swaps that are not cleared.[379] The margin requirements ensure that outstanding current and potential future risk exposures between swap dealers and their counterparties are collateralized, thereby reducing the possibility that swap dealers or MSPs take on excessive risks without having adequate financial backing to fulfill their obligations under the uncleared swap. In addition, with respect to swaps that are not submitted for clearing, section 4s(l) requires that a swap dealer or MSP notify the counterparty of its right to request that funds provided as margin be segregated, and upon such request, to segregate the funds with a third-party custodian for the benefit of the counterparty. In this way, the segregation requirement enhances the protections offered through margining uncleared swaps and thereby provides additional financial protection to counterparties. The Commission is working with foreign and domestic regulators to develop and finalize appropriate regulations for margin and segregation requirements.

iii. Trade Execution

Integrally linked to the clearing requirement is the trade execution requirement, which is intended to bring the trading of swaps that are required to be cleared and are made available to trade onto regulated exchanges or execution facilities. Specifically, section 2(h)(8) of the CEA provides that unless a clearing exception applies and is elected, a swap that is subject to a clearing requirement must be executed on a DCM or SEF, unless no such DCM or SEF makes the swap available to trade.[380] Commission regulations implementing the process for a DCM or SEF to make a swap available to trade were published in the **Federal Register** on June 4, 2013.[381] Under Commission regulations 37.10 and 38.12, respectively, a SEF or DCM may submit a determination for Commission review that a mandatorily cleared swap is available to trade based on enumerated factors. By requiring the trades of mandatorily cleared swaps that are made available to trade to be executed on an exchange or an execution facility—each with its attendant pre- and post-trade transparency and safeguards to ensure market integrity—the trade execution requirement furthers the statutory goals of financial stability, market efficiency, and enhanced transparency.

iv. Swap Trading Relationship Documentation

CEA section 4s(i) requires each swap dealer and MSP to conform to Commission standards for the timely and accurate confirmation, processing, netting, documentation and valuation of swaps. Pursuant thereto, Commission regulation 23.504(a) requires swap dealers and MSPs to ''establish, maintain and enforce written policies and procedures'' to ensure that the swap dealer or MSP executes written swap trading relationship documentation.[382] Under Commission regulation 23.504(b), the swap trading relationship documentation must include, among other things: All terms governing the trading relationship between the swap dealer or MSP and its counterparty; credit support arrangements; investment and re-hypothecation terms for assets used as margin for uncleared swaps; and custodial arrangements.[383] Further, the swap trading relationship documentation requirement applies to all swaps with registered swap dealers and MSPs. In addition, Commission regulation 23.505 requires swap dealers and MSPs to document certain information in connection with swaps for which exceptions from required clearing are elected.[384] Swap documentation standards facilitate sound risk management and may promote standardization of documents and transactions, which are key conditions for central clearing, and lead to other operational efficiencies, including improved valuation.

v. Portfolio Reconciliation and Compression

CEA section 4s(i) directs the Commission to prescribe regulations for the timely and accurate processing and netting of all swaps entered into by swap dealers and MSPs. Pursuant to CEA section 4s(i), the Commission adopted regulations (23.502 and 23.503), which require swap dealers and MSPs to perform portfolio reconciliation and compression, respectively, for all swaps.[385] Portfolio reconciliation is a

[375] *See* End-User Exception to the Clearing Requirement for Swaps, 77 FR 42560 (July 19, 2012) (''End-User Exception'').

[376] The Commission has adopted an exemption from required clearing for swaps between certain affiliated entities. Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750 (Apr. 11, 2013) (''Inter-Affiliate Exemption'').

[377] 17 CFR 23.506 and 23.610. *See also* Final Customer Documentation Rules, 77 FR 21278.

[378] *See* section H regarding the application of required clearing rules to market participants that are not registered as swap dealers or MSPs, including the circumstances under which the parties to such swaps would be eligible for substituted compliance.

[379] *See* 7 U.S.C. 6s(e). *See also* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 76 FR 23732, 23733–23740 (Apr. 28, 2011) (''Proposed Margin Requirements''). Section 4s(e) explicitly requires the adoption of rules establishing margin requirements for swap dealers and MSPs, and applies a bifurcated approach that requires each swap dealer and MSP for which there is a prudential regulator to meet the margin requirements established by the applicable prudential regulator, and each swap dealer and MSP for which there is no prudential regulator to comply with the Commission's margin regulations. In contrast, the segregation requirements in section 4s(1) do not use a bifurcated approach—that is, all swap dealers and MSPs are subject to the Commission's regulations regarding notice and third party custodians for margin collected for uncleared swaps.

[380] *See* 7 U.S.C. 2(h)(8).

[381] *See* Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 FR 33606 (Jun. 4, 2013).

[382] *See also* Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants; 77 FR 55904 (Sept. 11, 2012) (''Final Confirmation Rules'').

[383] The requirement under section 4s(i) relating to trade confirmations is a Transaction-Level Requirement. Accordingly, Commission regulation 23.504(b)(2) requires a swap dealer's and MSP's swap trading relationship documentation to include all confirmations of swaps, will apply on a transaction-by-transaction basis.

[384] *See also* Final Confirmation Rules, 77 FR 55964.

[385] *See id.*

post-execution risk management tool to ensure accurate confirmation of a swap's terms and to identify and resolve any discrepancies between counterparties regarding the valuation of the swap. Portfolio compression is a post-trade processing and netting mechanism that is intended to ensure timely, accurate processing and netting of swaps.[386] Regulation 23.503 requires all swap dealers and MSPs to establish policies and procedures for terminating fully offsetting uncleared swaps, when appropriate, and periodically participating in bilateral and/or multilateral portfolio compression exercises for uncleared swaps with other swap dealers or MSPs or conducted by a third party.[387] The rule also requires policies and procedures for engaging in such exercises for uncleared swaps with non-swap dealers and non-MSPs upon request. Further, participation in multilateral portfolio compression exercises is mandatory for dealer-to-dealer trades.

vi. Real-Time Public Reporting

Section 2(a)(13) of the CEA directs the Commission to promulgate rules providing for the public availability of swap transaction and pricing data on a real-time basis.[388] In accordance with this mandate, the Commission promulgated part 43, which provides that all ''publicly reportable swap transactions'' must be reported and publicly disseminated, and which establishes the method, manner, timing and particular transaction and pricing data that must be reported by parties to a swap transaction.[389] Additionally, the Commission adopted regulation 23.205, which directs swap dealers and MSPs to undertake such reporting and to have the electronic systems and procedures necessary to transmit electronically all information and data required to be reported in accordance with part 43.[390] The real-time dissemination of swap transaction and pricing data supports the fairness and efficiency of markets and increases transparency, which in turn improves price discovery and decreases risk (*e.g.,* liquidity risk).[391]

vii. Trade Confirmation

Section 4s(i) of the CEA [392] requires that each swap dealer and MSP must comply with the Commission's regulations prescribing timely and accurate confirmation of swaps. The Commission has adopted regulation 23.501, which requires, among other things, a timely and accurate confirmation of swap transactions (which includes execution, termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap) among swap dealers and MSPs by the end of the first business day following the day of execution.[393] Timely and accurate confirmation of swaps—together with portfolio reconciliation and compression—are important post-trade processing mechanisms for reducing risks and improving operational efficiency.[394]

viii. Daily Trading Records

Pursuant to CEA section 4s(g), the Commission adopted regulation 23.202, which requires swap dealers and MSPs to maintain daily trading records, including records of trade information related to pre-execution, execution, and post-execution data that is needed to conduct a comprehensive and accurate trade reconstruction for each swap. The final rule also requires that records be kept of cash or forward transactions used to hedge, mitigate the risk of, or offset any swap held by the swap dealer or MSP.[395] Accurate and timely recordkeeping regarding all phases of a swap transaction can serve to greatly enhance a firm's internal supervision, as well as the Commission's ability to detect and address market or regulatory abuses or evasion.

b. Category B: External Business Conduct Standards

Pursuant to CEA section 4s(h), the Commission has adopted external business conduct rules, which establish business conduct standards governing the conduct of swap dealers and MSPs in dealing with their counterparties in entering into swaps.[396] Broadly speaking, these rules are designed to enhance counterparty protection by significantly expanding the obligations of swap dealers and MSPs towards their counterparties. Under these rules, swap dealers and MSPs will be required, among other things, to conduct due diligence on their counterparties to verify eligibility to trade, provide disclosure of material information about the swap to their counterparties, provide a daily mid-market mark for uncleared swaps and, when recommending a swap to a counterparty, make a determination as to the suitability of the swap for the counterparty based on reasonable diligence concerning the counterparty.

E. Categorization of Entity-Level and Transaction-Level Requirements

As noted above, even before the Commission published the Proposed Guidance, a number of commenters recommended that the Commission, in interpreting the cross-border applicability of the Dodd-Frank Act swaps provisions, should distinguish between requirements that apply at an entity level (*i.e.,* to the firm as a whole) as compared to those that apply at a transactional level (*i.e.,* to the individual swap transaction or trading relationship).[397] The Commission agrees with such commenters, and generally expects that it may apply its policies differently depending on the category (Entity-Level or Transaction-Level) or sub-category (First or Second Category of Entity-Level Requirements or Category A or B of the Transaction-Level Requirements) into which such requirement falls, subject to its further consideration of all of the relevant facts and circumstances.

After giving further consideration to the categorization in the Proposed Guidance, including comments received in this area, this Guidance makes a few minor modifications to the proposed categorization of Entity-Level and Transaction-Level Requirements, as described below.

1. Categorization Under the Proposed Guidance

The Proposed Guidance separated the Entity-Level Requirements into two subcategories. The first included capital adequacy, chief compliance officer, risk management, and swap data

[386] For example, the reduced transaction count may decrease operational risk as there are fewer trades to maintain, process, and settle.

[387] *See* Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 FR 81519 (Dec. 28, 2010) (''Confirmation NPRM'').

[388] *See* 7 U.S.C. 2(a)(13). *See also* Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182, 1183 (Jan. 9, 2012) (''Final Real-Time Reporting Rule'').

[389] Part 43 defines a ''publicly reportable swap transaction'' as (i) any swap that is an arm's-length transaction between two parties that results in a corresponding change in the market risk position between the two parties; or (ii) any termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap that changes the pricing of a swap. *See* Final Real-Time Reporting Rule, 77 FR 1182.

[390] Final Swap Dealer and MSP Recordkeeping Rule, 77 FR at 20205.

[391] *See* Final Real-Time Reporting Rule, 77 FR at 1183.

[392] 7 U.S.C. 6s(i).

[393] *See also* Final Confirmation Rules, 77 FR 55904.

[394] In addition, the Commission notes that regulation 23.504(b)(2) requires that the swap trading relationship documentation of swap dealers and MSPs must include all confirmations of swap transactions.

[395] *See* Final Swap Dealer and MSP Recordkeeping Rule, 77 FR 20128.

[396] *See* 7 U.S.C. 6s(h). *See also* External Business Conduct Rules, 77 FR at 9822–9829.

[397] *See* note 351, *supra.*

recordkeeping, all of which relate to risks to a firm as a whole. The second proposed subcategory included SDR Reporting and Large Trader Reporting, which relate directly to the Commission's market oversight.

The Proposed Guidance separated the Transaction-Level Requirements into two subcategories, ''Category A'' and ''Category B.'' The ''Category A'' Transaction-Level Requirements relate to risk mitigation and transparency: (1) Clearing and swap processing; (2) margining and segregation for uncleared swaps; (3) trade execution; (4) swap trading relationship documentation; (5) portfolio reconciliation and compression; (6) real-time public reporting; (7) trade confirmation; and (8) daily trading records.

The ''Category B'' Transaction-Level Requirements—the external business conduct standards—are those requirements that may not be necessary to apply to swaps between non-U.S. persons taking place outside the United States. With respect to these swaps, the Commission believes that foreign regulators may have a relatively stronger supervisory interest in regulating sales practices concerns than the Commission.

2. Comments

Commenters generally supported the division of Dodd-Frank's swaps provisions (and Commission regulations thereunder) into Entity-Level and Transaction-Level Requirements.[398] Certain of these commenters, however, made specific recommendations for reclassification of some of these Requirements.

a. Reporting and Trade-Execution Requirements

With regard to reporting and trade-execution requirements, a number of commenters argued that all forms of swaps reporting, including SDR Reporting and Large Trader Reporting, should be treated as Transaction-Level Requirements and thereby could be eligible for substituted compliance for certain transactions with non-U.S. counterparties.[399] In their view, SDR Reporting—like real-time public reporting—is implemented on a swap-by-swap basis and more closely linked to market transparency than risk mitigation. Credit Suisse noted that the Commission's bifurcated approach to SDR Reporting and real-time public reporting creates unnecessary complications. It argued that both sets of reporting requirements should apply to a non-U.S. swap dealer only when dealing with U.S. persons (excluding foreign branches of U.S. swap dealers).[400]

ISDA believed that real-time public reporting and trade execution should be treated like the external business conduct rules. It argued that these rules relate to pre-trade price discovery and market structure and client protections.[401] Similarly, J.P. Morgan commented that the real-time public reporting and trade execution requirements should not apply to transactions between non-U.S. swap dealers or non-U.S. MSPs and non-U.S. counterparties, arguing that these requirements do not reduce market risk but rather promote price competition.[402] IIB stated that the Commission should treat mandatory trade execution, real-time public reporting and daily trading records as ''Category B'' Transaction-Level Requirements, since these requirements are intended to give customers enhanced access to the best pricing and affect not only individual counterparties but the overall market.[403]

On the other hand, Senator Levin stated that reporting and trade execution requirements should be applied broadly to all swaps of non-U.S. swap dealers and non-U.S. MSPs that are affiliates of U.S. financial institutions, so as to provide transparency regarding their swap activities and to protect the U.S. financial system.[404] He stated that standard trade execution helps to ensure that complex swaps are properly booked, and reporting discourages ''below-the-radar'' transactions involving complex swaps.[405]

b. Swap Trading Relationship Documentation, Portfolio Reconciliation and Compression, Daily Trading Records and External Business Conduct Standards

Sumitomo stated that certain Transaction-Level Requirements, including swap trading relationship documentation, portfolio reconciliation and compression, daily trading records, and external business conduct standards, should instead be classified as Entity-Level Requirements. It contended that these are not logically linked to particular transactions and would be required to be conducted on a daily basis per counterparty.[406] IATP stated that portfolio compression and reconciliation requirements are critical to a firm's central risk mitigation functions and therefore should be classified as Entity-Level Requirements. This commenter also argued that margin, segregation and other requirements for swaps that are so designated by non-U.S. affiliates of U.S. persons as to be unclearable should be regulated under the Entity-Level Requirements.[407]

Similarly, Senator Levin stated that clearing, margin and portfolio reconciliation and compression requirements and external business conduct standards should be applied to all swaps of non-U.S. swap dealers and non-U.S. MSPs that are affiliates of U.S. financial institutions.[408] In the Senator's view, margin requirements are critical safeguards against rapidly increasing losses, portfolio reconciliation and compression procedures help to maintain an accurate understanding of the size and nature of a firm's swaps positions, and external business conduct standards encourage integrity in the swaps markets.[409] Societe Generale also stated that rules relating to confirmation processing and portfolio reconciliation and compression should be categorized as Entity-Level Requirements, explaining that these all relate to the functioning of a swap dealer's ''back office'' operations and are tied to its trading systems. As a result, implementing confirmation rules, for

[398] *See, e.g.,* SocGen (Aug. 8, 2012) at 6; IIB (Aug. 27, 2012) at 2; Clearing House (Aug. 27, 2012) at 22.

[399] *See, e.g.,* SIFMA (Aug. 27, 2012) at A4, A34, A35; Credit Suisse (Aug. 27, 2012) at 10; Association for Financial Markets in Europe (AFME) (Aug. 24, 2012) at 8–9.

[400] Credit Suisse (Aug. 27, 2012) at 10.

[401] ISDA (Aug. 27, 2012) at 11. Similarly, Australian Bankers stated that the real-time public reporting and trade execution requirements should be treated in the same manner as the external business conduct standards and have no application to transactions involving a non-U.S. swap dealer and its non-U.S. counterparties. Australian Bankers (Aug. 27, 2012) at 5. *See also* SIFMA (Aug. 27, 2012) at A37 (stating that real-time public reporting should be treated in the same way as external business conduct standards and, in particular, should not apply to non-U.S. swap entities or non-U.S. branches for transactions with non-U.S. persons).

[402] *See also* The Clearing House (Aug. 27, 2012) at 22 (stating that no pre- or post-trade transparency rules or conflict of interest rules should apply to transactions with non-U.S. counterparties. These rules should be treated similarly to the external business conduct rules—excluded from the Transaction-Level and Entity-Level categories, and not applied at all to transactions between a non-U.S. entity (including a non-U.S. branch of a U.S. entity) and its non-U.S. counterparty, regardless of whether that counterparty is guaranteed by, or a conduit for, a U.S. person).

[403] IIB (Aug. 27, 2012) at 17, 32–33. IIB further stated that application of these pre- and post-trade requirements to swaps between non-U.S. persons outside the United States would raise ''serious, unprecedented'' concerns relating to the sovereignty of foreign markets. IIB (Aug. 27, 2012) at 34.

[404] Letter from Sen. Levin at 11–12.

[405] *Id.*

[406] Sumitomo (Aug. 24, 2012) at 3.

[407] IATP (Aug. 27, 2012) at 7.

[408] Letter from Sen. Levin at 11–12.

[409] *Id.*

example, for swaps with U.S. persons only is ''extremely difficult from a technological standpoint.'' [410]

IIB recommended that the daily trading records requirements (Commission regulation 23.202) be categorized as a Category B Transaction-Level Requirement. It reasoned that this rule is most relevant when a non-U.S. swap dealer or non-U.S. MSP is trading with a U.S. person to whom it owes U.S. sales practice obligations and for whom the Commission's interest in addressing market abuses is highest. It also noted that the obligation to make and retain records of pre-execution oral conversations, a principal element of the rule, is most likely to give rise to conflicts with foreign privacy laws.[411]

c. Internal Conflicts of Interest Requirement

IIB noted that the internal conflicts of interest requirement (Commission regulation 23.605) is categorized as an Entity-Level Requirement in the Proposed Guidance. It stated that internal research conflicts of interest procedures are intended to promote the integrity of research reports to customers, and that internal clearing conflicts of interest procedures are intended to promote client access to better pricing on execution and clearing. As a result, IIB views the Commission's interest in applying these requirements to non-U.S. clients as minimal and recommends that the internal conflicts of interest requirement be categorized as a new ''Category B'' Entity-Level Requirement.[412]

d. Position Limits and Anti-Manipulation Rules

SIFMA stated that position limits and anti-manipulation rules, which were not addressed in the Proposed Guidance, should be categorized as Transaction-Level Requirements and, therefore, be eligible for relief in some circumstances. They argued that these rules have a close nexus to market transparency, as opposed to risk mitigation of a firm's failure.[413]

3. Commission Guidance

In general, the Commission would apply the Dodd-Frank provisions differently depending on the category (Entity-Level or Transaction-Level) or sub-category (First or Second Category of Entity-Level Requirements or Category A or B of the Transaction-Level Requirements) into which such requirement falls. Therefore, the Commission has carefully reviewed comments on the classification of the Entity-Level Requirements and Transaction-Level Requirements, as well as comments regarding whether and how Entity-Level and Transaction-Level Requirements should apply to swaps between various types of counterparties, and under what circumstances the Commission's policy should contemplate that various swaps should generally be eligible for substituted compliance, or provide that certain of the Commission's requirements would generally not apply.

After careful consideration, the Commission would generally treat swaps requirements as Entity-Level Requirements and Transaction-Level Requirements largely in accordance with the Proposed Guidance, with certain minor modifications described below.

a. Entity-Level Requirements

Consistent with CEA section 2(i), the Commission would treat the following requirements as Entity-Level Requirements, as proposed: Capital adequacy, chief compliance officer, risk management, swap data recordkeeping, SDR Reporting, and Large Trader Reporting.

At the core of a robust internal risk controls system is the firm's capital—and particularly, how the firm identifies and manages its risk exposure arising from its portfolio of activities.[414] Equally foundational to the financial integrity of a firm is an effective internal risk management process, which must be comprehensive in scope and reliant on timely and accurate data regarding its swap activities. To be effective, such a system must have a strong and independent compliance function. These internal controls-related requirements—namely, the requirements related to chief compliance officer, risk management, swap data recordkeeping—are designed to serve that end. Given their functions, the Commission's policy is that these requirements should be applied on a firm-wide basis to effectively address risks to the swap dealer or MSP as a whole, and should be classified as Entity-Level Requirements.

SDR Reporting and Large Trader Reporting relate more closely to market transparency and to the Commission's market surveillance program. Among other things, data reported to SDRs will enhance the Commission's understanding of concentrations of risks within the market, as well as promote a more effective monitoring of risk profiles of market participants in the swaps market. Large Trader Reporting, along with an analogous reporting system for futures contracts, is essential to the Commission's ability to conduct effective surveillance of markets in U.S. physical commodity futures and economically equivalent swaps. Given the functions of these reporting requirements, the Commission's view is that each requirement generally should be applied across swaps, irrespective of the counterparty or the location of the swap, in order to ensure that the Commission has a comprehensive and accurate picture of market activities. Otherwise, the intended value of these requirements would be significantly compromised, if not undermined. Therefore, the Commission's policy is to generally treat SDR Reporting and Large Trader Reporting as Entity-Level Requirements.

The Commission did not address in the Proposed Guidance whether position limits and anti-manipulation provisions should fall in the Entity-Level or Transaction-Level Requirements category. It is the Commission's view that these provisions relate more to market integrity, as opposed to the financial integrity of a firm, and it is essential that they apply regardless of the counterparty's status (U.S. person or not) in order to fully achieve the underlying purpose of these respective provisions. Accordingly, these requirements are outside the scope of this Guidance. However, the monitoring of position limits under Commission regulation 23.601 is included in the Entity-Level Requirements under this Guidance.

After considering the input of market participants and others through the comment process, and giving further consideration to how the language in CEA section 2(i) should be interpreted for purposes of applying the Entity-

[410] SocGen (Aug. 8, 2012) at 6 (stating that banks with a centralized booking model will face technological difficulties in applying confirmation processing and portfolio reconciliation and compression rules only with respect to U.S. persons, and that a requirement to apply these rules to all customers (even non-U.S. persons) is inconsistent with international comity). *See also* Australian Bankers (Aug. 27, 2012) at 5 (stating that portfolio reconciliation and compression requirements should be categorized as Entity-Level Requirements, as they are critical to risk mitigation and back-office functions).

[411] IIB (Aug. 27, 2012) at 32–33.

[412] IIB (Aug. 27, 2012) at 32. This would render internal conflicts of interest requirements applicable only in connection with personnel of its research department or clearing unit preparing research reports for use with, or providing clearing services to, respectively, U.S. persons.

[413] SIFMA (Aug. 27, 2012) at A35–36.

[414] By way of illustration, consistent with the purpose of the capital requirement, which is intended to reduce the likelihood and cost of a swap dealer's default by requiring a financial cushion, a swap dealer's or MSP's capital requirements would be set on the basis of its overall portfolio of assets and liabilities.

Level Requirements and permitting substituted compliance, the Commission's policy is to treat the Entity-Level Requirements in subcategories largely as proposed.

As explained above, Entity-Level Requirements ensure that registered swap dealers and MSPs implement and maintain a comprehensive and robust system of internal controls to ensure the financial integrity of the firm, and in turn, the protection of the financial system. In this respect, the Commission has strong supervisory interests in applying the same rigorous standards, or comparable and comprehensive standards, to non-U.S. swap dealers and non-U.S. MSPs whose swap activities or positions are substantial enough to require registration under the CEA. Requiring such swap dealers and MSPs to rigorously monitor and address the risks they incur as part of their day-to-day businesses would lower the registrants' risk of default—and ultimately protect the public and the financial system.

Therefore, the Commission contemplates that non-U.S. swap dealers and non-U.S. MSPs will comply with all of the First Category of Entity-Level Requirements. In addition, consistent with principles of international comity, substituted compliance may be available for these Entity-Level Requirements in certain circumstances, as explained further below. In contrast, with regard to Entity-Level Requirements in the Second Category, substituted compliance should generally be available only where the counterparty is a non-U.S. person.[415]

i. The First Category—Capital Adequacy, Chief Compliance Officer, Risk Management, and Swap Data Recordkeeping (Except for Certain Recordkeeping Requirements)

The Commission's policy generally is to treat the requirements related to capital adequacy, chief compliance officer, risk management, and swap data recordkeeping (except swap data recordkeeping relating to complaints and marketing and sales materials under Commission regulations 23.201(b)(3) and 23.201(b)(4), respectively) in the First Category. These requirements address and manage risks that arise from a firm's operation as a swap dealer or MSP. Collectively, they constitute a firm's first line of defense against financial, operational, and compliance risks that could lead to a firm's default.

The First Category is identical to the first subcategory proposed by the Commission in the Proposed Guidance, except that the Commission's policy is to treat swap data recordkeeping under part 43 and part 46 of the Commission's regulations and swap data recordkeeping related to complaints and marketing and sales materials under Commission regulations 23.201(b)(3) and 23.201(b)(4) as part of the ''Second Category'' of Entity-Level Requirements. As noted above, for Entity-Level Requirements in the First Category, substituted compliance generally would be available for a non-U.S. swap dealer or non-U.S. MSP (including one that is an affiliate of a U.S. person) regardless of whether the counterparty is a U.S. person or a non-U.S. person.[416] In contrast, for Entity-Level Requirements in the Second Category, substituted compliance generally would be available for a non-U.S. swap dealer or MSP only where the counterparty is a non-U.S. person.

ii. The Second Category—SDR Reporting, Certain Swap Data Recordkeeping Requirements and Large Trader Reporting

The Commission's policy retains SDR Reporting in the Second Category, as proposed. SDR Reporting furthers the goals of the Dodd-Frank Act to reduce systemic risk, increase transparency and promote market integrity. Specifically, data reported to SDRs under the SDR Reporting rules provide the Commission with information necessary to better understand and monitor concentrations of risk, as well as risk profiles of individual market participants for cleared and uncleared swaps.

The Commission believes that retaining SDR Reporting in the Second Category would be appropriate. Consistent with section 2(i), the Commission's policy is that U.S. swap dealers or MSPs (including those that are affiliates of a non-U.S. person) generally should comply in full with all of the Entity-Level Requirements, including SDR Reporting. Further, non-U.S. swap dealers and non-U.S. MSPs (including those that are affiliates of a U.S. person), generally should comply with SDR Reporting, and substituted compliance should be available (to the extent applicable) only where the swap counterparty is a non-U.S. person, provided that the Commission has direct access (including electronic access) to the relevant swap data that is stored at the foreign trade repository.[417]

The Commission contemplates treating swap data recordkeeping related to complaints and marketing and sales materials under Commission regulations 23.201(b)(3) and 23.201(b)(4) as part of the ''Second Category'' because, in the Commission's view, non-U.S. swap dealers and non-U.S. MSPs (including those that are affiliates of a U.S. person) generally should comply with SDR Reporting. Further, substituted compliance should be available for non-U.S. swap dealers or MSPs, to the extent applicable, only where the swap counterparty is a non-U.S. person.

Large Trader Reporting furthers the goals of the Dodd-Frank Act to reduce systemic risk, increase transparency and promote market integrity. Large Trader Reporting, in conjunction with the Commission's large trader reporting system for futures contracts, is essential to the Commission's ability to conduct effective surveillance of markets in U.S. physical commodity futures and economically equivalent swaps. Given the regulatory function of Large Trader Reporting, the Commission's policy is to apply these requirements to non-U.S. persons whose trading falls within its scope to the same extent as U.S. persons. Accordingly, as discussed further in section G below, the Commission would not recognize substituted compliance in place of compliance with Large Trader Reporting.

b. Transaction-Level Requirements

As previously noted, whether a particular Dodd-Frank Act requirement should apply on a transaction-by-transaction basis in the context of cross-border activity for purposes of section 2(i) of the CEA requires the exercise of some degree of judgment. Nevertheless, bearing in mind principles of international comity, the Commission anticipates that, in general, the Transaction-Level Requirements may be applied on a transaction-by-transaction basis.

The Commission's policy contemplates treating as Transaction-Level Requirements all of the requirements that the Commission proposed to include. Thus, the

[415] In addition, as noted in section G below, reflecting its interpretation of CEA section 2(i), the Commission generally contemplates that U.S. swap dealers and MSPs would comply in full with the Entity-Level Requirements (regardless of whether the Entity-Level Requirements are classified as being in the First Category or Second Category), without substituted compliance available. This interpretation also applies to swaps with U.S. swap dealers or U.S. MSPs that are affiliates of non-U.S. persons.

[416] As explained in section G below, the Commission's policy is that where a swap dealer or MSP is a U.S. person, all of the entity-level requirements would generally apply in full (without substituted compliance available), regardless of the type of counterparty.

[417] *See* section G, *infra,* for additional information on the application of the Entity-Level Requirements.

Transaction-Level Requirements are: (1) Required clearing and swap processing; (2) margining and segregation for uncleared swaps; (3) trade execution; (4) swap trading relationship documentation; (5) portfolio reconciliation and compression; (6) real-time public reporting; (7) trade confirmation; (8) daily trading records; and (9) external business conduct standards.

The Commission contemplates treating the Transaction-Level Requirements in two subcategories, designated as Category A and Category B, largely as proposed. Generally, these categories reflect how the Commission generally contemplates applying various Transaction-Level Requirements to various types of counterparties, and in guiding the consideration of when substituted compliance will be available under this Guidance.[418]

i. The Category A Transaction-Level Requirements

The ''Category A'' Transaction-Level Requirements relate to risk mitigation and transparency, and included the first eight Transaction-Level requirements referenced above.

The Commission does not believe it would be appropriate to treat, as suggested by commenters, swap trading relationship documentation, portfolio reconciliation and compression, daily trading records and external business conduct standards as Entity-Level Requirements. The Commission recognizes that firms may find a certain degree of operational efficiency in applying these requirements on a firm-wide basis. On the other hand, the Commission expects that treatment of these as Transaction-Level Requirements should allow for greater flexibility in terms of whether and how Dodd-Frank requirements apply. For example, under the Proposed Guidance, the Commission would not interpret section 2(i) generally to apply the Dodd-Frank's clearing requirement to a swap between a non-U.S. swap dealer and a non-U.S. counterparty. In the Commission's judgment, allowing swap trading relationship documentation, portfolio reconciliation and compression and external business conduct standards to be applied on a transaction basis would not undermine the underlying regulatory objectives and, yet, will give due recognition to the home jurisdiction's supervisory interest. Consistent with this rationale, the Commission would treat margin, segregation, and related requirements as Transaction-Level Requirements.

The Commission also is retaining the trade execution requirement, as proposed, in Category A. The trade execution requirement is intended to bring the trading of mandatorily cleared swaps that are made available to trade onto regulated exchanges or execution facilities. By requiring the trades of mandatorily cleared swaps that are made available to trade to be executed on an exchange or an execution facility—each with its attendant pre- and post-trade transparency and safeguards to ensure market integrity—the trade execution requirement furthers the statutory goals of promoting financial stability, market efficiency and enhanced transparency.

The Commission's policy will treat real-time public reporting as a Transaction-Level Requirement. However, for the reasons discussed below, the Commission clarifies that it does not intend that its policy would preclude a market participant from applying real-time public reporting with respect to swap transactions that are not necessarily subject to this Transaction-Level Requirement if doing so would be more efficient for the market participant.

Part 43 of the Commission's regulations and part 45 of the Commission's regulations, respectively, prescribe the data fields that are to be included in real-time public reporting and SDR Reporting reports with respect to a reportable swap transaction.[419]

The Commission understands from commenters that in certain circumstances, reporting part 43 and part 45 data for the same swap transaction in separate reports (''two stream reporting'') could accommodate market participants that have a transactional structure and/or systems that are designed or suited to send separate submissions.[420] However, the Commission also recognizes that in other circumstances, permitting market participants to include part 43 and part 45 data for the same swap transaction in a single report (''single stream reporting'') could optimize efficiency.[421]

The Commission anticipated that reporting parties might elect to use one data reporting stream for both SDR Reporting and real-time public reporting under part 45 and part 43 respectively, to reduce costs and optimize efficiency, and many market participants have chosen to build and integrate single stream reporting systems.[422] The Commission is aware that, as commenters have stated, categorizing SDR Reporting under part 45 as an Entity-Level requirement and real-time public reporting under part 43 as a Transaction-Level requirement could, in certain circumstances, negate the benefits of single stream reporting, and could present challenges to market participants who have built single stream reporting infrastructure.

In view of these concerns, the Commission would, in general, treat real-time public reporting as a Transaction-Level Requirement. However, the Commission does not intend that its policy would preclude a market participant from applying real-time public reporting with respect to swap transactions that are not necessarily subject to this Transaction-Level Requirement if, for example, this would allow the market participant to realize efficiency gains from single stream reporting or otherwise as discussed above.

[418] Substituted compliance is discussed in section F, *infra.* The application of the Category A Transaction-Level Requirements and eligibility for substituted compliance is discussed in section IV.G.4. The application of the Category B Transaction-Level Requirements is discussed in section IV.G.5. The application of certain CEA provisions and certain Entity and Transaction-Level Requirements to non-registrants is discussed in section IV.H.

[419] *See generally* Final Real-Time Reporting Rule, 77 FR at 1250–1266; Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136, 2210–2224 (Jan. 13, 2012) (''Final Data Rules''). Part 43 applies to reports of swap transaction and pricing data to a registered SDR, in order that the SDR can publicly disseminate such data pursuant to part 43 and Appendix A to part 43 as soon as technologically practicable after execution of the publicly reportable swap. Final Real-Time Reporting Rule, 77 FR 1249. Under part 45, counterparties report creation data for the swap—including all primary economic terms (''PET'') data and confirmation data—as well as continuation data also as soon as technologically practicable. *See* Final Data Rules, 77 FR at 2149–2151, 2199–2202.

[420] *See* Final Real-Time Reporting Rule, 77 FR 1237 (Jan. 9, 2012) (noting that '' . . . coordination is expected to reduce costs by allowing reporting parties, SEFs and DCMs to send one set of data to an SDR for the purpose of satisfying the requirements of both rules.''); *id.* at 1210 (noting that '' . . . although reporting parties may use the same data stream for reporting regulatory data and real-time data, Commission regulation 43.4(d)(2) clarifies the intent of the Proposing Release: The reporting requirements for SEFs, DCMs and reporting parties for real-time public reporting purposes are separate from the requirement to report to an SDR for regulatory reporting purposes.'').

[421] Final Data Rules, 77 FR 2150, 2182. If SDR Reporting and real-time public reporting do not both apply to a swap transaction, market participants that have connected to registered SDRs and employed single stream reporting infrastructure and systems may be required to change such systems to bifurcate the part 43 and part 45 data sets, which are generated and transmitted in a single report. The Commission understands that such bifurcation could occur due to the manner with which Transaction-Level and Entity-Level requirements apply to the particular swap transaction.

[422] Real-Time Public Reporting of Swap Transaction Data, 77 FR 1217. *See also* Final Data Rules, 77 FR at 2182.

ii. The Category B Transaction-Level Requirements (External Business Conduct Standards)

As proposed, the Commission's policy will treat external business conduct standards as a ''Category B'' Transaction-Level Requirement for purposes of the general application of this Transaction-Level Requirement to various categories of swap counterparties.[423] External business conduct standards are oriented toward customer-protection. Among other obligations, the external business conduct rules generally require registrants to conduct due diligence on their counterparties to verify eligibility to trade (including eligible contract participant status), refrain from engaging in abusive market practices, provide disclosure of material information about the swap to their counterparties, provide a daily mid-market mark for uncleared swaps and, when recommending a swap to a counterparty, make a determination as to the suitability of the swap for the counterparty based on reasonable diligence concerning the counterparty. In the Commission's view, such rules have an attenuated link to, and are distinguishable from, market-oriented protections such as the trade execution mandate. Additionally, the Commission believes that the foreign jurisdictions in which non-U.S. persons are located are likely to have a significant interest in the type of business conduct standards that would be applicable to transactions with such non-U.S. persons within their jurisdiction. Because the Commission believes that foreign regulators may have a relatively stronger supervisory interest in regulating sales practices concerns related to swaps between non-U.S. persons taking place outside the United States than the Commission, the Commission believes that generally it is appropriate that the business conducts standards of the home jurisdiction, rather than those established by the Commission, apply to such transactions between non-U.S. persons.

After reviewing the comments on internal conflicts of interest procedures, the Commission has given consideration to whether to treat internal conflicts of interest rules relating to clearing under Commission regulation 23.605 under Category B of the Transaction-Level Requirements. The Commission considered the view of commenters that stated that this particular requirement is generally more akin to the external business conduct standards and, as such, can reasonably be expected to be narrowly targeted to apply only with respect to U.S. clients, without undermining the regulatory benefits associated with the rule. However, because the Commission believes that internal conflicts of interest related to clearing should be applied on a firm-wide basis, the Commission's policy is that this requirement generally should be treated as an Entity-Level Requirement as proposed.

The Commission also has considered whether internal conflicts of interest procedures relating to research should be treated as Entity-Level Requirements as proposed. These informational and supervisory firewalls are designed to ensure that research reports are free from undue influence by the firm's trading personnel. As a practical matter, it is generally difficult, if not impossible, to establish and maintain such safeguards on a transaction or client basis. Because the Commission believes that these firewalls, in order to achieve their regulatory purpose, should be applied on a firm-wide basis, the Commission's policy is that internal conflicts of interest procedures relating to research generally should be treated as Entity-Level Requirements.

F. Substituted Compliance

1. Proposed Guidance

In the Proposed Guidance, the Commission stated that a cross-border policy that allows for flexibility in the application of the CEA while ensuring the high level of regulation contemplated by the Dodd-Frank Act and avoiding potential conflicts between U.S. regulations and foreign law is consistent with principles of international comity. To that end, the Commission set forth a general framework for substituted compliance. Under this ''substituted compliance'' regime, the Commission may determine that certain laws and regulations of a foreign jurisdiction are comparable to and as comprehensive as a corresponding category of U.S. laws and regulations. If the Commission makes such a determination, then an entity or transaction in that foreign jurisdiction that is subject to the category of U.S. laws and regulations for which comparability is determined will be deemed to be in compliance therewith if that entity or transaction complies with the corresponding foreign laws and regulations.

2. Comments

Several commenters urged the Commission to use a principles-based approach and to review the legal regime as a whole, rather than evaluate comparability on an issue-by-issue basis.[424] A commenter supported the Commission's view that comparable does not mean identical, and urged the Commission to place an emphasis on shared principles and mutual recognition.[425]

Some commenters stated that foreign jurisdiction laws and regulations are unlikely to be identical to those in the United States and that they thus support the Commission's proposed ''outcomes based approach'' to evaluating whether foreign regulatory requirements meet Dodd-Frank normative objectives.[426] One of these commenters stated that in some cases foreign regulators would be faced with several challenges, noting that in ''light touch'' or principle-based regulatory jurisdictions, commodity derivatives data collection and surveillance is weak or even non-existent, as is concomitant enforcement.[427]

Commenters stressed the need to avoid imposing duplicative or conflicting regulatory requirements which could result in unnecessary costs.[428] Commenters urged the Commission to engage in a dialogue with other regulators[429] and to build on work done at the international level.[430]

Some commenters expressed the view that substituted compliance should not require Commission approval if the applicable foreign regulator promulgates applicable regulations in accordance with G20 commitments, or that a presumption that foreign rules are comparable should apply if the rules are consistent with G20 principles.[431] Some commenters urged the Commission to take what they described as an

[423] The application of the Category B Transaction-Level Requirements to swap dealers and MSPs is discussed in section IV.G.5.

[424] *See, e.g.,* SIFMA, (Aug. 27, 2012) at 3, A46; State Street (Aug. 27, 2012) at 3; Global Financial Markets Association (''GFMA'') (Aug. 27, 2012) at 2; Association for Financial Markets in Europe (''AFME'') (Aug. 27, 2012) at 2; J.P. Morgan (Aug. 13, 2012) at 5; Australian Bankers (Aug. 27, 2012) at 2; Japanese Bankers Association (Aug. 27, 2012) at 3; Comissao de Valores Mobiliarios (''CVM'') (Aug. 27, 2012) at 2.

[425] *See, e.g.,* FSR (Aug. 27, 2012) at 6–7.

[426] *See* IATP (Aug. 27, 2012) at 11–12; IIAC (Aug. 27, 2012) at 2, 9–11.

[427] *See* IATP (Aug. 27, 2012) at 11–12.

[428] *See, e.g.,* ICI (Aug. 23, 2012) at 7–11; Capital Markets (Aug. 24, 2012) at 5–6.

[429] *See* Deutsche Bank, Aug. 27, 2012 at 5–6; Lloyds (Aug. 24, 2012) at 2.

[430] *See* Australian Securities and Investments Commission; Hong Kong Monetary Authority; Monetary Authority of Singapore; Reserve Bank of Australia; Securities and Futures Commission, Hong Kong (Aug. 27, 2012) at 3–4.

[431] *See* CEWG (Aug. 27, 2012) at 7; CVM (Aug. 27, 2012) at 2; ICI (Aug. 23, 2012) at 9; IIB (Aug. 27, 2012) at 38–39; Hong Kong Banks (Aug. 27, 2012) at 2, 10, 14, 15; Korea Federation of Banks (''Korea Banks'') (Aug. 27, 2012) at 2–3; The Clearing House (Aug. 27, 2012) at 3–4, 31–35.

''equivalence approach'' similar to EMIR in the European Union,[432] by making substituted compliance determinations based on recognition of ''equivalent'' jurisdictions and not of individual firms.[433] The European Commission stated that EU firms dealing with U.S. counterparties would always be subject to the Dodd-Frank Act, while U.S. firms dealing with EU counterparties could not be subject to EU rules if the EU decides to grant equivalence to the United States. The European Commission stated that it is difficult to understand why comparable foreign legislation in the EU should not be sufficient.[434]

Commenters, including foreign regulators, requested that the Commission more clearly outline the circumstances under which a particular foreign jurisdiction would be acceptable for substituted compliance purposes.[435] Commenters stressed the need for comparability determinations to be transparent.[436] One commenter stated that comparability determinations should allow for notice and comment.[437] Another commenter stated that there should be a procedure for appeals, that memoranda of understanding (''MOUs'') should form the framework for comparability determinations, and that the Commission should develop a process for periodic review of comparability determinations.[438]

Some commenters found the Commission's proposed approach to substituted compliance too narrow or limiting. The European Securities and Markets Authority (''ESMA'') stated that when equivalence or substituted compliance is granted for an entire jurisdiction, registration should not be a prerequisite before substituted compliance can apply. ESMA also stated that the Commission's approach is quite limited because it is applied not uniformly but ''chapter by chapter,'' which ESMA represents contradicts what they described as EMIR's concepts of equivalence and mutual recognition.[439] Japan FSA and Bank of Japan expressed concern that the scope of application of substituted compliance is too narrow and requested that it be extended to avoid overlap or conflict with foreign regulations.[440] Other commenters stated that the approach being taken toward substituted compliance was narrow and not in accordance with comity.[441] However, another commenter stated that substituted compliance procedures are an inferior option to direct compliance with Commission regulations. This commenter stated that the Commission does not violate principles of international comity by extending the cross-border application to cover how ''U.S. persons'' operate in foreign jurisdictions, particularly when those jurisdictions lack the laws and/or regulatory capacity to prevent damage to the U.S. economy resulting from counterparty defaults originating in foreign affiliate swaps.[442]

Another commenter stated that substituted compliance should be expanded to a broader category of swap transactions, specifically, to the trade execution requirement.[443]

Some commenters urged the Commission to clarify which law is ''substituted'' for U.S. law and allow swap entities to determine which jurisdictions' laws apply where it could be more than one.[444]

Some commenters expressed concern regarding the timing of reform in other jurisdictions, urging the Commission to delay substituted compliance implementation or provide a grace period for these jurisdictions.[445]

Some commenters urged the Commission not to allow substituted compliance or to use it only sparingly, pointing out the risks of substituted compliance by the Commission. For example, one commenter contended that substituted compliance fails to ensure rigorous regulation of derivatives markets and so should not be allowed for foreign subsidiaries of U.S. parents as these subsidiaries pose a severe risk to the U.S. economy.[446] This commenter also stated that substituted compliance should only be used in ''rare circumstances'' and only after such rules in foreign jurisdictions have come into existence,[447] stating that the Commission ''cannot, through its use of comity, consider other countries' interests to the total derogation of Congress's intent to protect U.S. taxpayers.''[448] Citizen and taxpayer groups contended that substituted compliance should not be permitted when the swap transaction is with a U.S. counterparty,[449] including subsidiaries of a U.S. person.[450]

Commenters also urged that, to the extent substituted compliance is permitted, a rigorous approach be applied, including examining the history of enforcement in a foreign jurisdiction, the ability to revoke substituted compliance where necessary, the ability of the public to comment on substituted compliance applications, periodic review of the application of substituted compliance and a requirement that the applicant immediately inform the Commission of any material changes in its jurisdiction.[451]

With regard to SDR Reporting, some commenters disagreed with the Commission that a foreign trade repository must allow Commission access to information to be considered comparable, arguing that comparability should be based solely on the foreign jurisdiction's regulatory regime,[452] or that access is unnecessary where swaps are between non-U.S. counterparties.[453] In contrast, another commenter stated that open access to foreign swap data repositories is necessary to ensure that foreign surveillance of transaction-level swaps data flow requirements is comparable and comprehensive.[454]

International regulators have continued to express commitment to the Pittsburgh G20 reforms of OTC derivatives regulation, including a commitment to harmonize cross-border regulations and allow for substituted compliance or equivalence arrangements when appropriate. However, no international consensus has emerged regarding the implementation of such reforms or the

[432] *See* Australian Securities and Investments Commission; Hong Kong Monetary Authority; Monetary Authority of Singapore; Reserve Bank of Australia; Securities and Futures Commission, Hong Kong (Aug. 27, 2012) at 2–3.

[433] *See* Deutsche Bank (Aug. 27, 2012) at 6.

[434] *See* European Commission (Aug. 24, 2012) at 4.

[435] *See, e.g.,* Financial Services Authority (United Kingdom) (Aug. 24, 2012) at 3.

[436] *See* IIB (Aug. 27, 2012) at 40; American Bankers Association, (Aug. 27, 2012) at 2; IATP (Aug. 27, 2012) at 11.

[437] *See* American Bankers Association (Aug. 27, 2012) at 2.

[438] *See* IATP (Aug. 27, 2012) at 11–13.

[439] *See* ESMA (Aug. 27, 2012) at 3–4.

[440] *See* Japan FSA and Bank of Japan (Aug. 13, 2012) at 2–3.

[441] *See* SIFMA (Aug. 27, 2012) at 3, A46; Futures Industry Association (FIA), (Aug. 27, 2012) at 5–7.

[442] *See* IATP (Aug. 27, 2012) at 2–3.

[443] *See* Tradeweb Markets LLC (Aug. 27, 2012) at 4.

[444] *See* SIFMA (Aug. 27, 2012) at A48; Deutsche Bank (Aug. 27, 2012) at 6.

[445] *See, e.g.,* CFA Institute (Aug. 27, 2012) at 3; Financial Services Authority (United Kingdom) (Aug. 24, 2012) at 3; Barclays (Aug. 27, 2012) at 2; ICAP Group (Aug. 27, 2012) at 2; IIB (Aug. 27, 2012) at 39.

[446] *See* Greenberger (Aug. 27, 2012) at 20–24.

[447] *See* Greenberger (Aug. 27, 2012) at 3, 19, 22–23.

[448] *See* Greenberger (Aug. 27, 2012) at 19.

[449] *See* Public Citizen (Aug. 27, 2012) at 13, 16, 19.

[450] *See* Better Markets (Aug. 27, 2012) at 10.

[451] *See, e.g.,* Better Markets (Aug. 27, 2012) at 10–11; Public Citizen (Aug. 27, 2012) at 13, 16, 19.

[452] *See* Deutsche Bank (Aug. 27, 2012) at 6.

[453] *See* Japanese Bankers Association (Aug. 27, 2012) at 10.

[454] *See* IATP (Aug. 27, 2012) at 6–7.

circumstances under which substituted compliance should be permitted. In an April 18, 2013 letter to Treasury Secretary Lew, nine international financial regulators expressed concern about fragmentation in the OTC derivatives market as a result of lack of regulatory coordination, noting that ''[a]n approach in which jurisdictions require that their own domestic regulatory rules be applied to their firms' derivatives transactions taking place in broadly equivalent regulatory regimes abroad is not sustainable.'' [455] The letter expressed concern that such an approach would lead the global derivatives market to ''recede into localized and less efficient structures, impairing the ability of business across the globe to manage risk.'' The letter also suggested, among other things, that cross-border rules be adopted that would not result in duplicative or conflicting requirements through substituted compliance or equivalence arrangements, and that a reasonable transition period and measures be provided to foreign entities to ensure a smooth transition.[456]

A group of 25 organizations from numerous nations responded by asserting that the letter to Treasury Secretary Lew ''appears to place a higher priority on preventing 'fragmentation' in global financial markets than on effective management of global financial risks.'' [457] Emphasizing that the global financial crisis of 2008–2009 caused ''mass unemployment, home foreclosures, and cutbacks in key public services,'' these organizations argued that ''[s]ince G–20 nations have not yet met their 2009 Pittsburgh commitment to put in place effective derivatives regulation by the close of 2012, the first priority should be to complete this crucial element of financial oversight.'' [458] Although these organizations recognized the challenge of effectively regulating the global financial markets, they asserted that ''the path to addressing these challenges does not lie in further delays that prevent any nation from acting until every jurisdiction globally has agreed on a similar approach.'' [459] Instead, these organizations urged the international community ''to coordinate around a shared high level of financial oversight, and in the meantime to support the efforts of individual nations to ensure that the scope of their financial regulation properly captures all transactions, wherever conducted, that affect the safety and stability of each national financial system.'' [460]

3. Overview of the Substituted Compliance Regime

Once registered, a non-U.S. swap dealer or non-U.S. MSP would become subject to all of the substantive requirements under Title VII of the Dodd-Frank Act that apply to registered swap dealers or MSPs. In other words, the requirements under Title VII of the Dodd-Frank Act related to swap dealers and MSPs apply to all registered swap dealers and MSPs, irrespective of where they are based.

Consistent with CEA section 2(i) and comity principles, the Commission's policy generally is that eligible entities may comply with a substituted compliance regime under certain circumstances, subject, however, to the Commission's retention of its examination authority [461] and its enforcement authority. To the extent that the substituted compliance regime applies, the Commission generally would permit a non-U.S. swap dealer or MSP, U.S. bank that is a swap dealer or MSP with respect to its foreign branches,[462] or non-U.S. non-registrant that is a guaranteed or conduit affiliate, as applicable, to substitute compliance with the requirements of the relevant home jurisdiction's law and regulations (or in the case of foreign branches of a bank, the foreign location of the branch) in lieu of compliance with the attendant Entity-Level Requirements and/or Transaction-Level Requirements under the CEA and Commission regulations, provided that the Commission finds that such home jurisdiction's requirements (or in the case of foreign branches of a bank, the foreign location of the branch) are comparable with and as comprehensive as the corollary area(s) of regulatory obligations encompassed by the Entity- and Transaction-Level Requirements. Significantly, the Commission will rely upon an outcomes-based approach to determine whether these requirements achieve the same regulatory objectives of the Dodd-Frank Act. An outcomes-based approach in this context means that the Commission is likely to review the requirements of a foreign jurisdiction for rules that are comparable to and as comprehensive as the requirements of the Dodd-Frank Act, but it will not require that the foreign jurisdiction have identical requirements to those

[455] *See* letter to Treasury Secretary Lew regarding cross-border OTC derivatives regulation from Deputy Prime Minister Taro Aso, Minister of State for Finance Services, Government of Japan; Commissioner Michel Barnier, Commissioner for Internal Markets and Services, European Commission; Minister Pravin Gordhan, Minister of Finance, Government of South Africa; Minister Guido Mantega, Ministry of Finance, Government of Brazil; Minister Pierre Moscovici, Ministry of Finance, Government of France; Chancellor George Osborne, Chancellor of the Exchequer, Government of the United Kingdom; Minister Wolfgang Schäuble, Ministry of Finance, Government of Germany; Minister Anton Siluanov, Minister of Finance, Government of Russia; and Minister Eveline Widmer-Schlumpf, Finance Minister, Government of Switzerland (''Nine International Regulators'') (Apr. 18, 2013). *See also* letter to Treasury Secretary Lew from Sens. Kirsten E. Gillibrand, Thomas R. Carper, Kay R. Hagan, Heidi Heitkamp, Michael F. Bennet, and Charles E. Schumer (June 26, 2013) (advocating domestic and international harmonization of derivatives regulation).

[456] *Id.*

[457] *See* letter to Nine International Regulators from ActionAid International; AFL–CIO (American Federation of Labor And Congress of Industrial Organizations); Americans for Financial Reform; Berne Declaration; Center of Concern; The Centre for Research on Multinational Corporations (SOMO); Centre national de coopération au développement, CNCD–11.11.11; CGIL—Italian General Confederation of Labour; Consumer Federation of America; Global Progressive Forum; IBON International; The International Institute for Monetary Transformation; Institute for Agriculture and Trade Policy (IATP); Institute for Policy Studies, Global Economy Project; Jubilee Debt Campaign, UK; Kairos Europe (Brussels); Missionary Oblates—USP (Washington, DC); Oxfam; Red Latinoamericana sobre Deuda, Desarrollo y Derechos—LATINDADD; Stamp Out Poverty; Tax Justice Network; UBUNTU Forum; War on Want; WEED (World Economy, Ecology, and Development); and World Development Movement (Jul. 1, 2013).

[458] *Id.*

[459] *Id.*

[460] *Id.*

[461] Under Commission regulations 23.203 and 23.606, all records required by the CEA and the Commission's regulations to be maintained by a registered swap dealer or MSP shall be maintained in accordance with Commission regulation 1.31 and shall be open for inspection by representatives of the Commission, the United States Department of Justice, or any applicable prudential regulator.

In the January Order, the Commission noted that an applicant for registration as a swap dealer or MSP must file a Form 7–R with the National Futures Association and that Form 7–R was being modified at that time to address existing blocking, privacy or secrecy laws of foreign jurisdictions that applied to the books and records of swap dealers and MSPs acting in those jurisdictions. *See* 78 FR at 871–872 n. 107. The modifications to Form 7–R were a temporary measure intended to allow swap dealers and MSPs to apply for registration in a timely manner in recognition of the existence of the blocking, privacy, and secrecy laws. The Commission clarifies that the change to Form 7–R impacts the registration application only and does not modify the Commission's authority under the CEA and its regulations to access records held by registered swap dealers and MSPs. Commission access to a registrant's books and records is a fundamental regulatory tool necessary to properly monitor and examine each registrant's compliance with the CEA and the regulations adopted pursuant thereto. The Commission has maintained an ongoing dialogue on a bilateral and multilateral basis with foreign regulators and with registrants to address books and records access issues and may consider appropriate measures where requested to do so.

[462] The types of offices which the Commission would consider to be a ''foreign branch'' of a U.S. bank, and the circumstances in which a swap is with such foreign branch, are discussed further in section IV.C.3, *supra.*

established under the Dodd-Frank Act. This approach builds on the Commission's longstanding policy of recognizing comparable regulatory regimes based on international coordination and comity principles with respect to cross-border activities involving futures (and options on futures).[463] The Commission anticipates that its approach also will require close consultation, cooperation, and coordination among the Commission and relevant foreign regulators regarding ongoing compliance efforts. To date, the Commission notes that it has engaged in many multilateral and bilateral consultations and efforts to coordinate on the substance of OTC derivatives reform efforts.

In part, because many foreign jurisdictions have been implementing OTC derivatives reforms in an incremental manner, the Commission's comparability determinations may be made on a requirement-by-requirement basis, rather than on the basis of the foreign regime as a whole. For example, many jurisdictions have moved more quickly to implement reporting to trade repositories, and so the Commission may focus first on comparability with those requirements. In addition, in making its comparability determinations, the Commission may include conditions that take into account timing and other issues related to coordinating the implementation of reform efforts across jurisdictions.

A non-U.S. swap dealer or non-U.S. MSP, a U.S. bank that is a swap dealer or MSP with respect to its foreign branches, or non-U.S. non-registrant that is a guaranteed or conduit affiliate, to the extent applicable under this Guidance, may comply with regulations in its home jurisdiction (or in the case of foreign branches of a bank, the foreign location of the branch) to the extent that the Commission determines that these requirements are comparable to, and as comprehensive as, the corollary areas of the CEA and Commission regulations.[464] As noted above, however, the home jurisdiction's requirements do not have to be identical to the Dodd-Frank Act requirements. Moreover, the Commission notes, however, that entities relying on substituted compliance may be required to comply with certain of the Dodd-Frank Act requirements where comparable and comprehensive regulation in their home jurisdiction (or in the case of foreign branches of a bank, the foreign locations of the branches) are determined to be lacking.[465]

In evaluating whether a particular category of foreign regulatory requirement(s) is comparable and comprehensive to the applicable requirement(s) under the CEA and Commission regulations, the Commission will take into consideration all relevant factors, including but not limited to, the comprehensiveness of those requirement(s), the scope and objectives of the relevant regulatory requirement(s), the comprehensiveness of the foreign regulator's supervisory compliance program, as well as the home jurisdiction's authority to support and enforce its oversight of the registrant. In this context, comparable does not necessarily mean identical. Rather, the Commission would evaluate whether the home jurisdiction's regulatory requirement is comparable to and as comprehensive as the corresponding U.S. regulatory requirement(s).

In response to comments requesting greater clarity with respect to the substituted compliance determinations, the Commission notes that a comparability analysis would begin with a consideration of the regulatory objectives of a foreign jurisdiction's regulation of swaps and swaps market participants. In this regard, the Commission will first look to foreign regulator's swap-specific regulations. The Commission recognizes, however, that jurisdictions may not have swap-specific regulations in some areas, and instead may have regulatory or supervisory regimes that achieve comparable and comprehensive regulatory objectives as the Dodd-Frank Act requirements, but on a more general, entity-wide, or prudential, basis.[466] In addition, portions of a foreign regulatory regime may have similar regulatory objectives, but the means by which these objectives are achieved with respect to swaps market activities may not be clearly defined, or may not expressly include specific regulatory elements that the Commission concludes are critical to achieving the regulatory objectives or outcomes required under the CEA and the Commission's regulations. In these circumstances, the Commission anticipates that, as part of its broader efforts to consult and coordinate with foreign jurisdictions, it will work with the regulators and registrants in these jurisdictions to consider alternative approaches that may result in a determination that substituted compliance applies.[467]

The approaches used will vary depending on the circumstances relevant to each jurisdiction. One example would include coordinating with the foreign regulators in developing appropriate regulatory

[463] For example, under part 30 of the Commission's regulations, if the Commission determines that compliance with the foreign regulatory regime would offer comparable protection to U.S. customers transacting in foreign futures and options and there is an appropriate information-sharing arrangement between the home supervisor and the Commission, the Commission has permitted foreign brokers to comply with their home regulations (in lieu of the applicable Commission regulations), subject to appropriate conditions. *See, e.g.,* Foreign Futures and Options Transactions, 67 FR 30785 (May 8, 2002); Foreign Futures and Options Transactions, 71 FR 6759 (Feb. 9, 2009).

Upon promulgating part 30, the Commission stated that it ''intends to monitor closely the application of this regulatory scheme for the offer and sale of foreign futures and foreign options in the U.S. and to make adjustments in these rules, as necessary, based, in part, on it experience in administering the exemptive procedure [*i.e.,* 30.10 relief] as well as other requests for interpretations of the provisions herein.'' Foreign Futures and Foreign Options Transactions, 52 FR 28980, 28993 (Aug. 5, 1987). For example, the Commission has expanded part 30 to allow 30.10-exempt foreign brokers to act as introducing brokers for the purpose of executing linked U.S. transactions on behalf of U.S. customers under certain circumstances. The Commission also promulgated regulation 30.12 to allow unlicensed ''local'' brokers located outside the United States to execute trades through the customer omnibus account of an FCM or 30.10 exempt foreign broker, again under certain circumstances. The Commission expects that the substituted compliance process contemplated by this Guidance may similarly evolve.

[464] As stated in note 88, for purposes of this Guidance, the terms ''home jurisdiction'' or ''home country'' are used interchangeably and refer to the jurisdiction in which the person or entity is established, including the European Union. Further, the Commission clarifies that where a non-U.S. swap dealer (or non-U.S. MSP), or a non-U.S. non-registrant that is a guaranteed or conduit affiliate, transacts outside the home jurisdiction, substituted compliance is available and they may comply with the comparable and comprehensive requirements of the home jurisdiction, provided that they comply with such requirements in that other jurisdiction.

[465] The Commission recognizes that substantial progress has been made in other jurisdictions towards implementing OTC derivatives reform. For example, EMIR requires financial counterparties, including hedge funds, to clear OTC derivatives contracts subject to the clearing obligation through a central counterparty registered or recognized in accordance with EMIR. EMIR also requires such entities to comply with EMIR's risk mitigation techniques for uncleared OTC derivatives contracts; risk mitigation techniques include, confirmation, portfolio reconciliation, compression, valuation and dispute resolution. Lastly, EMIR requires financial counterparties to report all derivatives contracts to a trade repository registered or recognized in accordance with EMIR.

[466] The Commission notes that, of the 35 provisionally registered non-U.S. swap dealers as of July 12, 2013, all but one of them are banking entities that are subject to prudential supervision by banking supervisors in their home jurisdictions or affiliates of such banks. By comparison, 19 of the provisionally registered U.S. swap dealers and MSPs are not regulated by a prudential supervisor or the SEC.

[467] The Commission notes that such alternatives are available for both Entity- and Transaction-Level Requirements, but are more likely appropriate for Entity-Level Requirements.

changes or new regulations, particularly where changes or new regulations already are being considered or proposed by the foreign regulators or legislative bodies. As another example, the Commission may, after consultation with the appropriate regulators and market participants, include in its substituted compliance determination a description of the means by which certain swaps market participants can achieve substituted compliance within the construct of the foreign regulatory regime. The identification of the means by which substituted compliance is achieved would be designed to address the regulatory objectives and outcomes of the relevant Dodd-Frank Act requirements in a manner that does not conflict with a foreign regulatory regime and reduces the likelihood of inconsistent regulatory obligations. For example, the Commission may specify that swap dealers and MSPs in the jurisdiction undertake certain recordkeeping and documentation for swap activities that otherwise is only addressed by the foreign regulatory regime with respect to financial activities generally. In addition, the substituted compliance determination may include provisions for summary compliance and risk reporting to the Commission to allow the Commission to monitor whether the regulatory outcomes are being achieved. By using these approaches, in the interest of comity, the Commission would seek to achieve its regulatory objectives with respect to the Commission's registrants that are operating in foreign jurisdictions in a manner that works in harmony with the regulatory interests of those jurisdictions.[468]

4. Process for Comparability Determinations

Any comparability analysis will be based on a comparison of specific foreign requirements against specific related CEA provisions and Commission regulations in 13 categories of regulatory obligations and will consider the factors described above. After receiving a submission from an applicant, the resulting comparability determination would be made by the Commission with regard to each of the 13 categories of regulatory obligations, as appropriate. More specifically, the Commission could determine that a particular set of foreign laws and regulations provides a sufficient basis for an affirmative finding of comparability with respect to a relevant area of regulatory obligations. Where no comparability determination can be made,[469] the non-U.S. swap dealer or non-U.S. MSP, U.S. bank that is a swap dealer or MSP with respect to its foreign branches, or non-registrant, to the extent applicable under this Guidance, may be required to comply with the applicable Entity- or Transactional-Level requirements under the CEA and Commission regulations.

Anyone who is eligible for substituted compliance may apply, either individually or collectively, as may foreign regulators. Persons who may request a comparability determination include: (i) Foreign regulators, (ii) an individual non-U.S. entity, or group of non-U.S. entities; (iii) a U.S. bank that is a swap dealer or MSP with respect to its foreign branches; [470] or (iv) a trade association, or other group, on behalf of similarly-situated entities. Persons requesting a comparability determination may want to coordinate their application with other market participants and their home regulators to simplify and streamline the process. Once a comparability determination is made for a jurisdiction, it will apply for all entities or transactions in that jurisdiction to the extent provided in the determination, as approved by the Commission.

Generally, the Commission would expect that the applicant, at a minimum, state with specificity the factual and legal basis for requesting that the Commission find that a particular set of foreign laws and regulations is comparable to, and as comprehensive as, particular Dodd-Frank Act requirements as described above; include with specificity all applicable legislation, rules, and policies; and provide an assessment whether the objectives of the two regulatory regimes are comparable and comprehensive.[471] If the applicant is a registered swap dealer or MSP, it also would generally be helpful to understand the capacity in which the applicant is licensed with the applicant's regulator(s) in its home country and whether the applicant is in good standing.

The Commission expects that the comparability analysis process would, in most cases, involve consultation with the regulators in each jurisdiction for which a substituted compliance application has been submitted so that the Commission may better analyze the compliance regime of a jurisdiction. Consultations are particularly important in the near future because many jurisdictions are in the process of finalizing and implementing their derivatives reforms incrementally and the Commission's comparability determinations may need to take into account the timing of regulatory reforms that have been proposed or finalized, but not yet implemented.

Further, the Commission expects that, in connection with a determination that substituted compliance is appropriate, it would enter into an appropriate MOU or similar arrangement between the Commission and the relevant foreign regulator(s). Existing information-sharing and/or enforcement arrangements would be indicative of a foreign supervisor's ability to share information and otherwise work with the Commission. However, going forward, the Commission and relevant foreign supervisor(s) would need to establish supervisory MOUs or other arrangements that provide for information sharing and cooperation in the context of supervising swap dealers and MSPs. The Commission contemplates that such a supervisory MOU would establish the type of coordination activities that would continue on an ongoing basis between the Commission and the foreign supervisor(s), including topics such as procedures for confirming continuing oversight activities, access to

[468] The Commission anticipates that non-U.S. swap dealers and MSPs may require additional time after a Substituted Compliance Determination in order to phase in compliance with the relevant requirements of the jurisdiction in which the non-US swap dealer or MSP is established. The Commission and its staff intend to address the need for any further transitional relief at the time that the subject Substituted Compliance Determination is made.

[469] A finding of comparability may not be possible for a number of reasons, including the fact that the foreign jurisdiction has not yet implemented or finalized particular requirements.

[470] As previously noted, where the counterparty to a swap with a foreign branch is a non-U.S. person (whether or not such non-U.S. person is guaranteed or otherwise supported by, or is an affiliate conduit of, a U.S. person), the Commission continues to be of the view that compliance with comparable and comprehensive requirements in the foreign jurisdiction should be permitted in light of the supervisory interest of the foreign jurisdiction in the swaps transacted in that jurisdiction, together with the fact that foreign branches of U.S. swap dealers or U.S. MSPs are subject generally to direct or indirect oversight by U.S. regulators because they are part of a U.S. person. As discussed further in section IV.F.3, *supra,* the Commission's recognition of substituted compliance would be based on an evaluation of whether the requirements of the home jurisdiction are comparable and comprehensive to the applicable requirement(s) under the CEA and Commission regulations based on a consideration of all relevant factors, including among other things: (i) The comprehensiveness of the foreign regulator's supervisory compliance program and (ii) the authority of such foreign regulator to support and enforce its oversight of the registrant's branch or agency with regard to such activities to which substituted compliance applies.

[471] The Commission may, as it deems appropriate and necessary, conduct an on-site examination of the applicant, as well as consult with the applicant's home regulator regarding the status of the applicant. For certain matters, the Commission may request an opinion of counsel.

information,[472] on-site visits, and notification procedures in certain situations.[473]

The Commission expects that an applicant would notify the Commission of any material changes to information submitted in support of a comparability determination (including, but not limited to, changes in the relevant supervisory or regulatory regime) as the Commission's comparability determination may no longer be valid.

Within four years of issuing any Substituted Compliance Determination, the Commission will reevaluate its initial determination to ascertain whether any changes should be made to its finding and shall reissue the relevant Commission action, conditionally or unconditionally, as it deems appropriate.

SDR Reporting and real-time public reporting would generally be eligible for substituted compliance, as outlined above, but only if the Commission has direct access to all of the reported swap data elements that are stored in a foreign trade repository. The Commission intends that direct access would generally include, at a minimum, real time, direct electronic access to the data and the absence of any legal impediments to the Commission's access to the data. Due to the technical nature of this inquiry, a comparability evaluation for SDR Reporting and real-time public reporting would generally entail a detailed comparison and technical analysis. The Commission notes that while direct access to swap data is a threshold matter to be addressed in a comparability evaluation, a more particularized analysis would generally be necessary to determine whether the data stored in a foreign trade repository provides for effective Commission use, in furtherance of the regulatory purposes of the Dodd-Frank Act.

Comparability determinations for SDR Reporting and real-time public reporting would generally take into account whether the Commission may effectively access and use data stored in foreign trade repositories, both in isolation and when compared to and aggregated with swap data from other foreign trade repositories, as well as registered SDRs. At a minimum, effective use would generally require that the data elements stored in foreign trade repositories are sufficient to permit comparison and aggregation, and that all transactions with comparable required data elements, otherwise required to be reported to a registered SDR, are available in the foreign trade repository.

5. Conflicts Arising Under Privacy and Blocking Laws

Potential and actual conflicts between the Commission's regulations and the privacy and blocking laws of some non-U.S. jurisdictions may, in certain circumstances, limit or prohibit the disclosure of data that is required to be reported under the Dodd-Frank Act and implementing regulations.[474] For example, the Commission's part 45 and part 46 swap data reporting rules establish swap data recordkeeping and SDR reporting requirements applicable to reporting counterparties. Among other requirements, these rules prescribe certain reporting data fields for all swaps subject to the Commission's jurisdiction, including the identity of each counterparty to a swap. The privacy laws of some non-U.S. jurisdictions may, however, restrict or prohibit the disclosure by a reporting party or registrant of a non-reporting party's identity. In some jurisdictions, this privacy restriction may be overcome if the counterparty consents to the disclosure. In others, the restriction may take the form of a blocking statute which acts as an absolute prohibition to the disclosure of information, creating a direct conflict with the requirements of the Dodd-Frank Act.

The Commission recognizes that, notwithstanding the importance of swap data to its mandate under the Dodd-Frank Act, its regulations may be in conflict with the blocking, privacy, and/or secrecy laws of other jurisdictions. The Commission is mindful of the challenges presented by such circumstances and continues to work on a bilateral and multilateral basis with foreign regulators to address these issues. Where appropriate, the Commission may consider reasonable alternatives that allow the Commission to fulfill its mandate while respecting the regulatory interests of other jurisdictions. In that regard, where a real conflict of laws exists, the Commission strongly encourages regulators and registrants to consult directly with its staff.

6. Clearing

a. Clearing Venues

With respect to acceptable clearing venues, the Commission notes that section 2(h)(1) of the CEA provides that swaps subject to the clearing requirement must be submitted for clearing to a registered DCO or a DCO that is exempt from registration under the CEA.[475]

The Commission has previously recognized the role of foreign-based clearing organizations, including in the context of FBOTs. Specifically, in the final rules pertaining to Registration of Foreign Boards of Trade, the Commission required that an FBOT, in order to be registered, clear through a clearing organization that either is registered with the Commission as a DCO or observes the Principles for Financial Market Infrastructures (''PFMIs'').[476] Other relevant requirements in the FBOT final rules include, among other things, that the clearing organization be in good regulatory standing in its home country.

In addition, in the final rules adopting the Inter-Affiliate Exemption, the Commission permitted eligible affiliated counterparties that are located in certain jurisdictions to satisfy a condition to electing the exemption (requiring counterparties to clear their swaps with third-parties) by clearing the swap through a registered DCO or a clearing organization that is subject to supervision by appropriate government authorities in the clearing organization's home country and that has been assessed to be in compliance with the PFMIs.[477]

[472] As previously noted, the Commission observes that under section 4s(j)(3) and (4) of the CEA and Commission regulation 23.606, a registered swap dealer or MSP must make all records required to be maintained in accordance with Commission regulation 1.31 available to the Commission promptly upon request to representatives of the Commission. The Commission reserves this right to access records held by registered swap dealers and MSPs, including those that are non-U.S. persons who may comply with the Dodd-Frank recordkeeping requirement through substituted compliance. *See also* 7 U.S.C. 6s(f); 17 CFR 23.203.

[473] In this regard, the Commission has started working with foreign regulators to prepare for such arrangements.

[474] Section 727 of the Dodd Frank Act added to the CEA new section 2(a)(13)(G), which requires all swaps, whether cleared or uncleared, to be reported to registered SDRs. Section 21 of the CEA, added by section 728 of the Dodd Frank Act, directs the Commission to prescribe standards that specify the data elements for each swap that shall be collected and maintained by each registered SDR. Part 45 of the Commission's regulations establishes swap data recordkeeping and SDR reporting requirements; part 46 establishes similar requirements for pre-enactment and transition swaps (collectively, ''historical swaps'').

[475] As noted above, EMIR requires financial counterparties, including hedge funds, to clear OTC derivatives contracts subject to the clearing obligation through a CCP registered or recognized in accordance with EMIR.

[476] Registration of Foreign Boards of Trade, 76 FR 80674, 80681–80682 (Dec. 23, 2011) (the PFMIs are the successor standards to the Recommendations for Central Counterparties (''RCCPs''), which were issued jointly by the Committee on Payment and Settlement Systems (''CPSS'') and the Technical Committee of IOSCO).

[477] Inter-Affiliate Exemption, 78 FR at 21784 (adopting 17 CFR 50.52(b)(4)(i)(E)).

More recently, in the final rulemaking adopting Core Principles and Other Requirements for Swap Execution Facilities, the Commission noted that under section 5b(h) of the CEA it has discretionary authority to exempt DCOs, conditionally or unconditionally, from the applicable DCO registration requirements.[478] Thus, the Commission has discretion to exempt from registration DCOs that, at a minimum, are subject to comparable and comprehensive supervision by another regulator. The Commission further noted that it had not yet exercised its discretionary authority to exempt DCOs from registration. The Commission explained that, notwithstanding that there were no exempt DCOs at that time, certain swaps executed on a SEF could be cleared at an exempt DCO, if and when the Commission determined to exercise its authority to exempt DCOs from applicable registration requirements, at which time the Commission would likely address, among other things, the conditions and limitations applicable to clearing swaps for customers subject to section 4d(f) of the CEA.[479]

The conditions that may have to be met for a clearing organization to be eligible to qualify as an exempt DCO could include, among other things: (i) The Commission having entered into an appropriate memorandum of understanding or similar arrangement with the relevant foreign supervisor in the clearing organization's home country and (ii) the clearing organization having been assessed to be in compliance with the PFMIs.[480] The use of the PFMIs, an international standard that is substantially similar to the requirements for registered DCOs under part 39 of the Commission's regulations, would be consistent with the Commission's determination in the context of FBOTs.[481]

The Commission notes that its exemptive authority under CEA section 5b(h) is entirely discretionary. Accordingly, the Commission is not compelled to exempt any clearing organization from the DCO registration requirements, even upon a finding that a facility is ''subject to comparable, comprehensive supervision and regulation'' by another regulator.

b. Foreign End-Users

One of the conditions of the Inter-Affiliate Exemption, known as the ''treatment of outward-facing swaps'' condition, generally requires the clearing of swaps between affiliated counterparties and their unaffiliated counterparties.[482] Pursuant to Commission regulation 50.52(b)(4)(i)(C), eligible affiliate counterparties[483] can satisfy the treatment of outward-facing swaps condition by complying with the requirements of an exception or exemption under section 2(h)(7) of the CEA or part 50 of the Commission's regulations. Pursuant to section 2(h)(7) of the CEA, also known as the end-user exception, a counterparty to a swap that is subject to the clearing requirement[484] may elect not to clear the swap provided that such counterparty meets the conditions of section 2(h)(7)(A)(i)–(iii) of the CEA and the attendant regulations.[485]

For the purposes of the Inter-Affiliate Exemption, consistent with section 2(i), the Commission will permit a non-U.S. person eligible affiliate counterparty to satisfy Commission regulation 50.52(b)(4)(i)(C) for swaps entered into with an unaffiliated non-US person that is not otherwise subject to the CEA (''Foreign End-User''), under certain circumstances. The Foreign End-User may elect the end-user exception as if the provisions of sections 2(h)(7)(A)(i) and (ii) of the CEA apply to the Foreign End-User and the Foreign End-User elects not to clear the swap.[486]

Accordingly, a Foreign End-User may elect not to clear a swap if (1) the Foreign End-User and non-US person eligible affiliate counterparty are not located in a foreign jurisdiction in which the Commission has determined that a comparable and comprehensive clearing requirement exists and that the exceptions and/or exemptions thereto are comparable and comprehensive;[487] (2) the Foreign End-User is not a financial entity as provided in section 2(h)(7)(A)(i) of the CEA; and (3) the Foreign End-User enters into the swap to hedge or mitigate commercial risk as provided in section 2(h)(7)(A)(ii) of the CEA.[488] In the interests of international comity, the Commission will not require the Foreign End-User to satisfy the provisions of section 2(h)(7)(A)(iii) of the CEA which require the end-user to notify the Commission how it generally meets its financial obligations associated with entering into non-cleared swaps.[489]

G. Application of the Entity-Level and Transaction-Level Requirements to Swap Dealers and MSPs

This section sets forth the Commission's policy on application of the Entity-Level and Transaction-Level Requirements to swap dealers and MSPs, including when swaps generally would be eligible for substituted compliance.

1. Comments

As noted in section E above, commenters generally supported the division of Dodd-Frank's swaps provisions (and Commission regulations thereunder) into Entity-Level and Transaction-Level Requirements for purposes of this Guidance. Certain of these commenters, however, made specific recommendations for

[478] Specifically, section 5b(h) of the CEA provides that ''[t]he Commission may exempt, conditionally or unconditionally, a derivatives clearing organization from registration under this section for the clearing of swaps if the Commission determines that the [DCO] is subject to comparable, comprehensive supervision and regulation by the Securities and Exchange Commission or the appropriate government authorities in the home country of the organization.'' 7 U.S.C. 7a–1(h). *See also* Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33591 (Jun. 4, 2013) (adopting 17 CFR 37.701) (''Part 37 SEF Regulations'').

[479] *Id.* at 33534.

[480] The PFMIs were developed with significant input and public comment from market participants, and benefited from broad participation of market regulators and prudential supervisors from multiple nations. The PFMIs were approved by both IOSCO's Technical Committee and the CPSS and published in April 2012.

[481] The Commission recognizes that certain DCOs registered with the Commission also may be authorized, licensed, or recognized by a foreign authority. The Commission continues to work on a bilateral basis with such non-US authorities with respect to issues of central counterparty supervision. The Commission also participates in multilateral discussions with its foreign counterparts through a number of international groups.

[482] *See* Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21749; Commission regulation 50.52(b)(4)(i).

[483] As such term is defined in Commission regulation 50.52(a).

[484] *See* Clearing Requirement Determination, 77 FR 74284.

[485] *See* End-User Exception to the Clearing Requirement for Swaps, 77 FR 42560.

[486] If the Foreign End-User is an issuer of securities under, or required to file reports pursuant to, the Securities Exchange Act of 1934 (''SEC Filer''), then the Foreign End-User must obtain the approval to enter into uncleared swaps from an appropriate committee of the SEC Filer's board of directors (or governing body). *See* section 2(j) of the CEA. The Commission considers a counterparty controlled by an SEC Filer to be an SEC Filer itself for the purposes of the end-user exception. *See* 77 FR 42570.

[487] In these situations, the counterparties should comply with laws of the foreign jurisdiction. *See* Commission regulations 50.52(b)(4)(i)(B) and (D).

[488] Foreign End-Users may look to Commission regulation 50.50(c) in order to determine whether a swap hedges or mitigates commercial risk.

[489] This guidance is only applicable to Commission regulation 50.52(b)(4)(i)(C); all other persons electing the End-User Exception must comply with the requirements of section 2(h)(7) of the CEA and Commission regulation 50.50.

reclassification of some of these requirements.[490]

In addition, some commenters addressed perceived disparities in the application of Transaction-Level Requirements to U.S. swap dealers, stating that transactions between U.S. swap dealers and non-U.S. counterparties should be eligible for substituted compliance for Transaction-Level Requirements so as to avoid putting U.S. swap dealers at a competitive disadvantage.[491]

Other commenters supported the Commission's proposed application of the Transaction-Level Requirements to the transactions of U.S. persons with non-U.S. persons.[492] One commenter stated that the Transaction-Level Requirements should apply to transactions by registered swap dealers and MSPs with U.S. persons.[493]

Several commenters objected to the applicability of certain Transaction-Level Requirements to transactions between two non-U.S. parties.[494] One commenter stated that Transaction-Level Requirements should never apply to swaps between counterparties that are both non-U.S. persons.[495]

With respect to external business conduct standards, one commenter stated that these standards should not apply to swaps between U.S. swap entities and non-U.S. persons because the Commission's supervisory interest in these transactions are less implicated when the counterparty is a non-U.S. person.[496] Other commenters also stated that the external business conduct standards should not apply to transactions between two non-U.S. persons.[497]

2. Commission Guidance

The Commission has carefully considered the comments on Entity-Level and Transaction-Level Requirements. With regard to U.S. swap dealers and U.S. MSPs, the Commission's policy is that they generally would be expected to comply in full with all of the Entity-Level Requirements and Transaction-Level Requirements, without substituted compliance available. The Commission's policy would apply regardless of whether the counterparty to the swap is a U.S. person or non-U.S. person. This is consistent with the Commission's traditional approach to registered FCMs, wherein a person, once registered as an FCM, is subject to the full panoply of regulations applicable to such registrants, without distinctions based on whether the counterparties are U.S. or non-U.S. counterparties.

Further, the Commission believes that its cross-border policy and interpretation with respect to U.S. swap dealers and MSPs must be informed by the purposes of the Dodd-Frank Act. As discussed earlier, the Dodd-Frank Act was enacted to reduce systemic risk, increase transparency, and promote market integrity within the financial system by, among other things, providing for the comprehensive regulation of swap dealers and MSPs. In doing so, Congress understood the highly integrated nature of the global swaps business, with regard to both individual firms and the market at large, and that risk to U.S. firms and in turn, U.S. financial markets may arise anywhere in the world.

In view of the policy goals underlying the Dodd-Frank Act swaps reforms, the Commission's view is that U.S. swap dealers and MSPs should be fully subject to the robust oversight contemplated by the Dodd-Frank Act, without regard to whether their counterparty is a U.S. or non-U.S person. These firms are conducting their swap dealing business within the territory of the United States. That some of their business may be directed to foreign clients does not diminish the Commission's obligation to ensure that swaps between U.S. swap dealers and MSPs and their counterparties are subject to Dodd-Frank's financial safeguards and transparency requirements, to the fullest extent. Therefore, in the Commission's view, substituted compliance is incompatible with the Commission's ability to effectively discharge its statutory responsibilities.

For substantially the same reasons, the Commission believes that full U.S. regulation of U.S. swap dealers and MSPs, even when they transact swaps with non-U.S. counterparties, is a reasonable exercise of U.S. jurisdiction under the principles of foreign relations law. Among the factors supporting this exercise of U.S. jurisdiction are the links between the U.S. swap dealers and MSPs and their swap activities to U.S. commerce, and the generally accepted importance of regulating the activities of these entities both to the United States and the international financial system.[498] In addition, having an agency of the U.S. government serve as the primary regulator of U.S. entities is generally consistent with normal expectations and with traditions of the international system.[499] To the extent that other countries have an interest in regulating transactions with their nationals, the Commission notes that the U.S. regulatory scheme for swap dealers and MSPs does not preclude other countries from imposing their regulations if they consider it necessary for transactions affecting their interests.[500] As discussed below, the Commission will work with other regulators to avoid, and resolve where necessary, direct conflicts, as well as to reduce unnecessary burdens. The Commission observes that very few conflicts between the foreign regimes and Dodd-Frank Act requirements have been identified as part of many multilateral and bilateral consultations between staff of the CFTC and their foreign counterparts. For these purposes, conflict means that actions required for compliance under one jurisdiction's law are prohibited under the other jurisdiction's law, or compliance with the regulations of both jurisdictions is otherwise impossible.

With regard to non-U.S. swap dealers or MSPs (including those that are affiliates of a U.S. person), the Commission's policy is that these firms should be subject to all of the Entity-Level Requirements, but under certain circumstances substituted compliance should be available (except with regard to Large Trader Reporting). The Commission's policy with regard to the application of Transaction-Level Requirements to non-U.S. swap dealers or MSPs, and the availability of substituted compliance, depends in part on the type of counterparty to the swap transaction.

The foreign branch of a U.S. bank that is a swap dealer or MSP is expected to

[490] *See* section E, *supra.*

[491] *See* SIFMA (Aug. 27, 2012) at A36. *See also* State Street (Aug. 27, 2012) at 2; IIB (Aug. 27, 2012) at 27–28; The Clearing House (Aug. 27, 2012) at 4, 27.

[492] *See* Public Citizen (Aug. 27, 2012) at 13 (arguing that substituted compliance should not be permitted when the swap involves a U.S. counterparty and that Transaction-Level Requirements should be required for counterparties that are non-U.S. persons). *See also* IATP (Aug. 27, 2012) at 7–8 (recommending that Transaction-Level Requirements apply to transactions between non-U.S. swap dealers or MSPs and a U.S. person who is not a swap dealer or MSP).

[493] *See* IIAC (Aug. 27, 2012) at 8.

[494] *See, e.g.,* Clearing House (Aug. 27, 2012) at 22–24 (arguing that pre- and post-trade transparency rules should not apply to interactions with non-U.S. customers); SIFMA (Aug. 27, 2012) at A37 (stating that real-time public reporting requirements would be inappropriate for swaps involving only non-U.S. counterparties).

[495] *See* Australian Bankers (Aug. 27, 2012) at 5, A8.

[496] *See* SIFMA (Aug. 27, 2012) at A38.

[497] *See* Australian Bankers (Aug. 27, 2012) at 4, A10. *See also* IIAC (Aug. 27, 2012) at 8 (agreeing that external business conduct standards should not apply to swaps between non-U.S. swap dealers and MSPs and non-U.S. counterparties (whether or not guaranteed by a U.S. person)).

[498] *See* Restatement secs. 403(2)(a)–(c), 403(2)(e).

[499] *See* Restatement secs. 403(2)(d), 403(2)(f).

[500] *See* Restatement sec. 403(2)(g).

comply in full with the Entity-Level Requirements, without substituted compliance available, because it is not a separate legal entity.[501] In some circumstances the Commission's policy is that a foreign branch of a U.S. swap dealer or MSP would be expected to comply in full with Category A Transaction-Level Requirements where its counterparty is a U.S. person. However, as further explained below, substituted compliance would generally be available to a foreign branch of a U.S. bank with regard to Category A Transaction-Level Requirements where the counterparty to a swap transaction is a non-U.S. person or a foreign branch of a U.S. bank that is a swap dealer or MSP. In addition, the Commission's policy with regard to the application of the Category B Transaction-Level Requirements is explained below.

Below, the Commission describes its policies regarding how Entity-Level and Transaction-Level Requirements should apply to both U.S. and non-U.S. swap dealers and MSPs, and to foreign branches of a U.S. banks that are swap dealers and MSPs, as well as the circumstances under which substituted compliance would be available.

3. Application of the Entity-Level Requirements to Swap Dealers and MSPs

In this section, the Commission discusses its policy regarding the application of the Entity-Level Requirements to swap dealers and MSPs in cross-border transactions under its interpretation of 2(i), as well as the circumstances under which such swaps would be eligible for substituted compliance.

Section a discusses the Commission's view on the application of Entity-Level Requirements to swaps with U.S. swap dealers and U.S. MSPs, including subsidiaries and affiliates of non-U.S. persons, and foreign branches of U.S. swap dealers or U.S. MSPs, under CEA section 2(i).

Section b discusses the Commission's view on the application of Entity-Level Requirements to swaps with non-U.S. swaps dealers and MSPs, including subsidiaries and affiliates of U.S. persons.

The Commission's policy on application of the Entity-Level Requirements to swap dealers and MSPs, as well as substituted compliance, is discussed below and summarized in Appendix C to this Guidance, which should be read in conjunction with the rest of the Guidance.

a. To U.S. Swap Dealers and MSPs

As explained above, U.S. swap dealers and U.S. MSPs generally would be expected to comply in full with all of the Entity-Level Requirements, without substituted compliance available. The Commission's policy generally would apply regardless of whether the counterparty to the swap is a U.S. person or non-U.S. person.

Because under this Guidance the term ''U.S. person'' includes corporations, partnerships, limited liability companies, and other legal entities (as discussed above), the foregoing interpretation also applies to affiliates of non-U.S. persons that are U.S. swap dealers or U.S. MSPs. It also applies to U.S. banks that are swap dealers or MSPs when the swap is with their foreign branch. In this case, because a foreign branch of a U.S. bank is an integral part of the U.S. principal entity and has no separate legal existence, and the U.S. principal bank is the entity that registers as a swap dealer or MSP, under the Commission's interpretation of CEA section 2(i), the U.S. bank (principal entity) would be the party ultimately responsible for compliance with the Entity-Level Requirements for the entire legal entity.

b. To Non-U.S. Swap Dealers and MSPs

Consistent with CEA section 2(i), the Commission would expect non-U.S. swap dealers and non-U.S. MSPs to comply with all of the Entity-Level Requirements. This policy also applies to foreign affiliates of a U.S. person that are independently required to register as swap dealers or MSPs and to comply with applicable Dodd-Frank Act requirements.

However, in considering whether substituted compliance is available to a non-U.S. swap dealer or MSP with respect to particular Entity-Level Requirements, the Commission would consider it relevant whether the Entity-Level Requirement is classified in the First Category or Second Category (and with respect to the Second Category, whether the counterparty is a U.S. person).

The Commission recognizes that non-U.S swap dealers or MSPs are likely to have their principal swap business in their home jurisdiction, and in consideration of international comity principles, is interpreting CEA section 2(i) such that such non-U.S swap dealers or MSPs generally would be eligible for substituted compliance with regard to Entity-Level Requirements in the First Category (*i.e.,* capital adequacy, chief compliance officer, risk management, and swap data recordkeeping, except certain aspects of swap data recordkeeping relating to complaints and marketing and sales materials[502]).[503]

With respect to Entity-Level Requirements in the First Category, as noted by commenters on the Proposed Guidance, an affiliate of a U.S. swap dealer that is guaranteed by such U.S. swap dealer (or guaranteed by a U.S.-based parent or other affiliate of such swap dealer) may under certain circumstances be required to register as a swap dealer based on its swap dealing activity solely with non-U.S. persons, including those non-U.S. persons that are neither guaranteed affiliates or affiliate conduits of U.S. persons. Commenters have represented that some corporate groups may be required to register many of these guaranteed affiliates as swap dealers, even though such affiliates provide swap dealing services only to non-U.S. markets, and that many of such guaranteed affiliates exist only because the law of the local jurisdiction requires that a subsidiary be incorporated in the jurisdiction in order to enter into swaps with counterparties located in such jurisdiction. The Commission recognizes that certain structural conditions required to comply with the regulatory obligations of swap dealers may be burdensome for a corporate group with many of these guaranteed affiliates due to the requirement that such obligations be complied with at the individual entity level (e.g., Commission regulations §§ 3.3 (Chief compliance officer), 23.600 (Risk Management Program for swap dealers and major swap participants), 23.601 (Monitoring of position limits), 23.602 (Diligent supervision), 23.603 (Business continuity and disaster recovery), and 23.606 (General information: Availability for disclosure and inspection)).

[501] The types of offices the Commission would consider to be a ''foreign branch'' of a U.S. bank, and the circumstances in which a swap is with such foreign branch, are discussed further in section C, *supra.*

[502] *See* 17 CFR 23.201(b)(3), (4).

[503] As noted in the Proposed Guidance, the Commission anticipates that non-U.S. swap dealers and non-U.S. MSPs will likely have their principal swap business in their home jurisdiction. In these circumstances, the Commission notes that the home regulator would have a primary relationship to the swap dealer or MSP, which, coupled with the firm-wide focus of the Entity-Level Requirements, supports generally making the non-U.S. registrant eligible for substituted compliance. Therefore, consistent with the Proposed Guidance, the Commission believes that it is appropriate to make non-U.S. swap dealers and MSPs eligible for substituted compliance with respect to Entity-Level Requirements in the First Category where the non-U.S. swap dealers or non-U.S. MSPs are subject to comparable regulation in their home jurisdiction.

[504] ''Swaps activities'' are defined in Commission regulation 23.600(a)(7).

Specifically, the Commission notes that Commission regulations §§ 3.3 (Chief compliance officer), 23.600 (Risk Management Program for swap dealers and major swap participants), 23.601 (Monitoring of position limits), 23.602 (Diligent supervision), 23.603 (Business continuity and disaster recovery), and 23.606 (General information: Availability for disclosure and inspection) mandate that each swap dealer in a corporate group under common control individually establish policies, procedures, governance structures, reporting lines, operational units, and systems specified in the rules. Thus, the Commission would consider relief, subject to appropriate conditions and restrictions to be determined, that would permit guaranteed affiliates in a corporate group under common control that do not enter into swaps with U.S. persons to comply with such regulations by establishing consolidated policies, procedures, governance structures, reporting lines, operational units, and systems, thereby increasing operational efficiencies and lessening the economic burden on these groups with respect to their guaranteed affiliates that do not directly face U.S. persons when engaging in swaps activities.[504] The Commission notes, however, that any such relief would require a consolidated program to manage the risks of the included guaranteed affiliates on an individual, rather than a net, basis.

The Commission encourages interested parties to contact the Director of the Division of Swap Dealer and Intermediary Oversight to discuss the necessary conditions and restrictions of appropriate relief.

The Commission clarifies that, in the interest of international comity and for the purpose of permitting efficiencies in compliance programs, it would remain open to considering (or directing its staff to consider) relief, subject to appropriate conditions and restrictions to be determined, that would permit guaranteed affiliates in a corporate group under common control (that do not enter into swaps with U.S. persons or U.S. guaranteed affiliates or affiliate conduits of U.S. persons) to comply with certain of such regulations on a consolidated or group basis. The Commission notes, however, that any such relief would require a consolidated program to manage the risks of the included guaranteed affiliates on an individual, rather than a net, basis.

With respect to one of the Entity-Level Requirements in the Second Category, SDR Reporting (*i.e.,* SDR Reporting and swap data recordkeeping related to complaints and marketing and sales materials),[505] the Commission interprets CEA section 2(i) such that swap dealers or MSPs that are not U.S. persons generally would be eligible for substituted compliance only with respect to swaps where the counterparty is a non-U.S. person that is not a guaranteed or conduit affiliate.

With respect to the other Entity-Level Requirement in the Second Category (*i.e.,* swap data recordkeeping related to complaints and marketing and sales materials),[506] the Commission interprets CEA section 2(i) such that swap dealers or MSPs that are not U.S. persons generally would be eligible for substituted compliance only with respect to swaps where the counterparty is a non-U.S. person. However, as explained below, with respect to Large Trader Reporting, the Commission's policy would not recognize substituted compliance in place of compliance with Large Trader Reporting.

Specifically, with respect to SDR Reporting, the Commission interprets CEA section 2(i) such that substituted compliance may be available to non-U.S. swap dealers and non-U.S. MSPs (whether or not such swap dealers or MSPs are affiliates of or are guaranteed by U.S. persons) for swaps with non-U.S. counterparties, provided that the Commission has direct access (including electronic access) to the relevant swap data that is stored at the foreign trade repository. The Commission believes that this ensures that the Commission will have access to information that is critical to its oversight of these entities even where substituted compliance with regard to SDR Reporting would be applicable under this Guidance.[507] However, the Commission interprets section 2(i) as applied to these requirements such that substituted compliance generally would not be available for non-U.S. swap dealers and non-U.S. MSPs (whether or not such swap dealers or MSPs are guaranteed by U.S. persons) with respect to swaps with U.S. counterparties. The Commission believes that in general, application of these requirements, without eligibility for substituted compliance, is appropriate given its strong supervisory interest in a swap between a registered swap dealer or MSP and a U.S. counterparty.

However, with regard to the SDR reporting requirements, for the future, the Commission has agreed to continue to work collaboratively and to consider any unforeseen implementation effects that might arise in the application of our respective rules. The Commission will continue discussions with other international partners with a view to establishing a more generalized system that would allow, on the basis of these countries' implementation of the G–20 commitments, an extension of the treatment the EU and the CFTC will grant to each other.

With regard to certain aspects of swap data recordkeeping that relate to complaints and marketing and sales materials, the Commission interprets CEA section 2(i) such that non-U.S. swap dealers or non-U.S. MSPs generally would be eligible for substituted compliance with respect to swaps with non-U.S. counterparties.[508]

To the extent that swap data reported to a foreign trade repository would include data regarding the physical commodity swaps covered by Large Trader Reporting, the Commission—even if provided with direct access to such data—would still likely be required to convert it to ''futures equivalent'' positional data in order to render it comparable to the data obtained through Large Trader Reporting, which contemplates conversion by the entity required to

[504] ''Swaps activities'' are defined in Commission regulation 23.600(a)(7).

[505] *See* 17 CFR 23.201(b)(3), (4).

[506] *See id.*

[507] As the Commission noted in the Proposed Guidance, data reported to SDRs is critical to ensure that the Commission has a comprehensive and accurate picture of swap dealers and MSPs that are its registrants, including the gross and net counterparty exposures of swaps of all swap dealers and MSPs, to the greatest extent possible. Therefore, the Commission's view is that non-U.S. swap dealers and non-U.S. MSPs generally should be expected to report all of their swaps to a registered SDR. At the same time, the Commission recognized the interests of foreign jurisdictions with respect to swaps between a non-U.S. swap dealer or non-U.S. MSP with a non-U.S. counterparty. Therefore, the Commission would interpret section 2(i) so that swaps between non-U.S. swap dealers or MSPs with non-U.S. counterparties generally are eligible for substituted compliance with regard to SDR Reporting, but only if the Commission has direct access to all of the reported swap data elements that are stored at a foreign trade repository.

[508] In the Proposed Guidance, the Commission included all of the swap data recordkeeping requirements of regulations 23.201 and 23.203 in the proposed first subcategory of Entity-Level Requirements. 77 FR at 41225. In this Guidance, swap data recordkeeping related to complaints and marketing and sales materials under regulations 23.201(b)(3) and 23.201(b)(4), respectively, are being moved from the First Category to the Second Category because the Commission does not believe that substituted compliance generally should be available for requirements relating to complaints and marketing and sales materials where the counterparty is a U.S. person. This policy pertains equally to swaps with foreign affiliates of a U.S. person that are required to independently register as swap dealers and to comply with applicable Entity-Level Requirements.

report data to the Commission.[509] Given that Large Trader Reporting is intended to enable the Commission, in a prompt and efficient manner, to identify significant traders in the covered physical commodity swaps and to collect data on their trading activity in order to reconstruct market events, the time and resources expended by the Commission in conversion could significantly impede its market surveillance efforts.

The Commission notes further that its interpretation of CEA section 2(i) to permit substituted compliance with comparable and comprehensive regimes in certain circumstances recognizes the interests of foreign jurisdictions with respect to swaps between non-U.S. persons. Large Trader Reporting, however, reflects a very specific interest of the Commission in conducting effective surveillance of markets in swaps that have been determined to be economically equivalent to certain U.S.-listed physical commodity futures contracts. In light of this specific Commission interest—which is reflected in the particularized scope and methodology of Large Trader Reporting—and in light of the anticipated impediments to obtaining directly comparable positional data through any foreign swap data reporting regime, the Commission's policy would not recognize substituted compliance in place of compliance with Large Trader Reporting.

4. Application of the ''Category A'' Transaction-Level Requirements to Swap Dealers and MSPs

This section discusses the Commission's guidance on the application of the Category A Transaction Level Requirements to the parties to a swap where one of the parties is a registered swap dealer or MSP,[510] including when substituted compliance may be available to various types of counterparties.

As noted above, the Category A Transaction Level Requirements include: (1) Required clearing and swap processing; (2) margining and segregation requirements for uncleared swaps; (3) trade execution; (4); swap trading relationship documentation; (5) portfolio reconciliation and compression; (6) real-time public reporting; (7) trade confirmation; and (8) daily trading records.[511]

The Commission's policy on application of the Category A Transaction-Level Requirements is summarized in Appendix D to this Guidance, which should be read in conjunction with the rest of the Guidance.

a. Swaps With U.S. Swap Dealers and MSPs

As explained above, where one of the counterparties to a swap is a U.S. swap dealer or U.S. MSP, under the Commission's interpretation of CEA section 2(i), the Commission would generally expect the parties to the swap to comply with Category A Transaction-Level Requirements with respect to the transaction, without regard to whether the other counterparty to the swap is a U.S. person or a non-U.S. person.

Because the Commission interprets section 2(i) so that the term ''U.S. person'' would include any legal entity organized or incorporated under the laws of the United States or having its principal place of business in the United States, this interpretation also would apply where one of the parties to the swap is a U.S. swap dealer or U.S. MSP that is an affiliate of a non-U.S. person.[512] In addition, because the Commission considers a foreign branch of a U.S. person to be a part of the U.S. person, the foregoing interpretation also applies to swaps with foreign branches of a U.S. bank that is a swap dealer or MSP (although in some circumstances substituted compliance may be available as explained below).

Further, as explained above, with regard to substituted compliance, where one of the counterparties to a swap is a U.S. swap dealer or U.S. MSP (including those that are affiliates of a non-U.S. person), other than a foreign branch of a U.S. bank that is a swap dealer or MSP, the Commission's policy is that substituted compliance generally would not be available for the Category A Transaction-Level Requirements, without regard to whether the other counterparty is a U.S. person or a non-U.S. person. The Commission has a strong supervisory interest in ensuring that the Category A Transaction-Level Requirements apply to swaps with a U.S. swap dealer or MSP.[513]

Similarly, under the Commission's interpretation of 2(i), where a swap is between a foreign branch of a U.S. bank that is a swap dealer or MSP, on the one hand, and a U.S. person on the other, the Commission's policy is that substituted compliance generally would not be available with respect to the Category A Transaction-Level Requirements. In this case, the Commission also has a strong supervisory interest in ensuring that the Category A Transaction-Level Requirements fully apply to the transaction because it views the swap transaction as being between two U.S. persons. The Commission believes that this approach is appropriate in light of the Commission's strong supervisory interests in entities that are part or an extension of a U.S. swap dealer or U.S. MSP.

However, where a swap is between two foreign branches of U.S. banks that are both swap dealers or MSPs, the Commission believes that the interests of foreign regulators in applying their transaction-level requirements to a swap taking place in their jurisdiction, together with the fact that foreign branches of U.S. swap dealers or U.S. MSPs are subject generally to direct or indirect oversight by U.S. regulators, weigh in favor of allowing substituted compliance with comparable and comprehensive foreign regulatory requirements (to the extent applicable).

In addition, where a swap is between the foreign branch of a U.S. bank that is a swap dealer or MSP, on the one hand, and a non-U.S. person on the other

[509] Large Trader Reporting provides the Commission with data regarding large positions in swaps that are linked, directly or indirectly, to a discrete list of U.S.-listed physical commodity futures contracts, in order to enable the Commission to implement and conduct effective surveillance of these economically equivalent swaps and futures. To facilitate surveillance efforts and the monitoring of trading across the swaps and futures markets, swaps positions must be converted to equivalent positions of the related U.S. futures contract (''futures equivalents'') for reporting purposes; reportable thresholds are also defined in terms of ''futures equivalents.''

[510] Some of the Transaction-Level and Entity-Level Requirements also are applicable to market participants that are not swap dealers or MSPs, which are referred to herein as non-registrants. *See* section H, *infra,* for a discussion of the Commission's interpretation of how these requirements would apply to non-registrants under CEA section 2(i).

[511] The categorization of Transaction-Level Requirements into Categories A and B is discussed in section E, *supra. See* Appendix B for a descriptive list of the Category A and Category B requirements and Appendix D for a table summarizing the application of the Category A Transaction-Level Requirements to Swap Dealers and MSPs.

[512] *See* the Proposed Guidance, 77 FR 1218.

[513] Consistent with the foregoing rationale, the Commission takes the view that a U.S. branch of a non-U.S. swap dealer or MSP would be subject to Transaction-Level requirements, without substituted compliance available. As discussed above, a branch does not have a separate legal identity apart from its principal entity. Therefore, the Commission considers a U.S. branch of a non-U.S. swap dealer or non-U.S. MSP to be a non-U.S. person (just as the Commission considers a foreign branch of a U.S. person to be a U.S. person). Nevertheless, the Commission also recognizes its strong supervisory interest in regulating the dealing activities that occur with the United States, irrespective of the counterparty (just as the Commission allows for substituted compliance for foreign branches in certain instances to take into account the strong supervisory interest of local regulators).

(regardless of whether the non-U.S. person is a guaranteed or conduit affiliate), as a policy matter, the Commission believes that substituted compliance should be available (if otherwise applicable). In this case, even though the Commission considers the foreign branch of a U.S. person to be a U.S. person, the Commission believes that the interests of foreign regulators in applying their transaction-level requirements to a swap taking place in their jurisdiction, together with the fact that foreign branches of U.S. swap dealers or U.S. MSPs are subject generally to direct or indirect oversight by U.S. regulators because they are part of a U.S. person, may weigh in favor of allowing substituted compliance with comparable and comprehensive foreign regulatory requirements (to the extent applicable) where the counterparty to the foreign branch is a non-U.S. person.

In a modification to the Proposed Guidance, where a swap between the foreign branch of a U.S. swap dealer or U.S. MSP and a non-U.S. person (that is not a guaranteed or conduit affiliate) takes place in a foreign jurisdiction other than Australia, Canada, the European Union, Hong Kong, Japan, or Switzerland,[514] the Commission's policy is to interpret CEA section 2(i) so that counterparties may comply with the transaction-level requirements applicable to entities domiciled or doing business in the foreign jurisdiction where the foreign branch is located, rather than the Transaction-Level Requirements that would otherwise be applicable, if two elements are present. First, the aggregate notional value (expressed in U.S. dollars and measured on a quarterly basis) of the swaps of all U.S. swap dealer's foreign branches in foreign jurisdictions other than Australia, Canada, the European Union, Hong Kong, Japan, or Switzerland does not exceed five percent of the aggregate notional value (expressed in U.S. dollars and measured on a quarterly basis) of all of the swaps of the U.S. swap dealer. Second, the U.S. person maintains records with supporting information to verify that the first element is present, as well as to identify, define, and address any significant risk that may arise from the non-application of the Transaction-Level Requirements. The Commission believes this policy is appropriate because U.S. swap dealers' dealing activities through branches or agencies in jurisdictions other than the six jurisdictions referenced above, though not significant in many cases, may be nevertheless an integral element of their global business. The Commission notes that this exception is not available in the six jurisdictions referenced above because the Commission has received, or expects to receive in the near term, a request for substituted compliance determinations for transactions in these jurisdictions.

Although the foreign branch of a U.S. registrant would not register separately as a swap dealer or MSP, the Commission interprets 2(i) in a manner that would permit the U.S. registrant to task its foreign branch to fulfill its regulatory obligations with respect to the Category A Transaction-Level Requirements. The Commission would generally consider compliance by the foreign branch to constitute compliance with these Transaction-Level Requirements. However, under the Commission's interpretation of 2(i), the U.S. person (principal entity) would remain responsible for compliance with the Category A Transaction-Level Requirements.

b. Swaps With Non-U.S. Swap Dealers and Non-U.S. MSPs

Under the Commission's interpretation of CEA section 2(i), where a swap is between a non-U.S. swap dealer or non-U.S. MSP (including an affiliate of a U.S. person), on the one hand, and a U.S. person (other than a foreign branch of a U.S. swap dealer or MSP), on the other, the Commission would generally expect the parties to comply with Category A Transaction-Level Requirements with respect to the transaction.[515]

The Commission notes, however, that where a swap is executed anonymously between any non-U.S. person, whether a swap dealer or an MSP, and a U.S. person (other than a foreign branch of a U.S. swap dealer or MSP) on a registered DCM or SEF and cleared, the non-U.S. person will generally be considered to have satisfied each of the eight Category A Transaction-Level Requirements that apply to such a swap transaction as a consequence of being so executed on a DCM or SEF. Thus, neither the non-U.S. person (nor its U.S. person counterparty) will need to take any further steps to comply with the Category A Transaction-Level Requirements in connection with such a transaction.[516]

In making this determination, the Commission observes that where a cleared swap transaction is executed anonymously on a registered DCM or SEF, certain independent requirements that apply to DCM and SEF transactions generally, pursuant to the CEA or the Commission's regulations, will ensure that four of the eight Category A Transaction-Level Requirements will be met for such transactions—required clearing and swap processing,[517] trade execution,[518] real-time public reporting,[519] and trade confirmation.[520]

[514] Market participants or regulators in all of these jurisdictions have submitted requests for Substituted Compliance Determinations.

[515] Under the Commission's futures regulatory regime, any person located outside the U.S. that seeks to serve as an intermediary to U.S. persons trading on a U.S. designated contract market or in foreign futures and option contracts is required to register in the appropriate category and comply with related regulations, absent the availability of an exemption from registration (*e.g.,* relief pursuant to Commission regulation 30.10 in the foreign futures and option context).'' *See, e.g.,* Commission regulation 30.4.

[516] However, non-U.S. swap dealers and MSPs must satisfy the daily trading record requirement found in Commission regulation 23.202(a)(1).

[517] Pursuant to Commission regulations 37.702 and 38.601, each SEF and DCM must coordinate with each DCO to which it submits transactions for clearing in the development of rules and procedures to facilitate prompt and efficient transaction processing to meet the requirements of Commission regulation 39.12(b)(7). Commission regulation 39.12(b)(7)(ii) requires a DCO to accept or reject swaps executed on a SEF or DCM for clearing ''as quickly after execution as would be technologically practicable if fully automated systems were used.'' *See also* 17 CFR 23.506(a); 39.12(b)(7)(iii); Final Customer Documentation Rules, 77 FR at 21306–21310. As stated in the Final Customer Documentation Rules, these rules, taken as a whole, ''require SEFs, DCMs, swap dealers, MSPs, and DCOs to coordinate in order to facilitate real time acceptance or rejection of trades for clearing.'' *Id.* at 21296.

[518] CEA section 2(h)(8)(A) provides that transactions in swaps subject to the trade execution mandate must be executed on a registered DCM or SEF, or a SEF that has been exempted from registration. The Commission clarifies that the trading mandate under CEA section 2(h)(8)(A) is satisfied by trading on a registered DCM or SEF or a SEF that has been exempted from registration.

[519] Parties that execute a swap transaction on a DCM or SEF meet their real-time public reporting obligations by operation of a set of Commission regulations that essentially delegate the obligations to the DCM or SEF on which the transaction was executed, and the SDR to which the DCM or SEF reports the transaction. Specifically, Commission regulation 43.3(a)(2) provides that a party to a publicly reportable swap transaction satisfies its real-time reporting obligations by executing a publicly reportable swap transaction on or pursuant to the rules of a registered SEF or DCM. In turn, Commission regulation 43.3(b)(1) requires a SEF or DCM to transmit swap transaction and pricing data to a registered SDR, as soon as technically practicable after the publicly reportable swap transaction has been executed on or pursuant to the rules of such trading platform or facility. Finally, Commission regulation 43.3(b)(2) requires a registered SDR to ensure that swap transaction and pricing data is publicly disseminated, as soon as technologically practicable after such data is received from a registered SEF or DCM.

[520] *See* Commission regulation 23.501(a)(4)(i) (''Any swap transaction executed on a swap execution facility or designated contract market shall be deemed to satisfy the requirements of this section, provided that the rules of the swap execution facility or designated contract market establish that confirmation of all terms of the transactions shall take place at the same time as execution''); 37.6(b); Part 37 SEF Regulations, 78 FR at 33585 (''A swap execution facility shall provide

Continued

For a combination of reasons, the Commission also believes that the four remaining Transaction-Level Requirements do not, or should not, apply to cleared, anonymous DCM or SEF transactions. So, for instance, the fact that the DCM or SEF swap transaction will be cleared, obviates the need for margining or segregation requirements applicable to uncleared swaps. Two other Category A Transaction-Level Requirements—swap trading relationship documentation and portfolio reconciliation and compression—would not apply because the Commission regulations that establish those requirements make clear that they do not apply to cleared DCM or SEF transaction.[521] The last requirement—the daily trading records requirement[522]—would only be applicable to the non-U.S. swap dealer and only with regard to pre-trade execution swaps. However, because the non-U.S. swap dealer will have no information about its counterparty where the swap is executed anonymously, the Commission is of the view that, as a matter of international comity, CEA section 2(i) should not be interpreted to apply all of the daily trading records requirements to such a swap.[523]

In addition, the Commission is interpreting CEA section 2(i) such that, where a swap between a non-U.S. person, regardless of its swap dealer or MSP status, and a U.S. person is executed anonymously on an FBOT registered with the Commission pursuant to part 48 and cleared the non-U.S. person will generally be considered to have satisfied the Category A Transaction-Level Requirements that pertain to such a swap transaction. Some of the requirements will be satisfied by requirements levied by regulation on the FBOT and some will be satisfied because a registered FBOT is analogous to a DCM and is subject to comprehensive supervision and regulation in its home country that is comparable to that exercised over a DCM by the Commission. Thus, neither the non-U.S. person (nor its U.S. person counterparty) will need to take any further steps to satisfy the applicable Category A Transaction-Level Requirements in connection with such a transaction.[524]

In making this determination, the Commission observes that where a cleared swap transaction is executed anonymously on a registered FBOT, the FBOT, similar to a DCM, based on certain independent requirements that apply to DCM transactions generally pursuant to the CEA or the Commission's regulations, will ensure that two of the eight Category A Transaction-Level Requirements will be satisfied for such transactions: Required clearing and swap processing[525] and trade execution.[526] The Commission notes that while the real-time reporting requirement will be satisfied for cleared swaps executed anonymously on a DCM by operation of the Commission's real-time reporting regulations, absent further affirmative actions by an FBOT, the real-time public reporting requirements will not be satisfied through FBOT execution alone.[527]

For a combination of reasons, including the fact that the swap will be cleared, the Commission also is of the view that the remaining Transaction-Level Requirements do not apply to such transactions executed on a registered FBOT. For instance, the fact that the swap will be cleared, as required by regulation 48.7(c)(1)(ii), renders inapplicable the margining or segregation requirements for uncleared swaps. As the Commission observed above with respect to swaps executed anonymously on DCMs, certain of the other Category A Transaction-Level Requirements would not apply to the swap. Consistent with this determination, three of the other Category A Transaction-Level Requirements—swap trading relationship documentation, portfolio reconciliation and compression and trade confirmation—would not apply to the swap executed on a registered FBOT because the underlying Commission regulations themselves do not apply those requirements to cleared DCM or SEF transactions. The last requirement—the daily trading records requirement—would only be applicable to the non-U.S. swap dealer and only with regard to pre-trade execution swaps. However, because the non-U.S. swap dealer will have no information about its counterparty where the swap is executed anonymously on a registered FBOT, the Commission is of the view that, as a matter of international comity, CEA section 2(i) should be interpreted such that certain of the daily trading records requirements also would not apply to the swap.[528]

In addition, for the reasons discussed in the next two sections, where a swap is between a non-U.S. swap dealer or non-U.S. MSP, on the one hand, and a non-U.S. person that is a guaranteed or conduit affiliate, on the other, under the Commission's interpretation of 2(i), the Commission would generally expect the parties to comply with the Category A Transaction-Level Requirements.[529]

However, where a swap is between a non-U.S. swap dealer or non-U.S. MSP (including an affiliate of a U.S. person), on the one hand, and a non-U.S. person

each counterparty to a transaction that is entered on or pursuant to the rules of the swap execution facility with a written record of all of the terms of the transaction which shall legally supersede any previous agreement and serve as confirmation of the transaction. The confirmation of all terms shall take place at the same time as execution . . . ").

[521] *See* 17 CFR 23.504(a)(1) ("The requirements of this section [swap trading relationship documentation] shall not apply to . . . swaps executed on a board of trade designated as a contract market under section 5 of the Act or to swaps executed anonymously on a swap execution facility under section 5h of the Act, provided that such swaps are cleared by a derivatives clearing organization . . ."); 23.502(d) ("Nothing in this section [portfolio reconciliation] shall apply to a swap that is cleared by a derivatives clearing organization"); 23.503(c) ("Nothing in this section [portfolio compression] shall apply to a swap that is cleared by a derivatives clearing organization.").

[522] *See* 17 CFR 23.202.

[523] The Commission is of the view that CEA section 2(i) should not be interpreted to apply the daily trading records requirements, with the exception of those found in Commission regulation 23.202(a)(1).

[524] However, a non-U.S. swap dealer or non-U.S. MSP must satisfy the daily trading record requirement found in Commission regulation 23.202(a)(1).

[525] As discussed above, pursuant to Commission regulation 48.7(c)(1)(ii), all contracts, including swaps, made available in the U.S. by a registered FBOT must be cleared. The clearing organization must be either a DCO or must observe international clearing standards: The RCCP or the successor standards, PFMI.

[526] *See* discussion of clearing at section IV.F.6, *supra*. The Commission clarifies that the trading mandate under CEA section 2(h)(8)(A) is satisfied by trading on a registered FBOT.

[527] Pursuant to Commission regulation 48.8(a)(9), the registered FBOT must ensure that all transaction data relating to each swap transaction, including price and volume, are reported as soon as technologically practicable after execution of the swap transaction to a SDR that is either registered with the Commission or has an information sharing arrangement with the Commission. While Commission regulation 43(b)(2) requires that an SDR ensure that swap transaction and pricing data is publicly disseminated as soon as technologically practicable after such data is received from a registered SEF, DCM or reporting party, it does not specifically require public dissemination of swap transaction and pricing data from the FBOT. Therefore, in order for the FBOT to ensure that the real-time public reporting requirement is satisfied, the FBOT must either report the data to the public itself or enter into an arrangement with the SDR to which the data are reported pursuant to which the SDR agrees to publicly disseminate the data as soon as technologically practicable.

[528] The Commission is of the view that CEA section 2(i) should not be interpreted to apply the daily trading records requirements, with the exception of those found in Commission regulation 23.202(a)(1).

[529] Where one of the parties to the swap is a conduit affiliate, the Commission would generally expect the parties to the swap only to comply with (to the extent that the Inter-Affiliate Exemption is elected), the conditions of the Inter-Affiliate Exemption, including the treatment of outward-facing swaps condition in Commission regulation 50.52(b)(4)(i). In addition, the part 43 real-time reporting requirements must be satisfied.

that is not a guaranteed or conduit affiliate, on the other, under the Commission's interpretation of 2(i), the Commission would not expect the parties to the swap to comply with the Category A Transaction-Level Requirements.[530] In this case, the Commission believes that generally there may be a relatively greater supervisory interest on the part of foreign regulators with respect to transactions between two counterparties that are non-U.S. persons so that application of the Category A Transaction-Level Requirements may not be warranted.[531]

With regard to substituted compliance, where a swap is between a non-U.S. swap dealer or non-U.S. MSP (including an affiliate of a U.S. person), on the one hand, and a U.S. person (other than a foreign branch of a U.S. bank swap dealer or U.S. MSP), on the other, the Commission's policy is that substituted compliance would generally not be available for the Category A Transaction-Level Requirements. The Commission believes that this approach is appropriate in this case because the Commission has a strong interest in ensuring that the swap fully complies with the Category A Transaction Level Requirements, without substituted compliance. A number of related reasons support this conclusion. As discussed above, a major purpose of Title VII is to control the potential harm to U.S. markets that can arise from risks that are magnified or transferred between parties via swaps. As also discussed above, swaps between U.S. persons and non-U.S. persons inherently raise the possibility of such risk magnification and transfer. The Category A Transaction Level Requirements are designed to constrain such risk magnification and transfer. The United States thus has a strong interest in applying the Dodd-Frank Act requirements, rather than substitute requirements adopted by non-U.S. authorities, to swaps with U.S. persons. Exercise of U.S. jurisdiction with respect to the Category A Transaction Level Requirements over swaps between U.S. persons and non-U.S. persons is a reasonable exercise of jurisdiction because of the strong U.S. interest in minimizing the potential risks that may flow to the U.S. economy as a result of such swaps.[532]

Even though substituted compliance is not available with respect to swaps between a non-U.S. swap dealer or non-U.S. MSP, on the one hand, and a U.S. person (other than a foreign branch of a U.S. bank swap dealer or U.S. MSP), on the other, a market participant would be deemed in compliance with the relevant Dodd-Frank requirements where it complies with requirements in its home jurisdiction that are essentially identical to the Dodd-Frank requirements. Whether the home jurisdiction's requirements are essentially identical to the corollary Dodd-Frank requirements would be evaluated on a provision-by-provision basis. The Commission intends that a finding of essentially identical generally would be made through Commission action but in appropriate cases could be made through staff no-action.

Based on the foregoing principles, the Commission staff issued a no-action letter related to risk mitigation.[533] The Commission staff found that the Commission and the EU have essentially identical rules in important areas of risk mitigation for the largest counterparty swap market participants. Specifically, the Commission staff determined that under the European Market Infrastructure Regulation (EMIR), the EU has adopted risk mitigation rules that are essentially identical to certain provisions of the Commission's business conduct standards for swap dealers and major swap participants. In areas such as confirmation, portfolio reconciliation, portfolio compression, valuation, and dispute resolution, the Commission staff found that the respective regimes are essentially identical. The Commission staff determined that where a swap/OTC derivative is subject to concurrent jurisdiction under US and EU risk mitigation rules, compliance under EMIR will achieve compliance with the relevant Commission rules because they are essentially identical.[534]

However, where the swap is between a non-U.S. swap dealer or non-U.S. MSP (including an affiliate of a U.S. person) and a foreign branch of a U.S. bank that is a swap dealer or MSP, as a policy matter, the Commission believes that substituted compliance should be available for the Category A Transaction-Level Requirements, to the extent applicable. Under substituted compliance, a counterparty can choose to follow a foreign jurisdiction's rules even though those rules are not essentially identical, provided that the regime is comparable and comprehensive. The Commission believes that international comity principles support taking this more flexible approach where the transaction, although it involves a U.S. person, takes place in a foreign jurisdiction.

In addition, where a swap is between a non-U.S. swap dealer or non-U.S. MSP (including an affiliate of a U.S. person), on the one hand, and a non-U.S. person that is a guaranteed or conduit affiliate, on the other, substituted compliance may be available to satisfy the Category A Transaction Level Requirements, to the extent applicable, as discussed in the next two sections.

c. Swaps With a Non-U.S. Person Guaranteed by a U.S. Person

i. Proposed Guidance

In the Proposed Guidance, with respect to swaps between a non-U.S. swap dealer or non-U.S. MSP, on the one hand, and a non-U.S. counterparty on the other hand, the Commission proposed to interpret CEA section 2(i) such that a non-U.S. swap dealer or non-U.S. MSP would be expected to comply with the Category A Transaction-Level Requirements for swaps where the non-U.S. counterparty's performance is guaranteed, or otherwise supported by, a U.S. person.[535] In consideration of international comity principles, the Commission further proposed to interpret CEA section 2(i) so as to

[530] Thus, for example, a swap between a registered non-U.S. swap dealer and a German person would not be subject to Category A Transaction-Level Requirements.

[531] Where the counterparty to a non-U.S. swap dealer or non-U.S. MSP is an international financial institution such as the World Bank, the Commission also generally would not expect the parties to the swap to comply with the Category A Transaction-Level Requirements, even if the principal place of business of the international financial institution were located in the United States.

For this purpose, the Commission would consider the international financial institutions to be the institutions listed as such in the Final Entities Rules, 77 FR at 30692 n. 1180, which include the International Monetary Fund, International Bank for Reconstruction and Development, International Development Association, International Finance Corporation, Multilateral Investment Guarantee Agency, the Inter-American Development Bank, and the Inter-American Investment Corporation. Even though some or all of these international financial institutions may have their principal place of business in the United States, the Commission would generally not consider the application of the Category A Transaction-Level Requirements to be warranted, for the reasons of the traditions of the international system discussed in the Final Entities Rules.

[532] *See* Restatement secs. 403(2)(a) (effect on territory of regulating state), 403(2)(c) (importance of regulated activity to the regulating state); 403 cmt. b (weight to be given to reasonableness factors depends on circumstances).

[533] *See* No-Action Relief for Registered Swap Dealers and Major Swap Participants from Certain Requirements under Subpart I of Part 23 of Commission Regulations in Connection with Uncleared Swaps Subject to Risk Mitigation Techniques under EMIR, CFTC Letter No. 13–45 (Jul. 11, 2013) (''Risk Mitigation Letter'').

[534] The Risk Mitigation Letter provides an example of when requirements in a foreign jurisdiction would be essentially identical to Dodd-Frank requirements. *See id.*

[535] *See* Proposed Guidance, 77 FR 41288.

permit substituted compliance for these Transaction-Level Requirements.

The Commission explained that it proposed to interpret section 2(i) in this manner because, where a non-U.S. counterparty's swaps obligations are guaranteed by a U.S. person, the risk of non-performance by the counterparty rests with the U.S. person that is the guarantor of performance or payment. If the non-U.S. person defaults on its obligations under the swaps, then the U.S. person guarantor will be held responsible (or would bear the cost) to settle those obligations. In circumstances in which a U.S. person ultimately bears the risk of non-performance of a counterparty to a swap with a non-U.S. swap dealer or non-U.S. MSP, the Commission noted its strong regulatory interest in performance by both parties to the swap, and hence proposed to apply these Transaction-Level Requirements.[536]

ii. Comments

Some commenters concurred in the Commission's emphasis on a guarantee by a U.S. person as an interpretive guidepost. IATP, for example, stated that ''the U.S. person's guarantee is a crucial criterion for the Commission's determination of whether a non-U.S. person would be subject to compliance with Dodd-Frank or whether substituted compliance would be appropriate.'' [537] Similarly, AFR, in commenting on the Proposed Order, expressed concern about U.S. taxpayer exposure to ''foreign affiliates of U.S. banks whose liabilities are guaranteed (implicitly or explicitly) by the parent company.'' [538]

Other commenters, by contrast, stated that: (1) The Transaction-Level Requirements should never apply to swaps between counterparties that are both non-U.S. persons; [539] (2) the Commission should exclude the swap dealing transactions of a non-U.S. person where the counterparties to the swaps are, themselves, non-U.S. persons, irrespective of whether such counterparties' obligations are guaranteed by the U.S. person; [540] and (3) section 2(i) does not provide a legal basis for jurisdiction over a swap between non-U.S. persons based on a guaranty by a U.S. person because guarantees ''do not alter the location of activity.'' [541] In a similar vein, IIB stated that the Commission's proposed treatment of guarantees based on its concern that the U.S. guarantor is exposed to risks incurred by one of its non-U.S. affiliates, ''is unduly broad.'' [542]

IIB explained that guarantees are a very common way for U.S. multinational corporations (both financial and non-financial) to provide credit support for their non-U.S. subsidiaries. According to IIB, parent credit support enables these subsidiaries to hedge their risks cost-effectively in the markets in which they operate, thereby reducing the cost of risk management and therefore the costs of operations.[543] Citi noted that ordinary course parent support commitments, general payment guarantees and capital maintenance commitments are often necessary to enter foreign banking markets. It added that U.S. multinationals also guarantee obligations of local subsidiaries so that their subsidiaries can effectively hedge risks in local markets.[544]

IIB argued that these arrangements ''are in stark contrast to circumstances where an unregulated foreign 'shell' affiliate is used for purposes of entering into significant swap dealing activity outside the scope of Dodd-Frank and systematically transferring the market and credit risks arising from the activity to a U.S. affiliate.'' [545] Accordingly, IIB maintained that application of Transaction-Level Requirements where a non-U.S. counterparty to a non-U.S. swap dealer or non-U.S. MSP is guaranteed by a U.S. person is unnecessary because the Commission already has adopted an anti-evasion rule to address such schemes.[546]

Commenters stated that in many instances, the Commission's concerns about a guarantee by a U.S. person can be addressed as a safety and soundness matter by the Federal Reserve Board when it supervises both the guarantor and its subsidiaries; further, where the U.S. providing a guarantee is itself a swap dealer or MSP, it also will be subject to Title VII requirements.[547] In a related vein, the Commission was urged to adopt an exception from its proposed treatment of a non-U.S. counterparty with a guarantee from a U.S. person if either: (1) The counterparty is subject to U.S. capital requirements or comparable foreign (*i.e.,* Basel-compliant) capital requirements; or (2) the guarantor is a U.S. bank holding company.[548]

IIB also stated that the Commission should tie the application of Title VII requirements to the cross-border activities of U.S.-guaranteed foreign subsidiaries to the significance of the risk to the United States arising from the underlying guaranteed activity—that is, where the existence of a guarantee gives rise to direct and significant risks to the United States.[549] Otherwise, IIB stated, ''the level of risk to the United States is too contingent, remote or low to justify application of U.S. regulation in the face of strong and more direct non-U.S. regulatory interests.'' [550] Under such an approach, IIB stated, the Commission should adopt an exception from its proposed treatment of a non-U.S. counterparty with a guarantee from a U.S. person if the non-U.S. counterparty is not a financial entity and is entering into the transaction for hedging or risk mitigation purposes.[551] More particularly, IIB posited, if the level of the non-U.S. counterparty's swap activity is insubstantial in relation to its net equity, or if the aggregate potential liability of the U.S. guarantor with respect to the non-U.S. counterparty's swap activity is insubstantial in relation to the net equity of the guarantor, then the risk to the United States will not be significant and Transaction-Level Requirements should not be applied.[552]

Many of the comments on this topic stated that the Commission's proposal in this regard would result in adverse competitive consequences.[553] Others,

[536] *See id.*

[537] *See* IATP (Aug. 27, 2012) at 3–4.

[538] *See* AFR (Aug. 14, 2012) at 1–2.

[539] *See* Australian Bankers (Aug. 27, 2012) at A8.

[540] *See* Sumitomo (Aug. 24, 2012) at 3. Sumitomo added that, at a minimum, the Commission should exclude swaps obligations in excess of a capped guaranty. *Id.*

[541] *See* CEWG (Aug. 27, 2012) at 6–7.

[542] *See* IIB (Aug. 27, 2012) at 14–15.

[543] *Id.* at 15–16.

[544] *See* Citi (Aug. 27, 2012) at 4–9.

[545] *See* IIB (Aug. 27, 2012) at 20.

[546] *Id. See also* Sullivan & Cromwell (Aug. 13, 2012) at 7 (''the counterparty should be considered a non-U.S. person for purposes of the regulatory requirements, provided that the transactions are not being conducted by the non-U.S. persons as an evasion''); The Clearing House (Aug. 27, 2012) at 17 (stating that ''[a]ny guaranteed entity of a U.S. Person should only include 'shell' entities that have transferred substantially all of their market and credit risk to a U.S. Person (excluding non-financial entities) or any entities created to evade U.S. swaps rules.''); Citi (Aug. 27, 2012) at 4–9 (''. . . Title VII should not apply to non-U.S. subsidiaries on the basis of guarantees . . . where such subsidiaries are bona fide companies.'').

[547] *See* Sullivan & Cromwell (Aug. 13, 2012) at 15.

[548] *See* IIB (Aug. 27, 2012) at 17–18.

[549] *Id.* at 15–16, 18–19.

[550] *Id.* at 4.

[551] *Id.* at 16–17.

[552] *Id.* at 15–16.

[553] *See* End Users Coalition (Aug. 27, 2012) at 3 (Commission's proposal may disadvantage non-U.S. affiliates of U.S. end-users whose non-U.S. counterparties may require guarantees to do business); Citi (Aug. 27, 2012) at 4–9 (applying Transaction-Level Rules in these circumstances would place U.S. multinationals at a severe competitive disadvantage relative to foreign-based corporations, as their subsidiaries abroad would have to either forgo parent support or comply with different transaction-level rules than those of the local market); IIB (Aug. 27, 2012) at 18 (non-U.S. persons that register as swap dealers due to their trading with U.S. persons would be disadvantaged vis-à-vis non-U.S. firms that do not have a U.S.

though, objected that Transaction-Level Requirements should not apply to entities guaranteed by U.S. persons because non-U.S. counterparties will likely be unwilling to agree to the legal documents necessary to comply with those requirements.[554] And others stated that the proposed interpretation will not achieve the objective of mitigating counterparties' exposure to the credit risks of swap dealers because the U.S. guarantor's exposure in this scenario is to the credit risk of the guaranteed non-U.S. counterparty, not to the non-U.S. swap dealer that is transacting with that guaranteed non-U.S. counterparty.[555]

Citi commented that if Transaction-Level Requirements were to be applied to swaps of non-U.S. persons whose obligations were guaranteed by a U.S. person, then U.S.-based firms may be forced to remove parent support from their overseas subsidiaries in order to remain competitive. It argued that this would cause significant additional capital, resources, and personnel to be moved abroad so that these non-U.S. subsidiaries could manage swap risk on a stand-alone basis which, it averred, would fragment and harm the safety and soundness of U.S.-based firms, U.S. swaps markets, and the U.S. economy.[556] Accordingly, it urged the Commission to further study the issue of guarantees before finalizing its cross-border guidance.[557]

One commenter requested that the Commission clarify the scope of a ''guarantee'' that can trigger application of Transaction-Level Requirements in these circumstances.[558] Another objected to the scope of the term ''guarantee'' if it were defined to include not only a guarantee of payment or performance of swaps obligations, but also other formal arrangements to support the ability of a person to perform its obligations (such as liquidity puts and keepwell agreements).[559]

iii. Commission Guidance

Under this Guidance, with respect to swaps between a non-U.S. swap dealer or non-U.S. MSP (including an affiliate of a U.S. person) on the one hand, and a non-U.S. counterparty on the other hand where the non-U.S. counterparty's performance is guaranteed (or otherwise supported by) a U.S. person, the Commission would generally expect the parties to the swap to comply with all of the Category A Transaction-Level Requirements. The Commission believes that this policy is warranted in light of the significant regulatory interest in managing and reducing the risks to U.S. firms, markets and commerce from such transactions. Further, this policy is based on the Commission's view that the failure to apply Category A Transaction-Level Requirements to such swaps could leave a significant gap in the regulation of risks presented by swap activities undertaken by U.S. firms. However, as proposed, the Commission's policy contemplates that substituted compliance (to the extent applicable) could satisfy the Category A Transaction-Level Requirements that otherwise might apply to such swaps, as further discussed below.

In response to commenters that requested clarification of the nature of the guarantee of a non-U.S. counterparty by a U.S. person that will trigger the application of Transaction-Level Requirements to swaps with non-U.S. swap dealers or non-U.S. MSPs, the Commission references the approach set forth in the final rule further defining the term ''swap,'' among others.[560] That is, for this purpose, a guarantee of a swap is a collateral promise by a guarantor to answer for the debt or obligation of a counterparty obligor under a swap.[561] Thus, to the extent that the non-U.S. swap dealer or non-U.S. MSP would have recourse to the U.S. guarantor in connection with its swaps position, the Commission would generally expect such non-U.S. swap dealer or MSP to comply with the Category A Transaction-Level Requirements for such a guaranteed swap (although substituted compliance may satisfy compliance with such requirements to the extent it is applicable, as discussed above). This interpretation also is consistent with the interpretation related to the MSP definition that the Commission set forth in the Final Entities Rules.[562]

Conversely, where a non-U.S. swap dealer or non-U.S. MSP enters into a swap with a non-U.S. counterparty that does not have a guarantee as so described from a U.S. person and is not an affiliate conduit, the Commission's view is that the Transaction-Level Requirements should not apply.[563] Considerations relevant to application of the Transaction-Level Requirements also relate to persons guaranteeing swaps obligations. As noted in the proposal, the Transaction-Level Requirements with respect to required clearing and swap processing, margin (and segregation), and portfolio reconciliation and compression can serve to significantly mitigate risks to the swap dealer's counterparties, and by extension, the risk to the U.S. person guaranteeing the non-U.S. counterparty's obligations under the swap. Other Transaction-Level Requirements—trade confirmation, swap trading relationship documentation, and daily trading records—protect the counterparties to the swap, and thus also protect a U.S. person that guarantees a non-U.S. counterparty's obligations under the swap, by ensuring that swaps are properly documented and recorded.

In the Commission's view, because Congress directed that the trade execution requirement apply to swaps that are subject to the clearing requirement and made available to trade, it is appropriate for the trade execution requirement to apply to those cross-border swaps that are subject to the clearing mandate and are made available to trade. The Commission believes that both requirements—the clearing mandate and trade execution requirement—are of fundamental importance to the management and reduction of risks posed by swap activities of market participants. Requiring swaps to be traded on a regulated exchange or execution facility provides market participants with

swap dealing business because only the former would be obligated to comply with the Transaction-Level Requirements for swaps with U.S.-guaranteed counterparties); Sullivan & Cromwell (Aug. 13, 2012) at 6 (Title VII should not apply to the non-U.S. operations and activities of an entity simply because it has a U.S. parent that provides a guarantee because this would impose duplicative regulation and unnecessary costs on non-U.S. operations that are already subject to local foreign rules and regulations).

[554] *See* Hong Kong Banks (Aug. 27, 2012) at 4–5.

[555] *See, e.g.,* ISDA (Aug. 10, 2012) at 10.

[556] *See* Citi (Aug. 27, 2012) at 4–9.

[557] *Id. See also* CEWG (Aug. 27, 2012) at 4–5 (recommending that the Commission ''undertake a more thorough regulatory analysis with respect to guarantees of swaps obligations'').

[558] *See* Hong Kong Banks at 4–5.

[559] *See* CEWG (Aug. 27, 2012) at 4–5.

[560] *See* Final Swap Definition, 77 FR at 48225–48227. The interpretation herein applies only to a swap that is not a security-based swap or a mixed swap.

[561] *Id.* at 48226 n.186.

[562] *See* Final Entities Rules, 77 FR at 30689 (''[A]n entity's swap or security-based swaps positions in general would be attributed to a parent, other affiliate or guarantor for purposes of major participant analysis to the extent that counterparties to those positions would have recourse to that other entity in connection with the position. Positions would not be attributed in the absence of recourse.'').

[563] The Commission agrees with commenters who stated that Transaction-Level Requirements should not apply if a non-U.S. swap dealer or non-U.S. MSP relies on a written representation by a non-U.S. counterparty that its obligations under the swap are not guaranteed with recourse by a U.S. person. Such an approach is consistent with Commission practice in other contexts such as the external business conduct rules.

greater pre- and post-trade transparency. Real-time public reporting improves price discovery by requiring that swap and pricing data be made publicly available. Taken together, the trade execution and real-time public reporting Transaction-Level Requirements provide important information to market participants and regulators with resulting efficiency in the marketplace. This, in turn, facilitates risk management which benefits swap counterparties and also serves to reduce the likelihood that a U.S. guarantor will be called upon to satisfy a non-U.S. counterparty's swaps obligations.[564]

Further, in the Final Swap Definition, the Commission found that a guarantee of a swap is a term of that swap that affects the price or pricing attributes of that swap. The Commission therefore concluded that when a swap has the benefit of a guarantee, the guarantee is an integral part of that swap. The Commission explained that typically when a swap counterparty uses a guarantee as credit support for its swaps obligations, the guarantor's resources are added to the analysis of the swap because ''the market will not trade with that counterparty at the same price, on the same terms, or at all without the guarantee.'' [565]

For all the foregoing reasons, the Commission disagrees with commenters that asserted that it should not, or lacks the legal authority to, interpret CEA section 2(i) as to apply to swaps where one counterparty is a non-U.S. swap dealer or a non-U.S. MSP and the other counterparty is a non-U.S. person whose obligations under the swap are guaranteed by a U.S. person. Where a U.S. person provides a guarantee of a non-U.S. counterparty's swaps obligations for which there is recourse to the U.S. person, where that guarantee is a term of the swap and affects the price or pricing attributes of that swap, and where the Transaction-Level Requirements serve to protect and mitigate risk to that U.S. person guarantor, the Commission believes that such swaps, either individually or in the aggregate, have a direct and significant connection with activities in, or effect on, U.S. commerce.

The application of Dodd-Frank Act requirements to swaps of non-U.S. persons whose swaps obligations are guaranteed by U.S. persons is also consistent with foreign relations law. As noted in the discussion above regarding the application of these requirements to swaps of U.S. persons with non-U.S. persons, a major purpose of Title VII is to control the potential harm to U.S. markets that can arise from risks that are magnified or transferred between parties via swaps. Similarly, a guarantee—which is an integral part of a swap—can lead to the transfer of risk from the guaranteed non-U.S. person to the U.S. guarantor. Because Category A Transaction Level Requirements are designed to mitigate such risk transfer, the Commission believes there is a strong interest in applying the Dodd-Frank Act requirements to swaps of non-U.S. persons that are guaranteed by U.S. persons.[566] However, the Commission also understands the countervailing interest of home country regulators in such swaps, and therefore believes that substituted compliance should generally be available in this context.

The Commission also disagrees with commenters that suggested that its interpretation on this score should apply only to certain guaranteed swaps (*e.g.,* not to swaps by non-financial entities entered into for hedging or risk mitigation purposes), or only to in certain circumstances (*e.g.,* where the guaranteed non-U.S. counterparty's swap activity is a certain percentage of its net equity or the aggregate potential liability of the U.S. guarantor with respect to the non-U.S. counterparty's swaps obligations is a certain percentage of the guarantor's net equity), or only to a certain extent (*e.g.,* to swaps obligations in excess of a capped guarantee). In the Final Swap Definition, the Commission acknowledged that a ''full recourse'' guarantee would have a greater effect on the price of a swap than a ''limited'' or ''partial recourse'' guarantee, yet nevertheless determined that the presence of any guarantee with recourse, no matter how robust, is price forming and an integral part of a guaranteed swap.[567]

The Commission similarly believes that the presence of any guarantee with recourse by a U.S. person of the swaps obligations of a non-U.S. counterparty to a swap with a non-U.S. swap dealer or non-U.S. MSP suffices to justify the application of Transaction-Level Requirements that swap. Therefore, as noted above, to the extent that a non-U.S. swap dealer or non-U.S. MSP would have recourse to the U.S. guarantor in connection with its swaps position, the Commission would generally expect such non-U.S. swap dealer or MSP to comply with the Category A Transaction-Level Requirements for such a guaranteed swap (although substituted compliance may satisfy compliance with such requirements to the extent it is applicable). Although the Commission believes all relevant facts and circumstances should be analyzed, as a general matter the Commission is of the view that the purpose for which the non-U.S. counterparty is entering into the swap, or the net equity of the non-U.S. counterparty or the guarantor, or the extent of the guarantee, would generally not warrant a different conclusion.

Finally, the Commission disagrees with commenters that urged it to limit its interpretation in this regard to cases of evasion, or to exclude from the scope of its interpretation those swaps in which the non-U.S. counterparty is subject to appropriate capital requirements or the guarantor is a U.S. bank holding company. The events surrounding the collapse of AIGFP highlight how guarantees can cause major risks to flow to the guarantor. ''AIGFP's obligations were guaranteed by its highly rated parent company . . . an arrangement that facilitated easy money via much lower interest rates from the public markets, but ultimately made it difficult to isolate AIGFP from its parent, with disastrous consequences.'' [568]

The Commission's view is that the protections and mitigation of risk exposures afforded by the Category A Transaction-Level Requirements would be rendered far less effective if in the case of swaps where one counterparty is a non-U.S. swap dealer or a non-U.S. MSP and the other counterparty is a non-U.S. person guaranteed by a U.S. person such requirements only apply when such swaps are part of a scheme to evade the Dodd-Frank Act. Further, while capital requirements are an important element of the Title VII regime to reduce systemic risk,[569] the

[564] Accordingly, the Commission disagrees with commenters who objected to the proposed interpretation on the ground that it would not advance the goal of mitigating the risk of credit exposure of the guarantor U.S. person to the non-U.S. swap dealer or non-U.S. MSP. The Transaction-Level Requirements also serve to protect against risk to the guarantor U.S. person by reducing the likelihood that its obligations under the guarantee will be called upon in the first instance.

[565] *See* Final Swap Definition, 77 FR 48225–48226.

[566] *See generally* note 532 and related discussion, *supra.*

[567] *Id.* at 48226.

[568] AIG Report, *supra* note 5, at 20.

[569] CEA section 4s(e)(1) provides that each registered swap dealer and MSP for which there is a prudential regulator shall meet such minimum capital requirements as the applicable prudential regulator shall prescribe, but that each registered swap dealer and MSP for which there is not a prudential regulator shall meet such minimum capital requirements as the Commission shall prescribe.

comprehensive regulatory structure established by the Dodd-Frank Act goes beyond such requirements. The CEA, as amended by the Dodd-Frank Act, also requires the imposition of the Transaction-Level Requirements [570] except to the extent that section 2(i) limits their application to cross-border transactions or activities. Therefore, the Commission believes that, rather than excluding the swaps at issue from the scope of the Title VII regulatory regime, with the corresponding increase in risk to U.S. persons and to the U.S. financial system, in most cases compliance with the Category A Transaction-Level Requirements is appropriate where non-U.S. swap dealers and non-U.S. MSPs that enter into swaps with non-U.S. counterparties guaranteed by a U.S. person. Further, the Commission does not believe that a different interpretation should be taken solely because applicable capital requirements are satisfied.[571]

In addition, the Commission believes that this Guidance, which contemplates a system of substituted compliance in accordance with principles of international harmonization, may allow non-U.S. swap dealers and non-U.S. MSPs to comply, in appropriate circumstances, with their home-country requirements when transacting with non-U.S. counterparties whose swaps obligations are guaranteed with recourse by U.S. persons. The Commission believes that the substituted compliance regime contemplated by the Guidance will facilitate equivalent regulatory treatment of equivalent swaps without undermining the swaps reforms enacted by Congress in Title VII.

d. Swaps With a Non-U.S. Person That is an Affiliate Conduit

i. Proposed Guidance

The Commission proposed to interpret CEA section 2(i) such that the Category A Transaction-Level Requirements would apply to a swap if at least one of the parties to the swap is an ''affiliate conduit.'' Under the Proposed Guidance, an affiliate conduit exists when: (1) A non-U.S. person that is majority-owned, directly or indirectly, by a U.S. person; (2) the non-U.S. person regularly enters into swaps with one or more of its U.S. affiliates of its U.S. person owner; and (3) the financial results of such non-U.S. person are included in the consolidated financial statements of its U.S. person owner.[572] The Commission explained that it believed the proposed application of Transaction-Level Requirements was necessary because, ''given the nature of the relationship between the conduit and the U.S. person, the U.S. person is directly exposed to risks from and incurred by'' the affiliate conduit.[573] The Commission further indicated that it was concerned that a U.S. swap dealer or U.S. MSP would utilize affiliate conduits to conduct swaps outside the Dodd-Frank regulatory regime.

ii. Comments

The commenters who addressed the Commission's proposed approach to affiliate conduits expressed concerns about what they felt was an overly broad scope of the term ''affiliate conduit.'' Several of these commenters stated that the non-U.S. affiliate conduit concept should be omitted from the Guidance.[574] SIFMA stated that the term ''regular'' is too vague in that ''it does not account for the purpose of the inter-affiliate swap, the relative amount of the conduit's risk transferred, the nature of the transferred risk, or whether some or all of the risk is transferred.''[575] SIFMA also commented that activities of a non-U.S. affiliate conduit do not satisfy the requisite nexus to the United States under section 2(i) to justify different treatment from other non-U.S. counterparties. Further, SIFMA stated that where substituted compliance is unavailable, a non-U.S. swap dealer transacting with an affiliate conduit is subject to applicable Transaction-Level Requirements, which could cause non-U.S. swap dealers to cease doing business with non-U.S. affiliate conduits.[576] As an alternative, SIFMA recommended that the proposed affiliate conduit provision that the conduit ''regularly enter into swaps'' should be replaced with a provision that the conduit ''regularly enter[ ] into swaps with one or more other U.S. affiliates of the U.S. person for the purpose of transferring to that U.S. person all risk of swap activity.''

Other commenters raised similar objections concerning the scope of the affiliate conduit provision. Goldman stated that the proposed description of an affiliate conduit was so broad that ''an entity could be rendered a conduit by executing even a single trade despite the fact that the entity otherwise would be eligible for substituted compliance, or would not fall within Title VII's jurisdiction at all.'' [577] Such a broad definition, in Goldman's view, will result in competitive disparities for foreign affiliates of U.S.-based swap dealers and may even cover non-financial entities attempting to hedge risk.[578] SIFMA added that the concept

[570] *See* Appendix B for information regarding the Transaction-Level Requirements and the provisions of the CEA which they implement.

[571] In the Final Entities Rules, the Commission stated that it does ''not believe that it is necessary to attribute a person's swap or security-based swaps positions to a parent or other guarantor if the person is already subject to capital regulation by the CFTC or SEC (*i.e.,* swap dealers, security-based swap dealers, MSPs, major security-based swap participants, FCMs and broker-dealers) or if the person is a U.S. entity regulated as a bank in the United States. Positions of those regulated entities already will be subject to capital and other requirements, making it unnecessary to separately address, via major participant regulations, the risks associated with guarantees of those positions.'' *See* Final Entities Rules, 77 FR at 30689. The Commission continued, ''As a result of this interpretation, holding companies will not be deemed to be major swap participants as a result of guarantees to certain U.S. entities that are already subject to capital regulation.'' *Id.* at 30689 n. 1134. Subsequently, in the Final Swap Definition, the Commission stated that ''[a]s a result of interpreting the term 'swap' (that is not a security-based swap or mixed swap) to include a guarantee of such swap, to the extent that a counterparty to a swaps position would have recourse to the guarantor in connection with the position, and based on the reasoning set forth [in the Final Entities Rules] in connection with major swap participants, the CFTC will not deem holding companies to be swap dealers as a result of guarantees to certain U.S. entities that are already subject to capital regulation.'' *See* Final Swap Definition, 77 FR at 48266 n.188. The Commission's conclusion that capital compliance and prudential regulation, in certain circumstances, can obviate the need for registration as a swap dealer or MSP does not bear upon, and is not inconsistent with, the Commission's interpretation herein that notwithstanding capital compliance and prudential regulation, Transaction-Level Requirements may be applied where a non-U.S. swap dealer or non-U.S. MSP enters into a swap with a non-U.S. counterparty whose obligations under that swap are guaranteed, with recourse, by a U.S. person.

[572] *See* Proposed Guidance, 77 FR at 41229.

[573] *Id.*

[574] SIFMA (Aug. 27, 2012) at A22–23; IIB at (Aug. 27, 2012) at 20–21; Hong Kong Banks (Aug. 27, 2012) at 13.

[575] SIFMA (Aug. 27, 2012) at A23. *See also* IIAC (stating that the Commission should clarify the meaning of ''regularly enters into swaps with . . . affiliates'' and circumstances under which the Commission would interpret the financials of a non-U.S. counterparty to be combined with the financial statements of the U.S. person for purposes of applying Transaction-Level Requirements to transactions by U.S. persons that might be using conduits to avoid such requirements) (Aug. 27, 2012) at 8.

[576] SIFMA (Aug. 27, 2012) at A22.

[577] Goldman (Aug. 27, 2012) at 6. *See also* Japanese Bankers Association (Aug. 27, 2012) at 11 (stating that it is difficult to determine under the Proposed Guidance when a counterparty is a conduit for a U.S. person, and that the conduit provisions should not be implemented).

[578] Goldman (Aug. 27, 2012) at 6. *See also* Peabody (Aug. 27. 2012) at 3 (stating that applying the Dodd-Frank requirements to swaps entered into or booked by affiliates of commercial end-users outside the United States to hedge or mitigate commercial risks of activities outside the United States will create an overlapping (and potentially inconsistent) tangle of international laws that will increase costs and potential liabilities associated with such swaps, and materially undermine their utility and risk mitigation benefits; stating further that foreign entities wishing to avoid becoming subject to Dodd-Frank requirements will decline to enter into swaps with such affiliates, thereby

Continued

of indirect majority ownership is imprecise and its application to non-U.S. affiliate conduits is unclear.[579] Hong Kong Banks believed that the conduit proposal is unnecessary since its activities would be captured in the registration process.[580] Peabody stated that the application of Transaction-Level Requirements to affiliate conduits seemingly contradicts the Proposed Guidance's treatment of foreign affiliates as non-U.S. persons.[581] If the affiliate conduit concept remains in the Guidance, SIFMA requested that the Commission clarify whether or not swap dealers may rely on a counterparty's representations as to its non-U.S.-affiliate's conduit status.[582]

IIB stated that the Commission should withdraw its proposal on affiliate conduits and instead, where there is clear circumvention, rely on its existing anti-evasion authority.[583] It added that the Commission's proposal for the ''conduit'' treatment of a foreign entity that ''regularly'' engages in back-to-back swaps with a U.S. affiliate is unjustifiably broad. IIB also stated that the proposed standard is inconsistent with statutory standards for the extraterritorial application of Title VII, and that there is no basis to conclude that inter-affiliate swaps create direct and significant risk to the United States simply because they occur ''regularly.'' [584]

iii. Commission Guidance

In the Proposed Guidance, the Commission explained that it believed the proposed application of Transaction-Level Requirements was necessary because, ''given the nature of the relationship between the conduit and the U.S. person, the U.S. person is directly exposed to risks from and incurred by'' the affiliate conduit.[585] The Commission further indicated that it was concerned that a U.S. swap dealer or U.S. MSP would utilize affiliate conduits to conduct swaps outside the Dodd-Frank regulatory regime.

For purposes of this policy statement, the Commission is clarifying that an affiliate conduit encompasses those entities that function as a conduit or vehicle for U.S. persons conducting swaps transactions with third-party counterparties. In response to comments received, the Commission is identifying some of the factors that the Commission believes are relevant to determining whether a non-U.S. person is an ''affiliate conduit'' of a U.S. person. As explained in greater detail below, modifications to the Proposed Guidance with regard to the term ''affiliate conduit'' are intended to respond to commenters' concerns about a lack of clarity on the scope of the term affiliate conduit and to better identify those non-U.S. affiliates whose swap activities, either individually or in the aggregate, have a direct and significant connection with activities in, or effect on, U.S. commerce as a result of their relationship with their U.S. affiliates. Specifically, the Commission is modifying the factors that might be relevant to the consideration of whether a non-U.S. affiliate of a U.S. person is an affiliate conduit by: (1) clarifying the meaning of ''regularly enters into swaps,'' and in particular, the activities of a non-U.S. counterparty that renders it an affiliate conduit; and (2) adding the concept of ''control.''

As the Commission understands, it is common for large global companies to centralize their hedging or risk-management activities in one or more affiliates (informally referred to as a ''treasury conduit'' or ''conduit''). Under this structure, the conduit may enter into swaps with its affiliates and then enter into offsetting swaps with third-parties. In other cases, the conduit may enter into swaps with third-parties as agent for its affiliates. In either case, the conduit functions as a vehicle by which various affiliates engage in swaps with third-parties (*i.e.,* the market). This paradigm promotes operational efficiency and prudent risk management by enabling a company to manage its risks on a consolidated basis at a group level.[586] Accordingly, based on comments, rather than considering whether a non-U.S. person ''regularly enters into swaps'' with one or more of its U.S. affiliates of its U.S. person owner, the Commission will generally consider whether the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third-parties for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliates, and enters into offsetting swaps or other arrangements with its U.S. affiliates in order to transfer the risks and benefits of such swaps with third-parties to its U.S. affiliates.

The Commission recognizes the significant benefits associated with a corporate group's use of a single entity to conduct the group's market-facing swap business. The Commission also believes, though, that in this situation the risks resulting from swaps of the entity that faces the market as a conduit on behalf of its affiliates in fact reside with those affiliates; that is, while the swaps are entered into by the conduit, through back-to-back swaps or other arrangements the conduit passes the risks and benefits of those swaps to its affiliates.[587] Where the conduit is located outside the United States, but is owned and controlled by a U.S. person, the Commission believes that to recognize the economic reality of the situation, the conduit's swaps should be attributed to the U.S. affiliate(s). The fact that the conduit is located outside the United States does not alter the economic reality that its swaps are undertaken for the benefit of, and at the economic risk of, the U.S. affiliate(s), and more broadly, for the corporate group that is owned and controlled by a U.S. person. Under these circumstances, the Commission believes that the swap activities of the non-U.S. conduit may meet the ''direct and

decreasing market liquidity, increasing market risk competition, imposing higher commercial costs, and resulting in higher prices for customers and downstream consumers, and would put U.S. business at a competitive disadvantage in global markets).

[579] SIFMA (Aug. 27, 2012) at A24.

[580] Hong Kong Banks (Aug. 27, 2012) at 13.

[581] Peabody (Aug. 28, 2012) at 2–3.

[582] SIFMA (Aug. 27, 2012) at A24. SIFMA stated that the determination of whether a counterparty to a swap is a non-U.S. affiliate conduit should be made at the inception of the swap based on the most recent updated representation from the counterparty, which should be renewed by the counterparty once per calendar year. *Id.* at A25.

[583] IIB (Aug. 27, 2012) at 20–21.

[584] *Id.* at 19.

[585] *See* Proposed Guidance, 77 FR at 41229.

[586] One market participant described the functions of such a conduit and its relationship with respect to other affiliates within the corporate group in the following manner:

Many business enterprises, including [Prudential Financial Inc., or ''PFI''], elect to operate in a manner that assigns specific functions to related and commonly-controlled affiliates. With regard to swap transactions, it has long been our practice, as an enterprise-type company with separate legal entities that are commonly owned by PFI to use one affiliate, Prudential Global Funding LLC (''PGF''), to directly face the market as a ''conduit'' to hedge the net commercial and financial risk of the various operating affiliates within PFI. Under this practice, only PGF (*i.e.,* the conduit) is required to trade with external market participants, while the internal affiliates within PFI trade directly with the PGF. The use of PGF as the single conduit for the various operating affiliates within PFI diminishes the demands on PFI's financial liquidity, operational assets and management resources, as affiliates within PFI avoid having to establish independent relationships and unique infrastructure to face the market. Moreover, use of PGF as a conduit within PFI permits the netting of our affiliates' trades (*e.g.,* one affiliate is hedging floating rates while another is hedging fixed rates). This effectively reduces the overall risk of PFI and our affiliates, and allows us to manage fewer outstanding positions with external market participants.

The Prudential Insurance Company of America (Feb. 17, 2011) at 2.

[587] *See* The Prudential Insurance Company of America (Feb. 17, 2011); Kraft Foods (''Kraft'') (Feb. 11, 2011).

significant'' jurisdictional nexus within the meaning of CEA section 2(i).[588]

Further, in order to facilitate a consistent application of the term affiliate conduit and to mitigate any undue burden or complexity for market participants in assessing affiliate conduit status, the Commission clarifies that its policy contemplates that a market participant may reasonably rely on counterparty representations as to its non-U.S. affiliate conduit status.[589]

Finally, the Commission notes in response to commenters that an affiliate conduit would not necessarily be guaranteed by its parent. As one market participant explained, ''centralized hedging centers are generally evaluated as wholly-owned subsidiaries of the corporate group that do not require additional credit support, such as a parent guaranty or collateral.'' [590] Therefore, the Commission believes that it is reasonable and appropriate to interpret CEA section 2(i) in a manner that recognizes an affiliate conduit as a separate category of counterparty whose swaps with non-U.S. persons may be subject to certain Transaction-Level Requirements. Specifically, where one of the parties to the swap is a conduit affiliate, the Commission would generally expect the parties to the swap only to comply with (to the extent that the Inter-Affiliate Exemption is elected), the conditions of the Inter-Affiliate Exemption, including the treatment of outward-facing swaps condition in Commission regulation 50.52(b)(4)(i). In addition, the part 43 real-time reporting requirements must be satisfied.

In summary, for the purposes of the Commission's interpretation of CEA section 2(i), the Commission believes that certain factors are relevant to considering whether a non-U.S. person is an ''affiliate conduit.'' Such factors include whether:

(i) the non-U.S. person is a majority-owned affiliate [591] of a U.S. person;

(ii) the non-U.S. person is controlling, controlled by or under common control [592] with the U.S. person;

(iii) the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person; and

(iv) the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third-party(ies) for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s), and enters into offsetting swaps or other arrangements with its U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with third-party(ies) to its U.S. affiliates.

Other facts and circumstances also may be relevant. The Commission does not intend that the term ''conduit affiliate'' would include affiliates of swap dealers.

5. Application of the ''Category B'' Transaction-Level Requirements to Swap Dealers and MSPs

This section discusses the Commission's policy on the application of the Category B Transaction-Level Requirements to swaps in which at least one of the parties to the swap is a registered swap dealer or MSP. As noted earlier, the Category B Transaction Level Requirements pertain to external business conduct standards which the Commission adopted pursuant to CEA section 4s(b) as a Category B Transaction-Level Requirement.[593]

Consistent with the Proposed Guidance, the Commission will generally interpret CEA section 2(i) so that the Category B Transaction-Level Requirements (*i.e.,* the external business conduct standards) either do or do not apply to the swap, based on the counterparties to the swap, as explained below. Under this interpretation, substituted compliance is generally not expected to be applicable with regard to the Category B Transaction-Level Requirements under this Guidance.[594]

In considering whether Category B Transaction-Level Requirements are applicable, the Commission would generally consider whether the swap is with a:

(i) U.S. swap dealer or U.S. MSP (including affiliates of non-U.S. persons);

(ii) foreign branch of a U.S. bank that is a swap dealer or MSP; or

(iii) non-U.S. swap dealer or non-U.S. MSP (including an affiliate of a U.S. person).

Specifically, as explained more below, where a swap is with a U.S. swap dealer or U.S. MSP, the parties to the swap generally should be subject to the Category B Transaction-Level Requirements in full, regardless of whether the other counterparty to the swap is a U.S. person or a non-U.S. person. However, in the case of a foreign branch of a U.S. bank that is a swap dealer or MSP, or a non-U.S. swap dealer or non-U.S. MSP, the parties to the swap should generally only be subject to the Category B Transaction-Level Requirements when the counterparty to the swap is a U.S. person (other than a foreign branch of a U.S. bank that is a swap dealer or MSP). Conversely, under the Commission's interpretation of 2(i), where a swap is between a non-U.S. swap dealer or non-U.S. MSP (including an affiliate of a U.S. person) and a non-U.S. counterparty (regardless of whether the non-U.S. counterparty is a guaranteed or conduit affiliate), the parties to the swap would not be expected to comply with the Category B Transaction-Level Requirements. The reasons for the Commission's policies are discussed below.

The application of the Category B Transaction-Level Requirements is summarized in Appendix E to this Guidance, which should be read in conjunction with the rest of this Guidance.

a. Swaps With U.S. Swap Dealers and U.S. MSPs

As explained above, where a swap is with a U.S. swap dealer or U.S. MSP (including an affiliate of a non-U.S. person), the Commission's policy is that the parties to the swap should be subject

[588] In this respect, it is irrelevant whether the risk is wholly or partly transferred back to the U.S. affiliate(s); the jurisdictional nexus is met by reason of the trading relationship between the conduit and the affiliated U.S. persons.

[589] This is consistent with the Commission's approach to the determination of whether a counterparty is a ''U.S. person.'' *See* section IV.A, *supra.*

[590] *See* Kraft (Feb. 11, 2011) at 3.

[591] Commission regulation 1.3(ggg)(6)(i) defines ''majority-owned affiliates'' as follows:

[C]ounterparties to a swap are majority-owned affiliates if one counterparty directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both counterparties to the swap, where 'majority interest' is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership.

[592] Commission regulation 1.3(ggg)(4)(i) refers to an ''entity controlling, controlled by or under common control with the person.'' Final Entities Rules elaborated on this provision, stating:

For these purposes, we interpret control to mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise. This is consistent with the definition of ''control'' and ''affiliate'' in connection with Exchange Act rules regarding registration statements. *See* Exchange Act rule 12b–2. . . .

77 FR 30631 n. 437, and

[I]f a parent entity controls two subsidiaries which both engage in activities that would cause the subsidiaries to be covered by the dealer definitions, then each subsidiary must aggregate the swaps or security-based swaps that result from both subsidiaries' dealing activities in determining if either subsidiary qualifies for the *de minimis* exception.

Id. at n. 438.

[593] The categorization of Transaction-Level Requirements into Categories A and B is discussed in section E, *supra. See* Appendix B for a descriptive list of the Category A and Category B requirements and Appendix D for a table summarizing the application of the Category A Transaction-Level Requirements to Swap Dealers and MSPs. The Appendices to this Guidance should be read in conjunction with this section and the rest of the Guidance.

[594] *See* Appendix E to this Guidance for a summary of these requirements and the discussion in section D, *supra.*

to the Category B Transaction-Level Requirements in full, regardless of whether the counterparty is a U.S. person or a non-U.S. person, without substituted compliance available.

b. Swaps With Foreign Branches of a U.S. Bank That Is a Swap Dealer or MSP

In the case of a swap with a foreign branch of a U.S. bank that is a swap dealer or MSP, the Commission's policy is that the Category B Transaction-Level Requirements should apply only if the counterparty to the swap is a U.S. person (other than a foreign branch of a U.S. bank that is a swap dealer or MSP).[595]

The Commission believes that where a swap is between a foreign branch of a U.S. bank that is a swap dealer or MSP[596] and a U.S. person (other than a foreign branch of a U.S. bank that is a swap dealer or MSP), the swap has a direct and significant connection with activities in, or effect on, U.S. commerce. Because of the significant risks to U.S. persons and the financial system presented by such swap activities, under the Commission's interpretation of CEA section 2(i), generally the parties to the swap should comply with the Category B Transaction Level Requirements. Whenever a swap involves at least one counterparty that is a U.S. person, the Commission believes it has a strong supervisory interest in regulating and enforcing Transaction-Level Requirements, including external business conduct standards. In this case, the Commission believes the transaction should be viewed as being between two U.S. persons. For these reasons, the Commission's policy under section 2(i) is that substituted compliance would not be available.[597]

However, where the swap is between a foreign branch of a U.S. bank that is a swap dealer or MSP, on the one hand, and a non-U.S. person on the other (whether or not such non-U.S. person is a guaranteed or conduit affiliate), the Commission believes that the interests of the foreign jurisdiction in applying its own transaction-level requirements to the swap are sufficiently strong that the Category B Transaction-Level Requirements generally should not apply under section 2(i). In this case, even though the Commission considers a foreign branch of a U.S. bank that is a swap dealer or MSP to be a U.S. person, the Commission believes that because the counterparty is a non-U.S. person and the swap takes place outside the United States, foreign regulators may have a relatively stronger supervisory interest in regulating and enforcing sales practices related to the swap. Therefore, in light of international comity principles, the Commission believes that application of the Category B Transaction-Level Requirements may not be warranted in this case. Therefore, under the Commission's interpretation of section 2(i), the parties to the swap generally would not be expected to comply with the Category B Transaction-Level Requirements.

The Commission believes that, in the context of the Category B Transaction-Level Requirements, the same reasoning also should apply to a swap between two foreign branches of U.S. banks that are each swap dealers or MSPs. Just as the Commission would have a strong supervisory interest in regulating and enforcing sales practices associated with activities taking place within the United States, the foreign regulators would have a similar claim to overseeing sales practices occurring within their jurisdiction.

Accordingly, the Commission interprets CEA section 2(i) so that where a swap is between the foreign branch of a U.S. bank that is a swap dealer or MSP, on the one hand, and either a non-U.S. person or a foreign branch of a U.S. bank that is a swap dealer or MSP, on the other, the parties to the swap generally would not be expected to comply with the Category B Transaction-Level Requirements.

c. Swaps With Non-U.S. Swap Dealers and Non-U.S. MSPs

Under the Commission's interpretation of 2(i), where a swap is between a non-U.S. swap dealer or non-U.S. MSP (including an affiliate of a U.S. person), on the one hand, and a U.S. person, on the other, the parties to the swap generally would be expected to comply with the Category B Transaction-Level Requirements.[598] In the Commission's view, in this case, the swap should be subject to the provisions of Title VII of the Dodd-Frank Act and Commission implementing regulations, including the Category B Transaction-Level Requirements. Because of the significant risks to U.S. persons and the financial system presented by swap activities outside the United States where one of the counterparties to the swap is a U.S. person (whether inside or outside the United States), the Commission believes that a U.S. person's swap activities with a non-U.S. counterparty has the requisite direct and significant connection with activities in, or effect on, U.S. commerce under CEA section 2(i) to apply the Category B Transaction-Level Requirements to the transaction.

The Commission observes that, where a swap between a non-U.S. swap dealer and a U.S. person is executed anonymously on a registered DCM or SEF and cleared by a registered DCO,[599] the Category B Transaction-Level Requirements would not be applicable.[600]

Because a registered FBOT is analogous to a DCM, the Commission is of the view that the requirements

[595] For the reasons discussed in note 531, *supra,* where the counterparty to the swap is an international financial institution, the Commission also generally would not expect the parties to the swap to comply with the Category B Transaction-Level Requirements, even if the principal place of business of the international financial institution were located in the United States.

[596] *See* section C, *supra,* regarding the definition of a foreign branch and the determination of when a swap transaction is with a foreign branch for purposes of this Guidance.

[597] In this case, although the foreign branch would not register separately as a swap dealer, the Commission interprets 2(i) in a manner that would permit the U.S. person to task its foreign branch to fulfill its regulatory obligations with respect to the Category B Transaction-Level Requirements. The Commission would consider compliance by the foreign branch or agency to constitute compliance with these Transaction-Level Requirements. However, under the Commission's interpretation of 2(i), the U.S. person (principal entity) would remain responsible for compliance with the Category B Transaction-Level Requirements.

[598] As noted above, for the reasons discussed in note 531, where the counterparty to the swap is an international financial institution, the Commission also generally would not expect the parties to the swap to comply with the Category B Transaction-Level Requirements, even if the principal place of business of the international financial institution were located in the United States.

[599] As discussed in greater detail above, the Commission notes that there are no exempt DCOs at this time. If and when the Commission determines to exercise its authority to exempt DCOs from applicable registration requirements, the Commission would likely address, among other things, the conditions and limitations applicable to clearing swaps for customers subject to section 4d(f) of the CEA.

[600] *See* 17 CFR 23.402(b)–(c) (requiring swap dealers and MSPs to obtain and retain certain information only about each counterparty ''whose identity is known to the swap dealer or MSP prior to the execution of the transaction''); 23.430(e) (not requiring swap dealers and MSPs to verify counterparty eligibility when a transaction is entered on a DCM or SEF and the swap dealer or MSP does not know the identity of the counterparty prior to execution); 23.431(c) (not requiring disclosure of material information about a swap if initiated on a DCM or SEF and the swap dealer or MSP does not know the identity of the counterparty prior to execution); 23.450(h) (not requiring swap dealers and MSPs to have a reasonable basis to believe that a Special Entity has a qualified, independent representative if the transaction with the Special Entity is initiated on a DCM or SEF and the swap dealer or MSP does not know the identity of the Special Entity prior to execution); 23.451(b)(2)(iii) (disapplying the prohibition on entering into swaps with a governmental Special Entity within two years after any contribution to an official of such governmental Special Entity if the swap is initiated on a DCM or SEF and the swap dealer or MSP does not know the identity of the Special Entity prior to execution).

likewise would not be applicable where such a swap is executed anonymously on a registered FBOT and cleared.

Conversely, under the Commission's interpretation of 2(i), where a swap is between a non-U.S. swap dealer or non-U.S. MSP (including an affiliate of a U.S. person) and a non-U.S. counterparty (regardless of whether the non-U.S. counterparty is a guaranteed or conduit affiliate), the parties to the swap would not be expected to comply with the Category B Transaction-Level Requirements. The Commission believes that regulators may have a relatively stronger supervisory interest in regulating the Category B Transaction-Level Requirements related to swaps between non-U.S. persons taking place outside the United States than the Commission, and that therefore applying the Category B Transaction-Level Requirements to these transactions may not be warranted. The Commission notes that just as the Commission would have a strong supervisory interest in regulating and enforcing the Category B Transaction-Level Requirements associated with activities taking place in the United States, foreign regulators would have a similar claim to overseeing sales practices for swaps occurring within their jurisdiction.

For the reasons stated in section b above, under the Commission's interpretation of section 2(i), where a swap is between a non-U.S. swap dealer or non-U.S. MSP (including an affiliate of a U.S. person), on the one hand, and the foreign branch of a U.S. bank that is a swap dealer or MSP, on the other, the parties to the swap generally would not be expected to comply with the Category B Transaction-Level Requirements.

As noted previously, under the 2(i) interpretations, substituted compliance is generally not expected to be applicable to the Category B Transaction-Level Requirements under this Guidance.[601]

H. Application of the CEA's Swap Provisions and Commission Regulations to Market Participants That Are Not Registered as a Swap Dealer or MSP

This section sets forth the Commission's general policy on application of the CEA's swaps provisions and Commission regulations to swap counterparties that are not registered as swap dealers or MSPs (''non-registrants''), including the circumstances under which the counterparties would be eligible for substituted compliance.

Several of the CEA's swaps provisions and Commission regulations—namely, those relating to required clearing, trade execution, real-time public reporting, Large Trader Reporting, SDR Reporting, and swap data recordkeeping (collectively, the ''Non-Registrant Requirements'')[602]—also apply to persons or counterparties other than a swap dealer or MSP. In this section, the Commission sets forth the Commission's policy on application of these Non-Registrant Requirements to cross-border swaps in which neither counterparty is a swap dealer or MSP (*i.e.,* all other market participants including ''financial entities,'' as defined in CEA section 2(h)(7)(C)).[603]

Section 1 discusses the Commission's policy under CEA section 2(i) with regard to the application of the Non-Registrant Requirements to cross-border swaps between two non-registrants where one (or both) of the counterparties to the swap is a U.S. person. Substituted compliance is not applicable where one (or both) swap counterparties is a U.S. person.

Section 2 discusses the Commission's policy under CEA section 2(i) with regard to the application of the Non-Registrant Requirements to cross-border swaps between two non-registrants where both counterparties to the swap are non-U.S. persons. The eligibility of various counterparties to such swaps for substituted compliance is also addressed in section 2.

The application of the specified Dodd-Frank provisions and Commission regulations specified below to swaps between counterparties that are neither swap dealers nor MSPs is summarized in Appendix F to this Guidance, which should be read in conjunction with the rest of this Guidance.

1. Swaps Between Non-Registrants Where One or More of the Non-Registrants is a U.S. Person

As noted in the Proposed Guidance, to manage risks in a global economy, U.S. persons may need to, and frequently do, transact swaps with both U.S. and non-U.S. counterparties. The swap activities of U.S. persons, particularly those with global operations, frequently occur outside of U.S. borders.

With regard to cross-border swaps between two non-registrants where one (or both) of the counterparties to the swap is a U.S. person (including an affiliate of a non-U.S. person), the Commission's interprets CEA 2(i) such that the parties to the swap generally would be expected to comply with the Non-Registrant Requirements. As the Commission noted in the Proposed Guidance, the risks to U.S. persons and the U.S. financial system do not depend on the location of the swap activities of U.S. persons.[604] Where one or both of the counterparties to a swap between two non-registrants is a U.S. person, the Commission believes that the U.S. persons' swap activities (whether inside or outside the United States)—due their presence in the U.S. and relationship to U.S. commerce—have a direct and significant connection with activities in, or effect on, U.S. commerce. Therefore, the Commission's policy is that where a swap transaction is between non-registrants, and one or more of the counterparties is a U.S. person, generally the parties to the swap will be expected to comply in full with the Non-Registrant Requirements.[605] In addition, where one or more of the counterparties to a swap between non-registrants is a U.S. person, the Commission's policy generally is that

[601] *See* Appendix E to this Guidance for a summary of these requirements and the discussion in section E, *supra.*

[602] *See* section IV.D, *supra.* Part 45 of the Commission's regulations requires swap counterparties that are not swap dealers or MSPs to keep ''full, complete and systematic records, together with all pertinent data and memoranda'' with respect to each swap to which they are a counterparty. *See* 17 C.F. R. 45.2. Such records must include those demonstrating that they are entitled, with respect to any swap, to make use of the clearing exception in CEA section 2(h)(7). Swap counterparties that are not swap dealers or MSPs must also comply with the Commission's regulations in part 46, which address the reporting of data relating to pre-enactment swaps and data relating to transition swaps.

[603] Nothing in this Guidance should be construed to address the ability of a foreign board of trade to offer swaps to U.S. persons pursuant to part 48 of the Commission's regulations.

[604] *See* Proposed Guidance, 77 FR 41234 n. 138. Further, in the Proposed Guidance, the Commission stated that it believes that section 2(i) does not require a transaction-by-transaction determination that a particular swap outside the United States has a direct and significant connection with activities in, or effect on, commerce of the United States in order to apply the swaps provisions of the CEA to such transactions; rather, it is the aggregate of such activities and the aggregate connection of such activities with activities in the U.S. or effect on U.S. commerce that warrants application of the CEA swaps provisions to all such activities. *See Hoffmann-La Roche,* 542 U.S. at 168 (responding that respondents' recommendation that the court should take account of comity considerations on a case by case basis is ''too complex to prove workable'').

[605] For the reasons discussed in note 531, *supra,* one or more of the counterparties to a swap between non-registrants is an international financial institution, the Commission generally would not expect the parties to the swap to comply with the Non-Registrant Requirements, even if the principal place of business of the international financial institution were located in the United States.

substituted compliance is not available, for the reasons discussed below.

As noted in section D above, the Dodd-Frank Act's required clearing and swap processing requirements protect counterparties from the counterparty credit risk of their original counterparties, which in turn, protects against the accumulation of systemic risk because of the risk mitigation benefits offered by central clearing. Similarly, the trade execution and real-time public reporting requirements serve to promote both pre- and post-trade transparency which, in turn, enhance price discovery and decrease risk. Together, these requirements serve an essential role in protecting U.S. market participants and the general market against financial losses. The Commission cannot fully and responsibly fulfill its charge to protect the U.S. markets and market participants through a substituted compliance regime where one counterparty is a U.S. person. Accordingly, the Commission's policy is to expect full compliance with the Non-Registrant Requirements relating to required clearing, trade execution, and real-time public reporting with regard to any swaps between non-registrants where one or both of the counterparties is a U.S. person. For substantially the same reasons, application of U.S. requirements in these transactions is a reasonable exercise of U.S. jurisdiction under principles of foreign relations law.[606]

Large Trader Reporting provides the Commission with data regarding large positions in swaps with a direct or indirect linkage to specified U.S.-listed physical commodity futures contracts, in order to enable the Commission to implement and conduct effective surveillance of these economically equivalent swaps and futures. To facilitate the monitoring of trading across the swaps and futures markets, swaps positions must be converted to futures equivalents for reporting purposes; reportable thresholds are also defined in terms of futures equivalents. As discussed in further detail in section G above, in light of the very specific interest of the Commission in conducting effective surveillance of markets in swaps that have been determined to be economically equivalent to U.S. listed physical commodity futures contracts, and given the anticipated impediments to obtaining directly comparable positional data through any foreign swap data reporting regime, the Commission's policy is to construe CEA section 2(i) in a manner that would not recognize substituted compliance in lieu of compliance with Large Trader Reporting.

As noted in section E, data reported under the SDR Reporting rules provide the Commission with information necessary to better understand and monitor concentrations of risk, as well as risk profiles of individual market participants. Swap data recordkeeping is an important component of an effective internal risk management process. Therefore, the Commission's policy is that generally both SDR Reporting and swap data recordkeeping should apply in full where one of the counterparties to a swap between two non-registrants (non-swap dealers or non-MSPs) is a U.S. person.

As noted above, the clearing of swaps through a DCO mitigates counterparty credit risk and collateralizes the credit exposures posed by swaps. Section 2(h)(1) of the CEA requires a swap to be submitted for clearing to a registered DCO or a DCO that is exempt from registration under the CEA, if the Commission has determined that the swap is required to be cleared.[607] The Commission has adopted a clearing requirement determination pursuant to the CEA and rules under part 50 of the Commission's regulations such that certain classes of swaps are required to be cleared, unless counterparties to the swap qualify for an exception or exemption from clearing under the CEA or part 50 of the Commission's regulations.[608] In the final rules adopting the Inter-Affiliate Exemption, the Commission stated that a U.S. person that enters into any swap that is required to be cleared is subject to the clearing requirements of the CEA and part 50 of the Commission's regulations.[609] Accordingly, in the context of this Guidance, the Commission's policy is that the clearing requirement under section 2(h)(1) and part 50 of the Commission's regulations applies in full to a swap where at least one of the counterparties to the swap is a U.S. person, without substituted compliance available. But substituted compliance may be available with respect to the clearing requirement for swaps between, on the one hand, a U.S. swap dealer or U.S. MSP acting through its foreign branch or a non-U.S. person that is a guaranteed or conduit affiliate, and on the other hand, a non-U.S. swap dealer, non-U.S. MSP or other non-U.S. person.

With respect to the clearing requirement, the Commission has previously addressed both the scope and process of a comparability determination, which also would apply to the extent that substituted compliance is applicable under this Guidance.[610]

As for the process for determining comparability of a foreign jurisdiction's clearing mandate, the Commission has also previously stated that it will review the comparability and comprehensiveness of a foreign jurisdiction's clearing mandate by reviewing: (i) The foreign jurisdiction's laws and regulations with respect to its mandatory clearing regime (*i.e.,* jurisdiction-specific review) and (ii) the foreign jurisdiction's clearing determinations with respect to each class of swaps for which the

[606] *See* Restatement §§ 403(2)(a)–(c).

[607] The Commission notes that under CEA section 5b(h), the Commission has discretionary authority to exempt DCOs, conditionally or unconditionally, from the applicable DCO registration requirements. Specifically, section 5b(h) of the Act provides that ''[t]he Commission may exempt, conditionally or unconditionally, a derivatives clearing organization from registration under this section for the clearing of swaps if the Commission determines that the [DCO] is subject to comparable, comprehensive supervision and regulation by the Securities and Exchange Commission or the appropriate government authorities in the home country of the organization.'' Thus, the Commission has discretion to exempt from registration DCOs that, at a minimum, are subject to comparable and comprehensive supervision by another regulator. The Commission further notes that it has not yet exercised its discretionary authority to exempt DCOs from registration, and that until such time as the Commission determines to exercise such authority, swaps subject to the clearing requirement must be submitted to registered DCOs for clearing.

[608] In addition to the End-User Exception under CEA section 2(h)(7), which is codified in Commission regulation 50.50, as noted above, the Commission has adopted an exemption from required clearing for swaps between certain affiliated entities, codified at Commission regulation 50.52. *See* Inter-Affiliate Exemption, 78 FR 21750.

[609] *Id.* at 21765 (requiring, among other conditions, that eligible affiliate counterparties electing the exemption from clearing for the inter-affiliate swap must clear their swaps with unaffiliated counterparties, and permitting eligible affiliate counterparties located in foreign jurisdictions to clear such swaps pursuant to their applicable foreign jurisdictions' clearing regime, if the Commission determines that such regime is comparable and comprehensive to the U.S. clearing mandate).

[610] In particular, in the Inter-Affiliate Exemption, the Commission permitted eligible affiliate counterparties located outside of the U.S. to comply with a condition of the exemption to clear their swaps with unaffiliated counterparties (not located in the U.S.), to the extent such swaps are subject to the clearing requirement under section 2(h)(1) of the CEA, by complying with the requirements of a foreign jurisdiction's clearing mandate, including any exception or exemption granted under the foreign clearing mandate, provided that the Commission determines that: (i) such foreign jurisdiction's clearing mandate is comparable and comprehensive, but not necessarily identical, to the clearing requirement established under the CEA and part 50 of the Commission's regulations, and (ii) the exception or exemption is determined to be comparable to an exception or exemption provided under the CEA or part 50 of the Commission's regulations. *See* 17 CFR 50.52(b)(4)(i).

Commission has issued a clearing determination under Commission regulation 50.4 (*i.e.,* product-specific review).[611] In determining whether an exemption or exception under a comparable foreign mandate is comparable to an exception or exemption under the CEA or part 50, the Commission anticipates that it would review, for comparability purposes, the foreign jurisdiction's laws and regulations with respect to its mandatory clearing regime, as well as the relevant exception or exemption, and would exercise broad discretion to determine whether the requirements and objectives of such exemption are consistent with those under the comparable foreign clearing regime.

The Commission is also of the view that where a swap is executed anonymously on a registered DCM or SEF between two non-registrants and cleared by a registered DCO, and one (or both) of the counterparties to the swap is a U.S. person, neither party to the swap should be required to comply with the Non-Registrant Requirements that otherwise apply to the swap, with the exception of Large Trader Reporting,[612] SDR Reporting, and swap data recordkeeping.[613] The Commission notes that in this case, the DCM or SEF will fulfill the required clearing, trade execution,[614] and real-time public reporting requirements that apply to the swap.

Further, the Commission is of the view that where a swap is executed anonymously between two non-registrants on a registered FBOT and cleared and one (or both) of the counterparties to the swap is a U.S. person, neither party to the swap (as is the case when the swap is executed anonymously on a DCM) should be required to comply with the Non-Registrant Requirements that otherwise apply to the swap, with the exception of Large Trader Reporting, SDR Reporting and swap data recordkeeping. The Commission notes that in this case, the registered FBOT, as would the DCM, will fulfill the required clearing and trade execution requirements[615] that apply to the swap but not, without further action, the real-time public reporting requirements.

The Commission expects that derivatives markets and regulatory regimes will continue to evolve in the future. In order to ensure a level playing field, promote participation in transparent markets, and promote market efficiency, the Commission will, through staff no action letters, extend appropriate time-limited transitional relief to certain European Union-regulated multilateral trading facilities (MTFs), in the event that the Commission's trade execution requirement is triggered before March 15, 2014. Such relief would be available through March 15th for MTFs that have multilateral trading schemes, a sufficient level of pre- and post-trade price transparency, non-discriminatory access by market participants, and an appropriate level of oversight. In addition, the Commission will consult with the European Commission in giving consideration to extending regulatory relief to European Union-regulated trading platforms that are subject to requirements that achieve regulatory outcomes that are comparable to those achieved by the requirements for SEFs. Both parties will assess progress in January 2014.

2. Swaps Between Non-Registrants That Are Both Non-U.S. Persons

As noted above, where a swap is between two non-U.S. persons and neither counterparty is required to register as a swap dealer or MSP, the Commission proposed interpreting CEA section 2(i) so as not to apply the Non-Registrant Requirements,[616] with the exception of Large Trader Reporting.[617]

Section a discusses the Commission's policy on application of Large Trader Reporting to swaps between two non-registrants that are not U.S. persons. Section b discusses the application of the other Non-Registrant Requirements to swaps between two non-registrants that are not U.S. persons, where each of the counterparties to the swap is a guaranteed or conduit affiliate, and the availability of substituted compliance for the parties to such swaps. Section c discusses the Commission's policy on application of the Non-Registrant Requirements other than Large Trader Reporting to swaps between non-registrants that are not U.S. persons where neither or only one of the counterparties is a guaranteed or conduit affiliate.

a. Large Trader Reporting

Large Trader Reporting requires routine positional reports from clearing members in addition to clearing organizations and swap dealers. As is the case with swap dealers, routine reports are required from clearing members to the extent that they hold significant positions in the swaps subject to Large Trader Reporting—swaps that are directly or indirectly linked to specified U.S.-listed physical commodity futures contracts. Routine reporting provides essential visibility into the trading activity of large market participants, which enables the Commission to conduct effective surveillance of markets in swaps and futures that have been determined to be economically equivalent. Given the

[611] The Commission further explained that comparability will not require a regime identical to the clearing framework established under the CEA and the Commission regulations. Rather, the Commission anticipates that it will make jurisdiction-specific comparability determinations by comparing the regulatory requirements of a foreign jurisdiction's clearing regime with the requirements and objectives of the Dodd-Frank Act. The Commission further noted that it anticipates that the product-specific comparability determination will necessarily be made on the basis of whether the applicable swap is included in a class of swaps covered under Commission regulation 50.4.

[612] The Commission's part 20 regulations set forth large trader reporting rules for physical commodity swaps. *See* 76 FF 43851 (Jul. 22, 2011). Part 20 requires routine swaps position reports from clearing organizations, clearing members and swap dealers, and establishes certain non-routine reporting requirements for large swaps traders. Among other things, part 20 requires that a reporting entity, as defined in Commission regulation 20.1, disclose the identity of the counterparty in respect of which positional information is being reported in large swap trader reports and associated filings. *See* 76 FR. 43851 at 43863–4 n.11.

[613] The Dodd-Frank Act added to the CEA provisions requiring the retention and reporting of data related to swap transactions. Section 727 of the Dodd-Frank Act added section 2(a)(13)(g), which requires that all swaps, whether cleared or uncleared, be reported to an SDR. Section 728 of the Dodd-Frank Act added section 21(b), which directs the Commission to prescribe standards for swap data recordkeeping and reporting. Section 723 of the Dodd-Frank Act added section 2(h)(5), which addresses the reporting of swap data for swaps executed before the enactment of the Dodd-Frank Act and swaps executed on or after the date of its enactment. The Commission's swap data reporting and recordkeeping requirements are found in part 45, which establishes swap data recordkeeping and SDR reporting requirements; and part 46, which establishes swap data recordkeeping and SDR reporting requirements for pre-enactment and transition swaps (collectively, ''historical swaps''). *See* 77 FR 2136 (Jan. 13, 2012) (part 45); 77 FR 35200 (June 12, 2012) (part 46). Under both part 45 and part 46 (collectively, the ''swap data reporting rules'') reporting parties have swap data reporting obligations. The swap data reporting rules further prescribe certain data fields that must be included in swap data reporting. *See* Appendix 1 to part 45; Appendix 1 to part 46. For all swaps subject to the Commission's jurisdiction, each counterparty must be identified by means of a single legal entity identifier (''LEI'') in all swap data reporting pursuant to parts 45 and 46. A reporting counterparty, as defined in Commission regulations 45.1 and 46.1, respectively, has obligations that include providing certain data to the SDR relating to the primary economic terms (''PET'') of the swap, including the LEI of the non-reporting counterparty.

[614] The Commission clarifies that the trading mandate under CEA section 2(h)(8)(A) is satisfied by trading on a registered DCM or SEF or a SEF that is exempt from registration.

[615] The Commission clarifies that the trading mandate under CEA section 2(h)(8)(A) is satisfied by trading on a registered FBOT.

[616] *See* the Proposed Guidance, 77 FR 41234–41235.

[617] *See id.* at 41234 n. 139, 41235.

linkage of the swaps covered by Large Trader Reporting to U.S. futures markets, the Commission believes that any non-U.S. clearing member that holds positions in such swaps that are significant enough to trigger routine reporting obligations is engaged in activities that have a direct and significant connection with activities in, or effect on, commerce of the United States. Consistent with the Proposed Guidance, the Commission's policy, in light of its interpretation of CEA section 2(i), is that any such non-U.S. clearing member should report all reportable positions to the Commission.[618]

Large Trader Reporting also establishes recordkeeping requirements for traders with significant positions in the covered physical commodity swaps. Given the vital role that Large Trader Reporting plays in ensuring that the Commission has access to comprehensive data regarding trading activity in swaps linked to U.S. futures, the Commission's policy, in light of its interpretation of CEA section 2(i), is that non-U.S. persons with positions that meet the prescribed recordkeeping thresholds should comply with the prescribed recordkeeping requirements. The Commission notes that traders, which are not swap dealers or clearing members with routine Large Trader Reporting obligations, may generally keep books and records regarding their transactions in the covered physical commodity swaps and produce them for inspection by the Commission in the record retention format that such traders have developed in the normal course of their business operations.

b. Swaps Where Each of The Counterparties Is Either a Guaranteed or Conduit Affiliate

In contrast to the Proposed Guidance, where a swap is between two non-registrants that are not U.S. persons, and each of the counterparties to the swap is a guaranteed or conduit affiliate,[619] the parties to the swap generally should be expected to comply with the Non-Registrant Requirements with respect to the transaction. However, where at least one of the parties to the swap is an ''affiliate conduit,'' the Commission would generally expect the parties to the swap only to comply with (to the extent that the Inter-Affiliate Exemption is elected), the conditions of the Inter-Affiliate Exemption, including the treatment of outward-facing swaps condition in Commission regulation 50.52(b)(4)(i). In addition, the part 43 real-time reporting requirements must be satisfied.

The Commission has not interpreted CEA section 2(i) so as to include a guaranteed or conduit affiliate in the interpretation of the term ''U.S. person'' solely because of the guarantee or affiliation. Where each of the counterparties to the swap are non-registrants that are guaranteed or conduit affiliates, the Commission believes that the risks to U.S. persons and to the U.S. financial system sufficiently increase so that the additional measure of applying the Non-Registrant Requirements to the swap is warranted (but with substituted compliance available, to the extent applicable).[620] The Commission notes that in the case of guarantees by U.S. persons, if there is a default by the non-U.S. person, the U.S. guarantor generally would be held responsible to settle the obligations. In the case of affiliate conduits, a non-U.S. affiliate could effectively operate as a conduit for the U.S. person, and could be used to execute swaps with counterparties in foreign jurisdictions, outside the Dodd-Frank Act regulatory regime.

Therefore, where a swap is between two non-registrants that are guaranteed or conduit affiliates, the Commission believes that the swap has a ''direct and significant connection with activities in, or effect on, commerce of the United States'' within the meaning of CEA section 2(i) so that certain Entity-Level and Transaction-Level Requirements would apply to the swap counterparties. Consistent with section 2(i), however, the Commission's policy generally is to make the parties to the swap eligible for substituted compliance (except with regard to Large Trader Reporting, and provided that SDR Reporting would be eligible for substituted compliance only if the Commission has direct access to all of the reported swap data elements that are stored at a foreign trade repository).

c. Swaps Where Neither or Only One of the Parties is a Guaranteed or Conduit Affiliate

With respect to swaps between two non-registrants where neither or only one party is a guaranteed or conduit affiliate, the Commission's policy is that the parties to the swap generally should not be expected to comply with the Non-Registrant Requirements, except as described below.

As discussed above, where a counterparty to a swap is a guaranteed or conduit affiliate, the risks to U.S. persons and to the U.S. financial system increase. In the case of guarantees by U.S. persons, if there is a default by the non-U.S. person, the U.S. guarantor would be held responsible to settle the obligations. In the case of affiliate conduits, a non-U.S. affiliate could effectively operate as a ''conduit'' for the U.S. person, and could be used to execute swaps with counterparties in foreign jurisdictions, outside the Dodd-Frank Act regulatory regime. Nevertheless, the Commission also recognizes that foreign jurisdictions may have an interest in regulating swaps between two non-registrants where both counterparties to the swap are non-U.S. persons. Therefore, consistent with international comity principles, the Commission would generally expect the parties to the swap only to comply with (to the extent that the Inter-Affiliate Exemption is elected), the conditions of the Inter-Affiliate Exemption, including the treatment of outward-facing swaps condition in Commission regulation 50.52(b)(4)(i), and Large Trader Reporting. The Commission believes that this policy strikes the right balance between U.S. interests in regulating such a swap and the interest of foreign regulators.

V. Appendix A—The Entity-Level Requirements

A. First Category of Entity-Level Requirements

The First Category of Entity-Level Requirements includes capital adequacy, chief compliance officer, risk management, and swap data recordkeeping (except certain aspects of swap data recordkeeping relating to complaints and sales materials).

1. Capital Adequacy

Section 4s(e)(2)(B) of the CEA specifically directs the Commission to set capital requirements for swap dealers and MSPs that are not subject to the capital requirements of U.S. prudential regulators (hereinafter referred to as ''non-bank swap dealers or

[618] To the extent that they transact in the physical commodity swaps covered by the Commission's Large Trader Reporting rules, non-U.S. clearing members also should maintain the records required by such rules.

[619] As noted above, this Guidance uses the term ''guaranteed or conduit affiliate'' to refer to a non-U.S. person that is guaranteed by a U.S. person or that is an affiliate conduit.

[620] The Commission proposed to interpret section 2(i) so that the Non-Registrant Requirements would not apply to swaps between two non-registrants (whether or not one or more counterparties was guaranteed by a U.S. person), with the exception of Large Trader Reporting. The Commission noted in the Proposed Guidance that it intended to review the issue of affiliate conduits. *See* Proposed Guidance, 77 FR 1234–41235.

MSPs'').[621] With respect to the use of swaps that are not cleared, these requirements must: ''(1) [h]elp ensure the safety and soundness of the swap dealer or major swap participant; and (2) [be] appropriate for the risk associated with the non-cleared swaps held as a swap dealer or major swap participant.'' [622] Pursuant to section 4s(e)(3), the Commission proposed regulations, which would require non-bank swap dealers and MSPs to hold a minimum level of adjusted net capital (*i.e.,* ''regulatory capital'') based on whether the non-bank swap dealer or MSP is: (i) also a FCM; (ii) not an FCM, but is a non-bank subsidiary of a bank holding company; or (iii) neither an FCM nor a non-bank subsidiary of a bank holding company.[623] The primary purpose of the capital requirement is to reduce the likelihood and cost of a swap dealer's or MSP's default by requiring a financial cushion that can absorb losses in the event of the firm's default.

2. Chief Compliance Officer

Section 4s(k) requires that each swap dealer and MSP designate an individual to serve as its chief compliance officer (''CCO'') and specifies certain duties of the CCO.[624] Pursuant to section 4s(k), the Commission adopted regulation 3.3, which requires swap dealers and MSPs to designate a CCO who would be responsible for administering the firm's compliance policies and procedures, reporting directly to the board of directors or a senior officer of the swap dealer or MSP, as well as preparing and filing with the Commission a certified report of compliance with the CEA. The chief compliance function is an integral element of a firm's risk management and oversight and the Commission's effort to foster a strong culture of compliance within swap dealers and MSPs.

3. Risk Management

Section 4s(j) of the CEA requires each swap dealer and MSP to establish internal policies and procedures designed to, among other things, address risk management, monitor compliance with position limits, prevent conflicts of interest, and promote diligent supervision, as well as maintain business continuity and disaster recovery programs.[625] The Commission adopted implementing regulations (23.600, 23.601, 23.602, 23.603, 23.605, and 23.606).[626] The Commission also adopted regulation 23.609, which requires certain risk management procedures for swap dealers or MSPs that are clearing members of a derivatives clearing organization (''DCO'').[627] Collectively, these requirements help to establish a robust and comprehensive internal risk management program for swap dealers and MSPs, which is critical to effective systemic risk management for the overall swaps market.

i. Swap Data Recordkeeping (Except Certain Aspects of Swap Data Recordkeeping Relating to Complaints and Sales Materials)

CEA section 4s(f)(1)(B) requires swap dealers and MSPs to keep books and records for all activities related to their business.[628] Sections 4s(g)(1) and (4) require swap dealers and MSPs to maintain trading records for each swap and all related records, as well as a complete audit trail for comprehensive trade reconstructions.[629] Pursuant to these provisions, the Commission adopted regulations 23.201and 23.203, which require swap dealers and MSPs to keep records including complete transaction and position information for all swap activities, including documentation on which trade information is originally recorded. Pursuant to regulation 23.203, records of swaps must be maintained for the duration of the swap plus 5 years, and voice recordings for 1 year, and records must be ''readily accessible'' for the first 2 years of the 5 year retention period. Swap dealers and MSPs also must comply with Parts 43, 45 and 46 of the Commission's regulations, which, respectively, address the data recordkeeping and reporting requirements for all swaps subject to the Commission's jurisdiction, including swaps entered into before the date of enactment of the Dodd-Frank Act (''pre-enactment swaps'') and swaps entered into on or after the date of enactment of the Dodd-Frank Act but prior to the compliance date of the swap data reporting rules (''transition swaps'').[630]

B. Second Category of Entity-Level Requirements

The Second Category of Entity-Level Requirements includes SDR Reporting, certain aspects of swap data recordkeeping relating to complaints and marketing and sales materials under Commission regulations 23.201(b)(3) and 23.201(b)(4) and Large Trader Reporting.

1. SDR Reporting

CEA section 2(a)(13)(G) requires all swaps, whether cleared or uncleared, to be reported to a registered SDR.[631] CEA section 21 requires SDRs to collect and maintain data related to swaps as prescribed by the Commission, and to

[621] *See* 7 U.S.C. 6s(e)(2)(B). Section 4s(e) of the CEA explicitly requires the adoption of rules establishing capital and margin requirements for swap dealers and MSPs, and applies a bifurcated approach that requires each swap dealer and MSP for which there is a U.S. prudential regulator to meet the capital and margin requirements established by the applicable prudential regulator, and each swap dealer and MSP for which there is no prudential regulator to comply with the Commission's capital and margin regulations. *See* 7 U.S.C. 6s(e). Further, systemically important financial institutions (''SIFIs'') that are not FCMs would be exempt from the Commission's capital requirements, and would comply instead with Federal Reserve Board requirements applicable to SIFIs, while nonbank (and non-FCM) subsidiaries of U.S. bank holding companies would calculate their Commission capital requirement using the same methodology specified in Federal Reserve Board regulations applicable to the bank holding company, as if the subsidiary itself were a bank holding company. The term ''prudential regulator'' is defined in CEA section 1a(39) as the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Farm Credit Administration, and the Federal Housing Finance Agency. *See* 7 U.S.C. 1a(39). In addition, in the proposed capital regulations for swap dealers and MSPs, the Commission solicited comment regarding whether it would be appropriate to permit swap dealers and MSPs to use internal models for computing market risk and counterparty credit risk charges for capital purposes if such models had been approved by a foreign regulatory authority and were subject to periodic assessment by such foreign regulatory authority. *See* Proposed Capital Requirements, 76 FR 27802.

[622] *See* 7 U.S.C. 6s(e)(3)(A).

[623] *See* 7 U.S.C. 6s(e). *See also* Proposed Capital Requirements, 76 FR 27802. ''The Commission's capital proposal for [swap dealers] and MSPs includes a minimum dollar level of $20 million. A non-bank [swap dealer] or MSP that is part of a U.S. bank holding company would be required to maintain a minimum of $20 million of Tier 1 capital as measured under the capital rules of the Federal Reserve Board. [A swap dealer] or MSP that also is registered as an FCM would be required to maintain a minimum of $20 million of adjusted net capital as defined under [proposed] section 1.17. In addition, an [swap dealer] or MSP that is not part of a U.S. bank holding company or registered as an FCM would be required to maintain a minimum of $20 million of tangible net equity, plus the amount of the [swap dealer's] or MSP's market risk exposure and OTC counterparty credit risk exposure.'' *See id.* at 27817.

[624] *See* 7 U.S.C. 6s(k).

[625] 7 U.S.C. 6s(j).

[626] *See* Final Swap Dealer and MSP Recordkeeping Rule, 77 FR 20128 (relating to risk management program, monitoring of position limits, business continuity and disaster recovery, conflicts of interest policies and procedures, and general information availability, respectively).

[627] Customer Documentation Rule, 77 FR 21278. Also, swap dealers must comply with Commission regulation 23.608, which prohibits swap dealers providing clearing services to customers from entering into agreements that would: (i) Disclose the identity of a customer's original executing counterparty; (ii) limit the number of counterparties a customer may trade with; (iii) impose counterparty-based position limits; (iv) impair a customer's access to execution of a trade on terms that have a reasonable relationship to the best terms available; or (v) prevent compliance with specified time frames for acceptance of trades into clearing.

[628] 7 U.S.C. 6s(f)(1)(B).

[629] 7 U.S.C. 6s(g)(1).

[630] 17 CFR part 46; Proposed Data Rules, 76 FR 22833.

[631] 7 U.S.C. 2(a)(13)(G).

make such data electronically available to particular regulators under specified conditions related to confidentiality.[632] Part 45 of the Commission's regulations (and Appendix 1 thereto) sets forth the specific swap data that must be reported to a registered SDR, along with attendant recordkeeping requirements; and part 46 addresses recordkeeping and reporting requirements for pre-enactment and transition swaps (''historical swaps''). The fundamental goal of the part 45 rules is to ensure that complete data concerning all swaps subject to the Commission's jurisdiction is maintained in SDRs where it will be available to the Commission and other financial regulators for fulfillment of their various regulatory mandates, including systemic risk mitigation, market monitoring and market abuse prevention. Part 46 supports similar goals with respect to pre-enactment and transition swaps and ensures that data needed by regulators concerning ''historical'' swaps is available to regulators through SDRs. Among other things, data reported to SDRs will enhance the Commission's understanding of concentrations of risks within the market, as well as promote a more effective monitoring of risk profiles of market participants in the swaps market. The Commission also believes that there are benefits that will accrue to swap dealers and MSPs as a result of the timely reporting of comprehensive swap transaction data and consistent data standards for recordkeeping, among other things. Such benefits include more robust risk monitoring and management capabilities for swap dealers and MSPs, which in turn will improve the monitoring of their current swaps market positions.

2. Swap Data Recordkeeping Relating to Complaints and Marketing and Sales Materials

CEA section 4s(f)(1) requires swap dealers and MSPs to ''make such reports as are required by the Commission by rule or regulation regarding the transactions and positions and financial condition of the registered swap dealer or major swap participant.'' [633] Additionally, CEA section 4s(h) requires swap dealers and MSPs to ''conform with such business conduct standards . . . as may be prescribed by the Commission by rule or regulation.'' [634] Pursuant to those authorities, the Commission promulgated final rules that set forth certain reporting and recordkeeping for swap dealers and MSPs.[635] Commission Regulation 23.201 states that ''[e]ach swap dealer and major swap participant shall keep full, complete, and systematic records of all activities related to its business as a swap dealer or major swap participant.'' Such records must include, among other things, ''[a] record of each complaint received by the swap dealer or major swap participant concerning any partner, member, officer, employee, or agent,'' [636] as well as ''[a]ll marketing and sales presentations, advertisements, literature, and communications.'' [637]

3. Physical Commodity Large Swaps Trader Reporting (Large Trader Reporting)

CEA section 4t [638] authorizes the Commission to establish a large trader reporting system for significant price discovery swaps (of which the economically equivalent swaps subject to the Commission's part 20 rules are a subset). Pursuant thereto, the Commission adopted its Large Trader Reporting rules (part 20 of the Commission regulations), which require routine reports from swap dealers, among other entities, that hold significant positions in swaps that are linked, directly or indirectly, to a prescribed list of U.S.-listed physical commodity futures contracts.[639] Additionally, Large Trader Reporting requires that swap dealers, among other entities, comply with certain recordkeeping obligations.

VI. Appendix B—The Transaction-Level Requirements

The Transaction-Level Requirements cover a range of Dodd-Frank requirements: some of the requirements more directly address financial protection of swap dealers (or MSPs) and their counterparties; others address more directly market efficiency and/or price discovery. Further, some of the Transaction-Level Requirements can be classified as Entity-Level Requirements and applied on a firm-wide basis across all swaps or activities. Nevertheless, in the interest of comity principles, the Commission believes that the Transaction-Level Requirements may be applied on a transaction-by-transaction basis.

A. Category A: Risk Mitigation and Transparency

1. Required Clearing and Swap Processing

Section 2(h)(1) of the CEA requires a swap to be submitted for clearing to a DCO if the Commission has determined that the swap is required to be cleared, unless one of the parties to the swap is eligible for an exception from the clearing requirement and elects not to clear the swap.[640] Clearing via a DCO mitigates the counterparty credit risk between swap dealers or MSPs and their counterparties.

Commission regulations implementing the first designations of swaps for required clearing were published in the **Federal Register** on December 13, 2012.[641] Under Commission regulation 50.2, all persons executing a swap that is included in a class of swaps identified under Commission regulation 50.4 must submit such swap to an eligible derivatives clearing organization (DCO) for clearing as soon as technologically practicable after clearing, but in any event by the end of the day of execution.

Regulation 50.4 establishes required clearing for certain classes of swaps. Currently, those classes include, for credit default swaps: Specified series of untranched North American CDX indices and European iTraxx indices; and for interest rate swaps: Fixed-to-floating swaps, basis swaps, forward rate agreements referencing U.S. Dollar, Euro, Sterling, and Yen, and overnight index swaps referencing U.S. Dollar, Euro, and Sterling. Each of the six classes is further defined in Commission regulation 50.4. Swaps that have the specifications identified in the regulation are required to be cleared and must be cleared pursuant to the rules of any eligible DCO unless an exception or exemption specified in the CEA or the Commission's regulations applies.

Generally, if a swap is subject to Section 2(h)(1)(A) of the CEA and part 50 of the Commission's regulations, it must be cleared through an eligible DCO, unless: (i) One of the counterparties is eligible for and elects

[632] 7 U.S.C. 24a.

[633] 7 U.S.C. 6s(f)(1).

[634] 7 U.S.C. 6s(h)(1). *See* 7 U.S.C. 6s(h)(3).

[635] Final Swap Dealer and MSP Recordkeeping Rule, 77 FR 20128.

[636] 17 CFR 23.201(b)(3)(i).

[637] 17 CFR 23.201(b)(4).

[638] 7 U.S.C. 6t.

[639] Large Trader Reporting for Physical Commodity Swaps, 76 FR 43851. The rules require routine position reporting by clearing organizations, as well as clearing members and swap dealers with reportable positions in the covered physical commodity swaps. The rules also establish recordkeeping requirements for clearing organizations, clearing members and swap dealers, as well as traders with positions in the covered physical commodity swaps that exceed a prescribed threshold. In general, the rules apply to swaps that are linked, directly or indirectly, to either the price of any of the 46 U.S.-listed physical commodity futures contracts the Commission enumerates (Covered Futures Contracts) or the price of the physical commodity at the delivery location of any of the Covered Futures Contracts.

[640] 7 U.S.C. 2(h)(1), (7).

[641] 77 FR 72284.

the End-User Exception under Commission regulation 50.50;[642] or (ii) both counterparties are eligible for and elect an Inter-Affiliate Exemption under Commission regulation 50.52. To elect either the end-user exception or the Inter-Affiliate Exemption, the electing party or parties and the swap must meet certain requirements set forth in the regulations.

Closely connected with the clearing requirement are the following swap processing requirements: (i) Commission regulation 23.506, which requires swap dealers and MSPs to submit swaps promptly for clearing; and (ii) Commission regulations 23.610 and 39.12, which establish certain standards for swap processing by DCOs and/or swap dealers and MSPs that are clearing members of a DCO.[643] Together, required clearing and swap processing requirements promote safety and soundness of swap dealers and MSPs, and mitigate the credit risk posed by bilateral swaps between swap dealers or MSPs and their counterparties.[644]

2. Margin and Segregation Requirements for Uncleared Swaps

Section 4s(e) of the CEA requires the Commission to set margin requirements for swap dealers and MSPs that trade in swaps that are not cleared.[645] The margin requirements ensure that outstanding current and potential future risk exposures between swap dealers and their counterparties are collateralized, thereby reducing the possibility that swap dealers or MSPs take on excessive risks without having adequate financial backing to fulfill their obligations under the uncleared swap. In addition, with respect to swaps that are not submitted for clearing, section 4s(l) requires that a swap dealer or MSP notify the counterparty of its right to request that funds provided as margin be segregated, and upon such request, to segregate the funds with a third-party custodian for the benefit of the counterparty. In this way, the segregation requirement enhances the protections offered through margining uncleared swaps and thereby provides additional financial protection to counterparties. The Commission is working with foreign and domestic regulators to develop and finalize appropriate regulations for margin and segregation requirements.

3. Trade Execution

Integrally linked to the clearing requirement is the trade execution requirement, which is intended to bring the trading of mandatorily cleared swaps that are made available to trade onto regulated exchanges or execution facilities. Specifically, section 2(h)(8) of the CEA provides that unless a clearing exception applies and is elected, a swap that is subject to a clearing requirement must be executed on a DCM or SEF, unless no such DCM or SEF makes the swap available to trade.[646] Commission regulations implementing the process for a DCM or SEF to make a swap available to trade were published in the **Federal Register** on June 4, 2013.[647] Under Commission regulations 37.10 and 38.12, respectively, a SEF or DCM may submit a determination for Commission review that a mandatorily cleared swap is available to trade based on enumerated factors. By requiring the trades of mandatorily cleared swaps that are made available to trade to be executed on an exchange or an execution facility—each with its attendant pre- and post-trade transparency and safeguards to ensure market integrity—the trade execution requirement furthers the statutory goals of financial stability, market efficiency, and enhanced transparency.

4. Swap Trading Relationship Documentation

CEA section 4s(i) requires each swap dealer and MSP to conform to Commission standards for the timely and accurate confirmation, processing, netting, documentation and valuation of swaps.[648] Pursuant thereto, Commission regulation 23.504(a) requires swap dealers and MSPs to ''establish, maintain and enforce written policies and procedures'' to ensure that the swap dealer or MSP executes written swap trading relationship documentation.[649] Under Commission regulation 23.504, the swap trading relationship documentation must include, among other things: all terms governing the trading relationship between the swap dealer or MSP and its counterparty; credit support arrangements; investment and re-hypothecation terms for assets used as margin for uncleared swaps; and custodial arrangements.[650] Further, the swap trading relationship documentation requirement applies to all swaps with registered swap dealers and MSPs. In addition, Commission regulation 23.505 requires swap dealers and MSPs to document certain information in connection with swaps for which exceptions from required clearing are elected.[651] A robust swap documentation standard may promote standardization of documents and transactions, which are key conditions for central clearing, and lead to other operational efficiencies, including improved valuation and risk management.

5. Portfolio Reconciliation and Compression

CEA section 4s(i) directs the Commission to prescribe regulations for the timely and accurate processing and netting of all swaps entered into by swap dealers and MSPs. Pursuant to CEA section 4s(i), the Commission adopted regulations (23.502 and 23.503), which require swap dealers and MSPs to perform portfolio reconciliation and compression, respectively, for all swaps.[652] Portfolio reconciliation is a post-execution risk management tool to ensure accurate confirmation of a swap's terms and to identify and resolve any discrepancies between counterparties regarding the valuation of the swap. Portfolio compression is a post-trade processing and netting mechanism that is intended to ensure timely, accurate processing and netting of swaps.[653] Regulation 23.503 requires all swap dealers and MSPs to participate in bilateral compression exercises and/or multilateral portfolio compression

[642] *See* End-User Exception to the Clearing Requirement for Swaps, 77 FR 42560 (Jul. 19, 2012).

[643] *See* Final Customer Documentation Rules, 77 FR 21278.

[644] *See* section IV.H, *supra,* regarding the application of required clearing rules to market participants that are not registered as swap dealers or MSPs, including the circumstances under which the parties to such swaps would be eligible for substituted compliance.

[645] *See* 7 U.S.C. 6s(e). *See also* Proposed Margin Requirements, 76 FR at 23733–23740. Section 4s(e) explicitly requires the adoption of rules establishing margin requirements for swap dealers and MSPs, and applies a bifurcated approach that requires each swap dealer and MSP for which there is a prudential regulator to meet the margin requirements established by the applicable prudential regulator, and each swap dealer and MSP for which there is no prudential regulator to comply with the Commission's margin regulations. In contrast, the segregation requirements in section 4s(1) do not use a bifurcated approach—that is, all swap dealers and MSPs are subject to the Commission's rule regarding notice and third party custodians for margin collected for uncleared swaps.

[646] *See* 7 U.S.C. 2(h)(8).

[647] 78 FR 33606.

[648] *See* 7 U.S.C. 6s(i).

[649] *See* Final Confirmation Rules, 77 FR 55904.

[650] The requirements under section 4s(i) relating to trade confirmations is a Transaction-Level Requirement. Accordingly, Commission regulation 23.504(b)(2) requires a swap dealer's and MSP's swap trading relationship documentation to include all confirmations of swaps, will apply on a transaction-by-transaction basis.

[651] *See* Final Confirmation Rules, 77 FR at 55964.

[652] *See id.*

[653] For example, the reduced transaction count may decrease operational risk as there are fewer trades to maintain, process, and settle.

exercises conducted by a third party.[654] The rule also requires policies and procedures for engaging in such exercises for uncleared swaps with non-swap dealers and non-MSPs upon request. Further, participation in multilateral portfolio compression exercises is mandatory for dealer-to-dealer trades.

6. Real-Time Public Reporting

Section 2(a)(13) of the CEA also directs the Commission to promulgate rules providing for the public availability of swap transaction and pricing data on a real-time basis.[655] In accordance with this mandate, the Commission promulgated part 43 of its regulations, which provide that all ''publicly reportable swap transactions'' must be reported and publicly disseminated, and which establish the method, manner, timing and particular transaction and pricing data that must be reported by parties to a swap transaction.[656] The real-time dissemination of swap transaction and pricing data supports the fairness and efficiency of markets and increases transparency, which in turn improves price discovery and decreases risk (*e.g.,* liquidity risk).[657]

7. Trade Confirmation

Section 4s(i) of the CEA [658] requires that each swap dealer and MSP must comply with the Commission's regulations prescribing timely and accurate confirmation of swaps. The Commission has adopted regulation 23.501, which requires, among other things, a timely and accurate confirmation of swap transactions (which includes execution, termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap) among swap dealers and MSPs by the end of the first business day following the day of execution.[659] Timely and accurate confirmation of swaps—together with portfolio reconciliation and compression—are important post-trade processing mechanisms for reducing risks and improving operational efficiency.[660]

8. Daily Trading Records

Pursuant to section CEA 4s(g), the Commission adopted regulation 23.202, which requires swap dealers and MSPs to maintain daily trading records, including records of trade information related to pre-execution, execution, and post-execution data that is needed to conduct a comprehensive and accurate trade reconstruction for each swap. The final rule also requires that records be kept of cash or forward transactions used to hedge, mitigate the risk of, or offset any swap held by the swap dealer or MSP.[661] Accurate and timely recordkeeping regarding all phases of a swap transaction can serve to greatly enhance a firm's internal supervision, as well as the Commission's ability to detect and address market or regulatory abuses or evasion.

B. Category B: External Business Conduct Standards

Pursuant to CEA section 4s(h), the Commission has adopted external business conduct rules, which establish business conduct standards governing the conduct of swap dealers and MSPs in dealing with their counterparties in entering into swaps.[662] Broadly speaking, these rules are designed to enhance counterparty protection by significantly expanding the obligations of swap dealers and MSPs towards their counterparties. Under these rules, swap dealers and MSPs will be required, among other things, to conduct due diligence on their counterparties to verify eligibility to trade, provide disclosure of material information about the swap to their counterparties, provide a daily mid-market mark for uncleared swaps and, when recommending a swap to a counterparty, make a determination as to the suitability of the swap for the counterparty based on reasonable diligence concerning the counterparty.

VII. Appendix C—Application of the Entity-Level Requirements to Swap Dealers and MSPs *

U.S. Swap Dealer or MSP (including an affiliate of a non-U.S. person). Also applies when acting through a foreign branch.[1]	Apply.
Non-U.S. Swap Dealer or MSP (including an affiliate of a U.S. person).	First Category:[2] Substituted Compliance. Second Category:[3] Apply for U.S. counterparties; Substituted Compliance for SDR reporting with non-U.S. counterparties that are not guaranteed or conduit affiliates; Substituted compliance (except for Large Trader Reporting) with non-U.S. counterparties.[4]

* The Appendices to the Guidance should be read in conjunction with the rest of the Guidance.

[1] Both Entity-Level and Transaction-Level Requirements are the ultimate responsibilities of the U.S.-based swap dealer or MSP.

[2] First Category is capital adequacy, Chief Compliance Officer, risk management, and swap data recordkeeping (except Commission regulations 23.201(b)(3) and (4)).

[3] Second Category is SDR Reporting, certain aspects of swap data recordkeeping relating to complaints and marketing and sales materials (Commission regulations 23.201(b)(3) and (4)), and Large Trader Reporting.

[4] Substituted compliance does not apply to Large Trader Reporting, *i.e.,* non-U.S. persons that are subject to part 20 would comply with it in the same way that U.S. persons comply. With respect to the SDR Reporting requirement, the Commission may make substituted compliance available only if direct access to swap data stored at a foreign trade repository is provided to the Commission.

[654] *See* 17 CFR 23.503(c); Confirmation NPRM, 75 FR 81519.

[655] *See* 7 U.S.C. 2(a)(13). *See also* Real-Time Reporting Rule, 77 FR 1183.

[656] Part 43 defines a ''publicly reportable swap transaction'' as: (i) Any swap that is an arm's-length transaction between two parties that results in a corresponding change in the market risk position between the two parties; or (ii) any termination, assignment, novation, exchange, transfer, amendment, conveyance, or extinguishing of rights or obligations of a swap that changes the pricing of a swap. *See* Real-Time Reporting Rule, 77 FR 1182. Additionally, the Commission adopted regulation 23.205, which directs swap dealers and MSPs to undertake such reporting and to have the electronic systems and procedures necessary to transmit electronically all information and data required to be reported in accordance with part 43. *See* Final Swap Dealer and MSP Recordkeeping Rule, 77 FR 20205.

[657] *See* Real-Time Reporting Rule, 77 FR 1183.

[658] 7 U.S.C. 6s(i).

[659] *See* Final Confirmation Rules, 77 FR 55904.

[660] In addition, the Commission notes that regulation 23.504(b)(2) requires that the swap trading relationship documentation of swap dealers and MSPs must include all confirmations of swap transactions.

[661] *See* Final Swap Dealer and MSP Recordkeeping Rule, 77 FR 20128.

[662] *See* 7 U.S.C. 6s(h). *See also* External Business Conduct Rules, 77 FR 9822–9829.

VIII. Appendix D—Application of the Category A Transaction-Level Requirements to Swap Dealers and MSPs *

(Category A includes (1) Clearing and swap processing; (2) Margining and segregation for uncleared swaps; (3) Trade Execution; (4) Swap trading relationship documentation; (5) Portfolio reconciliation and compression; (6) Real-time public reporting; (7) Trade confirmation; and (8) Daily trading records).**

	U.S. Person (other than Foreign Branch of U.S. Bank that is a Swap Dealer or MSP)	Foreign Branch of U.S. Bank that is a Swap Dealer or MSP	Non-U.S. Person Guaranteed by, or Affiliate Conduit [1] of, a U.S. Person	Non-U.S. Person *Not* Guaranteed by, and Not an Affiliate Conduit [1] of, a U.S. Person
U.S. Swap Dealer or MSP (including an affiliate of a non-3U.S. person).	Apply	Apply	Apply	Apply.
Foreign Branch of U.S. Bank that is a Swap Dealer or MSP.	Apply	Substituted Compliance.	Substituted Compliance.[2]	Substituted Compliance.[2]
Non-U.S. Swap Dealer or MSP (including an affiliate of a U.S. person).	Apply	Substituted Compliance.	Substituted Compliance.	Do Not Apply.

* The Appendices to the Guidance should be read in conjunction with the rest of the Guidance.

** Where one of the counterparties is electing the Inter-Affiliate Exemption, the Commission would expect the parties to the swap to comply with the conditions of the Inter-Affiliate Exemption, including the treatment of outward-facing swaps condition in Commission regulation 50.52(b)(4)(i).

[1] Factors that are relevant to the consideration of whether a non-U.S. person is an ''affiliate conduit'' include whether: (i) the non-U.S. person is majority-owned, directly or indirectly, by a U.S. person; (ii) the non-U.S. person controls, is controlled by, or is under common control with the U.S. person; (iii) the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third party(ies) for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s), and enters into offsetting swaps or other arrangements with such U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with third-party(ies) to its U.S. affiliates; and (iv) the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person. Other facts and circumstances also may be relevant.

[2] Under a limited exception, where a swap between the foreign branch of a U.S. swap dealer or U.S. MSP and a non-U.S. person (that is not a guaranteed or conduit affiliate) takes place in a foreign jurisdiction other than Australia, Canada, the European Union, Hong Kong, Japan, or Switzerland, the counterparties generally may comply only with the transaction-level requirements in the foreign jurisdiction where the foreign branch is located if the aggregate notional value of all the swaps of the U.S. swap dealer's foreign branches in such countries does not exceed 5% of the aggregate notional value of all of the swaps of the U.S. swap dealer, and the U.S. person maintains records with supporting information for the 5% limit and to identify, define, and address any significant risk that may arise from the non-application of the Transaction-Level Requirements.

NOTES:

[1] The swap trading relationship documentation requirement applies to all transactions with registered swap dealers and MSPs.

[2] Participation in multilateral portfolio compression exercises is mandatory for dealer to dealer trades.

IX. Appendix E—Application of the Category B Transaction-Level Requirements to Swap Dealers and MSPs *

(Category B is External Business Conduct Standards).

	U.S. Person (other than Foreign Branch of U.S. Bank that is a Swap Dealer or MSP)	Foreign Branch of U.S. Bank that is a Swap Dealer or MSP	Non-U.S. Person Guaranteed by, or Affiliate Conduit [1] of, a U.S. Person	Non-U.S. Person *Not* Guaranteed by, and Not an Affiliate Conduit [1] of, a U.S. Person
U.S. Swap Dealer or MSP (including an affiliate of a non-U.S. person)	Apply	Apply	Apply	Apply.
U.S. Swap Dealer or MSP (when it solicits and negotiates through a foreign subsidiary or affiliate).	Apply	Do Not Apply	Do Not Apply	Do Not Apply.
Foreign Branch of U.S. Bank that is a Swap Dealer or MSP.	Apply	Do Not Apply	Do Not Apply	Do Not Apply.
Non-U.S. Swap Dealer or MSP (including an affiliate of a U.S. person).	Apply	Do Not Apply	Do Not Apply	Do Not Apply.

*The Appendices to the Guidance should be read in conjunction with the rest of the Guidance.

[1] Factors that are relevant to the consideration of whether a non-U.S. person is an ''affiliate conduit'' include whether: (i) the non-U.S. person is majority-owned, directly or indirectly, by a U.S. person; (ii) the non-U.S. person controls, is controlled by, or is under common control with the U.S. person; (iii) the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third party(ies) for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s), and enters into offsetting swaps or other arrangements with such U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with third-party(ies) to its U.S. affiliates; and (iv) the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person. Other facts and circumstances also may be relevant.

X. Appendix F—Application of Certain Entity-Level and Transaction-Level Requirements to Non-Swap Dealer/Non-MSP Market Participants*

(The relevant Dodd-Frank requirements are those relating to: clearing, trade execution, real-time public reporting, Large Trader Reporting, SDR Reporting and swap data recordkeeping).**

	U.S. Person (including an affiliate of non-U.S. person)	Non-U.S. Person Guaranteed by, or Affiliate Conduit [1] of, a U.S. Person	Non-U.S. Person *Not* Guaranteed by, or Affiliate Conduit [1] of, by U.S. Person
U.S. Person (including an affiliate of non-U.S. person)	Apply	Apply	Apply.
Non-U.S. Person Guaranteed by, or Affiliate Conduit [1] of, a U.S. person.	Apply	Substituted Compliance.[2]	Do Not Apply.
Non-U.S. Person *Not* Guaranteed by, or Affiliate Conduit [1] of, U.S. Person.	Apply	Do Not Apply	Do Not Apply.

* The Appendices to the Guidance should be read in conjunction with the rest of the Guidance.

** Where one of the counterparties is electing the Inter-Affiliate Exemption, the Commission would generally expect the parties to the swap to comply with the conditions of the Inter-Affiliate Exemption, including the treatment of outward-facing swaps condition in Commission regulation 50.52(b)(4)(i).

[1] Factors that are relevant to the consideration of whether a non-U.S. person is an ''affiliate conduit'' include whether: (i) the non-U.S. person is majority-owned, directly or indirectly, by a U.S. person; (ii) the non-U.S. person controls, is controlled by, or is under common control with the U.S. person; (iii) the non-U.S. person, in the regular course of business, engages in swaps with non-U.S. third party(ies) for the purpose of hedging or mitigating risks faced by, or to take positions on behalf of, its U.S. affiliate(s), and enters into offsetting swaps or other arrangements with such U.S. affiliate(s) in order to transfer the risks and benefits of such swaps with third-party(ies) to its U.S. affiliates; and (iv) the financial results of the non-U.S. person are included in the consolidated financial statements of the U.S. person. Other facts and circumstances also may be relevant.

[2] Substituted compliance does not apply to Large Trader Reporting, *i.e.,* non-U.S. persons that are subject to part 20 would comply with it in the same way that U.S. persons comply. With respect to the SDR Reporting requirement, the Commission may permit substituted compliance only if direct access to swap data stored at a foreign trade repository is provided to the Commission.

Issued in Washington, DC, on July 17, 2013, by the Commission.

Melissa D. Jurgens,

Secretary of the Commission.

Appendices to Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations—Commission Voting Summary and Statements of Commissioners

Note: The following appendices do not constitute a part of the Interpretive Guidance and Policy Statement itself.

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton and Wetjen voted in the affirmative; Commissioner O'Malia voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations (Guidance) and the related phase-in exemptive order also being adopted today. With this Commission action another important step has been taken to make swaps market reform a reality.

This Guidance is being adopted just shy of the third anniversary of President Obama signing the Dodd-Frank Act, and that law was historic. It was an historic answer to an historic problem: the near collapse of the American economy driven, in part, by the unregulated derivatives marketplace. Congress and the President were clear in their intention to bring transparency to this marketplace, to lower risk to the public, and to ensure the regulation of swap dealers and major swap participants.

In 2008, when both the financial system and the financial regulatory system failed the public, Americans paid the price through the crisis with their jobs, their pensions, and their homes. We lost 8 million jobs in that crisis and thousands of businesses shuttered. The swaps market was central to the crisis and financial institutions operating complicated swaps businesses and offshore entities nearly toppled the economy. Congress responded. Americans are remarkably resilient—but the public really does expect us to learn from the lessons of the crisis, and to do everything possible to prevent this from happening to any of us again.

It's pretty straightforward, I think. Even though we oversee, here at the CFTC, a complex and sometimes difficult to understand market (my mom consistently asks me, ''Gary, what are swaps?''), the questions the American people are looking for us to answer are simple: Have we lowered risk? Have we brought transparency to these markets? Have we promoted competition and openness in these markets so that end users can get the greatest benefit when they seek to lower their risk and focus on what they do well—which is employing people, innovating and moving our economy forward? That is why reform matters.

Five years after the crisis and three years after Dodd-Frank passed, market participants are coming into compliance with the common sense reforms that Congress and the President laid out. Through Dodd-Frank and the rules that this agency has put in place, no longer will the markets be opaque and dark, and we will have transparency in the markets. In fact, throughout this year, for the first time, the public and regulators have benefitted from reporting to swap data repositories and reporting to the public. And later this year, starting actually in August, facilities called swap execution facilities will start so that the public can benefit from greater openness and competition before the transaction occurs. And by the end of this year, there are likely to be trade execution mandates for interest rate and credit derivative index products, as well.

Central clearing became required for the broader market earlier this year, with key phase in dates to come this Fall and Winter, as well. We have 80 swap dealers, and, yes, two major swap participants, now provisionally registered. As part of the responsibilities accompanying registration, they're responsible for sales practice, record keeping and other business conduct requirements that help lower the risk to the public.

Yesterday, we took another significant step when we and the European Commission announced a path forward regarding joint understandings regarding the regulation of cross border derivatives. I want to publicly thank Commissioner Michel Barnier, his Director General Jonathan Faull, and their staffs, the staffs at the European Securities Market Authority, and Steven Maijoor's leadership, for collaborating throughout the reform process. This was a significant step forward in harmonizing and giving clarity to the markets as to when there might be jurisdictional overlaps with regard to this reform.

Today, we are considering two important actions, the Guidance, as well as a related

phase-in exemptive order. And as you probably have heard me say before, the nature of modern finance is that financial institutions commonly set up hundreds, even thousands of legal entities around the globe. In fact, the U.S.'s largest banks each have somewhere between 2,000 and 3,000 legal entities around the globe. Some of them have hundreds of legal entities just in the Cayman Islands alone. We have to remind ourselves that the largest banks and institutions are global in nature, and when a run starts on any part of an overseas affiliate or branch of a modern financial institution, risk comes crashing right back to our shores.

Similarly, if it's an EU financial institution and it has some guaranteed affiliate in the U.S. or overseas that gets into trouble, that risk can flow back to their shores. That's why, together both we and Europe recognize the importance of covering guaranteed affiliates, whether they're guaranteed affiliates of a U.S. person or of an EU person.

There's no question to me, at least, that the words of Dodd-Frank addressed this (i.e., risk importation) when they said that a direct and significant connection with activities and/or effect on commerce in the United States covers these risks that may come back to us.

I want to publicly thank Chairman Barney Frank along with Spencer Bachus, Frank Lucas, and Collin Peterson, and their staffs for reaching out to the CFTC and the public to ask how to best address offshore risks that could wash back to our economy in Dodd-Frank.

In addition, we should not forget the actual events over the past several years that remind us of the risks to the U.S. that can be posed by offshore entities:

AIG nearly brought down the U.S. economy. Lehman Brothers had 3,300 legal entities, including a London affiliate that was guaranteed here in the U.S., and it had 130,000 outstanding swap transactions. Citigroup had structured investment vehicles that were set up in the Cayman Islands, run out of London, and yet were central to not one, but two bailouts of that institution. Bear Stearns, in 2007 had two sinking hedge funds that had to be bailed out by Bear Stearns—and, yes, those hedge funds were organized in the jurisdiction of the Cayman Islands.

More than a decade earlier, I was working in my position as Assistant Secretary of the United States Department of the Treasury. I found myself making a call from Connecticut to then Treasury Secretary Robert Rubin to report that Long Term Capital Management's $1.2 trillion swaps book was not only going to go down within a day or two, but that the business—that we thought was in Connecticut—was actually incorporated in the Cayman Islands as a PO Box facility.

Even last year, we had yet another reminder that branches of big U.S. banks can bring risk back to the US. Even though they were not the risks as large as I've just related, JPMorgan Chase's Chief Investment Office's credit default swaps were executed primarily in the U.K. branch.

Each of these examples demonstrated a direct and significant connection with activities and/or an effect on commerce in the United States. Congress knew this painful history when it provided the cross border provisions of swaps market reform. And as market participants asked the CFTC to provide interpretive guidance on Congress's word, I believe that we have had to keep this painful history in mind. Two and a half years ago, the CFTC started working on guidance, which was published for notice and comment in June 2012, and for which we sought further input on in December 2012. We have greatly benefitted from this public input. The Guidance the Commission will adopt today incorporates the public's input and, I think, appropriately interprets the cross border provisions of Dodd-Frank.

There are four areas that I think really are important:

First, the CFTC interprets the cross-border provisions to cover swaps between non U.S. swap dealers and guaranteed affiliates of U.S. Persons, as well as swaps between two guaranteed affiliates that are not swap dealers. The guidance does, as was proposed, recognize and embrace the concept of substituted compliance where there are comparable and comprehensive rules abroad. But the history of AIG, Lehman Brothers, Citigroup and the others, and of guaranteed affiliates, is a strong lesson that Congress knew when we were approaching these issues.

Second, the definition of U.S. person in this guidance captures offshore hedge funds and collective investment vehicles that have their principal place of business here in the U.S., or that are majority owned by U.S. persons. Addressing ourselves to guidance, and yet forgetting the lessons of Long Term Capital Management or Bear Stearns, is not in my opinion what Congress wanted.

Third, under the guidance, foreign branches, like the JPMorgan's U.K. branch, of U.S. swap dealers may also comply with Dodd-Frank through substituted compliance if they are appropriately ring-fenced—that is, they are truly branches where employees and the booking and the taxes are actually offshore in the foreign branch. The Guidance allows, if there are comparable and comprehensive regimes overseas and supervisory authorities overseas looking at those branches, that those branches can avail themselves to substituted compliance in the manner offshore guaranteed affiliates would.

Lastly, the guidance provides that swap dealers, foreign or U.S., transacting with U.S. persons (whether they be in New Jersey, Maryland, Michigan, Arkansas, Iowa—I have to get all the right states, recognizing where my fellow Commissioners come from) anywhere in the United States, must comply with Dodd-Frank's swap market reform. The guidance does provide, though, that U.S. Persons can meet international people anonymously, and not only on our exchanges called designated contract markets, but also on the new swap execution facilities, as well as foreign boards of trade. International parties trading on those platforms do not have to worry about whether those swaps might make them a swap dealer, or whether they need to worry about certain transaction level requirements. And I think that was important to maintain and promote the liquidity of these three very important types of platforms—foreign boards of trade, swap execution facilities, and designated contract markets.

In conclusion, I will be voting in support of the Guidance and the related phase-in exemptive order also being adopted today. I'll say more about the exemptive order in my statement of support for that document, but I think these are both critical steps for the Commission and swaps reform. They add to the approximately 56 final guidance and rules that this Commission has adopted. We're well over 90 percent through the various rule and guidance writing. And the markets are probably well towards half way implementing these reforms. I have a deep respect for how much work market participants are doing to come into compliance.

So now, 3 years after the passage of financial reform, and a full year after the Commission proposed guidance with regard to the cross border application of reform, it is time for reforms to properly apply to and cover those activities that, as identified by Congress in section 722(d) of the Dodd-Frank Act, have ''a direct and significant connection with activities in, or effect on, commerce of the United States.'' With the additional transitional phase-in period provided by this Order, it is now time for the public to get the full benefit of the transparency and the measures to reduce risk included in Dodd Frank reforms.

Appendix 3—Dissenting Statement of Commissioner Scott D. O'Malia

I respectfully dissent from the Commodity Futures Trading Commission's (the ''Commission'' or ''CFTC'') approval of its interpretive guidance and policy statement (''Guidance'') regarding the cross-border application of the swaps provisions of the Commodity Exchange Act (''CEA''), as well as from the Commission's approval of a related exemptive order (''Exemptive Order'').

When I voted in July 2012 to issue for public comment the proposed interpretive guidance and policy statement (''Proposed Guidance''),[1] I made clear that if I had been asked to vote on the Proposed Guidance as final, my vote would have been no. I then laid out my concerns with the Proposed Guidance, all relating to the Commission's unsound interpretation of section 2(i) of the CEA,[2] which governs the extraterritorial application of the CEA's swaps provisions. Regrettably, the Guidance fails to address these concerns and constitutes a regulatory overreach based on a weak foundation of thin statutory and legal authority.

Like the Proposed Guidance, the Guidance: (1) Fails to articulate a valid statutory foundation for its overbroad scope and inconsistently applies the statute to different activities; (2) crosses the line between interpretive guidance and rulemaking; and (3) gives insufficient consideration to international law and comity. These shortcomings are compounded by serious procedural flaws in the Commission's treatment of international harmonization and substituted compliance, as well as in its issuance of the Exemptive Order.

[1] Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act, 77 FR 41214 (July 12, 2012).

[2] 7 U.S.C. 1 *et seq.*

Lack of Statutory Foundation

Section 2(i) of the CEA [3] as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the ''Dodd-Frank Act'') [4] provides, in part, that the Commission's swap authority ''shall not apply'' to activities outside the United States unless those activities ''have a direct and significant connection with activities in, or effect on, commerce of the United States . . . .'' [5] This provision is clearly a limitation on the Commission's authority.[6] It follows that the Commission must properly articulate how and when the ''direct and significant'' standard is met in order to apply Commission rules to swap activities that take place outside of the United States.

The Guidance, however, fails to do so. Instead, it treats section 2(i) as a ready tool to expand authority rather than as a limitation. The statutory analysis section of the Guidance is insufficient to support the broad sweep of extraterritorial activities that the Guidance contemplates would fall under the Commission's jurisdiction, relying heavily on a comparison to somewhat similar statutory language whose wholly different context renders the comparison unpersuasive. The Guidance makes no mention of statutes that may be more analogous to the CEA, such as the securities or banking laws.[7] Because the ''direct and significant'' standard is never defined, the Guidance's attempts to link certain requirements imposed on market participants to the ''direct and significant'' standard do not establish the requisite jurisdictional nexus.[8]

I would also like to point out that CEA section 2(i) contains a second clause, which allows for the limited application of the Commission's swap rules to activities outside the United States when they violate the Commission's anti-evasion rules.[9] Pursuant to this clause, the Commission promulgated section 1.6 under Part 1 of its regulations.[10] Rather than relying on section 1.6 to address its concerns about evasion, the Commission chose simply to reference the same concerns in justifying its overbroad reach in the Guidance.

With such an unsound foundation for the Commission's extraterritorial authority under the ''direct and significant'' standard, I am not surprised that the Guidance often applies section 2(i) of the CEA inconsistently and arbitrarily. Examples of inconsistency abound.

For instance, just as with the Proposed Guidance, the Guidance does not provide a basis for its reasoning that all Transaction-Level Requirements described in the Guidance satisfy the ''direct and significant'' standard under section 2(i). As I stated in my concurrence to the Proposed Guidance, trade execution and real-time public reporting requirements, although important for transparency purposes, do not raise the same systemic risk concerns that clearing and margining for uncleared swaps do. The Guidance acknowledges this point, but does not go on to sufficiently explain why they should be, and are, treated equally. The Guidance also acknowledges that clearing and margining, because of their implications for systemic risk, could be classified as Entity-Level Requirements, but it does not explain why are they are not. The Guidance's failure to give meaning to the ''direct and significant'' standard in its discussion of these requirements is glaring.

Inconsistent application can also be seen within a specific Transaction-Level Requirement, for example reporting to swap data repositories (''SDRs''). The Guidance allows non-U.S. swap dealers (''SDs'') and major swap participants (''MSPs'') to utilize substituted compliance for SDR reporting of their swaps with non-U.S. counterparties, but it does not allow for substituted compliance for non-U.S. SD and MSPs' trades with U.S. counterparties. Again, the Commission fails here to give real meaning to ''direct and significant'' in order to adequately explain its reasoning for this distinction. The rationale is even weaker given the fact that substituted compliance is available for swaps with non-U.S. counterparties only under the condition that the Commission has direct access to the relevant data at the foreign trade repository. In either case, the Commission will have direct access to the relevant data, whether substituted compliance is available or not. This raises the question: if the outcome is the same, why is the distinction made? If it is different, the Guidance does not explain how or why—despite requiring data at foreign trade repositories to be essentially the same as data at domestic SDRs, before the Commission even contemplates substituted compliance for SDR reporting.

Yet another example of inconsistent application of section 2(i) involves the requirement of physical commodity large swaps trader reporting (''Large Trader Reporting''). In contrast to SDR reporting, the Guidance does not allow substituted compliance for Large Trader Reporting, even for swaps between a non-U.S. registrant and a non-U.S. counterparty. The Commission's flimsy rationale is that Large Trader Reporting involves data conversion to ''futures equivalent'' units, and that it would cost too much time and resources for the Commission to conduct this conversion on data that it could access in a foreign trade repository. Here again, the ''direct and significant'' standard is nowhere to be found. Moreover, the Commission overstates the burden of the ''futures equivalent'' conversion and, more generally, the significance of Large Trader Reporting in its oversight duties, while understating the availability of data collected through SDR reporting, with its eligibility for substituted compliance, to achieve the same regulatory objectives.

Interpretive Guidance Versus Rulemaking

The imposition of requirements on market participants raises another of my major concerns with the Guidance. I strongly disagree with the Commission's decision to issue its position on the cross-border application of its swaps regulations in the form of ''interpretive guidance'' instead of promulgating a legislative rule under the Administrative Procedure Act (''APA'').[11]

Simply putting the guise of ''guidance'' on this document does not change its content or consequences. Where agency action has the practical effect of binding parties within its scope, it has the force and effect of law, regardless of the name it is given.[12] Legally binding regulations that impose new obligations on affected parties—''legislative rules''—must conform to the APA.[13] On its face, the Guidance sets out standards that it contemplates will be regularly applied by staff to cross-border activities in the swaps markets. Market participants cannot afford to ignore detailed regulations imposed upon their activities that may result in enforcement or other penalizing action.[14] This point is underlined by the fact that, as I discuss below, Commission staff no-action letters have been issued in connection with compliance obligations that have essentially been imposed by the Guidance.[15] All of this leads to the logical conclusion that the Guidance has a practical binding effect and

[3] § 2(i).

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[5] § 2(i)(1).

[6] Stated another way, section 2(i)(1) may be read as the following: ''[The CEA's swaps provisions enacted by the Dodd-Frank Act] *may* apply to activities outside the United States *only if* those activities have a direct and significant connection with activities in, or effect on, commerce of the United States.''

[7] For a recent statutory analysis of the extraterritorial application of the Securities and Exchange Act of 1934, *see Morrison* v. *Nat'l Australia Bank,* 561 U.S. ____ (2010).

[8] *See Appalachian Power Co.* v. *Envtl. Prot. Agency,* 208 F.3d 1015, 1027 (D.C. Cir. 2000) (vacating agency guidance interpreting statutory language with practical binding effect because it did not define subparts of the interpreted term and should have been promulgated as a legislative rule under the APA).

[9] 7 U.S.C. 2(i)(2) ([The CEA's swaps provisions enacted by the Dodd-Frank Act] ''shall not apply to activities outside the United States unless those activities . . . contravene such rules or regulations as the Commission may prescribe or promulgate as are necessary or appropriate to prevent the evasion of any provision of [the CEA enacted by the Dodd-Frank Act]'').

[10] 17 CFR 1.6.

[11] 5 U.S.C. 551 *et seq.*

[12] *See Gen. Elec. Co.* v. *Envtl. Prot. Agency,* 290 F.3d 377, 380 (D.C. Cir. 2002) (finding that a guidance document is final agency action); *Appalachian Power,* 208 F.3d at 1020–21.

[13] *See Chrysler Corp.* v. *Brown,* 441 U.S. 281, 302–03 (1979) (agency rulemaking with the force and effect of law must be promulgated pursuant to the procedural requirements of the APA).

[14] ''A document will have practical binding effect before it is actually applied if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences . . . .'' *Gen. Elec.,* 290 F.3d at 383 (quoting Anthony, Robert A., *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?,* 41 Duke L.J. 1311 (1992)) (vacating an agency's guidance document that the court found to have practical binding effect and where procedures under the APA were not followed).

[15] A no-action letter is issued by a division of the Commission and states that, for the reasons and under the conditions described therein, it will not recommend that the Commission commence an enforcement action against an entity or group of entities for failure to comply with obligations imposed by the Commission.

should have been promulgated as a legislative rule under the APA.

There are important policy and legal considerations that weigh strongly in support of rulemaking in accordance with the APA. Not only do the safeguards enacted by Congress in the APA ensure fair notice and public participation, they help to ensure reasoned decision-making and accountability. In addition, the APA requires that courts take a ''hard look'' at agency action.[16]

By issuing ''interpretive guidance'' instead of rulemaking, the Commission has also avoided analyzing the costs and benefits of its actions pursuant to section 15(a) of the CEA,[17] because the CEA requires the Commission to consider costs and benefits only in connection with its promulgation of regulations and orders. Compliance with the Commission's swaps regulations entails significant costs for market participants. Avoiding cost-benefit analysis by labeling the document as guidance is unacceptable.

In my concurrence to the Proposed Guidance, I suggested that the Commission should at least prepare a report analyzing the costs attributable to the breadth of the Commission's new authority under CEA section 2(i). I am disappointed, but not surprised, that the Commission has not taken up my suggestion.

Insufficient Consideration of Principles of International Comity

Also in my concurrence to the Proposed Guidance, I pointed out that the Commission's approach gave insufficient consideration to principles of international comity. The Guidance suffers from the same shortcoming.

The Commission does describe principles of international comity in the Guidance, as it did in the Proposed Guidance. However, mere citation is meaningless if unaccompanied by adherence. With an interpretation of section 2(i) that essentially views the Commission's jurisdiction as boundless, roping in all transactions with U.S. persons regardless of the location or the regulations that foreign regulators may have in place, the reality is that the Commission's approach is unilateral and does not give adequate consideration to comity principles.

These principles are crucial given the global, interconnected nature of today's swaps markets. Properly considering these principles—in addition to indicating respect for the international system and the legitimate interests of other jurisdictions—strengthens, not weakens, the Commission's ability to effectively regulate swaps markets.

On the Path Forward to Harmonization, But a Flawed Process

In order to implement principles of international comity and develop a harmonized global regulatory system that is both effective and efficient, I have consistently called for meaningful cooperation with foreign regulators. I initially did so in my concurrence to the Proposed Guidance, and the necessity of greater collaboration was subsequently driven home by the number and tone of comment letters on the Proposed Guidance submitted by foreign regulators.[18] Then, when the Commission finalized a cross-border exemptive order last December with an expiration date of July 12,[19] in my concurring statement I again urged the Commission and foreign regulators to engage in meaningful, substantive discussions.

I am pleased that over the past several months, this engagement has taken place and progress has been made toward harmonization. However, we are not where we need to be: many outstanding issues and questions remain, from data privacy concerns, to the implications of other jurisdictions still finalizing their regulations, to a lack of a clear, consistent and transparent framework for substituted compliance. It would have made sense for these issues to be addressed in the Guidance—but they are not. The looming July 12 expiration of the December exemptive order and the resulting time crunch cannot reasonably be cited as the reason for this failure, because July 12 is an artificial date; it could have been pushed back in order to reach the right outcome with the right process.

Instead, while we are moving toward a workable outcome on harmonization, the process by which we are getting there is patently unacceptable. The most glaring example of this flawed process is this week's publication of a Commission staff no-action letter allowing substituted compliance for certain of the Transaction-Level Requirements.[20] It boggles the mind to think that a staff letter issued by a single division, with no input from the Commission, would be used as the vehicle for addressing such a major issue.[21] Making matters worse, this no-action letter is outside the scope of a forthcoming Commission decision regarding the comparability of European rules. And the relief is not time-limited, thereby creating an effect similar to a rulemaking. Consequently, this indefinite exclusion not only preemptively overrides a Commission decision, but it also seems to provide relief beyond that contemplated by the Guidance, which calls for a re-evaluation of all substituted compliance determinations within four years of the initial determination.

Unfortunately, this is not the first instance in recent times of staff no-action letters being used to issue Commission policy. Not only are they an improper tool to get around formal Commission action, their prolific use is a reflection of the ad-hoc, last-minute approach that has been far too prevalent lately at the Commission. I cannot emphasize this enough: the Commission must stop this approach and get back to issuing policy in a more formal, open and transparent manner.

Substituted Compliance

In my discussions with fellow regulators abroad and international regulatory bodies, it is clear that there are varying degrees of reforms being developed and implemented in respective jurisdictions: some are comparable to U.S. regulations and some are less stringent, but there are some that exceed the Commission's own requirements. I would have preferred the Commission to take the past year following the release of the Proposed Guidance to engage our international colleagues and to involve the International Organization of Securities Commissions (''IOSCO'') in order to resolve the issue of harmonizing our rules. Under this approach, we could finalize our guidance upon completion of the international harmonization process, allowing us to take into account any shortcomings in that process. Instead, we

[16] The ''arbitrary and capricious'' standard of review of agency action under the APA is a rationality analysis also known as the hard-look doctrine:

Under the leading formulation of this doctrine, ''the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.' '' The court ''consider[s] whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'' In addition, the agency may not ''entirely fail[ ] to consider an important aspect of the problem,'' may not ''offer[ ] an explanation for its decision that runs counter to the evidence before the agency,'' nor offer an explanation that is ''so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'' The agency must also relate the factual findings and expected effects of the regulation to the purposes or goals the agency must consider under the statute as well as respond to salient criticisms of the agency's reasoning.

Stack, Kevin M., *Interpreting Regulations,* 111 Mich. L. Rev. 355, 378–79 (2012) (internal citations omitted).

[17] 7 U.S.C. 19(a).

[18] The Commission received comment letters from, among others: Jonathan Faull, European Commission; Steven Maijoor, European Securities and Markets Authority; David Lawton and Stephen Bland, UK Financial Services Authority; Pierre Moscovici, France Ministry of Economy and Finance, Christian Noyer, Autorite de controle prudential, and Jacques Delmas-Marsalet, Autorite des marches financiers; Patrick Raaflaub and Mark Branson, Swiss Financial Market Supervisory Authority; Masamichi Kono, Japan Financial Services Agency, and Hideo Hayakawa, Bank of Japan; K.C. Chan, Financial Services and Treasury Bureau of the Hong Kong Special Administrative Region; Belinda Gibson, Australian Securities and Investments Commission, Malcolm Edey, Reserve Bank of Australia, Arthur Yuen, Hong Kong Monetary Authority, Keith Lui, Hong Kong Securities and Futures Commission, and Teo Swee Lian, Monetary Authority of Singapore. These and all public comment letters on the Proposed Guidance are available at: *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1234&ctl00_ctl00_cphContentMain_MainContent_gvCommentList.*

[19] Final Exemptive Order Regarding Compliance With Certain Swap Regulations, 78 FR 858 (January 7, 2013). The document was adopted by the Commission in December 2012 and published in the **Federal Register** in January 2013.

[20] No-Action Relief for Registered Swap Dealers and Major Swap Participants from Certain Requirements under Subpart I of Part 23 of Commission Regulations in Connection with Uncleared Swaps Subject to Risk Mitigation Techniques under EMIR, CFTC Letter No. 13–45 (July 11, 2013).

[21] I have set forth in note 18 some of the comment letters that the Commission has received from foreign supervisors and regulators. By allowing substituted compliance to be addressed through a no-action letter, is the Commission implying that, *e.g.,* the Bank of Japan should accede to, *e.g.,* decisions of the CFTC Division of Swap Dealer and Intermediary Oversight? If so, I find such implication inappropriate.

have chosen the reverse order: to impose statutorily weak guidance, with all its no-action riders and exemptions, with only the promise of further negotiations with our foreign counterparts.

Given the way the Commission has proceeded up to this point, it is my hope that the harmonization work lying ahead will be undertaken in a more transparent manner and not done through the abused no-action process that lacks any formal Commission process or oversight. Further, I hope that the process of substituted compliance will offer the opportunity for other regulatory bodies to engage directly with the full Commission, so that we can better understand how our rules and theirs will work and can minimize the likelihood of regulatory retaliation and inconsistent, duplicative, or conflicting rules. I believe the Commission has worked too hard to develop principles and standards that will encourage greater transparency, open access to clearing and trading and improved market data to let them go to waste due to a lack of global regulatory harmonization.

I want to work with other home country regulators to ensure there is not an opportunity for entities to exploit regulatory loopholes. The stark reality is that this Commission is not the global regulatory authority and does not have the resources to support such a mission. Therefore, our best and most effective solution is to engage in a fully transparent discussion on substituted compliance and to do so immediately.

Exemptive Order

In an effort to mitigate the broad reach of the Guidance and accommodate its last-minute finalization, and in a moment of humility, the Commission has agreed to delay the application of certain elements of the Commission's swaps regulations with its approval of the Exemptive Order. The Exemptive Order provides relief ranging from 75 days (for application of the expanded U.S. person definition, for example) to December 21, 2013 (for Entity-Level and Transaction-Level Requirements for non-U.S. SDs and MSPs in certain jurisdictions). The Commission is issuing the Exemptive Order pursuant to section 4(c) of the CEA.[22]

Even though the Exemptive Order goes into effect immediately, the Commission has included a post hoc 30-day comment period. I support the additional time that the Exemptive Order provides for market participants to comply with the Commission's last-minute Guidance, but I cannot support a final order that blatantly ignores the APA-mandated comment periods for Commission action, especially when I advocated for a relief package that would have provided for public comment over a month ago.[23]

Additional Concerns

In addition to the above, the Guidance leaves me concerned in a number of other areas. I am concerned about whether the definition of U.S. person contained herein provides the necessary clarity for market participants, particularly as its enumerated prongs are explicitly deemed to form a non-exhaustive list. I question whether the Commission has done enough to harmonize its cross-border approach with that of the Securities and Exchange Commission (which is being issued through notice-and-comment rulemaking instead of interpretive guidance, I should note), in particular with regard to the definitions of U.S. person and foreign branches. I also am concerned about whether the Guidance creates an uneven playing field for U.S. firms, which would be a plainly unacceptable outcome to me. I am concerned that the Guidance is overlapping, duplicative, and perhaps even contradictory with other provisions in the Dodd-Frank Act that mitigate systemic risk and allocate responsibility for administering its complex and comprehensive regulatory regime to multiple agencies under Title I, Title II, and even within Title VII.[24] In addition, I am concerned that the Guidance practically ignores the hugely important matter of protecting customer funds, specifically in connection with bankruptcies, which has critical cross-border implications as vividly demonstrated by the recent collapse of MF Global.[25] Finally, I am concerned about whether in overreaching to rope in entities into U.S. jurisdiction that would more appropriately be regulated elsewhere pursuant to an effective system of substituted compliance, the Guidance will have the perverse effect of creating more risk to the U.S. system and more risk to U.S. taxpayers.

Conclusion

For an administrative agency, good government combines good substance—based on a faithful, appropriate reading of the guiding statute—and good process. The Guidance falls woefully short on both counts. Therefore, I respectfully dissent from the decision of the Commission to approve the Guidance and Exemptive Order for publication in the **Federal Register**.

[FR Doc. 2013–17958 Filed 7–25–13; 8:45 am]

BILLING CODE 6351–01–P

[22] Section 4(c) of the CEA grants the Commission the authority to ''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). . . .'' 7 U.S.C. 6(c). Section 4(a) applies to ''any person to offer to enter into, to enter into, to execute, to confirm the execution of, or to conduct any office or business anywhere in the United States, its territories or possessions, for the purpose of soliciting, or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery (other than a contract which is made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories or possessions). . . .'' 7 U.S.C. 6(a).

[23] The Exemptive Order claims, unconvincingly, that it falls under a good-cause exception to notice-and-comment requirements provided for by the APA under section 553(b)(B): ''*Except when notice and hearing is required by statute,* this subsection does not apply . . . (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(B) (emphasis added). However, section 4(c) of the CEA clearly provides that the Commission may grant exemptive relief only by ''rule, regulation, or order *after notice and opportunity for hearing*'' (emphasis added). 7 U.S.C. 6(c). The APA further provides under section 559 that it does not ''limit or repeal additional requirements imposed by statute or otherwise recognized by law.'' 5 U.S.C. 559. The CEA also grants emergency powers to the Commission under exigent circumstances. *See, e.g.,* 7 U.S.C. 12a(9). In addition, courts have narrowly construed the good-cause exception and placed the burden of proof on the agency. *See Tenn. Gas Pipeline Co.* v. *Fed. Energy Regulatory Comm'n,* 969 F.2d 1141 (D.C. Cir. 1992); *Guardian Fed. Sav. & Loan Ass'n* v. *Fed. Sav. & Loan Ins. Corp.,* 589 F.2d 658, 663 (D.C. Cir. 1978).

[24] *See, e.g.,* 7 U.S.C. 6s(d)(2) (''The Commission may not prescribe rules imposing prudential requirements on swap dealers or major swap participants for which there is a prudential regulator.''); 7 U.S.C. 6b–1(b) (''The prudential regulators shall have exclusive authority to enforce the provisions of section 4s(e) with respect to swap dealers or major swap participants for which they are the prudential regulator.'')

[25] In a recent op-ed article James Giddens, the bankruptcy trustee for MF Global's U.S.-registered entities, points out that serious concerns regarding the harmonization, or lack thereof, of bankruptcy regimes were identified during the resolution of Lehman Brothers in 2008 (he was then the liquidation trustee for Lehman Brothers's U.S. broker-dealer), only for similar failings to appear with MF Global. He urges clearer and more consistent cross-border rules regarding the protection of customer money in advance of any future multinational financial company meltdown. Giddens, James, *How to Avoid the Next MF Global Surprise: Change Cross-Border Rules to Stop Raids on U.S. Customer Accounts,* Wall St. J., July 9, 2013.

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Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 20

Migratory Bird Hunting; Proposed Frameworks for Early-Season Migratory Bird Hunting Regulations; Notice of Meetings; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

[Docket No. FWS–HQ–MB–2013–0057; FF09M21200–134–FXMB1231099BPP0]

RIN 1018–AY87

Migratory Bird Hunting; Proposed Frameworks for Early-Season Migratory Bird Hunting Regulations; Notice of Meetings

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; supplemental.

SUMMARY: The U.S. Fish and Wildlife Service (hereinafter Service or we) is proposing to establish the 2013–14 early-season hunting regulations for certain migratory game birds. We annually prescribe frameworks, or outer limits, for dates and times when hunting may occur and the maximum number of birds that may be taken and possessed in early seasons. Early seasons may open as early as September 1, and include seasons in Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands. These frameworks are necessary to allow State selections of specific final seasons and limits and to allow recreational harvest at levels compatible with population status and habitat conditions. This proposed rule also provides the final regulatory alternatives for the 2013–14 duck hunting seasons.

DATES: *Comments:* You must submit comments on the proposed early-season frameworks by August 5, 2013.

Meetings: The Service Migratory Bird Regulations Committee (SRC) will meet to consider and develop proposed regulations for late-season migratory bird hunting and the 2013 spring/summer migratory bird subsistence seasons in Alaska on July 31 and August 1, 2013. All meetings will commence at approximately 8:30 a.m.

ADDRESSES: *Comments:* You may submit comments on the proposals by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–HQ–MB–2013–0057.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–HQ–MB–2013–0057; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will not accept emailed or faxed comments. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

Meetings: The SRC will meet in room 200 of the U.S. Fish and Wildlife Service's Arlington Square Building, 4401 N. Fairfax Dr., Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Ron W. Kokel, U.S. Fish and Wildlife Service, Department of the Interior, MS MBSP–4107–ARLSQ, 1849 C Street NW., Washington, DC 20240; (703) 358–1714.

SUPPLEMENTARY INFORMATION:

Regulations Schedule for 2013

On April 9, 2013, we published in the **Federal Register** (78 FR 21200) a proposal to amend 50 CFR part 20. The proposal provided a background and overview of the migratory bird hunting regulations process, and addressed the establishment of seasons, limits, and other regulations for hunting migratory game birds under §§ 20.101 through 20.107, 20.109, and 20.110 of subpart K. Major steps in the 2013–14 regulatory cycle relating to open public meetings and **Federal Register** notifications were also identified in the April 9 proposed rule.

Further, we explained that all sections of subsequent documents outlining hunting frameworks and guidelines were organized under numbered headings. Those headings are:

1. Ducks
   A. General Harvest Strategy
   B. Regulatory Alternatives
   C. Zones and Split Seasons
   D. Special Seasons/Species Management
   i. September Teal Seasons
   ii. September Teal/Wood Duck Seasons
   iii. Black ducks
   iv. Canvasbacks
   v. Pintails
   vi. Scaup
   vii. Mottled ducks
   viii. Wood ducks
   ix. Youth Hunt
   x. Mallard Management Units
   xi. Other
2. Sea Ducks
3. Mergansers
4. Canada Geese
   A. Special Seasons
   B. Regular Seasons
   C. Special Late Seasons
5. White-fronted Geese
6. Brant
7. Snow and Ross's (Light) Geese
8. Swans
9. Sandhill Cranes
10. Coots
11. Moorhens and Gallinules
12. Rails
13. Snipe
14. Woodcock
15. Band-tailed Pigeons
16. Doves
17. Alaska
18. Hawaii
19. Puerto Rico
20. Virgin Islands
21. Falconry
22. Other

Subsequent documents will refer only to numbered items requiring attention. Therefore, it is important to note that we will omit those items requiring no attention, and remaining numbered items will be discontinuous and appear incomplete.

On June 14, 2013, we published in the **Federal Register** (78 FR 35844) a second document providing supplemental proposals for early- and late-season migratory bird hunting regulations. The June 14 supplement also provided detailed information on the 2013–14 regulatory schedule and announced the SRC and Flyway Council meetings.

This document, the third in a series of proposed, supplemental, and final rulemaking documents for migratory bird hunting regulations, deals specifically with proposed frameworks for early-season regulations and the regulatory alternatives for the 2013–14 duck hunting seasons. It will lead to final frameworks from which States may select season dates, shooting hours, and daily bag and possession limits for the 2013–14 season.

We have considered all pertinent comments received through June 22, 2013, on the April 9 and June 14, 2013, rulemaking documents in developing this document. In addition, new proposals for certain early-season regulations are provided for public comment. Comment periods are specified above under **DATES**. We will publish final regulatory frameworks for early seasons in the **Federal Register** on or about August 16, 2013.

Service Migratory Bird Regulations Committee Meetings

Participants at the June 19–20, 2013, meetings reviewed information on the current status of migratory shore and upland game birds and developed 2013–14 migratory game bird regulations recommendations for these species plus regulations for migratory game birds in Alaska, Puerto Rico, and the U.S. Virgin Islands; special September waterfowl seasons in designated States; special sea duck seasons in the Atlantic Flyway; and extended falconry seasons. In addition, we reviewed and discussed preliminary information on the status of waterfowl.

Participants at the previously announced July 31–August 1, 2013, meetings will review information on the current status of waterfowl and develop

recommendations for the 2013–14 regulations pertaining to regular waterfowl seasons and other species and seasons not previously discussed at the early-season meetings. In accordance with Department of the Interior policy, these meetings are open to public observation and you may submit comments on the matters discussed.

Population Status and Harvest

The following paragraphs provide preliminary information on the status of waterfowl and information on the status and harvest of migratory shore and upland game birds excerpted from various reports. For more detailed information on methodologies and results, you may obtain complete copies of the various reports at the address indicated under **FOR FURTHER INFORMATION CONTACT** or from our Web site at *http://www.fws.gov/migratorybirds/NewsPublicationsReports.html.*

Waterfowl Breeding and Habitat Survey

Federal, provincial, and State agencies conduct surveys each spring to estimate the size of waterfowl breeding populations and to evaluate the conditions of the habitats. These surveys are conducted using fixed-wing aircraft, helicopters, and ground crews and encompass principal breeding areas of North America, covering an area over 2.0 million square miles. The traditional survey area comprises Alaska, Canada, and the northcentral United States, and includes approximately 1.3 million square miles. The eastern survey area includes parts of Ontario, Quebec, Labrador, Newfoundland, Nova Scotia, Prince Edward Island, New Brunswick, New York, and Maine, an area of approximately 0.7 million square miles.

Overall, despite a delayed spring, habitat conditions during the 2013 Waterfowl Breeding Population and Habitat Survey were improved or similar to last year in many areas due to abundant winter or spring precipitation, with the exception of eastern Canada, the northeast United States, and portions of Montana and the Dakotas. The total pond estimate (Prairie Canada and United States combined) was 6.9±0.2 million. This was 24 percent higher than the 2012 estimate of 5.5±0.2 million ponds, and 35 percent higher than the long-term average (1974–2012) of 5.1±0.03 million ponds.

Traditional Survey Area (U.S. and Canadian Prairies and Parklands)

Spring was much delayed across the traditional survey area. Extreme southern Saskatchewan, southern Manitoba, and North Dakota received abundant spring rainfall; most of this moisture came too late for the majority of waterfowl breeding this year, but could benefit habitats into 2014. The majority of the Canadian prairies had above-average winter precipitation; however, a poor frost seal was produced and little runoff was observed. The Parklands have improved from 2012, and the boreal region has benefitted from average annual precipitation. Most of the Canadian portion of the traditional survey area was rated as good or excellent this year, in contrast to the dry conditions last year across northern Saskatchewan and Alberta. The 2013 estimate of ponds in Prairie Canada was 4.6±0.2 million. This was 17 percent higher than last year's estimate (3.9±0.1 million) and 32 percent higher than the 1961–2012 average (3.5±0.03 million).

The U.S. prairies received record-breaking snowfall in April; however, below-average early spring precipitation in parts of Montana and the eastern Dakotas resulted in fair to poor habitat conditions. The 2013 estimate of ponds in the north-central United States was 2.3±0.1 million, which was 41 percent higher than last year's estimate (1.7±0.1 million) and 42 percent higher than the 1974–2012 average (1.7±0.02 million).

Eastern Survey Area

Spring temperatures in the eastern survey area were closer to normal than in the traditional survey area. Winter precipitation in southwestern Ontario, southern Quebec, and most of the Maritimes was below average. Eastern Canada experienced near record low winter precipitation but improved to the north and east into the Maritimes. Much of eastern Canada experienced excessive late-spring rains, which may have inhibited waterfowl production. Habitat conditions ranged from fair, in Maine and the southern Maritimes, to good in Newfoundland and Labrador.

Status of Teal

The estimate of blue-winged teal from the traditional survey area is 7.7 million. This count represents a 16 percent decrease from 2012, and is 60 percent above the 1955–2012 average.

Sandhill Cranes

Compared to increases recorded in the 1970s, annual indices to abundance of the Mid-Continent Population (MCP) of sandhill cranes have been relatively stable since the early 1980s. The preliminary spring 2013 index for sandhill cranes in the Central Platte River Valley (CPRV), Nebraska, uncorrected for visibility bias, was 756,217 birds. This estimate is significantly higher than the previous 5 years, which is likely due to late winter weather in North and South Dakota delaying any migration from the CPRV. The photo-corrected, 3-year average for 2010–12 was 504,658, which is above the established population-objective range of 349,000–472,000 cranes. All Central Flyway States, except Nebraska, allowed crane hunting in portions of their States during 2012–13. An estimated 7,239 hunters participated in these seasons, which was 7 percent lower than the number that participated in the previous season. Hunters harvested 14,887 MCP cranes in the U.S. portion of the Central Flyway during the 2012–13 seasons, which was 3 percent lower than the harvest for the previous year and 2 percent higher than the long-term average. The retrieved harvest of MCP cranes in hunt areas outside of the Central Flyway (Arizona, Pacific Flyway portion of New Mexico, Minnesota, Alaska, Canada, and Mexico combined) was 9,683 during 2012–13. The preliminary estimate for the North American MCP sport harvest, including crippling losses, was 27,966 birds, which was a 16 percent decrease from the previous year's estimate. The long-term (1982–2012) trends for the MCP indicate that harvest has been increasing at a higher rate than population growth.

The fall 2012 pre-migration survey for the Rocky Mountain Population (RMP) resulted in a count of 15,417 cranes. The 3-year average was 17,992 sandhill cranes, which is within the established population objective of 17,000–21,000 for the RMP. Hunting seasons during 2012–13 in portions of Arizona, Idaho, Montana, New Mexico, Utah, and Wyoming resulted in a harvest of 1,080 RMP cranes, an 11 percent decrease from the previous year's harvest.

The Lower Colorado River Valley Population (LCRVP) survey results indicate a 16 percent increase from 2,646 birds in 2012, to 3,078 birds in 2013. The 3-year average is 2,713 LCRVP cranes, which is above the population objective of 2,500.

The Eastern Population (EP) sandhill crane fall survey index (87,796) increased by 21 percent in 2012, and in Kentucky's second hunting season 92 cranes were harvested, up from 50 cranes in the inaugural season.

Woodcock

Singing-ground and Wing-collection Surveys were conducted to assess the population status of the American woodcock (*Scolopax minor*). The Singing-ground Survey is intended to measure long-term changes in woodcock population levels. Singing-ground Survey data for 2013 indicate that the

number of singing male woodcock per route in the Eastern and Central Management Regions were unchanged from 2012. There were no significant 10-year trends in woodcock heard in the Eastern or Central Management Regions during 2003–13, which marks the tenth consecutive year that the 10-year trend estimate for the Eastern Region was stable and the third year that the 10-year trend was stable for the Central Region. Both management regions have a long-term (1968–2012) declining trend (−1.0 percent per year in the Eastern Management Region and −0.8 percent per year in the Central Management Region).

The Wing-collection Survey provides an index to recruitment. Wing-collection Survey data indicate that the 2012 recruitment index for the U.S. portion of the Eastern Region (1.65 immatures per adult female) was 1.9 percent less than the 2011 index, and 0.8 percent greater than the long-term (1963–2011) average. The recruitment index for the U.S. portion of the Central Region (1.66 immatures per adult female) was 8.0 percent greater than the 2011 index and 5.7 percent greater than the long-term (1963–2011) average.

Band-Tailed Pigeons

Two subspecies of band-tailed pigeon occur north of Mexico, and are managed as two separate populations: Interior and Pacific Coast. Information on the abundance and harvest of band-tailed pigeons is collected annually in the United States and British Columbia. Abundance information comes from the Breeding Bird Survey (BBS) and the Mineral Site Survey (MSS, specific to the Pacific Coast Population). Harvest and hunter participation are estimated from the Migratory Bird Harvest Information Program (HIP). The BBS provided evidence that the abundance of Pacific Coast band-tailed pigeons decreased (−2.0 percent per year) over the long term (1968–2012). Trends in abundance during the recent 10- and 5-year periods were inconclusive. The MSS, however, provided some evidence that abundance decreased during the recent 9-year (−4.7 percent per year) and 5-year (−4.0 percent per year) periods, but results were inconclusive. An estimated 3,900 hunters harvested 10,900 birds in 2012.

For Interior band-tailed pigeons, the BBS provided evidence that abundance decreased (−5.1 percent per year) over the long term (1968–2012). Trends in abundance during the recent 10- and 5-year periods were inconclusive. An estimated 1,400 hunters harvested 2,900 birds in 2012.

Mourning Doves

We annually summarize information collected in the United States on survival, recruitment, abundance and harvest of mourning doves. We report on trends in the number of doves heard per route from the Mourning Dove Call-count Survey (CCS), doves seen per route from the CCS, birds heard and seen per route from the all-bird BBS, and provide absolute abundance estimates based on band recovery and harvest data. Harvest and hunter participation are estimated from the HIP.

The CCS-heard data suggested that abundance of doves decreased in all three dove management units (Eastern [EMU], Central [CMU], and Western [WMU]) over the long term (1966–2013); within the EMU, however, there is evidence that abundance decreased in hunt States but increased in non-hunt States. In the recent 10 years, there was no evidence for a change in mourning dove abundance in the EMU, but there was evidence of a decline in the CMU and WMU. Over the most recent two years, there was no evidence for a change in abundance in any of the management units. Over the long term, trends based on CCS-heard and CCS-seen data were consistent in the CMU and WMU, but inconsistent in the EMU; CCS-seen data indicated that abundance increased in the EMU. BBS data suggested that the abundance of mourning doves over the long-term increased in the EMU and decreased in the CMU and WMU. Thus, over the long term, the three data sets provided consistent results for the CMU and WMU but not the EMU.

Estimates of absolute abundance are available only since 2003, and indicate that there are about 349 million doves in the United States, and annual abundance during the recent 5 years appears stationary in the EMU and WMU, but may be declining in the CMU. However, abundance appeared to increase between 2011 and 2012 in the CMU and WMU. Based on a composite trend (weighted trend estimate using information from the CCS, BBS, and absolute abundance), the EMU and WMU populations were stationary over the previous 5 and 10 years, whereas the population in the CMU declined.

Current (2012) HIP estimates for mourning dove total harvest, active hunters, and total days afield in the U.S. were 14,490,800 birds, 828,900 hunters, and 2,538,000 days afield. Harvest and hunter participation at the unit level were: EMU, 6,279,900 birds, 349,600 hunters, and 1,015,600 days afield; CMU, 6,361,600 birds, 338,700 hunters, and 1,108,700 days afield; and WMU, 1,849,400 birds, 140,700 hunters, and 413,700 days afield.

White-Winged Doves

Two states harbor substantial populations of white-winged dove: Arizona and Texas. California and New Mexico also have substantial but smaller populations. Based on the preliminary HIP report for 2012, white-winged doves were harvested in 22 additional states. The Arizona Game and Fish Department monitors white-winged dove populations by means of a CCS to provide an annual index to population size. It runs concurrently with the Service's Mourning Dove CCS. The index of mean number of white-winged doves heard per route from this survey peaked at 52.3 in 1968, but then declined until about 2000. The index had stabilized at around 25 doves per route in the last few years; however, for 2013, the mean number of doves heard per route was 16.8. Harvest of white-winged doves in Arizona peaked in the late 1960s at approximately 740,000 birds, and has since declined and stabilized at around 100,000 birds; the preliminary 2012 HIP estimate of harvest was 86,000 birds.

In Texas, white-winged doves continue to expand their breeding range. Nesting by white-winged doves has been recorded in most counties, with new colonies recently found in east Texas. Nesting is essentially confined to urban areas, but appears to be expanding to exurban areas. Concomitant with this range expansion has been a continuing increase in white-winged dove abundance. A new distance-based sampling protocol was implemented for Central and South Texas in 2007, and has been expanded each year. In 2010, 4,650 points were surveyed statewide and the urban population of breeding white-winged doves was estimated at 4.6 million. Additionally, the Texas Parks and Wildlife Department has an operational white-winged dove banding program and has banded 52,001 white-winged doves from 2006 to 2010. The estimated harvest of white-wings in Texas in the 2012 season was 1,414,800 birds. The Texas Parks and Wildlife Department continues to work to improve the scientific basis for management of white-winged doves.

In California, Florida, Louisiana, New Mexico and Texas BBS data indicate an increasing trend in the population indices between 1966 and 2011. In Arizona BBS data indicate population indices were stationary between 1966 and 2011. According to HIP surveys, the preliminary harvest estimates for the

2012 season were 42,200 white-winged doves in California, and 79,500 in New Mexico. In 2012 white-winged doves were also harvested (range 100 to 8,700 per state) in Alabama, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Kentucky, Minnesota, Mississippi, Nebraska, Nevada, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

White-Tipped Doves

White-tipped doves occur primarily south of the United States-Mexico border; however, the species does occur in Texas. Monitoring information is presently limited. White-tipped doves are believed to be maintaining a relatively stable population in the Lower Rio Grande Valley of Texas. Distance-based sampling procedures implemented in Texas are also providing limited information on white-tipped dove abundance. Texas is working to improve the sampling frame to include the rural Rio Grande corridor in order to improve the utility of population indices. Annual estimates for white-tipped dove harvest in Texas average between 3,000 and 4,000 birds.

Review of Public Comments

The preliminary proposed rulemaking (April 9 **Federal Register**) opened the public comment period for migratory game bird hunting regulations and announced the proposed regulatory alternatives for the 2013–14 duck hunting season. Comments concerning early-season issues and the proposed alternatives are summarized below and numbered in the order used in the April 9 **Federal Register** document. Only the numbered items pertaining to early-seasons issues and the proposed regulatory alternatives for which we received written comments are included. Consequently, the issues do not follow in consecutive numerical or alphabetical order.

We received recommendations from all four Flyway Councils. Some recommendations supported continuation of last year's frameworks. Due to the comprehensive nature of the annual review of the frameworks performed by the Councils, support for continuation of last year's frameworks is assumed for items for which no recommendations were received. Council recommendations for changes in the frameworks are summarized below.

We seek additional information and comments on the recommendations in this supplemental proposed rule. New proposals and modifications to previously described proposals are discussed below. Wherever possible, they are discussed under headings corresponding to the numbered items in the April 9 **Federal Register** document.

1. Ducks

Categories used to discuss issues related to duck harvest management are: (A) General Harvest Strategy; (B) Regulatory Alternatives, including specification of framework dates, season lengths, and bag limits; (C) Zones and Split Seasons; and (D) Special Seasons/Species Management. The categories correspond to previously published issues/discussions, and only those containing substantial recommendations are discussed below.

A. General Harvest Strategy

Council Recommendations: The Mississippi Flyway Council recommended that regulations changes be restricted to one step per year, both when restricting as well as liberalizing hunting regulations.

Service Response: As we stated in the April 9 **Federal Register**, we intend to continue use of Adaptive Harvest Management (AHM) to help determine appropriate duck-hunting regulations for the 2013–14 season. AHM is a tool that permits sound resource decisions in the face of uncertain regulatory impacts, as well as providing a mechanism for reducing that uncertainty over time. The current AHM protocol is used to evaluate four alternative regulatory levels based on the population status of mallards and their breeding habitat (i.e., abundance of ponds) (special hunting restrictions are enacted for certain species, such as canvasbacks, black ducks, scaup, and pintails).

Unfortunately, this year a mechanical issue with the Service aircraft normally used in the Eastern Survey Area of the May Breeding Population and Habitat Survey prohibited the use of those aircraft to conduct this year's survey. Lack of reliable data from Canadian survey strata (51–54, 56) precludes a reliable estimate of the Eastern mallard breeding population for 2013. As a result, an observed 2013 breeding population (BPOP) estimate will not be available for updating model weights and deriving the 2013 harvest policy. Therefore, we propose to predict the 2013 BPOP size based on the 2012 BPOP estimate and 2012 model weights, the 2012–13 harvest rate, and the current model set. That predicted value will be used in place of the observed value for this year, and that value will be compared with last year's (2012) AHM harvest policy matrix to determine the optimal regulatory alternative for the 2013–14 regular duck seasons in the Atlantic Flyway. Further details on these proposed technical changes will be detailed in the forthcoming AHM report for the 2013 season.

Regarding the Mississippi Flyway Council's recommendation for a one-step constraint, we have repeatedly stated over the past several years that we believe that the new Supplemental Environmental Impact Statement (SEIS) for the migratory bird hunting program (see National Environmental Policy Act (NEPA) section) is the appropriate venue for considering such changes in a more comprehensive manner that involves input from all Flyways. With the May 24, 2013, release of the new SEIS and the associated Record of Decision (RoD) contained in this rule, we believe that any recommendations for changes such as the inclusion of a one-step constraint should be considered within the context of the process that is being used to revise current AHM protocols. As AHM decision-making frameworks are modified, regulatory alternatives should be crafted by the Flyways in the context of those changes, including revised harvest management objectives and the demographic models that predict changes in waterfowl status due to those regulations.

We will propose a specific regulatory alternative for each of the Flyways during the 2013–14 season after survey information becomes available later this summer. More information on AHM is located at *http://www.fws.gov/migratorybirds/CurrentBirdIssues/Management/AHM/AHM-intro.htm.*

B. Regulatory Alternatives

Council Recommendations: The Mississippi and Central Flyway Councils recommended that regulatory alternatives for duck hunting seasons remain the same as those used in 2012–13.

Service Response: The regulatory alternatives proposed in the April 9 **Federal Register** will be used for the 2013–14 hunting season (see accompanying table at the end of this proposed rule for specifics). In 2005, the AHM regulatory alternatives were modified to consist only of the maximum season lengths, framework dates, and bag limits for total ducks and mallards. Restrictions for certain species within these frameworks that are not covered by existing harvest strategies will be addressed during the late-season regulations process. For those species with specific harvest strategies (canvasbacks, pintails, black ducks, and scaup), those strategies will again be used for the 2013–14 hunting season.

D. Special Seasons/Species Management

i. Special Teal Seasons

Council Recommendations: The Atlantic, Mississippi, and Central Flyway Councils recommended that the daily bag limit be increased from 4 to 6 teal in the aggregate during the Special September teal season. The Atlantic Flyway Council also recommended that we allow Maryland to adjust existing shooting hours during the Special September teal season from sunrise to one-half hour before sunrise on an experimental basis during 2013–15 seasons.

Service Response: We appreciate the long-standing interest by the Flyway Councils to pursue additional teal harvest opportunity. With this interest in mind, in 2009, the Flyways and Service began to assess the collective results of all teal harvest, including harvest during special September seasons. The Teal Harvest Potential Working Group conducted this assessment work, which included a thorough assessment of the harvest potential for both blue-winged and green-winged teal, as well as an assessment of the impacts of current special September seasons on these two species. Cinnamon teal were subsequently included in this assessment.

In the April 9, 2013, **Federal Register**, we stated that the final report of the Teal Harvest Potential Working Group indicated that additional opportunity could be provided for blue-winged teal and green-winged teal. Therefore, we support recommendations from the Atlantic, Mississippi, and Central Flyway Councils that the daily bag limit be increased from 4 to 6 teal in the aggregate during the Special September teal season in 2013–14. However, we will not support additional changes to the structure of the September teal season until specific management objectives for teal have been articulated and a comprehensive, cross-flyway approach to developing and evaluating other potential avenues by which additional teal harvest opportunity can be provided has been completed. We recognize this comprehensive approach may include addition of new hunting seasons (e.g., September teal seasons in northern States) as well as expanded hunting opportunities (e.g., season lengths, bag limits) in States with existing teal seasons. In order to assess the overall effects of these changes, an evaluation plan must be developed that includes specific objectives and is tailored to appropriately address concerns about potential impacts resulting from the type of opportunity offered. We outlined guidance for conducting special season evaluations in SEIS 88 (Controlled Use of Special Regulations, pp 82–83) which should be used when developing the plan. We recognize that additional technical and coordination work will need to be accomplished to complete this task, thus, a small technical group comprised of members from the Flyway Councils and Service should be convened. We look forward to working with the Flyway Councils in undertaking the technical work needed to develop regulatory proposals, and would expect a progress report on such work at the February 2014 Service Regulations Committee meeting.

In the interest of guiding State and Federal workloads and facilitating a timely process for providing additional teal harvest opportunity, we provide the following initial considerations. First, we have stated that the primary focus of special season regulations is underutilized species and/or stocks whose migration and distribution provide opportunities outside the time period in which regular seasons are held, and where such harvest can occur without appreciable impacts to non-target species (SEIS 2013). Although the Teal Harvest Potential Working Group's report documented the existence of additional blue-winged and green-winged teal harvest opportunity, we believe the unique migration behavior of blue-winged teal presents the opportunity to isolate only that species both temporally and geographically, consistent with the intent of special regulations. Consequently, regulatory proposals to increase teal harvest should direct harvest primarily at blue-winged teal.

Second, previous alternatives to provide additional teal harvest opportunities have included bonus teal, Special September duck seasons in Iowa, and Special September teal/wood duck seasons. Following implementation of the SEIS 88 regarding the sport hunting of migratory birds, all of these efforts were reviewed. Assessments of special hunting opportunities, including September teal seasons and bonus teal bags, were conducted. The results of these reviews indicated that the September teal seasons could adequately be assessed regarding their effects on migratory birds, but that bonus teal regulations could not. Thus, in the early 1990s, bonus teal bags were no longer offered in the annual duck regulations frameworks. With regard to Special September duck seasons, we have previously stated that mixed-species special seasons (as defined in the context of SEIS 88) are not a preferred management approach, and that we do not wish to entertain refinements to this season or foster expansions of this type of season into other States (August 29, 1996, 61 FR 45838). Special September teal/wood duck seasons in Florida, Tennessee and Kentucky have been provided in lieu of Special September teal seasons and our preference at this time is to maintain that policy. If Flyway Councils wish to pursue these regulatory approaches to providing additional teal harvest opportunity, we request that they provide compelling information as to why such policies and approaches should be reinstated (i.e., bonus teal) or expanded/modified (i.e., September duck seasons or September teal/wood duck seasons).

A copy of the teal working group's final report is available on our Web site at either *http://www.fws.gov/migratorybirds,* or at *http://www.regulations.gov.*

Regarding the regulations for this year, utilizing the criteria developed for the teal season harvest strategy, this year's estimate of 7.7 million blue-winged teal from the traditional survey area indicates that a 16-day September teal season in the Atlantic, Central, and Mississippi Flyways is appropriate for 2013.

Regarding the Atlantic Flyway Council's request to allow Maryland to adjust existing shooting hours during the Special September teal season from sunrise to sunset to one-half hour before sunrise to sunset on an experimental basis, we agree. Since the inception of Maryland's September teal season in 1998, Maryland has utilized shooting hours of sunrise to sunset. Maryland has agreed to conduct hunter performance surveys to assess the impacts of the expanded shooting hours on non-target waterfowl species. The hunter performance survey and assessment criteria will be specified in an agreement between Maryland and the Service.

2. Sea Ducks

Council Recommendations: The Atlantic Flyway Council recommended that the Service amend the annual waterfowl hunting regulations at 50 CFR 20.105 to allow the shooting of crippled waterfowl from a motorboat under power in New Jersey, North Carolina, South Carolina, and Georgia in those areas described, delineated, and designated in their respective hunting regulations as special sea duck hunting areas.

Service Response: We concur with the Atlantic Flyway's recommendation and

note that this provision is already allowed in all other Atlantic Flyway States with special sea duck hunting areas. Sea duck hunting areas are typically large, open water areas (i.e., Atlantic Ocean) at least 800 yards from shore where it is not reasonable to use retrieving dogs. Further, all States with sea duck seasons have defined special sea duck hunting areas described, delineated, and designated in their respective hunting regulations as special sea duck hunting areas.

4. Canada Geese

A. Special Seasons

Council Recommendations: The Mississippi Flyway Council recommended increasing the daily bag limit in Minnesota from 5 geese to 10 geese during the special September season in certain areas of the State. The Council further recommended that there be no possession limits for Canada geese in either special seasons or regular seasons (see 22. Other for further discussion on possession limits).

Service Response: We agree with the Mississippi Flyway Council's request to increase the Canada goose daily bag limit within certain areas that have experienced higher levels of agricultural depredations in Minnesota. The Special Early Canada Goose hunting season is generally designed to reduce or control overabundant resident Canada geese populations. Increasing the daily bag limit from 5 to 10 geese in certain areas may help reduce or control existing high populations of resident Canada geese and associated agricultural depredation problems. Nest and egg permits, airport removal, trap and euthanize, and agricultural shooting permits have all been used in efforts to address damage caused by overabundant Canada geese. In 2012, a record number of shooting permits (234) were issued to landowners dealing with excessive numbers of Canada geese causing agricultural damage.

The breeding population of resident Canada geese in Minnesota has averaged 332,000 Canada geese, since 2001, which is 33 percent higher than the goal of 250,000 Canada geese. In 2012, the breeding population estimate was 434,000 Canada geese, which was the highest estimate on record and 74 percent above the population goal. Annual harvest of Canada geese in Minnesota has averaged 220,000 since 2001, with harvest during the September season averaging 98,000 Canada geese. Further, Minnesota has used a variety of methods to increase the harvest of resident Canada geese, including an expanded September season (Sept. 1 through 22) and expanded opportunity during the regular season.

Bag limits for Canada geese above 5 per day during the September season have not yet been used in the Mississippi Flyway during September seasons. Based on bag frequency data from Atlantic Flyway States that have utilized Canada goose daily bag limits of 15 during September seasons, increasing the daily bag limit from 5 to 10 is expected to increase Canada goose harvest approximately 16 percent during the September season. Thus, a daily bag limit of 10 geese implemented Statewide in Minnesota during the September season would be expected to increase the annual harvest from 98,000 to 114,000 during the September season.

B. Regular Seasons

Council Recommendations: The Mississippi Flyway Council recommended that the framework opening date for all species of geese for the regular goose seasons in the Lower Peninsula of Michigan and Wisconsin be September 16, 2013, and in the Upper Peninsula of Michigan be September 11, 2013. The Council further recommended that there be no possession limits for Canada geese throughout the Flyway (see 22. Other for further discussion on possession limits).

Service Response: We concur with recommended framework opening dates. Michigan, beginning in 1998, and Wisconsin, beginning in 1989, have opened their regular Canada goose seasons prior to the Flyway-wide framework opening date to address resident goose management concerns in these States. As we have previously stated (73 FR 50678, August 27, 2008), we agree with the objective to increase harvest pressure on resident Canada geese in the Mississippi Flyway and will continue to consider the opening dates in both States as exceptions to the general Flyway opening date, to be reconsidered annually. The framework closing date for the early goose season in the Upper Peninsula of Michigan is September 10. By changing the framework opening date for the regular season to September 11 in the Upper Peninsula of Michigan there will be no need to close goose hunting in that area for 5 days and thus lose the ability to maintain harvest pressure on resident Canada geese. We note that the most recent resident Canada goose estimate for the Mississippi Flyway was a record high 1,767,900 geese during the spring of 2012, 8 percent higher than the 2011 estimate of 1,629,800 geese, and well above the Flyway's population goal of 1.18 to 1.40 million birds. See 23. Other for further discussion on possession limits.

9. Sandhill Cranes

Council Recommendations: The Mississippi Flyway Council recommended implementation of a 3-year, experimental 60-day sandhill crane season in Tennessee beginning in the 2013–14 season.

The Central Flyway Council recommended increasing the season length in North Dakota's eastern sandhill crane hunting zone (Area 2) from 37 to 58 days in length.

The Central and Pacific Flyway Councils recommend using the 2013 Rocky Mountain Population (RMP) sandhill crane harvest allocation of 771 birds as proposed in the allocation formula using the 3-year running average of fall population estimates for 2010–12.

Service Response: We concur with the Mississippi Flyway Council's recommendation concerning an experimental season in Tennessee. We note that a management plan for the Eastern Population of sandhill cranes was approved by the Atlantic and Mississippi Flyway Councils in 2010. The plan contained provisions and guidelines for establishing hunting seasons in the Mississippi and Atlantic Flyway States if the fall population was above a minimum threshold of 30,000 cranes. The management plan also sets an overall harvest objective for an individual State to be no more than 10 percent of the 5-year average peak population estimate in that State. Since Tennessee's 5-year average peak population count is 23,334 cranes, the State's maximum allowable harvest would be 2,333 cranes. Tennessee's proposed experimental season would limit the number of crane hunters to 775 with each hunter receiving 3 tags for a maximum allowed harvest of 2,325 cranes. Given Tennessee's proposed harvest monitoring system, the maximum allowed harvest of 2,333 cranes cannot be exceeded.

Additionally, we prepared a draft environmental assessment (EA) on the hunting of EP sandhill cranes in Tennessee as allowed under the management plan. A copy of the draft EA and specifics of the two alternatives we analyzed can be found on our Web site at *http://www.fws.gov/migratorybirds,* or at *http://www.regulations.gov.* Our EA outlines two different approaches for assessing the ability of the EP crane population to withstand the level of harvest contained in EP management plan: (1) The potential biological removal allowance method; and (2) a simple population

model using fall survey data and annual survival rates. The EA concluded that the anticipated combined level of harvest and crippling loss in Tennessee could be sustained by the proposed hunt. Furthermore, population modeling indicated that any harvest below 2,000 birds would still result in a growing population of EP cranes. We anticipate that the proposed action to allow a new experimental EP crane hunt in Tennessee, combined with the existing experimental EP crane season in Kentucky, would result in a potential take of 1,875 cranes, or only 2.7 percent of the EP population being harvested, which is lower than the percentage currently experienced in either the RMP or Mid-continent Population. Thus, we believe the proposed action would still allow positive growth of the EP sandhill crane population. We further believe that we have fulfilled our NEPA obligation with the preparation of an EA, and therefore an EIS is not required.

The proposed crane hunt in Tennessee would begin in early December and continue until late January. These proposed season dates would begin approximately 2 to 3 weeks after whooping cranes are normally migrating through Tennessee and would reduce the likelihood that sandhill crane hunters would encounter whooping cranes. We further note that whooping cranes that migrate through Tennessee are part of the experimental nonessential population of whooping cranes (NEP). In 2001, the Service announced its intent to reintroduce whooping cranes (*Grus americana*) into historic habitat in the eastern United States with the intent to establish a migratory flock that would summer and breed in Wisconsin, and winter in west-central Florida (66 FR 14107, March 9, 2001). We designated this reintroduced population as an NEP according to section 10(j) of the Endangered Species Act of 1973 (Act), as amended (66 FR 33903, June 26, 2001). Mississippi and Atlantic Flyway States within the NEP area maintain their management prerogatives regarding the whooping crane. They are not directed by the reintroduction program to take any specific actions to provide any special protective measures, nor are they prevented from imposing restrictions under State law, such as protective designations, and area closures.

We also support the Central Flyway Council's recommendation to increase the season length for midcontinent sandhill cranes in the eastern zone of North Dakota (Area 2). However, we believe additional information recently published on the demographics of this population should be incorporated into a revised management plan, and that the revised plan should include more specificity regarding how harvest opportunities should be expanded and restricted based on population status and harvest. Such a process is essential to successful, collaborative management of shared populations by the Service and the Flyways. We do not want to address regulatory changes in an incremental manner and believe codifying specifically in a management plan how such changes in harvest opportunities will occur would achieve that end.

We also agree with the Central and Pacific Flyway Councils' recommendations on the RMP sandhill crane harvest allocation of 771 birds for the 2013–14 season, as outlined in the RMP sandhill crane management plan's harvest allocation formula. The objective for RMP sandhill cranes is to manage for a stable population index of 17,000–21,000 cranes determined by an average of the three most recent, reliable September (fall pre-migration) surveys. Additionally, the RMP management plan allows for the regulated harvest of cranes when the 3-year average of the population indices exceeds 15,000 cranes. In 2012, 15,417 cranes were counted in the September survey, a decrease from the previous year's count of 17,494 birds. The most recent 3-year average for the RMP sandhill crane fall index is 17,992, a decrease from the previous 3-year average of 19,626.

14. Woodcock

In 2011, we implemented an interim harvest strategy for woodcock for a period of 5 years (2011–15) (76 FR 19876, April 8, 2011). The interim harvest strategy provides a transparent framework for making regulatory decisions for woodcock season length and bag limit while we work to improve monitoring and assessment protocols for this species. Utilizing the criteria developed for the interim strategy, the 3-year average for the Singing Ground Survey indices and associated confidence intervals fall within the ''moderate package'' for both the Eastern and Central Management Regions. As such, a ''moderate season'' for both management regions for the 2013–14 woodcock hunting season is appropriate for 2013. Specifics of the interim harvest strategy can be found at *http://www.fws.gov/migratorybirds/NewsPublicationsReports.html.*

15. Band-Tailed Pigeons

Council Recommendations: The Pacific Flyway Council recommended reducing the daily bag limit from 5 to 2 pigeons for the Interior Population.

Service Response: We have a long-standing practice of giving considerable deference to harvest strategies developed in cooperative Flyway management plans. However, a harvest strategy does not exist for the Interior Population of band-tailed pigeons even though the development of one was identified as a high priority when the management plan was adopted in 2001. Because the Pacific Flyway Council's recommendation is not supported by the Central Flyway at this time, we recommend that the two Flyway Councils discuss this issue and advise us of the results of these deliberations in their respective recommendation packages from their meetings next March. It is our desire to see adoption of a mutually acceptable harvest strategy for this population as soon as possible.

16. Doves

Council Recommendations: The Atlantic and Mississippi Flyway Councils recommended use of the ''moderate'' season framework for States within the Eastern Management Unit population of mourning doves resulting in a 70-day season and 15-bird daily bag limit. The daily bag limit could be composed of mourning doves and white-winged doves, singly or in combination.

The Mississippi and Central Flyway Councils recommend the use of the standard (or ''moderate'') season package of a 15-bird daily bag limit and a 70-day season for the 2013–14 mourning dove season in the States within the Central Management Unit. The Central Flyway Council previously recommended that the Special White-winged Dove Area be expanded to Interstate Highway 37 in the 2013–14 season.

The Pacific Flyway Council recommended use of the ''moderate'' season framework for States in the Western Management Unit (WMU) population of doves, which represents no change from last year's frameworks.

The Atlantic, Mississippi, Central, and Pacific Flyway Councils also recommended that the present interim mourning dove harvest strategy be replaced by a new national mourning dove harvest strategy for implementation beginning with the 2014–15 season. The new strategy uses a discrete logistic growth model based on information derived from the banding program, the Harvest Information Program, and the mourning dove parts collection survey to predict mourning dove population size in a Bayesian statistical framework. The method is similar to other migratory bird strategies already in place and

performs better than several other modeling strategies that were evaluated by the National Mourning Dove Task Force. The strategy uses mourning dove population thresholds to determine a regulation package for mourning doves for each year. The Central and Mississippi Flyway Councils did, however, recommend several changes to the strategy, including a reduced closure threshold, using a running 3-year average of abundance in assessing regulatory change, and holding regulations constant for 3 years.

Service Response: In 2008, we accepted and endorsed the interim harvest strategies for the Central, Eastern, and Western Management Units (73 FR 50678, August 27, 2008). As we stated then, the interim mourning dove harvest strategies are a step towards implementing the Mourning Dove National Strategic Harvest Plan (Plan) that was approved by all four Flyway Councils in 2003. The Plan represents a new, more informed means of decision-making for dove harvest management besides relying solely on traditional roadside counts of mourning doves as indicators of population trend. However, recognizing that a more comprehensive, national approach would take time to develop, we requested the development of interim harvest strategies, by management unit, until the elements of the Plan can be fully implemented. In 2009, the interim harvest strategies were successfully employed and implemented in all three Management Units (74 FR 36870, July 24, 2009).

We concur with the Atlantic and Pacific Flyway Councils' recommendations that the National mourning dove harvest strategy, as developed by the Mourning Dove Task Force, be adopted this year for implementation in 2014–15 hunting season. This strategy would replace the Interim Harvest Strategies that have been in place since 2009. While we appreciate the Central and Mississippi Flyway Councils' recommendations supporting implementation of the National mourning dove harvest, we do not support the changes proposed by the Central and Mississippi Flyway Councils specific to the Central Management Unit. More specifically, we do not support the reduced closure threshold, using a running 3-year average of abundance in assessing regulatory change, and holding regulations constant for at least 3 years. We support continued development and further evaluation of the modifications proposed by the Mississippi and Central Flyways, including appropriate closure levels for each management unit based on objective biological criteria. The Mourning Dove Task Force is a useful venue for developing these issues for future consideration and potential modification to the National Strategy.

This year, based on the interim harvest strategies and current population status, we agree with the recommended selection of the ''moderate'' season frameworks for doves in the Eastern, Central, and Western Management Units.

Regarding the Central Flyway Council's recommendation to expand the Special White-winged Dove Area in Texas, we expressed our support for this recommendation last year and addressed it in the August 30, 2012, **Federal Register** (77 FR 53118). The then-approved changes take effect this season.

22. Other

Council Recommendations: The Atlantic Flyway Council recommended increasing the possession limits for sora and Virginia rails from 1 to 3 times the aggregate daily bag limit, consistent with the Council's proposed bag limits for all other migratory game birds during normal established hunting seasons.

The Atlantic, Mississippi, Central, and Pacific Flyway Councils recommended increasing the possession limit from 2 to 3 times the daily bag limit for doves.

The Pacific Flyway Council recommended increasing the possession limit from 2 to 3 times the daily bag limit for band-tailed pigeons; special September Canada goose seasons; snipe; falconry; and Alaska seasons for brant, sandhill cranes, and geese (except dusky Canada geese).

The Mississippi Flyway Council recommended that the Service increase the possession limit from 2 times to 3 times the daily bag limit for all migratory game bird species and seasons except for Canada geese, where they recommended that there be no possession limit, or other overabundant species for which no current possession limits are currently assigned (e.g., light geese), where there would continue to be no possession limits. The Council also recommended increasing the possession limits for sora and Virginia rails from 1 to 3 times the aggregate daily bag limit, consistent with other possession limit recommendations, and no change for those species that currently have permit hunts (e.g., cranes and swans). The Council recommends these changes be implemented beginning in the 2013–14 season. New and/or experimental seasons could have different possession limits if justified. The Council further recommended that possession limits not apply at one's personal permanent residence and specifically recommended language to modify 50 CFR 20.39 to do so.

Lastly, the Central Flyway Council recommended that the Service develop a mechanism that allows not for profit community food distribution centers to exceed possession limits for Canada geese during the regular hunting season.

Service Response: The issue of possession limits was first raised by the Flyway Councils in the summer of 2010. At that time, we stated that we were generally supportive of the Flyways' interest in increasing the possession limits for migratory game birds and appreciated the discussions to frame this important issue (75 FR 58250, September 23, 2010). We also stated that we believed there were many unanswered questions regarding how this interest could be fully articulated in a proposal that satisfies the harvest management community, while fostering the support of the law enforcement community and informing the general hunting public. Thus, we proposed the creation of a cross-agency Working Group, chaired by the Service, and comprised of staff from the Service's Migratory Bird Program, State Wildlife Agency representatives, and Federal and State law enforcement staff, to develop a recommendation that fully articulates a potential change in possession limits. This effort would include a discussion of the current status and use of possession limits, which populations and/or species/species groups should not be included in any proposed modification of possession limits, potential law enforcement issues, and a reasonable timeline for the implementation of any such proposed changes.

After discussions last year at the January SRC meeting, and March and July Flyway Council meetings, the Atlantic, Central, and Pacific Flyway Councils recommended that the Service increase the possession limit from 2 times to 3 times the daily bag limit for all migratory game bird species and seasons except for those species that currently have possession limits of less than 2 times the daily bag limit (e.g., some rail species), for permit hunts (e.g., cranes and swans), and for overabundant species for which no current possession limits are assigned (e.g., light geese), beginning in the 2013–14 season (77 FR 58444; September 20, 2012). These recommendations from the Councils were one such outgrowth of the efforts started in 2010. With the Mississippi Flyway Council's recommendation and

the additional input and recommendations from all four Flyway Councils from their March 2013 Council meetings, we believe the Flyway Councils' consensus approach of moving from 2 times to 3 times the daily bag limit is appropriate for implementation beginning with the 2013–14 season. Thus, we propose to increase the possession limit for all species for which we currently have possession limits of twice the daily bag limit to three times the daily bag limit. We also propose to include sora and Virginia rails in this possession limit increase. Possession limits for other species and hunts for which the possession limit is equal to the daily bag limit would remain unchanged, as would permit hunts for species such as swans and some crane populations.

Additionally, as we discussed in the April 9 and June 14 proposed rules, when our initial review of possession limits was instituted in 2010, we also realized that a review of possession limits could not be adequately conducted without expanding the initial review to include other possession-related regulations. In particular, it was our belief that any potential increase in the possession limits should be done in concert with a review and update of the wanton waste regulations in 50 CFR 20.25. We believed it prudent to review some of the long-standing sources of confusion (for both hunters and law enforcement) regarding wanton waste. A review of the current Federal wanton waste regulations, along with various State wanton waste regulations, has been recently completed, and we anticipate publishing a proposed rule this summer to revise 50 CFR 20.25.

Lastly, we recognize that there are other important issues surrounding possession that need to be reviewed, such as termination of possession (as recommended by the Mississippi Flyway Council). However, that issue is a much larger and more complex review than the wanton waste regulations and the possession limit regulations. We anticipate starting a review of termination of possession regulations upon completion of changes to the wanton waste regulations.

Regarding the Central Flyway Council's recommendation to allow food banks to exceed possession limits for Canada geese, we note that this issue is outside the scope of this proposed rule. Such a proposal would require a change to 50 CFR 20.33 and would require a separate rulemaking process.

Public Comments

The Department of the Interior's policy is, whenever possible, to afford the public an opportunity to participate in the rulemaking process. Accordingly, we invite interested persons to submit written comments, suggestions, or recommendations regarding the proposed regulations. Before promulgating final migratory game bird hunting regulations, we will consider all comments we receive. These comments, and any additional information we receive, may lead to final regulations that differ from these proposals.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by email or fax. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in the **DATES** section.

We will post all comments in their entirety—including your personal identifying information—on *http://www.regulations.gov.* Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Migratory Bird Management, Room 4107, 4501 North Fairfax Drive, Arlington, VA 22203.

For each series of proposed rulemakings, we will establish specific comment periods. We will consider, but possibly may not respond in detail to, each comment. As in the past, we will summarize all comments we receive during the comment period and respond to them after the closing date in the preambles of any final rules.

National Environmental Policy Act (NEPA)

The programmatic document, ''Final Supplemental Environmental Impact Statement: Issuance of Annual Regulations Permitting the Sport Hunting of Migratory Birds (FSES 88–14),'' filed with the Environmental Protection Agency (EPA) on June 9, 1988, addresses NEPA compliance by the Service for issuance of the annual framework regulations for hunting of migratory game bird species. We published a notice of availability in the **Federal Register** on June 16, 1988 (53 FR 22582), and our Record of Decision on August 18, 1988 (53 FR 31341). We also address NEPA compliance for waterfowl hunting frameworks through the annual preparation of separate environmental assessments, the most recent being ''Duck Hunting Regulations for 2012–13,'' with its corresponding August 23, 2012, finding of no significant impact. We will prepare another separate EA for 2013–14 waterfowl hunting frameworks this summer. In addition, an August 1985 environmental assessment entitled ''Guidelines for Migratory Bird Hunting Regulations on Federal Indian Reservations and Ceded Lands'' is available from the address indicated under the caption **FOR FURTHER INFORMATION CONTACT**.

In a notice published in the September 8, 2005, **Federal Register** (70 FR 53376), the Service announced its intent to develop a new supplemental environmental impact statement for the migratory bird hunting program. We held public scoping meetings in the spring of 2006, as announced in a March 9, 2006, **Federal Register** notice (71 FR 12216). We published the 2010 draft supplemental environmental impact statement in the **Federal Register** on July 9, 2010 (73 FR 39577). The public comment period closed on March 26, 2011. On May 31, 2013, we published a notice of availability in the **Federal Register** (78 FR 32686) announcing a Second Final Supplemental Environmental Impact Statement for the Issuance of Annual Regulations Permitting the Hunting of Migratory Birds. The programmatic document was filed with the EPA on May 24, 2013, pursuant to the NEPA. The public review period ended July 1, 2013.

Below is the Service's Record of Decision (RoD) for the migratory bird hunting program, prepared pursuant to National Environmental Policy Act (NEPA) regulations at 40 CFR 1505.2. We have provided it here in its entirety. This RoD was developed by the Service in compliance with the agency decision-making requirements of NEPA. The purpose of this RoD is to document the Service's decision for the selection of an alternative for the issuance of annual regulations permitting the hunting of migratory birds. Alternatives have been fully described and evaluated in the May 2013 Second Final Supplemental Environmental Impact Statement for the Issuance of Annual Regulations Permitting the Hunting of Migratory Birds.

This RoD is intended to: (a) State the Service's decision, present the rationale for its selection, and describe its implementation; (b) identify the alternatives considered in reaching the decision; and (c) state whether all means to avoid or minimize environmental harm from implementation of the selected alternative have been adopted (40 CFR 1505.2).

Record of Decision—Second Final Supplemental Environmental Impact Statement for the Issuance of Annual Regulations Permitting the Hunting of Migratory Birds

Through this Record of Decision (RoD), the U.S. Fish and Wildlife Service (Service) selects alternatives for the seven regulatory components considered for establishing annual regulations for the hunting of migratory birds in the United States. This RoD includes brief summaries of the alternatives considered, the public involvement process, and the rationale for selecting an alternative for each of the seven regulatory components considered, as described in the Final Supplemental Environmental Impact Statement (FSEIS), for issuance of annual migratory bird hunting regulations. In all cases, the ''preferred'' alternative is also the environmentally preferred one.

Description of the Seven Regulatory Components and Alternatives Considered Under Each

1. Schedule and Timing of the General Regulatory Process

Promulgation of annual hunting regulations relies on a well-defined process of monitoring, data collection, and scientific assessment. At key points during that process, Flyway Technical Committees, Flyway Councils, and the public review and provide valuable input on technical assessments or other documents related to proposed regulatory frameworks. The Service then finalizes the frameworks and forwards them to the Assistant Secretary of the Interior for Fish and Wildlife and Parks for final approval. After approval, each State selects its seasons, usually following its own schedule of public hearings and other deliberations. After State selections are completed, the Service adopts them as Federal regulations by publication in the **Federal Register**.

Alternative 1: (*no change alternative*). Promulgate annual regulations using separate early and late season processes based on previous or current year biological information and established harvest strategies.

Alternative 2: (*preferred alternative*). Promulgate annual regulations using a single process for early and late seasons based on predictions derived from long-term biological information and established harvest strategies.

Alternative 3: Promulgate biennial (or longer) regulations using separate early and late season processes.

Alternative 4: Promulgate biennial (or longer) regulations using a single process for early and late seasons.

Decision: The Service has selected Alternative 2 as described in the FSEIS for implementation. Alternative 2 is the most effective alternative for addressing key issues identified during the planning process and will best achieve the purposes and goals of the Service and States. Implementation of the preferred alternative is targeted for the 2015–16 regulations cycle.

Factors Considered in Making the Decision: In reaching this decision, the Service reviewed and considered the following: Impacts identified in Chapter 6 of the draft and FSEIS; relevant issues, concerns, and opportunities presented by agencies, organizations, and individuals throughout the planning process, including comments on the draft and FSEIS; and other relevant factors, including statutory and regulatory guidance.

The Service concludes that the impact of Alternative 2 on hunted populations of migratory birds compared to the no change alternative is likely to be minimal. Alternative 2 combines the current early and late season regulatory actions into a single process. Regulatory proposals will be developed using biological data from the preceding year(s), model predictions, or most recently accumulated data that are available at the time the proposals are being formulated. Individual harvest strategies will be modified using either data from the previous year(s) or model predictions because the current year's data would not be available for many of the strategies. Considerable technical work will be necessary over a period of years to adjust the underlying biological models to the new regulatory time scale. During this transition period, harvest strategies and prescriptions will be modified to fit into the new regulatory schedule. These adjustments could be accomplished immediately upon adoption of the new process. Many existing regulatory prescriptions used for Canada geese and sandhill cranes currently work on this basis. The process will be somewhat less precise in some instances because population projections would be used instead of current-year status information. The use of population projections rather than current-year population estimates would add variability to the population estimate from which the regulations are based. However, the uncertainty associated with these status predictions will be accounted for and incorporated into the process. This uncertainty will not result in a disproportionately higher harvest rate for any stock, either annually or on a cumulative basis, because these regulations likely would become slightly more conservative due to the increased uncertainty of the population status. Additionally, under this alternative, the SRC will meet in March or April (exact dates would be determined in consultation with the four Flyway Councils). Proposed frameworks will be available for public review by early June. Final frameworks will be published by mid-August. The schedule proposed under Alternative 2 will allow 30–60 days for public input and comments (currently the comment period is as short as 10 days). The four Flyway Councils could meet only once instead of twice, and the SRC will meet twice a year, once in January and once in March-April, instead of the three times they currently convene. The reduced number of meetings could lower administrative costs by 40 percent per year and substantially lower the Service's carbon footprint due to a decrease in travel and a reduction in the costs associated with the additional meetings.

2. Frequency of Review and Adoption of Duck Regulatory Packages

Duck regulatory packages are the set of framework regulations that apply to the general duck hunting seasons. Packages include opening and closing dates, season lengths, daily bag limits, and shooting hours. Current regulatory packages contain a set of frameworks for each of the four flyways and a set of four regulatory alternatives: restrictive (relatively short seasons and low daily bag limits), moderate (intermediate season lengths and daily bag limits), liberal (longer seasons and higher daily bag limits), and closed. The differences in season lengths and daily bag limits among flyways reflect the historic differences in waterfowl abundance and hunter numbers in these regions. Each regulatory package has an associated target harvest rate, which is based on mallards since mallards are the most well-studied and most heavily harvested (nationally) of all duck species. Each year the adaptive harvest management (AHM) models are run, with the most up-to-date harvest survey data included, and one of the regulatory alternatives

(i.e., closed, restrictive, moderate, or liberal) is selected based on the AHM process. These regulatory packages apply to all duck species except those for which specific individual harvest strategies exist or, in some cases, for species in which separate daily bag limits have been established. Daily bag limit restrictions within the general duck seasons are used to limit the harvest of certain less abundant species (e.g., American black duck, wood duck, mottled duck).

Importantly, when employing the AHM approach, the regulatory packages should remain relatively constant over time, because the optimization process assumes that the expected harvest rates resulting from the various packages remains constant. However, the uncertainty in harvest rates from what is projected and what is realized in any given year is a component that is accounted for in the process; thus, there is room for modification. Recognizing the desire of many constituents to make adjustments to the basic packages, a regular process to review and incorporate possible modifications is necessary and appropriate. The intent, regardless of the alternative selected below, is to have the first open review and possible modification of these packages begin in the year following the finalization of the FSEIS.

Alternative 1: (*no change alternative*). Regulatory packages adopted annually.

Duck regulatory packages are currently reviewed and adopted on an annual basis (see above). This would continue under this alternative.

Alternative 2: (*preferred alternative*). Establish regulatory packages for 5-year periods.

A description of duck regulatory packages is provided above. Under this alternative, the set of regulatory packages would be adopted for a 5-year period instead of annually, and changes would be considered at the time of renewal. The first review period would coincide with the initial implementation of the proposed action.

Decision: The Service has selected Alternative 2 as described in the FSEIS for implementation. Alternative 2 is the most effective alternative for addressing key issues identified during the planning process and will best achieve the purposes and goals of the Service and States. Implementation of the preferred alternative is targeted for the 2015–16 regulations cycle or as soon as is technically feasible.

Factors Considered in Making the Decision: In reaching this decision, the Service reviewed and considered the following: Impacts identified in Chapter 6 of the draft and FSEIS; relevant issues, concerns, and opportunities presented by agencies, organizations, and individuals throughout the planning process, including comments on the draft and FSEIS; and other relevant factors, including statutory and regulatory guidance.

The Service concludes that Alternative 2 allowing review and adoption of regulatory packages every 5 years instead of annually is the best course of action balancing the need for consistent regulatory actions with the need for occasional adjustments. Adopting such a process will result in limited impacts on population status. Limiting changes to a 5-year interval is expected to result in an improvement over the current situation. The improvement should result because of the reduced variability in harvest rates that are expected when compared to allowing annual changes in the basic duck regulatory packages. Adopting packages annually as is presently done could increase variability, if the packages are actually changed annually. In fact, and in recognition of this problem, the Service has kept packages stable, although it reviews and adopts them each year. Alternative 2 will minimize the frequency of changes, thereby improving the learning potential under the AHM process, while still affording the option to adjust packages at regular intervals in recognition of changing bird status, environmental conditions, and socioeconomic changes.

3. Stock-Specific Harvest Strategies

Harvest strategies have been developed for stocks deemed not biologically capable of sustaining the same harvest levels that jointly managed stocks are capable of sustaining, or whose migration and distribution do not conform to patterns followed by the most commonly harvested species. There also is a desire to have a known set of conditions under which regulations would be changed for species covered by these strategies. The formal strategies provide this information by describing abundance levels and other demographic factors that would result in changes in harvest opportunity. Stock-specific harvest strategies formally adopted by the Service include those for American black ducks, canvasbacks, northern pintails, and scaup. In addition, an interim harvest strategy was recently developed and proposed for approval for mourning doves starting with the 2014–15 hunting season. A draft harvest strategy for wood ducks may be developed and considered for adoption in the future. The Service has adopted stock-specific strategies for ducks and mourning doves through the **Federal Register** process. Harvest guidelines for goose, swan and crane populations are addressed in flyway-specific management plans. Although these harvest guidelines are not formally adopted by the Service, the Service gives strong consideration to these plans when formulating annual regulatory proposals.

Alternative 1: (*no change, preferred alternative*). Continue use of currently employed stock-specific harvest strategies and develop new strategies when necessary.

Alternative 2: Significantly reduce the use of stock-specific harvest strategies.

This action would be accomplished by reducing general seasons to a structure that can be sustained by more stocks than the existing aggregate structures are able to sustain. For example, a simplified set of regulations for general duck seasons would result in a reduction in the number of separate harvest strategies that would be needed for ducks (e.g., duck limits overall would be reduced to those appropriate for scaup or northern pintails, whichever of these required the most conservative regulations).

Alternative 3: Expand the use of stock-specific harvest strategies to include most individual stocks.

This alternative would lead to additional stock-specific regulations that would eventually result in separate hunting seasons for most, if not all, recognized stocks for which harvest is allowed.

Decision: The Service has selected Alternative 1 as described in the FSEIS for implementation. Alternative 1 is the most effective alternative for addressing key issues identified during the planning process and will best achieve the purposes and goals of the Service and States. Implementation of the preferred alternative is targeted for the 2015–16 regulations cycle or as soon as is technically feasible.

Factors Considered in Making the Decision: In reaching this decision, the Service reviewed and considered the following: Impacts identified in Chapter 6 of the draft and FSEIS; relevant issues, concerns, and opportunities presented by agencies, organizations, and individuals throughout the planning process, including comments on the draft and FSEIS; and other relevant factors, including statutory and regulatory guidance.

The Service concludes that the use of stock-specific harvest strategies protects individual species deemed biologically incapable of sustaining the harvest levels imposed by the current AHM process based on mallard status.

Alternative 1 reduces the risk of overharvesting specific stocks without unnecessarily reducing harvest opportunities on more abundant species. Alternative 1 allows hunters, businesses, and governments to plan for hunting expenses and regulations in advance, since it provides a set of conditions under which regulations would be changed, and the extent of change in those regulations. However, adding additional strategies could increase regulatory complexity because there could be new strategies and associated regulations developed, as needed, to address additional stocks of migratory birds. Any new strategies will also increase the cost of the annual regulatory process. Thus, new strategies will only be added when there is a clear need and after consultation with State partners. New strategies will be proposed, and the public will be provided opportunities for comment. The Service will continue the current policy of reviewing, revising and/or eliminating strategies to reflect changes in the status and technical understanding of the strategies that are in use.

4. Special Regulations

Special regulations differ from stock-specific harvest strategies because they entail additional days of harvest opportunity outside the established frameworks for general seasons, but within the 107-day limit mandated by the Migratory Bird Treaty Act (16 U.S.C. 703–712). Special regulations are employed to provide additional harvest opportunity on overabundant stocks, stocks that are lightly harvested and can sustain greater harvest pressure when harvest can be achieved without appreciable impacts to nontarget species, and/or stocks whose migration and distribution provide opportunities outside the time period in which regular seasons are held. An important tenet of special regulations is that harvest pressure can be effectively directed primarily at target stocks that can be temporally and geographically isolated so as to avoid nontarget take. Currently, special regulations include: (1) September teal seasons in the Atlantic, Mississippi, and Central Flyways; (2) September teal and wood duck seasons in Florida, Kentucky, and Tennessee; (3) the special sea duck season along the Atlantic Coast; and (4) special regulations on overabundant resident Canada geese. The Service has required that States implementing special regulations conduct experiments that assess the biological impacts of those seasons on both target and non-target stocks.

Alternative 1: (*no change alternative*). No change to currently allowed special regulations.

Maintain requirement for experimental evaluation of any proposed new special regulations and periodic assessments of the effects of special regulations to determine whether they are still justified.

Alternative 2: (*preferred alternative*). Eliminate experimental evaluation requirements for special regulations on overabundant resident Canada geese, except for areas where previous evaluations indicate an unacceptable level of take of migrant Canada geese, and in areas which have not conducted evaluations where one could reasonably expect an unacceptable level of take of migrant Canada geese (e.g., areas in northern States). All special Canada goose seasons require Flyway Council endorsement, and Flyway Councils may request evaluations as part of the approval process if they believe such evaluations to be warranted. Additionally, if conditions are believed to have changed, new evaluations can be conducted for areas in which prior evaluations failed with respect to the take of migrant Canada geese. The Service may periodically re-evaluate existing special regulations for other species/stocks on a case-by-case basis to determine whether they are still justified, and will continue to require experiments for any other types of new special regulations. The Service will undertake a review of the Special harvest regulations in place for sea ducks.

Decision: The Service has selected Alternative 2 as described in the FSEIS for implementation. Alternative 2 is the most effective alternative for addressing key issues identified during the planning process and will best achieve the purposes and goals of the Service and States. Implementation of the preferred alternative is targeted for the 2015–16 regulations cycle or as soon following as is technically feasible.

Factors Considered in Making the Decision: In reaching this decision, the Service reviewed and considered the following: Impacts identified in Chapter 6 of the draft and FSEIS; relevant issues, concerns, and opportunities presented by agencies, organizations, and individuals throughout the planning process, including comments on the draft and FSEIS; and other relevant factors, including statutory and regulatory guidance.

The Service concludes that several target populations will benefit from the biological review that would determine if special harvest opportunities were still warranted. In particular, special seasons for sea ducks and teal will be considered. Elimination of experimental season evaluations for overabundant resident Canada geese is not expected to alter their population status, but is expected to expedite actions designed to increase harvest of these birds. Sufficient experimentation already has been conducted, and the results indicate that these seasons will not endanger the resident geese. There are some risks to non-target migrant Canada goose populations; however, recent studies provide sufficient data regarding select areas where such seasons could pose a problem for non-target goose populations and those areas will be addressed on a case-by-case basis to ensure non-resident stocks are not negatively impacted.

Alternative 2 could lead to increased administrative costs associated with the re-evaluation of the existing special regulations. The Service has historically reviewed special regulations when changes in status or environmental conditions suggest there is a reason to do so. This alternative continues that practice. Although there could be an initial increase in cost associated with such re-evaluations, there could also be financial savings associated with elimination of the experimental evaluation requirement for most resident Canada goose special regulations. Depending on findings, the results of those evaluations could lead to expansion of one or more of the current special duck seasons or establishment of additional special seasons, either of which would result in more hunting opportunity and the associated economic benefits. On the other hand, evaluations could lead to reduction or elimination of one or more current special seasons, resulting in reduced hunting opportunity and some negative impacts on local economies. Expediting the approval of additional special regulations for resident Canada geese would increase harvest and result in fewer of those birds, which in turn would reduce crop depredation and other conflicts caused by their overabundance.

5. Management Scale for the Harvest of Migratory Birds

Management scale is defined as the geographic area in which stocks are monitored and harvest is managed. Determining the appropriate scale of harvest management is important for two primary reasons: (1) Scale determines the degree to which harvest regulations can differ geographically, and (2) management at smaller geographic scales commits management agencies to increased monitoring efforts

on greater numbers of stocks of migratory birds. The finer the scale of management employed in harvest management, the higher the cost of monitoring to management agencies. The desire for smaller management scales is driven by the potential for increased harvest opportunity associated with more refined geographic management.

Alternative 1: (*no change, preferred alternative*). Maintain the current scale of management for all migratory bird species.

Under this alternative, ducks would be managed by flyway on the basis of three mallard stocks: Eastern, western, and mid-continent. For duck species that are covered by harvest strategies (e.g., pintails, scaup, and canvasbacks), the management scale would continue to be continental. New strategies would include geographic definitions of the applicable scale as part of their descriptions. American woodcock would continue to be managed as two units and mourning doves as three. Sandhill cranes, geese, tundra swans, and band-tailed pigeons would be managed as the currently defined individual populations. American black duck and wood duck seasons would remain as currently implemented. All geographic scales would be subject to periodic review and revision when new information becomes available, or if population distributions shift markedly in the future. This approach provides considerable allowances for differences in hunting opportunity based on geographic differences in population status and distribution, yet limits the number of different stocks that require individual monitoring to a manageable level.

Alternative 2: Expand the existing management scale by reverting to a single continental management scale for population monitoring of ducks, mourning doves, and American woodcock. The existing harvest-management units (e.g., flyways, management units) would be maintained to account for regional differences in hunter numbers and harvest pressure.

This alternative would establish a continental scale for the monitoring of migratory game birds and harvest management decisions. Regional differences in population status and trends would not be taken into account when making regulatory decisions. The only geographic differences in harvest opportunity would be based on the traditional differences that have been established among flyways and among/between ducks, mourning dove, tundra swan, and American woodcock management units.

Alternative 3: Work to further geographically refine the scale of duck harvest management, and maintain existing management scales for other stocks.

Monitoring programs would be established wherever sufficient biological evidence suggests further geographic refinement is possible for any stocks. The monitoring programs would allow for differential harvest regulations within the defined range of each stock. Conceptually, this would greatly increase the number of stocks for which separate regulations would be established independently. This could include subdividing the traditional management units of flyways (in the case of ducks), or the management units, in the case of mourning doves or American woodcock.

Decision: The Service has selected Alternative 1 as described in the FSEIS for implementation. Alternative 1 is the most effective alternative for addressing key issues identified during the planning process and will best achieve the purposes and goals of the Service and States. Implementation of the preferred alternative is targeted for the 2015–16 regulations cycle or as soon following as is technically feasible.

Factors Considered in Making the Decision: In reaching this decision, the Service reviewed and considered the following: Impacts identified in Chapter 6 of the draft and FSEIS; relevant issues, concerns, and opportunities presented by agencies, organizations, and individuals throughout the planning process, including comments on the draft and FSEIS; and other relevant factors, including statutory and regulatory guidance.

The Service concludes that Alternative 1 ensures sustainable continental populations of mallards and other duck species that are the subjects of species-specific harvest strategies, because those harvest strategies are supported by adequate population size, harvest monitoring programs, and other relevant population statistics. Likewise, geese, mourning doves, woodcock, sandhill cranes, tundra swans, and band-tailed pigeons are monitored at their current management scales to ensure sustainability. However, if distinct subpopulations exist within any of the currently defined populations/species, and have demographics that differ greatly from the management-scale-wide average, those subpopulations could undergo undetected growth or decline under Alternative 1. Coots, gallinules, moorhens, snipe, and rails will be managed at the continental scale under this alternative. Alternative 1 maintains the traditional approach of allowing for recognition of geographic variation in harvest opportunity while maintaining a relatively limited number of geographic units that must be monitored and managed separately. Costs of monitoring and managing at the current scale have been considered acceptable to the public and the cooperating management agencies. To date, the level of hunting opportunity that this alternative affords has been adequate to satisfy migratory bird hunters in most years. This approach represents a compromise between recognition of existing natural variation in abundance and distribution with the costs associated with managing at more refined geographic scales, such as is considered in Alternative 3 for this component.

6. Zones and Split Seasons

A zone is a geographic area or portion of a State, with a contiguous boundary, for which an independent season may be selected. A split is a situation where a season is broken into two or more segments with a closed period between segments. The combination of zones and split seasons allows a State to maximize harvest opportunity within the Federal frameworks without exceeding the number of days allowed for a given season. Guidelines for the use of zones and splits have been formalized for ducks and doves. For these species, States select zone/split configurations for 5-year periods. After each 5 year period, States have the opportunity to change their configurations within the provisions of the guidelines. The use of zones and split seasons for other migratory game birds is handled on a case-by-case basis. Refer to Chapter 2 of the FSEIS for a more in-depth description of zones and splits.

Alternative 1: (*no change, preferred alternative*). Continue the current use of zones and split seasons and the 5-year schedule for consideration of changes for ducks and doves within established zones/splits guidelines. Goose and crane zones may be adjusted annually.

Alternative 2: Allow annual adjustments to zone/split-season configurations for all migratory game birds.

Decision: The Service has selected Alternative 1 as described in the FSEIS for implementation. Alternative 1 is the most effective alternative for addressing key issues identified during the planning process and will best achieve the purposes and goals of the Service and States. Implementation of the preferred alternative is targeted for the

2015–16 regulations cycle or as soon following as is technically feasible.

Factors Considered in Making the Decision: In reaching this decision, the Service reviewed and considered the following: Impacts identified in Chapter 6 of the draft and FSEIS; relevant issues, concerns, and opportunities presented by agencies, organizations, and individuals throughout the planning process, including comments on the draft and FSEIS; and other relevant factors, including statutory and regulatory guidance.

The Service recognizes that the use of zones and split seasons results in some additional harvest, but the incremental impacts of each State's existing zone and split season configuration on the overall harvest of ducks and doves are not anticipated to be significant at the population level. However, most duck and dove populations are stable or increasing, indicating that within the context of other framework regulations, current zone and split season configurations are not adversely impacting those populations. When reductions in harvest are necessary, they are accomplished through framework regulations, taking into account the effects of existing zone and split season configurations. Thus, Alternative 1 is not expected to have any measurable impacts on target duck and dove populations compared to current practice. The use of zones and split seasons enables States to better maximize hunting opportunity, thereby encouraging participation in migratory bird hunting and resulting in increased benefits to local economies. Alternative 1 would maintain those benefits at current levels. Limiting the frequency of potential changes to the proposed 5-year interval for zone/split-season configurations continues to be somewhat less responsive to public desires for adjustments, but there is no evidence that this has impacted hunter participation negatively. States incur some costs associated with contacting their hunting publics to assess their desires with regard to zone locations and dates for split seasons, primarily through public meetings and surveys.

7. Subsistence-Harvest Regulatory Process

Regulations governing the subsistence harvest of migratory birds provide a framework that enables the continuation of customary and traditional subsistence uses of migratory birds in Alaska. These regulations are subject to annual review and are developed under a co-management process involving the Service, the Alaska Department of Fish and Game, and Alaska Native representatives. This annual review process establishes regulations that prescribe frameworks for dates when harvesting of birds may occur, species that can be taken, and methods and means that are excluded from use.

Alternative 1: (*no change, preferred alternative*). Allow a spring-summer subsistence hunting season with regulations necessary to ensure the long-term conservation of the migratory bird resource.

Under this alternative, the Service would allow a spring-summer harvest of migratory birds. The harvest would, to the extent possible, be consistent with the customary and traditional subsistence harvest of migratory birds by Alaskan indigenous inhabitants, while providing for the long-term sustained use of the migratory bird resource. Egg gathering would be consistent with the customary and traditional subsistence harvest of eggs by Alaskan indigenous inhabitants. Only bird populations that are determined to be capable of supporting this sustained use would be open to harvest.

In general, the Service will consider the following actions when establishing subsistence hunting regulations consistent with the long-term conservation of species open to subsistence harvest. The species open to harvest will be determined annually based on conservation status and a determination that harvest is consistent with long-term conservation. The secondary consideration of the Service in establishing subsistence harvest regulations will be to preserve the customary and traditional practices of the rural residents of Alaska to the maximum extent possible after ensuring the long-term conservation of species harvested. The third consideration of the Service in establishing subsistence harvest regulations will be to determine that the proposed harvest is consistent with the Migratory Bird Treaty Act (MBTA), as modified by amendments to the Protocols of Migratory Bird Treaties with Canada and Mexico. A summary of the potential management tools that could be employed to regulate subsistence harvest under these actions is as follows:

(A) *Closures to protect nesting birds.* For all species, the Service will require at least a 30 day closure to protect nesting birds. In-season closures of a minimum of 30 days will be set for each region to protect nesting birds. The closed period will apply every year; however, the dates of the closures may be altered to adapt to changes in the nesting cycle of birds. Regions may have different closures for different taxonomic groups. Closures may be set in advance in regulation or may be set in-season, based upon data collected by field biologists and subsistence users. In the case of closures set in-season, the dates will be announced by the U.S. Fish and Wildlife Service Regional Director (or designee) and then broadcast widely.

(B) *Species closures to all harvest.* Seasons for certain species may be closed when there is a conservation concern. Harvest will be resumed when the species recovers to a status sufficient to ensure sustainability.

(C) *Species closures to egg-gathering.* Species may be closed to egg-gathering when there is a conservation concern. Egg harvest may be resumed when the species recovers to a status sufficient to ensure sustainability.

(D) *Special area closure.* A defined area may be closed to all harvest of a species when there is a conservation concern. The closure may be lifted when the species has recovered. A defined area also may be closed to all harvest of a particular species when the species in question has not been traditionally harvested or when the Regional Council, which represents the land in question, recommends the closure.

(E) *Early season closure.* A season may be closed early for a defined area to protect birds staging during migration when there is a conservation concern or the birds are vulnerable to excessive harvest.

(F) *Establishment of a community bag limit.* A community or regional bag limit may be implemented only in the case in which the affected species would otherwise be closed to all harvest.

(G) *Special opening for a specified area.* Special openings (i.e., egg gathering) may be created to allow for the customary and traditional use of a migratory bird species in areas that are not otherwise eligible to participate in subsistence harvest seasons. Such areas will be recommended by Regional Councils, and such recommendations will be based on evidence of customary and traditional subsistence harvest practices.

(H) *Individual bag limits.* Personal harvester bag limits may be imposed in the case of a declining population of a species that would otherwise be closed, or an increasing population that is closed to harvest and would not otherwise be open. Personal bag limits will be employed only after consultation with respective regional management bodies affected through the Alaska Migratory Bird Co-management Council (AMBCC) process described in Appendix 6 of the FEIS.

Alternative 2: Open a spring-summer subsistence hunting season that incorporates fall-winter hunting season regulations (e.g., bag limits, shooting hours).

Under this alternative, the Service would replace the current spring-summer subsistence hunting season regulations with regulations consistent with the fall harvest. Methods and means required for fall-winter hunting would be adopted, daily bag limits for individual hunters would be imposed, and fall regulations concerning exchange and transport of birds and bird parts would apply. Egg gathering would, to the extent possible, be consistent with the customary and traditional subsistence harvest of eggs by Alaskan indigenous inhabitants.

The regulations at title 50 of the Code of Federal Regulations (CFR), part 20, subpart C (Taking), apply in this alternative with the exception of closed seasons (§ 20.22). 50 CFR 20, subpart D (Possession), also applies with the exception of § 20.32. The final frameworks approved by the Secretary of the Interior for the Pacific Flyway season would apply with the following exceptions: (1) Shooting hours would not be specified; (2) the season would be from April 2 through August 31; and (3) the closed periods to protect nesting birds described in Alternative 1 would apply.

Decision: The Service has selected Alternative 1 as described in the FSEIS for implementation. Alternative 1 is the most effective alternative for addressing key issues identified during the planning process and will best achieve the purposes and goals of the Service and States. Implementation of the preferred alternative is targeted for the 2015–16 regulations cycle or as soon following as is technically feasible.

Factors Considered in Making the Decision: In reaching this decision, the Service reviewed and considered the following: Impacts identified in Chapter 6 of the draft and FSEIS; relevant issues, concerns, and opportunities presented by agencies, organizations, and individuals throughout the planning process, including comments on the draft and FSEIS; and other relevant factors, including statutory and regulatory guidance.

The preamble of the 1995 Protocol to the Migratory Bird Treaty Amendment states, ''. . . it is not the intent of this Protocol to cause significant increases in the take of species of migratory birds relative to their continental population sizes.'' The use of household surveys of subsistence harvest areas will enable tracking of participation in subsistence harvest activities and the extent of the take. Should the harvest significantly increase relative to continental populations, then regulatory actions would be taken to keep harvest in compliance with the 1995 Protocol.

Under Alternative 1, law enforcement efforts will be carried out commensurate with threats to migratory bird populations to ensure that compliance is achieved to maintain harvest at prescribed levels. The subsistence economies of rural areas will continue to benefit from an important food resource which is traditionally shared among members of a community. In addition, this alternative promotes the establishment of regulations recommended by the AMBCC which, along with the regional management bodies, is the embodiment of the co-management process. Greater compliance with regulations developed through the co-management process is more likely than with Alternative 2. By being part of the regulatory process, subsistence hunters, and those who share in the harvest, will have a sense of ownership, leading to greater compliance. An example of how this has worked in the past is the population recovery of cackling Canada geese that nest on the Yukon-Kuskokwim Delta, in Alaska. The institution of the Hooper Bay agreement in advance of the Migratory Bird Treaty Amendment led to reduced subsistence and reduced fall-winter harvests of cackling Canada geese and helped the population recover from a low of about 25,000 birds to the current population size of approximately 200,000. Participation in the regulatory process also is anticipated to result in greater participation in the harvest survey. Broader coverage of the survey would lead to more accurate harvest data because it would include the harvest of more of the subsistence hunter population.

Avoiding and Minimizing Environmental Harm

The above seven components of the annual regulatory process are designed to continue and improve the long-standing Federal process for establishing regulations for hunting migratory birds. These components continue the process that has maintained this harvest consistent with the long-term conservation of the species and populations that are harvested. The preferred alternatives selected for these components will reduce the administrative burden and thus reduce the carbon footprint by both Federal and State government agencies by reducing the number of meetings conducted annually to establish these regulations. In addition, changing the timing of the meetings will now allow for a greater opportunity for public input and consideration of the proposed annual regulations. The changed process will also allow for periodic modifications of the underlying regulatory packages at 5-year intervals to better address potential changes in environmental conditions caused by factors other than hunting (i.e., climate change). These changes are possible due to improved technical understanding gained through decades of monitoring and assessment of these biological systems. This process will not alter the continued development and improvement of such understanding of the biological systems, as monitoring and assessment will continue on an annual basis.

Public Involvement

Scoping is the initial stage of the EIS process used to design the extent and influence of an action. On September 8, 2005, the Service published a notice of intent to prepare a SEIS on the hunting of migratory birds under the authority of the MBTA (70 FR 53376). On March 9, 2006, the Service subsequently announced a total of 12 public meetings to be held across the United States to accept public and agency comment on the scope and relevant issues that should be addressed in the SEIS (71 FR 12216). In addition to these public meetings, the Service established a Web site to receive electronic comments and solicited written comments. The Service also announced that all comments received from the initiation of this process on September 8, 2005 until May 30, 2006 would be considered in the development of the SEIS. Subsequent to the conclusion of the scoping process a draft FSEIS was developed based on the input received. The draft FSEIS was released for public comment on June 7, 2010 and comments were accepted until March 31, 2011. All comments on the draft FSEIS were carefully considered in the preparation of the FSEIS and the selection of the preferred alternatives for the seven regulatory components considered.

Findings Required by Other Laws and Executive Orders

Please see the Other Required Determinations section of this document.

For Further Information

Questions about the FSEIS may be directed to Robert Trost, Pacific Flyway Representative, Division of Migratory Bird Management, Portland, OR 97232; phone number (503) 231–6162, fax

number (503) 231–6228, and email: *robert_trost@fws.gov.*

Supporting References

U.S. Fish and Wildlife Service. 2010. Issuance of Annual Regulations Permitting the hunting of Migratory Birds: Draft Supplemental Environmental Impact Statement. U.S. Fish and Wildlife Service, Washington, DC. 296 pages.

U.S. Fish and Wildlife Service. 2013. Issuance of Annual Regulations Permitting the hunting of Migratory Birds: Final Supplemental Environmental Impact Statement. U.S. Fish and Wildlife Service, Washington, DC. 418 pages.

Note: This RoD and supporting references are available for public review from the Pacific Flyway Representative, Division of Migratory Bird Management at (503) 231–6162, or the Chief, Division of Migratory Bird Management, at (703) 358–1714. Alternately, you may write to: Pacific Flyway Representative, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 911 NE 11th Avenue, Portland, OR 97232.

Paperwork Reduction Act

This proposed rule does not contain any new information collection requirement that require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number. OMB has reviewed and approved the information collection requirements associated with migratory bird surveys and assigned the following OMB control numbers:

- 1018–0010—Mourning Dove Call Count Survey (expires 4/30/2015).
- 1018–001—North American Woodcock Singing Ground Survey (expires 4/30/2015).
- 1018–0023—Migratory Bird Surveys (expires 4/30/2015). Includes Migratory Bird Harvest Information Program, Migratory Bird Hunter Surveys, Sandhill Crane Survey, and Parts Collection Survey.

Other Required Determinations

Based on our most current data, we are affirming our required determinations made in earlier proposed rules; for descriptions of our actions to ensure compliance with the following statutes and Executive Orders, see our April 9, and June 14, 2013, proposed rules (78 FR 21200 and 78 FR 35844):

- Regulatory Planning and Review (Executive Orders 12866 and 13563);
- Endangered Species Act;
- Regulatory Flexibility Act;
- Small Business Regulatory Enforcement Fairness Act;
- Unfunded Mandates Reform Act;
- Executive Orders 12630, 12988, 13175, 13132, and 13211.

List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

The rules that eventually will be promulgated for the 2013–14 hunting season are authorized under 16 U.S.C. 703–712 and 16 U.S.C. 742 a–j.

Dated: July 18, 2013.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

Proposed Regulations Frameworks for 2013–14 Early Hunting Seasons on Certain Migratory Game Birds

Pursuant to the Migratory Bird Treaty Act and delegated authorities, the Department of the Interior approved the following proposed frameworks, which prescribe season lengths, bag limits, shooting hours, and outside dates within which States may select hunting seasons for certain migratory game birds between September 1, 2013, and March 10, 2014. These frameworks are summarized below.

General

Dates: All outside dates noted below are inclusive.

Shooting and Hawking (taking by falconry) Hours: Unless otherwise specified, from one-half hour before sunrise to sunset daily.

Possession Limits: Unless otherwise specified, possession limits are three times the daily bag limit.

Permits: For some species of migratory birds, the Service authorizes the use of permits to regulate harvest or monitor their take by sport hunters, or both. In many cases (e.g., tundra swans, some sandhill crane populations), the Service determines the amount of harvest that may be taken during hunting seasons during its formal regulations-setting process, and the States then issue permits to hunters at levels predicted to result in the amount of take authorized by the Service. Thus, although issued by States, the permits would not be valid unless the Service approved such take in its regulations.

These Federally authorized, State-issued permits are issued to individuals, and only the individual whose name and address appears on the permit at the time of issuance is authorized to take migratory birds at levels specified in the permit, in accordance with provisions of both Federal and State regulations governing the hunting season. The permit must be carried by the permittee when exercising its provisions and must be presented to any law enforcement officer upon request. The permit is not transferrable or assignable to another individual, and may not be sold, bartered, traded, or otherwise provided to another person. If the permit is altered or defaced in any way, the permit becomes invalid.

Flyways and Management Units

Waterfowl Flyways

Atlantic Flyway—includes Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia.

Mississippi Flyway—includes Alabama, Arkansas, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Ohio, Tennessee, and Wisconsin.

Central Flyway—includes Colorado (east of the Continental Divide), Kansas, Montana (Counties of Blaine, Carbon, Fergus, Judith Basin, Stillwater, Sweetgrass, Wheatland, and all counties east thereof), Nebraska, New Mexico (east of the Continental Divide except the Jicarilla Apache Indian Reservation), North Dakota, Oklahoma, South Dakota, Texas, and Wyoming (east of the Continental Divide).

Pacific Flyway—includes Alaska, Arizona, California, Idaho, Nevada, Oregon, Utah, Washington, and those portions of Colorado, Montana, New Mexico, and Wyoming not included in the Central Flyway.

Management Units

Mourning Dove Management Units

Eastern Management Unit—All States east of the Mississippi River, and Louisiana.

Central Management Unit—Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming.

Western Management Unit—Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington.

Woodcock Management Regions

Eastern Management Region—Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia.

Central Management Region—Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana,

Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, and Wisconsin.

Other geographic descriptions are contained in a later portion of this document.

Definitions

Dark geese: Canada geese, white-fronted geese, brant (except in Alaska, California, Oregon, Washington, and the Atlantic Flyway), and all other goose species, except light geese.

Light geese: Snow (including blue) geese and Ross's geese.

Waterfowl Seasons in the Atlantic Flyway

In the Atlantic Flyway States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Jersey, North Carolina, Pennsylvania, and Virginia, where Sunday hunting is prohibited Statewide by State law, all Sundays are closed to all take of migratory waterfowl (including mergansers and coots).

Special September Teal Season

Outside Dates: Between September 1 and September 30, an open season on all species of teal may be selected by the following States in areas delineated by State regulations:

Atlantic Flyway—Delaware, Florida, Georgia, Maryland, North Carolina, South Carolina, and Virginia.

Mississippi Flyway—Alabama, Arkansas, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Ohio, and Tennessee.

Central Flyway—Colorado (part), Kansas, Nebraska (part), New Mexico (part), Oklahoma, and Texas.

Hunting Seasons and Daily Bag Limits: Not to exceed 16 consecutive hunting days in the Atlantic, Mississippi, and Central Flyways. The daily bag limit is 6 teal.

Shooting Hours:

Atlantic Flyway—One-half hour before sunrise to sunset.

Mississippi and Central Flyways—One-half hour before sunrise to sunset, except in the States of Arkansas, Illinois, Indiana, Missouri, and Ohio, where the hours are from sunrise to sunset.

Special September Duck Seasons

Florida, Kentucky and Tennessee: In lieu of a special September teal season, a 5-consecutive-day season may be selected in September. The daily bag limit may not exceed 4 teal and wood ducks in the aggregate, of which no more than 2 may be wood ducks.

Iowa: Iowa may hold up to 5 days of its regular duck hunting season in September. All ducks that are legal during the regular duck season may be taken during the September segment of the season. The September season segment may commence no earlier than the Saturday nearest September 20 (September 21). The daily bag and possession limits will be the same as those in effect last year but are subject to change during the late-season regulations process. The remainder of the regular duck season may not begin before October 10.

Special Youth Waterfowl Hunting Days

Outside Dates: States may select 2 days per duck-hunting zone, designated as ''Youth Waterfowl Hunting Days,'' in addition to their regular duck seasons. The days must be held outside any regular duck season on a weekend, holidays, or other non-school days when youth hunters would have the maximum opportunity to participate. The days may be held up to 14 days before or after any regular duck-season frameworks or within any split of a regular duck season, or within any other open season on migratory birds.

Daily Bag Limits: The daily bag limits may include ducks, geese, mergansers, coots, and gallinules and will be the same as those allowed in the regular season. Flyway species and area restrictions will remain in effect.

Shooting Hours: One-half hour before sunrise to sunset.

Participation Restrictions: Youth hunters must be 15 years of age or younger. In addition, an adult at least 18 years of age must accompany the youth hunter into the field. This adult may not duck hunt but may participate in other seasons that are open on the special youth day.

Scoters, Eiders, and Long-Tailed Ducks (Atlantic Flyway)

Outside Dates: Between September 15 and January 31.

Hunting Seasons and Daily Bag Limits: Not to exceed 107 days, with a daily bag limit of 7, singly or in the aggregate, of the listed sea duck species, of which no more than 4 may be scoters.

Daily Bag Limits During the Regular Duck Season: Within the special sea duck areas, during the regular duck season in the Atlantic Flyway, States may choose to allow the above sea duck limits in addition to the limits applying to other ducks during the regular duck season. In all other areas, sea ducks may be taken only during the regular open season for ducks and are part of the regular duck season daily bag (not to exceed 4 scoters) and possession limits.

Areas: In all coastal waters and all waters of rivers and streams seaward from the first upstream bridge in Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, and New York; in any waters of the Atlantic Ocean and in any tidal waters of any bay which are separated by at least 1 mile of open water from any shore, island, and emergent vegetation in New Jersey, South Carolina, and Georgia; and in any waters of the Atlantic Ocean and in any tidal waters of any bay which are separated by at least 800 yards of open water from any shore, island, and emergent vegetation in Delaware, Maryland, North Carolina, and Virginia; and provided that any such areas have been described, delineated, and designated as special sea duck hunting areas under the hunting regulations adopted by the respective States.

Special Early Canada Goose Seasons

Atlantic Flyway

General Seasons

A Canada goose season of up to 15 days during September 1–15 may be selected for the Eastern Unit of Maryland. Seasons not to exceed 30 days during September 1–30 may be selected for Connecticut, Florida, Georgia, New Jersey, New York (Long Island Zone only), North Carolina, Rhode Island, and South Carolina. Seasons may not exceed 25 days during September 1–25 in the remainder of the Flyway. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State's hunting regulations.

Daily Bag Limits: Not to exceed 15 Canada geese.

Shooting Hours: One-half hour before sunrise to sunset, except that during any general season, shooting hours may extend to one-half hour after sunset if all other waterfowl seasons are closed in the specific applicable area.

Mississippi Flyway

General Seasons

Canada goose seasons of up to 15 days during September 1–15 may be selected, except in the Upper Peninsula in Michigan, where the season may not extend beyond September 10, and in Minnesota, where a season of up to 22 days during September 1–22 may be selected. The daily bag limit may not exceed 5 Canada geese, except in designated areas of Minnesota where the daily bag limit may not exceed 10 Canada geese. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State's hunting regulations.

A Canada goose season of up to 10 consecutive days during September 1–

10 may be selected by Michigan for Huron, Saginaw, and Tuscola Counties, except that the Shiawassee National Wildlife Refuge, Shiawassee River State Game Area Refuge, and the Fish Point Wildlife Area Refuge will remain closed. The daily bag limit may not exceed 5 Canada geese.

Shooting Hours: One-half hour before sunrise to sunset, except that during September 1–15 shooting hours may extend to one-half hour after sunset if all other waterfowl seasons are closed in the specific applicable area.

Central Flyway

General Seasons

In Kansas, Nebraska, Oklahoma, South Dakota, and Texas, Canada goose seasons of up to 30 days during September 1–30 may be selected. In Colorado, New Mexico, North Dakota, Montana, and Wyoming, Canada goose seasons of up to 15 days during September 1–15 may be selected. The daily bag limit may not exceed 5 Canada geese, except in Kansas, Nebraska, and Oklahoma, where the daily bag limit may not exceed 8 Canada geese and in North Dakota and South Dakota, where the daily bag limit may not exceed 15 Canada geese. Areas open to the hunting of Canada geese must be described, delineated, and designated as such in each State's hunting regulations.

Shooting Hours: One-half hour before sunrise to sunset, except that during September 1–15 shooting hours may extend to one-half hour after sunset if all other waterfowl seasons are closed in the specific applicable area.

Pacific Flyway

General Seasons

California may select a 9-day season in Humboldt County during the period September 1–15. The daily bag limit is 2.

Colorado may select a 9-day season during the period of September 1–15. The daily bag limit is 4.

Oregon may select a special Canada goose season of up to 15 days during the period September 1–15. In addition, in the NW Goose Management Zone in Oregon, a 15-day season may be selected during the period September 1–20. Daily bag limits may not exceed 5 Canada geese.

Idaho may select a 7-day season during the period September 1–15. The daily bag limit is 2.

Washington may select a special Canada goose season of up to 15 days during the period September 1–15. Daily bag limits may not exceed 5 Canada geese.

Wyoming may select an 8-day season on Canada geese during the period September 1–15. This season is subject to the following conditions:

A. Where applicable, the season must be concurrent with the September portion of the sandhill crane season.

B. A daily bag limit of 3, with season and possession limits of 9, will apply to the special season.

Areas open to hunting of Canada geese in each State must be described, delineated, and designated as such in each State's hunting regulations.

Regular Goose Seasons

Regular goose seasons may open as early as September 11 in the Upper Peninsula of Michigan and September 16 in Wisconsin and the Lower Peninsula of Michigan. Season lengths, bag and possession limits, and other provisions will be established during the late-season regulations process.

Sandhill Cranes

Regular Seasons in the Mississippi Flyway

Outside Dates: Between September 1 and February 28.

Hunting Seasons: A season not to exceed 37 consecutive days may be selected in the designated portion of northwestern Minnesota (Northwest Goose Zone).

Daily Bag Limit: 2 sandhill cranes.

Permits: Each person participating in the regular sandhill crane season must have a valid Federal or State sandhill crane hunting permit.

Experimental Seasons in the Mississippi Flyway

Outside Dates: Between September 1 and January 31.

Hunting Seasons: A season not to exceed 30 consecutive days may be selected in Kentucky and a season not to exceed 60 consecutive days may be selected in Tennessee.

Daily Bag Limit: Not to exceed 2 daily and 2 per season in Kentucky. Not to exceed 3 daily and 3 per season in Tennessee.

Permits: Each person participating in the regular sandhill crane season must have a valid Federal or State sandhill crane hunting permit.

Other Provisions: Numbers of permits, open areas, season dates, protection plans for other species, and other provisions of seasons must be consistent with the management plan and approved by the Mississippi Flyway Council.

Regular Seasons in the Central Flyway

Outside Dates: Between September 1 and February 28.

Hunting Seasons: Seasons not to exceed 37 consecutive days may be selected in designated portions of Texas (Area 2). Seasons not to exceed 58 consecutive days may be selected in designated portions of the following States: Colorado, Kansas, Montana, North Dakota, South Dakota, and Wyoming. Seasons not to exceed 93 consecutive days may be selected in designated portions of the following States: New Mexico, Oklahoma, and Texas.

Daily Bag Limits: 3 sandhill cranes, except 2 sandhill cranes in designated portions of North Dakota (Area 2) and Texas (Area 2).

Permits: Each person participating in the regular sandhill crane season must have a valid Federal or State sandhill crane hunting permit.

Special Seasons in the Central and Pacific Flyways

Arizona, Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming may select seasons for hunting sandhill cranes within the range of the Rocky Mountain Population (RMP) subject to the following conditions:

Outside Dates: Between September 1 and January 31.

Hunting Seasons: The season in any State or zone may not exceed 30 consecutive days.

Bag limits: Not to exceed 3 daily and 9 per season.

Permits: Participants must have a valid permit, issued by the appropriate State, in their possession while hunting.

Other Provisions: Numbers of permits, open areas, season dates, protection plans for other species, and other provisions of seasons must be consistent with the management plan and approved by the Central and Pacific Flyway Councils, with the following exceptions:

A. In Utah, 100 percent of the harvest will be assigned to the RMP quota;

B. In Arizona, monitoring the racial composition of the harvest must be conducted at 3-year intervals;

C. In Idaho, 100 percent of the harvest will be assigned to the RMP quota; and

D. In New Mexico, the season in the Estancia Valley is experimental, with a requirement to monitor the level and racial composition of the harvest; greater sandhill cranes in the harvest will be assigned to the RMP quota.

Special Seasons in the Pacific Flyway

Arizona may select a season for hunting sandhill cranes within the range of the Lower Colorado River Population (LCR) of sandhill cranes, subject to the following conditions:

Outside Dates: Between January 1 and January 31.

Hunting Seasons: The season may not exceed 3 days.

Bag limits: Not to exceed 1 daily and 1 per season.

Permits: Participants must have a valid permit, issued by the appropriate State, in their possession while hunting.

Other provisions: The season is experimental. Numbers of permits, open areas, season dates, protection plans for other species, and other provisions of seasons must be consistent with the management plan and approved by the Pacific Flyway Council.

Common Moorhens and Purple Gallinules

Outside Dates: Between September 1 and the last Sunday in January (January 26) in the Atlantic, Mississippi, and Central Flyways. States in the Pacific Flyway have been allowed to select their hunting seasons between the outside dates for the season on ducks; therefore, they are late-season frameworks, and no frameworks are provided in this document.

Hunting Seasons and Daily Bag Limits: Seasons may not exceed 70 days in the Atlantic, Mississippi, and Central Flyways. Seasons may be split into 2 segments. The daily bag limit is 15 common moorhens and purple gallinules, singly or in the aggregate of the two species.

Zoning: Seasons may be selected by zones established for duck hunting.

Rails

Outside Dates: States included herein may select seasons between September 1 and the last Sunday in January (January 26) on clapper, king, sora, and Virginia rails.

Hunting Seasons: Seasons may not exceed 70 days, and may be split into 2 segments.

Daily Bag Limits:

Clapper and King Rails—In Rhode Island, Connecticut, New Jersey, Delaware, and Maryland, 10, singly or in the aggregate of the two species. In Texas, Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina, and Virginia, 15, singly or in the aggregate of the two species.

Sora and Virginia Rails—In the Atlantic, Mississippi, and Central Flyways and the Pacific Flyway portions of Colorado, Montana, New Mexico, and Wyoming, 25 rails, singly or in the aggregate of the two species. The season is closed in the remainder of the Pacific Flyway.

Common Snipe

Outside Dates: Between September 1 and February 28, except in Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, and Virginia, where the season must end no later than January 31.

Hunting Seasons and Daily Bag Limits: Seasons may not exceed 107 days and may be split into two segments. The daily bag limit is 8 snipe.

Zoning: Seasons may be selected by zones established for duck hunting.

American Woodcock

Outside Dates: States in the Eastern Management Region may select hunting seasons between October 1 and January 31. States in the Central Management Region may select hunting seasons between the Saturday nearest September 22 (September 21) and January 31.

Hunting Seasons and Daily Bag Limits: Seasons may not exceed 45 days in the Eastern Region and 45 days in the Central Region. The daily bag limit is 3. Seasons may be split into two segments.

Zoning: New Jersey may select seasons in each of two zones. The season in each zone may not exceed 36 days.

Band-Tailed Pigeons

Pacific Coast States (California, Oregon, Washington, and Nevada)

Outside Dates: Between September 15 and January 1.

Hunting Seasons and Daily Bag Limits: Not more than 9 consecutive days, with a daily bag limit of 2 band-tailed pigeons.

Zoning: California may select hunting seasons not to exceed 9 consecutive days in each of two zones. The season in the North Zone must close by October 3.

Four-Corners States (Arizona, Colorado, New Mexico, and Utah)

Outside Dates: Between September 1 and November 30.

Hunting Seasons and Daily Bag Limits: Not more than 30 consecutive days, with a daily bag limit of 5 band-tailed pigeons.

Zoning: New Mexico may select hunting seasons not to exceed 20 consecutive days in each of two zones. The season in the South Zone may not open until October 1.

Doves

Outside Dates: Between September 1 and January 15, except as otherwise provided, States may select hunting seasons and daily bag limits as follows:

Eastern Management Unit

Hunting Seasons and Daily Bag Limits: Not more than 70 days, with a daily bag limit of 15 mourning and white-winged doves in the aggregate.

Zoning and Split Seasons: States may select hunting seasons in each of two zones. The season within each zone may be split into not more than three periods. Regulations for bag and possession limits, season length, and shooting hours must be uniform within specific hunting zones.

Central Management Unit

For all States except Texas:

Hunting Seasons and Daily Bag Limits: Not more than 70 days, with a daily bag limit of 15 mourning and white-winged doves in the aggregate.

Zoning and Split Seasons: States may select hunting seasons in each of two zones. The season within each zone may be split into not more than three periods.

Texas:

Hunting Seasons and Daily Bag Limits: Not more than 70 days, with a daily bag limit of 15 mourning, white-winged, and white-tipped doves in the aggregate, of which no more than 2 may be white-tipped doves.

Zoning and Split Seasons: Texas may select hunting seasons for each of three zones subject to the following conditions:

A. The hunting season may be split into not more than two periods, except in that portion of Texas in which the special white-winged dove season is allowed, where a limited take of mourning and white-tipped doves may also occur during that special season (see Special White-winged Dove Area).

B. A season may be selected for the North and Central Zones between September 1 and January 25; and for the South Zone between the Friday nearest September 20 (September 20), but not earlier than September 17, and January 25.

C. Except as noted above, regulations for bag and possession limits, season length, and shooting hours must be uniform within each hunting zone.

Special White-winged Dove Area in Texas:

In addition, Texas may select a hunting season of not more than 4 days for the Special White-winged Dove Area of the South Zone between September 1 and September 19. The daily bag limit may not exceed 15 white-winged, mourning, and white-tipped doves in the aggregate, of which no more than 2 may be mourning doves and no more than 2 may be white-tipped doves.

Western Management Unit

Hunting Seasons and Daily Bag Limits:

Idaho, Nevada, Oregon, Utah, and Washington—Not more than 30

consecutive days, with a daily bag limit of 10 mourning and white-winged doves in the aggregate.

Arizona and California—Not more than 60 days, which may be split between two periods, September 1–15 and November 1–January 15. In Arizona, during the first segment of the season, the daily bag limit is 10 mourning and white-winged doves in the aggregate. During the remainder of the season, the daily bag limit is 10 mourning doves. In California, the daily bag limit is 10 mourning and white-winged doves in the aggregate.

Alaska

Outside Dates: Between September 1 and January 26.

Hunting Seasons: Alaska may select 107 consecutive days for waterfowl, sandhill cranes, and common snipe in each of 5 zones. The season may be split without penalty in the Kodiak Zone. The seasons in each zone must be concurrent.

Closures: The hunting season is closed on emperor geese, spectacled eiders, and Steller's eiders.

Daily Bag and Possession Limits:

Ducks—Except as noted, a basic daily bag limit of 7 ducks. Daily bag limits in the North Zone are 10, and in the Gulf Coast Zone, they are 8. The basic limits may include no more than 1 canvasback daily and may not include sea ducks.

In addition to the basic duck limits, Alaska may select sea duck limits of 10 daily, singly or in the aggregate, including no more than 6 each of either harlequin or long-tailed ducks. Sea ducks include scoters, common and king eiders, harlequin ducks, long-tailed ducks, and common and red-breasted mergansers.

Light Geese—A basic daily bag limit of 4.

Dark Geese—A basic daily bag limit of 4.

Dark-goose seasons are subject to the following exceptions:

A. In Units 5 and 6, the taking of Canada geese is permitted from September 28 through December 16.

B. On Middleton Island in Unit 6, a special, permit-only Canada goose season may be offered. A mandatory goose identification class is required. Hunters must check in and check out. The bag limit is 1 daily and 1 in possession. The season will close if incidental harvest includes 5 dusky Canada geese. A dusky Canada goose is any dark-breasted Canada goose (Munsell 10 YR color value five or less) with a bill length between 40 and 50 millimeters.

C. In Units 6–B, 6–C, and on Hinchinbrook and Hawkins Islands in Unit 6–D, a special, permit-only Canada goose season may be offered. Hunters must have all harvested geese checked and classified to subspecies. The daily bag limit is 4 daily. The Canada goose season will close in all of the permit areas if the total dusky goose (as defined above) harvest reaches 40.

D. In Units 9, 10, 17, and 18, dark goose limits are 6 per day.

Brant—A daily bag limit of 2.

Common snipe—A daily bag limit of 8.

Sandhill cranes—Bag limit of 2 in the Southeast, Gulf Coast, Kodiak, and Aleutian Zones, and Unit 17 in the Northern Zone. In the remainder of the Northern Zone (outside Unit 17), bag limit of 3.

Tundra Swans—Open seasons for tundra swans may be selected subject to the following conditions:

A. All seasons are by registration permit only.

B. All season framework dates are September 1–October 31.

C. In Game Management Unit (GMU) 17, no more than 200 permits may be issued during this operational season. No more than 3 tundra swans may be authorized per permit, with no more than 1 permit issued per hunter per season.

D. In Game Management Unit (GMU) 18, no more than 500 permits may be issued during the operational season. Up to 3 tundra swans may be authorized per permit. No more than 1 permit may be issued per hunter per season.

E. In GMU 22, no more than 300 permits may be issued during the operational season. Each permittee may be authorized to take up to 3 tundra swans per permit. No more than 1 permit may be issued per hunter per season.

F. In GMU 23, no more than 300 permits may be issued during the operational season. No more than 3 tundra swans may be authorized per permit, with no more than 1 permit issued per hunter per season.

Hawaii

Outside Dates: Between October 1 and January 31.

Hunting Seasons: Not more than 65 days (75 under the alternative) for mourning doves.

Bag Limits: Not to exceed 15 (12 under the alternative) mourning doves.

Note: Mourning doves may be taken in Hawaii in accordance with shooting hours and other regulations set by the State of Hawaii, and subject to the applicable provisions of 50 CFR part 20.

Puerto Rico

Doves and Pigeons

Outside Dates: Between September 1 and January 15.

Hunting Seasons: Not more than 60 days.

Daily Bag and Possession Limits: Not to exceed 20 Zenaida, mourning, and white-winged doves in the aggregate, of which not more than 10 may be Zenaida doves and 3 may be mourning doves. Not to exceed 5 scaly-naped pigeons.

Closed Seasons: The season is closed on the white-crowned pigeon and the plain pigeon, which are protected by the Commonwealth of Puerto Rico.

Closed Areas: There is no open season on doves or pigeons in the following areas: Municipality of Culebra, Desecheo Island, Mona Island, El Verde Closure Area, and Cidra Municipality and adjacent areas.

Ducks, Coots, Moorhens, Gallinules, and Snipe

Outside Dates: Between October 1 and January 31.

Hunting Seasons: Not more than 55 days may be selected for hunting ducks, common moorhens, and common snipe. The season may be split into two segments.

Daily Bag Limits:

Ducks—Not to exceed 6.

Common moorhens—Not to exceed 6.

Common snipe—Not to exceed 8.

Closed Seasons: The season is closed on the ruddy duck, white-cheeked pintail, West Indian whistling duck, fulvous whistling duck, and masked duck, which are protected by the Commonwealth of Puerto Rico. The season also is closed on the purple gallinule, American coot, and Caribbean coot.

Closed Areas: There is no open season on ducks, common moorhens, and common snipe in the Municipality of Culebra and on Desecheo Island.

Virgin Islands

Doves and Pigeons

Outside Dates: Between September 1 and January 15.

Hunting Seasons: Not more than 60 days for Zenaida doves.

Daily Bag and Possession Limits: Not to exceed 10 Zenaida doves.

Closed Seasons: No open season is prescribed for ground or quail doves or pigeons.

Closed Areas: There is no open season for migratory game birds on Ruth Cay (just south of St. Croix).

Local Names for Certain Birds: Zenaida dove, also known as mountain dove; bridled quail-dove, also known as

Barbary dove or partridge; common ground-dove, also known as stone dove, tobacco dove, rola, or tortolita; scaly-naped pigeon, also known as red-necked or scaled pigeon.

Ducks

Outside Dates: Between December 1 and January 31.

Hunting Seasons: Not more than 55 consecutive days.

Daily Bag Limits: Not to exceed 6.

Closed Seasons: The season is closed on the ruddy duck, white-cheeked pintail, West Indian whistling duck, fulvous whistling duck, and masked duck.

Special Falconry Regulations

Falconry is a permitted means of taking migratory game birds in any State meeting Federal falconry standards in 50 CFR 21.29. These States may select an extended season for taking migratory game birds in accordance with the following:

Extended Seasons: For all hunting methods combined, the combined length of the extended season, regular season, and any special or experimental seasons must not exceed 107 days for any species or group of species in a geographical area. Each extended season may be divided into a maximum of 3 segments.

Framework Dates: Seasons must fall between September 1 and March 10.

Daily Bag Limits: Falconry daily bag limits for all permitted migratory game birds must not exceed 3 birds, singly or in the aggregate, during extended falconry seasons, any special or experimental seasons, and regular hunting seasons in all States, including those that do not select an extended falconry season.

Regular Seasons: General hunting regulations, including seasons and hunting hours, apply to falconry in each State listed in 50 CFR 21.29. Regular season bag limits do not apply to falconry. The falconry bag limit is not in addition to gun limits.

Area, Unit, and Zone Descriptions

Doves

Alabama

South Zone—Baldwin, Barbour, Coffee, Covington, Dale, Escambia, Geneva, Henry, Houston, and Mobile Counties.

North Zone—Remainder of the State.

California

White-winged Dove Open Areas—Imperial, Riverside, and San Bernardino Counties.

Florida

Northwest Zone—The Counties of Bay, Calhoun, Escambia, Franklin, Gadsden, Gulf, Holmes, Jackson, Liberty, Okaloosa, Santa Rosa, Walton, Washington, Leon (except that portion north of U.S. 27 and east of State Road 155), Jefferson (south of U.S. 27, west of State Road 59 and north of U.S. 98), and Wakulla (except that portion south of U.S. 98 and east of the St. Marks River).

South Zone—Remainder of State.

Louisiana

North Zone—That portion of the State north of a line extending east from the Texas border along State Highway 12 to U.S. Highway 190, east along U.S. 190 to Interstate Highway 12, east along Interstate 12 to Interstate Highway 10, then east along Interstate Highway 10 to the Mississippi border.

South Zone—The remainder of the State.

Mississippi

North Zone—That portion of the State north and west of a line extending west from the Alabama State line along U.S. Highway 84 to its junction with State Highway 35, then south along State Highway 35 to the Louisiana State line.

South Zone—The remainder of Mississippi.

Texas

North Zone—That portion of the State north of a line beginning at the International Bridge south of Fort Hancock; north along FM 1088 to TX 20; west along TX 20 to TX 148; north along TX 148 to I–10 at Fort Hancock; east along I–10 to I–20; northeast along I–20 to I–30 at Fort Worth; northeast along I–30 to the Texas–Arkansas State line.

South Zone—That portion of the State south and west of a line beginning at the International Bridge south of Del Rio, proceeding east on U.S. 90 to State Loop 1604 west of San Antonio; then south, east, and north along Loop 1604 to Interstate Highway 10 east of San Antonio; then east on I–10 to Orange, Texas.

Special White-winged Dove Area in the South Zone—That portion of the state south and west of a line beginning at the International Toll Bridge in Del Rio; then northeast along U.S. Highway 277 Spur to Highway 90 in Del Rio; thence east along U.S. Highway 90 to State Loop 1604; thence along Loop 1604 south and east to Interstate Highway 37; thence south along Interstate Highway 37 to U.S. Highway 181 in Corpus Christi; thence north and east along U.S. 181 to the Corpus Christi Ship Channel, thence eastwards along the south shore of the Corpus Christi Ship Channel to the Gulf of Mexico.

Central Zone—That portion of the State lying between the North and South Zones.

Band-Tailed Pigeons

California

North Zone—Alpine, Butte, Del Norte, Glenn, Humboldt, Lassen, Mendocino, Modoc, Plumas, Shasta, Sierra, Siskiyou, Tehama, and Trinity Counties.

South Zone—The remainder of the State.

New Mexico

North Zone—North of a line following U.S. 60 from the Arizona State line east to I–25 at Socorro and then south along I–25 from Socorro to the Texas State line.

South Zone—The remainder of the State.

Washington

Western Washington—The State of Washington excluding those portions lying east of the Pacific Crest Trail and east of the Big White Salmon River in Klickitat County.

Woodcock

New Jersey

North Zone—That portion of the State north of NJ 70.

South Zone—The remainder of the State.

Special September Canada Goose Seasons

Atlantic Flyway

Connecticut

North Zone—That portion of the State north of I–95.

South Zone—The remainder of the State.

Maryland

Eastern Unit—Calvert, Caroline, Cecil, Dorchester, Harford, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Wicomico, and Worcester Counties; and that part of Anne Arundel County east of Interstate 895, Interstate 97 and Route 3; that part of Prince George's County east of Route 3 and Route 301; and that part of Charles County east of Route 301 to the Virginia State line.

Western Unit—Allegany, Baltimore, Carroll, Frederick, Garrett, Howard, Montgomery, and Washington Counties and that part of Anne Arundel County west of Interstate 895, Interstate 97 and Route 3; that part of Prince George's County west of Route 3 and Route 301; and that part of Charles County west of Route 301 to the Virginia State line.

Massachusetts

Western Zone—That portion of the State west of a line extending south from the Vermont border on I–91 to MA 9, west on MA 9 to MA 10, south on MA 10 to U.S. 202, south on U.S. 202 to the Connecticut border.

Central Zone—That portion of the State east of the Berkshire Zone and west of a line extending south from the New Hampshire border on I–95 to U.S. 1, south on U.S. 1 to I–93, south on I–93 to MA 3, south on MA 3 to U.S. 6, west on U.S. 6 to MA 28, west on MA 28 to I–195, west to the Rhode Island border; except the waters, and the lands 150 yards inland from the high-water mark, of the Assonet River upstream to the MA 24 bridge, and the Taunton River upstream to the Center St.–Elm St. bridge will be in the Coastal Zone.

Coastal Zone—That portion of Massachusetts east and south of the Central Zone.

New York

Lake Champlain Zone—The U.S. portion of Lake Champlain and that area east and north of a line extending along NY 9B from the Canadian border to U.S. 9, south along U.S. 9 to NY 22 south of Keesville; south along NY 22 to the west shore of South Bay, along and around the shoreline of South Bay to NY 22 on the east shore of South Bay; southeast along NY 22 to U.S. 4, northeast along U.S. 4 to the Vermont border.

Eastern Long Island Goose Area (North Atlantic Population (NAP) High Harvest Area)—That area of Suffolk County lying east of a continuous line extending due south from the New York-Connecticut boundary to the northernmost end of Roanoke Avenue in the Town of Riverhead; then south on Roanoke Avenue (which becomes County Route 73) to State Route 25; then west on Route 25 to Peconic Avenue; then south on Peconic Avenue to County Route (CR) 104 (Riverleigh Avenue); then south on CR 104 to CR 31 (Old Riverhead Road); then south on CR 31 to Oak Street; then south on Oak Street to Potunk Lane; then west on Stevens Lane; then south on Jessup Avenue (in Westhampton Beach) to Dune Road (CR 89); then due south to international waters.

Western Long Island Goose Area (Resident Population (RP) Area)—That area of Westchester County and its tidal waters southeast of Interstate Route 95 and that area of Nassau and Suffolk Counties lying west of a continuous line extending due south from the New York-Connecticut boundary to the northernmost end of the Sunken Meadow State Parkway; then south on the Sunken Meadow Parkway to the Sagtikos State Parkway; then south on the Sagtikos Parkway to the Robert Moses State Parkway; then south on the Robert Moses Parkway to its southernmost end; then due south to international waters.

Central Long Island Goose Area (NAP Low Harvest Area)—That area of Suffolk County lying between the Western and Eastern Long Island Goose Areas, as defined above.

Western Zone—That area west of a line extending from Lake Ontario east along the north shore of the Salmon River to I–81, and south along I–81 to the Pennsylvania border.

Northeastern Zone—That area north of a line extending from Lake Ontario east along the north shore of the Salmon River to I–81, south along I–81 to NY 49, east along NY 49 to NY 365, east along NY 365 to NY 28, east along NY 28 to NY 29, east along NY 29 to I–87, north along I–87 to U.S. 9 (at Exit 20), north along U.S. 9 to NY 149, east along NY 149 to U.S. 4, north along U.S. 4 to the Vermont border, exclusive of the Lake Champlain Zone.

Southeastern Zone—The remaining portion of New York.

Pennsylvania

Southern James Bay Population (SJBP) Zone—The area north of I–80 and west of I–79, including in the city of Erie west of Bay Front Parkway to and including the Lake Erie Duck Zone (Lake Erie, Presque Isle, and the area within 150 yards of the Lake Erie Shoreline).

Vermont

Lake Champlain Zone—The U.S. portion of Lake Champlain and that area north and west of the line extending from the New York border along U.S. 4 to VT 22A at Fair Haven; VT 22A to U.S. 7 at Vergennes; U.S. 7 to VT 78 at Swanton; VT 78 to VT 36; VT 36 to Maquam Bay on Lake Champlain; along and around the shoreline of Maquam Bay and Hog Island to VT 78 at the West Swanton Bridge; VT 78 to VT 2 in Alburg; VT 2 to the Richelieu River in Alburg; along the east shore of the Richelieu River to the Canadian border.

Interior Zone—That portion of Vermont east of the Lake Champlain Zone and west of a line extending from the Massachusetts border at Interstate 91; north along Interstate 91 to US 2; east along US 2 to VT 102; north along VT 102 to VT 253; north along VT 253 to the Canadian border.

Connecticut River Zone—The remaining portion of Vermont east of the Interior Zone.

Mississippi Flyway

Arkansas

Early Canada Goose Area—Baxter, Benton, Boone, Carroll, Clark, Conway, Crawford, Faulkner, Franklin, Garland, Hempstead, Hot Springs, Howard, Johnson, Lafayette, Little River, Logan, Madison, Marion, Miller, Montgomery, Newton, Perry, Pike, Polk, Pope, Pulaski, Saline, Searcy, Sebastian, Sevier, Scott, Van Buren, Washington, and Yell Counties.

Illinois

North September Canada Goose Zone—That portion of the State north of a line extending west from the Indiana border along Interstate 80 to I–39, south along I–39 to Illinois Route 18, west along Illinois Route 18 to Illinois Route 29, south along Illinois Route 29 to Illinois Route 17, west along Illinois Route 17 to the Mississippi River, and due south across the Mississippi River to the Iowa border.

Central September Canada Goose Zone—That portion of the State south of the North September Canada Goose Zone line to a line extending west from the Indiana border along I–70 to Illinois Route 4, south along Illinois Route 4 to Illinois Route 161, west along Illinois Route 161 to Illinois Route 158, south and west along Illinois Route 158 to Illinois Route 159, south along Illinois Route 159 to Illinois Route 3, south along Illinois Route 3 to St. Leo's Road, south along St. Leo's road to Modoc Road, west along Modoc Road to Modoc Ferry Road, southwest along Modoc Ferry Road to Levee Road, southeast along Levee Road to County Route 12 (Modoc Ferry entrance Road), south along County Route 12 to the Modoc Ferry route and southwest on the Modoc Ferry route across the Mississippi River to the Missouri border.

South September Canada Goose Zone—That portion of the State south and east of a line extending west from the Indiana border along Interstate 70, south along U.S. Highway 45, to Illinois Route 13, west along Illinois Route 13 to Greenbriar Road, north on Greenbriar Road to Sycamore Road, west on Sycamore Road to N. Reed Station Road, south on N. Reed Station Road to Illinois Route 13, west along Illinois Route 13 to Illinois Route 127, south along Illinois Route 127 to State Forest Road (1025 N), west along State Forest Road to Illinois Route 3, north along Illinois Route 3 to the south bank of the Big Muddy River, west along the south bank of the Big Muddy River to the Mississippi River, west across the Mississippi River to the Missouri border.

South Central September Canada Goose Zone—The remainder of the State between the south border of the Central Zone and the North border of the South Zone

Iowa

North Zone—That portion of the State north of U.S. Highway 20.

South Zone—The remainder of Iowa.

Cedar Rapids/Iowa City Goose Zone—Includes portions of Linn and Johnson Counties bounded as follows: Beginning at the intersection of the west border of Linn County and Linn County Road E2W; then south and east along County Road E2W to Highway 920; then north along Highway 920 to County Road E16; then east along County Road E16 to County Road W58; then south along County Road W58 to County Road E34; then east along County Road E34 to Highway 13; then south along Highway 13 to Highway 30; then east along Highway 30 to Highway 1; then south along Highway 1 to Morse Road in Johnson County; then east along Morse Road to Wapsi Avenue; then south along Wapsi Avenue to Lower West Branch Road; then west along Lower West Branch Road to Taft Avenue; then south along Taft Avenue to County Road F62; then west along County Road F62 to Kansas Avenue; then north along Kansas Avenue to Black Diamond Road; then west on Black Diamond Road to Jasper Avenue; then north along Jasper Avenue to Rohert Road; then west along Rohert Road to Ivy Avenue; then north along Ivy Avenue to 340th Street; then west along 340th Street to Half Moon Avenue; then north along Half Moon Avenue to Highway 6; then west along Highway 6 to Echo Avenue; then north along Echo Avenue to 250th Street; then east on 250th Street to Green Castle Avenue; then north along Green Castle Avenue to County Road F12; then west along County Road F12 to County Road W30; then north along County Road W30 to Highway 151; then north along the Linn–Benton County line to the point of beginning.

Des Moines Goose Zone—Includes those portions of Polk, Warren, Madison and Dallas Counties bounded as follows: Beginning at the intersection of Northwest 158th Avenue and County Road R38 in Polk County; then south along R38 to Northwest 142nd Avenue; then east along Northwest 142nd Avenue to Northeast 126th Avenue; then east along Northeast 126th Avenue to Northeast 46th Street; then south along Northeast 46th Street to Highway 931; then east along Highway 931 to Northeast 80th Street; then south along Northeast 80th Street to Southeast 6th Avenue; then west along Southeast 6th Avenue to Highway 65; then south and west along Highway 65 to Highway 69 in Warren County; then south along Highway 69 to County Road G24; then west along County Road G24 to Highway 28; then southwest along Highway 28 to 43rd Avenue; then north along 43rd Avenue to Ford Street; then west along Ford Street to Filmore Street; then west along Filmore Street to 10th Avenue; then south along 10th Avenue to 155th Street in Madison County; then west along 155th Street to Cumming Road; then north along Cumming Road to Badger Creek Avenue; then north along Badger Creek Avenue to County Road F90 in Dallas County; then east along County Road F90 to County Road R22; then north along County Road R22 to Highway 44; then east along Highway 44 to County Road R30; then north along County Road R30 to County Road F31; then east along County Road F31 to Highway 17; then north along Highway 17 to Highway 415 in Polk County; then east along Highway 415 to Northwest 158th Avenue; then east along Northwest 158th Avenue to the point of beginning.

Cedar Falls/Waterloo Goose Zone—Includes those portions of Black Hawk County bounded as follows: Beginning at the intersection of County Roads C66 and V49 in Black Hawk County, then south along County Road V49 to County Road D38, then west along County Road D38 to State Highway 21, then south along State Highway 21 to County Road D35, then west along County Road D35 to Grundy Road, then north along Grundy Road to County Road D19, then west along County Road D19 to Butler Road, then north along Butler Road to County Road C57, then north and east along County Road C57 to U.S. Highway 63, then south along U.S. Highway 63 to County Road C66, then east along County Road C66 to the point of beginning.

Michigan

North Zone—Same as North duck zone.

Middle Zone—Same as Middle duck zone.

South Zone—Same as South duck zone.

Minnesota

Northwest Goose Zone—That portion of the State encompassed by a line extending east from the North Dakota border along U.S. Highway 2 to State Trunk Highway (STH) 32, north along STH 32 to STH 92, east along STH 92 to County State Aid Highway (CSAH) 2 in Polk County, north along CSAH 2 to CSAH 27 in Pennington County, north along CSAH 27 to STH 1, east along STH 1 to CSAH 28 in Pennington County, north along CSAH 28 to CSAH 54 in Marshall County, north along CSAH 54 to CSAH 9 in Roseau County, north along CSAH 9 to STH 11, west along STH 11 to STH 310, and north along STH 310 to the Manitoba border.

Intensive Harvest Zone—That portion of the State encompassed by a line extending east from the junction of US 2 and the North Dakota border, US 2 east to MN 32 N, MN 32 N to MN 92 S, MN 92 S to MN 200 E, MN 200 E to US 71 S, US 71 S to US 10 E, US 10 E to MN 101 S, MN 101 S to Interstate 94 E, Interstate 94 East to US 494 S, US 494 S to US 212 W, US 212 W to MN 23 S, MN 23 S to US 14 W, US 14 W to the South Dakota border, South Dakota Border north to the North Dakota border, North Dakota border north to US 2 E.

Rest of State: Remainder of Minnesota.

Wisconsin

Early-Season Subzone A—That portion of the State encompassed by a line beginning at the intersection of U.S. Highway 141 and the Michigan border near Niagara, then south along U.S. 141 to State Highway 22, west and southwest along State 22 to U.S. 45, south along U.S. 45 to State 22, west and south along State 22 to State 110, south along State 110 to U.S. 10, south along U.S. 10 to State 49, south along State 49 to State 23, west along State 23 to State 73, south along State 73 to State 60, west along State 60 to State 23, south along State 23 to State 11, east along State 11 to State 78, then south along State 78 to the Illinois border.

Early-Season Subzone B—The remainder of the State.

Central Flyway

North Dakota

Missouri River Canada Goose Zone—The area within and bounded by a line starting where ND Hwy 6 crosses the South Dakota border; then north on ND Hwy 6 to I–94; then west on I–94 to ND Hwy 49; then north on ND Hwy 49 to ND Hwy 200; then north on Mercer County Rd. 21 to the section line between sections 8 and 9 (T146N–R87W); then north on that section line to the southern shoreline to Lake Sakakawea; then east along the southern shoreline (including Mallard Island) of Lake Sakakawea to US Hwy 83; then south on US Hwy 83 to ND Hwy 200; then east on ND Hwy 200 to ND Hwy 41; then south on ND Hwy 41 to US Hwy 83; then south on US Hwy 83 to I–94; then east on I–94 to US Hwy 83; then south on US Hwy 83 to the South

Dakota border; then west along the South Dakota border to ND Hwy 6.

Rest of State—Remainder of North Dakota.

South Dakota

Special Early Canada Goose Unit—The Counties of Campbell, Marshall, Roberts, Day, Clark, Codington, Grant, Hamlin, Deuel, Walworth; that portion of Dewey County north of Bureau of Indian Affairs Road 8, Bureau of Indian Affairs Road 9, and the section of U.S. Highway 212 east of the Bureau of Indian Affairs Road 8 junction; that portion of Potter County east of U.S. Highway 83; that portion of Sully County east of U.S. Highway 83; portions of Hyde, Buffalo, Brule, and Charles Mix counties north and east of a line beginning at the Hughes-Hyde County line on State Highway 34, east to Lees Boulevard, southeast to the State Highway 34, east 7 miles to 350th Avenue, south to Interstate 90 on 350th Avenue, south and east on State Highway 50 to Geddes, east on 285th Street to U.S. Highway 281, and north on U.S. Highway 281 to the Charles Mix-Douglas County boundary; that portion of Bon Homme County north of State Highway 50; that portion of Fall River County west of State Highway 71 and U.S. Highway 385; that portion of Custer County west of State Highway 79 and north of French Creek; McPherson, Edmunds, Kingsbury, Brookings, Lake, Moody, Miner, Faulk, Hand, Jerauld, Douglas, Hutchinson, Turner, Lincoln, Union, Clay, Yankton, Aurora, Beadle, Davison, Hanson, Sanborn, Spink, Brown, Harding, Butte, Lawrence, Meade, Pennington, Shannon, Jackson, Mellette, Todd, Jones, Haakon, Corson, Ziebach, McCook, and Minnehaha Counties.

Texas

Eastern Goose Zone—East of a line from the International Toll Bridge at Laredo, north following IH–35 and 35W to Fort Worth, northwest along U.S. Hwy. 81 and 287 to Bowie, north along U.S. Hwy. 81 to the Texas-Oklahoma State line.

Pacific Flyway

Idaho

East Zone—Bonneville, Caribou, Fremont, and Teton Counties.

Oregon

Northwest Zone—Benton, Clackamas, Clatsop, Columbia, Lane, Lincoln, Linn, Marion, Polk, Multnomah, Tillamook, Washington, and Yamhill Counties.

Southwest Zone—Coos, Curry, Douglas, Jackson, Josephine, and Klamath Counties.

East Zone—Baker, Gilliam, Malheur, Morrow, Sherman, Umatilla, Union, and Wasco Counties.

Washington

Area 1—Skagit, Island, and Snohomish Counties.

Area 2A (SW Quota Zone)—Clark County, except portions south of the Washougal River; Cowlitz County; and Wahkiakum County.

Area 2B (SW Quota Zone)—Pacific County.

Area 3—All areas west of the Pacific Crest Trail and west of the Big White Salmon River that are not included in Areas 1, 2A, and 2B.

Area 4—Adams, Benton, Chelan, Douglas, Franklin, Grant, Kittitas, Lincoln, Okanogan, Spokane, and Walla Walla Counties.

Area 5—All areas east of the Pacific Crest Trail and east of the Big White Salmon River that are not included in Area 4.

Ducks

Atlantic Flyway

New York

Lake Champlain Zone—The U.S. portion of Lake Champlain and that area east and north of a line extending along NY 9B from the Canadian border to U.S. 9, south along U.S. 9 to NY 22 south of Keesville; south along NY 22 to the west shore of South Bay, along and around the shoreline of South Bay to NY 22 on the east shore of South Bay; southeast along NY 22 to U.S. 4, northeast along U.S. 4 to the Vermont border.

Long Island Zone—That area consisting of Nassau County, Suffolk County, that area of Westchester County southeast of I–95, and their tidal waters.

Western Zone—That area west of a line extending from Lake Ontario east along the north shore of the Salmon River to I–81, and south along I–81 to the Pennsylvania border.

Northeastern Zone—That area north of a line extending from Lake Ontario east along the north shore of the Salmon River to I–81, south along I–81 to NY 49, east along NY 49 to NY 365, east along NY 365 to NY 28, east along NY 28 to NY 29, east along NY 29 to I–87, north along I–87 to U.S. 9 (at Exit 20), north along U.S. 9 to NY 149, east along NY 149 to U.S. 4, north along U.S. 4 to the Vermont border, exclusive of the Lake Champlain Zone.

Southeastern Zone—The remaining portion of New York.

Maryland

Special Teal Season Area— Calvert, Caroline, Cecil, Dorchester, Harford, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Wicomico, and Worcester Counties; that part of Anne Arundel County east of Interstate 895, Interstate 97, and Route 3; that part of Prince Georges County east of Route 3 and Route 301; and that part of Charles County east of Route 301 to the Virginia State Line.

Mississippi Flyway

Indiana

North Zone—That part of Indiana north of a line extending east from the Illinois border along State Road 18 to U.S. 31; north along U.S. 31 to U.S. 24; east along U.S. 24 to Huntington; southeast along U.S. 224; south along State Road 5; and east along State Road 124 to the Ohio border.

Central Zone—That part of Indiana south of the North Zone boundary and north of the South Zone boundary.

South Zone—That part of Indiana south of a line extending east from the Illinois border along U.S. 40; south along U.S. 41; east along State Road 58; south along State Road 37 to Bedford; and east along U.S. 50 to the Ohio border.

Iowa

North Zone—That portion of Iowa north of a line beginning on the South Dakota-Iowa border at Interstate 29, southeast along Interstate 29 to State Highway 175, east along State Highway 175 to State Highway 37, southeast along State Highway 37 to State Highway 183, northeast along State Highway 183 to State Highway 141, east along State Highway 141 to U.S. Highway 30, and along U.S. Highway 30 to the Illinois border.

Missouri River Zone—That portion of Iowa west of a line beginning on the South Dakota-Iowa border at Interstate 29, southeast along Interstate 29 to State Highway 175, and west along State Highway 175 to the Iowa-Nebraska border.

South Zone—The remainder of Iowa.

Michigan

North Zone: The Upper Peninsula.

Middle Zone: That portion of the Lower Peninsula north of a line beginning at the Wisconsin State line in Lake Michigan due west of the mouth of Stony Creek in Oceana County; then due east to, and easterly and southerly along the south shore of Stony Creek to Scenic Drive, easterly and southerly along Scenic Drive to Stony Lake Road, easterly along Stony Lake and Garfield Roads to Michigan Highway 20, east along Michigan 20 to U.S. Highway 10 Business Route (BR) in the city of Midland, easterly along U.S. 10 BR to

U.S. 10, easterly along U.S. 10 to Interstate Highway 75/U.S. Highway 23, northerly along I–75/U.S. 23 to the U.S. 23 exit at Standish, easterly along U.S. 23 to the centerline of the Au Gres River, then southerly along the centerline of the Au Gres River to Saginaw Bay, then on a line directly east 10 miles into Saginaw Bay, and from that point on a line directly northeast to the Canadian border.

South Zone: The remainder of Michigan.

Wisconsin

North Zone: That portion of the State north of a line extending east from the Minnesota State line along U.S. Highway 10 into Portage County to County Highway HH, east on County Highway HH to State Highway 66 and then east on State Highway 66 to U.S. Highway 10, continuing east on U.S. Highway 10 to U.S. Highway 41, then north on U.S. Highway 41 to the Michigan State line.

Mississippi River Zone: That area encompassed by a line beginning at the intersection of the Burlington Northern & Santa Fe Railway and the Illinois State line in Grant County and extending northerly along the Burlington Northern & Santa Fe Railway to the city limit of Prescott in Pierce County, then west along the Prescott city limit to the Minnesota State line.

South Zone: The remainder of Wisconsin.

Central Flyway

Colorado

Special Teal Season Area—Lake and Chaffee Counties and that portion of the State east of Interstate Highway 25.

Kansas

High Plains Zone—That portion of the State west of U.S. 283.

Early Zone—That part of Kansas bounded by a line from the Nebraska-Kansas State line south on K–128 to its junction with U.S.–36, then east on U.S.–36 to its junction with K–199, then south on K–199 to its junction with Republic County 30 Rd, then south on Republic County 30 Rd to its junction with K–148, then east on K–148 to its junction with Republic County 50 Rd, then south on Republic County 50 Rd to its junction with Cloud County 40th Rd, then south on Cloud County 40th Rd to its junction with K–9, then west on K–9 to its junction with U.S.–24, then west on U.S.–24 to its junction with U.S.–281, then north on U.S.–281 to its junction with U.S.–36, then west on U.S.–36 to its junction with U.S.–183, then south on U.S.–183 to its junction with U.S.–24, then west on U.S.–24 to its junction with K–18, then southeast on K–18 to its junction with U.S.–183, then south on U.S.–183 to its junction with K–4, then east on K–4 to its junction with I–135, then south on I–135 to its junction with K–61, then southwest on K–61 to McPherson County.

14th Avenue, then south on McPherson County 14th Avenue to its junction with Arapaho Rd, then west on Arapaho Rd to its junction with K–61, then southwest on K–61 to its junction with K–96, then northwest on K–96 to its junction with U.S.–56, then southwest on U.S.–56 to its junction with K–19, then east on K–19 to its junction with U.S.–281, then south on U.S.–281 to its junction with U.S.–54, then west on U.S.–54 to its junction with U.S.–183, then north on U.S.–183 to its junction with U.S.–56, then southwest on U.S.–56 to its junction with Ford County Rd 126, then south on Ford County Rd 126 to its junction with U.S.–400, then northwest on U.S.–400 to its junction with U.S.–283, then north on U.S.–283 to its junction with the Nebraska-Kansas State line, then east along the Nebraska-Kansas State line to its junction with K–128.

Late Zone—That part of Kansas bounded by a line from the Nebraska-Kansas State line south on K–128 to its junction with U.S.–36, then east on U.S.–36 to its junction with K–199, then south on K–199 to its junction with Republic County 30 Rd, then south on Republic County 30 Rd to its junction with K–148, then east on K–148 to its junction with Republic County 50 Rd, then south on Republic County 50 Rd to its junction with Cloud County 40th Rd, then south on Cloud County 40th Rd to its junction with K–9, then west on K–9 to its junction with U.S.–24, then west on U.S.–24 to its junction with U.S.–281, then north on U.S.–281 to its junction with U.S.–36, then west on U.S.–36 to its junction with U.S.–183, then south on U.S.–183 to its junction with U.S.–24, then west on U.S.–24 to its junction with K–18, then southeast on K–18 to its junction with U.S.–183, then south on U.S.–183 to its junction with K–4, then east on K–4 to its junction with I–135, then south on I–135 to its junction with K–61, then southwest on K–61 to 14th Avenue, then south on 14th Avenue to its junction with Arapaho Rd, then west on Arapaho Rd to its junction with K–61, then southwest on K–61 to its junction with K–96, then northwest on K–96 to its junction with U.S.–56, then southwest on U.S.–56 to its junction with K–19, then east on K–19 to its junction with U.S.–281, then south on U.S.–281 to its junction with U.S.–54, then west on U.S.–54 to its junction with U.S.–183, then north on U.S.–183 to its junction with U.S.–56, then southwest on U.S.–56 to its junction with Ford County Rd 126, then south on Ford County Rd 126 to its junction with U.S.–400, then northwest on U.S.–400 to its junction with U.S.–283, then south on U.S.–283 to its junction with the Oklahoma-Kansas State line, then east along the Oklahoma-Kansas State line to its junction with U.S.–77, then north on U.S.–77 to its junction with Butler County, NE 150th Street, then east on Butler County, NE 150th Street to its junction with U.S.–35, then northeast on U.S.–35 to its junction with K–68, then east on K–68 to the Kansas-Missouri State line, then north along the Kansas-Missouri State line to its junction with the Nebraska State line, then west along the Kansas-Nebraska State line to its junction with K–128.

Southeast Zone—That part of Kansas bounded by a line from the Missouri-Kansas State line west on K–68 to its junction with U.S.–35, then southwest on U.S.–35 to its junction with Butler County, NE 150th Street, then west on NE 150th Street until its junction with K–77, then south on K–77 to the Oklahoma-Kansas State line, then east along the Kansas-Oklahoma State line to its junction with the Missouri State line, then north along the Kansas-Missouri State line to its junction with K–68.

Nebraska

Special Teal Season Area—That portion of the State south of a line beginning at the Wyoming State line; east along U.S. 26 to Nebraska Highway L62A east to U.S. 385; south to U.S. 26; east to NE 92; east along NE 92 to NE 61; south along NE 61 to U.S. 30; east along U.S. 30 to the Iowa border.

High Plains—That portion of Nebraska lying west of a line beginning at the South Dakota-Nebraska border on U.S. Hwy. 183; south on U.S. Hwy. 183 to U.S. Hwy. 20; west on U.S. Hwy. 20 to NE Hwy. 7; south on NE Hwy. 7 to NE Hwy. 91; southwest on NE Hwy. 91 to NE Hwy. 2; southeast on NE Hwy. 2 to NE Hwy. 92; west on NE Hwy. 92 to NE Hwy. 40; south on NE Hwy. 40 to NE Hwy. 47; south on NE Hwy. 47 to NE Hwy. 23; east on NE Hwy. 23 to U.S. Hwy. 283; and south on U.S. Hwy. 283 to the Kansas-Nebraska border.

Zone 1—Area bounded by designated Federal and State highways and political boundaries beginning at the South Dakota-Nebraska border west of NE Hwy. 26E Spur and north of NE Hwy. 12; those portions of Dixon, Cedar and Knox Counties north of NE Hwy. 12; that portion of Keya Paha County

east of U.S. Hwy. 183; and all of Boyd County. Both banks of the Niobrara River in Keya Paha and Boyd counties east of U.S. Hwy. 183 shall be included in Zone 1.

Zone 2—The area south of Zone 1 and north of Zone 3.

Zone 3—Area bounded by designated Federal and State highways, County Roads, and political boundaries beginning at the Wyoming-Nebraska border at the intersection of the Interstate Canal; east along northern borders of Scotts Bluff and Morrill Counties to Broadwater Road; south to Morrill County Rd 94; east to County Rd 135; south to County Rd 88; southeast to County Rd 151; south to County Rd 80; east to County Rd 161; south to County Rd 76; east to County Rd 165; south to Country Rd 167; south to U.S. Hwy. 26; east to County Rd 171; north to County Rd 68; east to County Rd 183; south to County Rd 64; east to County Rd 189; north to County Rd 70; east to County Rd 201; south to County Rd 60A; east to County Rd 203; south to County Rd 52; east to Keith County Line; east along the northern boundaries of Keith and Lincoln Counties to NE Hwy. 97; south to U.S. Hwy 83; south to E Hall School Rd; east to N Airport Road; south to U.S. Hwy. 30; east to Merrick County Rd 13; north to County Rd O; east to NE Hwy. 14; north to NE Hwy. 52; west and north to NE Hwy. 91; west to U.S. Hwy. 281; south to NE Hwy. 22; west to NE Hwy. 11; northwest to NE Hwy. 91; west to U.S. Hwy. 183; south to Round Valley Rd; west to Sargent River Rd; west to Sargent Rd; west to Milburn Rd; north to Blaine County Line; east to Loup County Line; north to NE Hwy. 91; west to North Loup Spur Rd; north to North Loup River Rd; east to Pleasant Valley/Worth Rd; east to Loup County Line; north to Loup-Brown county line; east along northern boundaries of Loup and Garfield Counties to Cedar River Rd; south to NE Hwy. 70; east to U.S. Hwy. 281; north to NE Hwy. 70; east to NE Hwy. 14; south to NE Hwy. 39; southeast to NE Hwy. 22; east to U.S. Hwy. 81; southeast to U.S. Hwy. 30; east to U.S. Hwy. 75; north to the Washington County line; east to the Iowa-Nebraska border; south to the Missouri-Nebraska border; south to Kansas-Nebraska border; west along Kansas-Nebraska border to Colorado-Nebraska border; north and west to Wyoming-Nebraska border; north to intersection of Interstate Canal; and excluding that area in Zone 4.

Zone 4—Area encompassed by designated Federal and State highways and County Roads beginning at the intersection of NE Hwy. 8 and U.S. Hwy. 75; north to U.S. Hwy. 136; east to the intersection of U.S. Hwy. 136 and the Steamboat Trace (Trace); north along the Trace to the intersection with Federal Levee R–562; north along Federal Levee R–562 to the intersection with the Trace; north along the Trace/Burlington Northern Railroad right-of-way to NE Hwy. 2; west to U.S. Hwy. 75; north to NE Hwy. 2; west to NE Hwy. 43; north to U.S. Hwy. 34; east to NE Hwy. 63; north to NE Hwy. 66; north and west to U.S. Hwy. 77; north to NE Hwy. 92; west to NE Hwy. Spur 12F; south to Butler County Rd 30; east to County Rd X; south to County Rd 27; west to County Rd W; south to County Rd 26; east to County Rd X; south to County Rd 21 (Seward County Line); west to NE Hwy. 15; north to County Rd 34; west to County Rd J; south to NE Hwy. 92; west to U.S. Hwy. 81; south to NE Hwy. 66; west to Polk County Rd C; north to NE Hwy. 92; west to U.S. Hwy. 30; west to Merrick County Rd 17; south to Hordlake Road; southeast to Prairie Island Road; southeast to Hamilton County Rd T; south to NE Hwy. 66; west to NE Hwy. 14; south to County Rd 22; west to County Rd M; south to County Rd 21; west to County Rd K; south to U.S. Hwy. 34; west to NE Hwy. 2; south to U.S. Hwy. I–80; west to Gunbarrel Rd (Hall/Hamilton county line); south to Giltner Rd; west to U.S. Hwy. 281; south to U.S. Hwy. 34; west to NE Hwy. 10; north to Kearney County Rd R and Phelps County Rd 742; west to U.S. Hwy. 283; south to U.S. Hwy 34; east to U.S. Hwy. 136; east to U.S. Hwy. 183; north to NE Hwy. 4; east to NE Hwy. 10; south to U.S. Hwy. 136; east to NE Hwy. 14; south to NE Hwy. 8; east to U.S. Hwy. 81; north to NE Hwy. 4; east to NE Hwy. 15; south to U.S. Hwy. 136; east to NE Hwy. 103; south to NE Hwy. 8; east to U.S. Hwy. 75.

New Mexico (Central Flyway Portion)

North Zone—That portion of the State north of I–40 and U.S. 54.

South Zone—The remainder of New Mexico.

Pacific Flyway

California

Northeastern Zone—In that portion of California lying east and north of a line beginning at the intersection of Interstate 5 with the California-Oregon line; south along Interstate 5 to its junction with Walters Lane south of the town of Yreka; west along Walters Lane to its junction with Easy Street; south along Easy Street to the junction with Old Highway 99; south along Old Highway 99 to the point of intersection with Interstate 5 north of the town of Weed; south along Interstate 5 to its junction with Highway 89; east and south along Highway 89 to Main Street Greenville; north and east to its junction with North Valley Road; south to its junction of Diamond Mountain Road; north and east to its junction with North Arm Road; south and west to the junction of North Valley Road; south to the junction with Arlington Road (A22); west to the junction of Highway 89; south and west to the junction of Highway 70; east on Highway 70 to Highway 395; south and east on Highway 395 to the point of intersection with the California-Nevada State line; north along the California-Nevada State line to the junction of the California-Nevada-Oregon State lines west along the California-Oregon State line to the point of origin.

Colorado River Zone—Those portions of San Bernardino, Riverside, and Imperial Counties east of a line extending from the Nevada border south along U.S. 95 to Vidal Junction; south on a road known as ''Aqueduct Road'' in San Bernardino County through the town of Rice to the San Bernardino-Riverside County line; south on a road known in Riverside County as the ''Desert Center to Rice Road'' to the town of Desert Center; east 31 miles on I–10 to the Wiley Well Road; south on this road to Wiley Well; southeast along the Army-Milpitas Road to the Blythe, Brawley, Davis Lake intersections; south on the Blythe-Brawley paved road to the Ogilby and Tumco Mine Road; south on this road to U.S. 80; east 7 miles on U.S. 80 to the Andrade-Algodones Road; south on this paved road to the Mexican border at Algodones, Mexico.

Southern Zone—That portion of southern California (but excluding the Colorado River Zone) south and east of a line extending from the Pacific Ocean east along the Santa Maria River to CA 166 near the City of Santa Maria; east on CA 166 to CA 99; south on CA 99 to the crest of the Tehachapi Mountains at Tejon Pass; east and north along the crest of the Tehachapi Mountains to CA 178 at Walker Pass; east on CA 178 to U.S. 395 at the town of Inyokern; south on U.S. 395 to CA 58; east on CA 58 to I–15; east on I–15 to CA 127; north on CA 127 to the Nevada border.

Southern San Joaquin Valley Temporary Zone—All of Kings and Tulare Counties and that portion of Kern County north of the Southern Zone.

Balance-of-the-State Zone—The remainder of California not included in the Northeastern, Southern, and Colorado River Zones, and the Southern San Joaquin Valley Temporary Zone.

Canada Geese

Michigan

North Zone—Same as North duck zone.

Middle Zone—Same as Middle duck zone.

South Zone—Same as South duck zone.

Tuscola/Huron Goose Management Unit (GMU): Those portions of Tuscola and Huron Counties bounded on the south by Michigan Highway 138 and Bay City Road, on the east by Colwood and Bay Port Roads, on the north by Kilmanagh Road and a line extending directly west off the end of Kilmanagh Road into Saginaw Bay to the west boundary, and on the west by the Tuscola-Bay County line and a line extending directly north off the end of the Tuscola-Bay County line into Saginaw Bay to the north boundary.

Allegan County GMU: That area encompassed by a line beginning at the junction of 136th Avenue and Interstate Highway 196 in Lake Town Township and extending easterly along 136th Avenue to Michigan Highway 40, southerly along Michigan 40 through the city of Allegan to 108th Avenue in Trowbridge Township, westerly along 108th Avenue to 46th Street, northerly along 46th Street to 109th Avenue, westerly along 109th Avenue to I–196 in Casco Township, then northerly along I–196 to the point of beginning.

Saginaw County GMU: That portion of Saginaw County bounded by Michigan Highway 46 on the north; Michigan 52 on the west; Michigan 57 on the south; and Michigan 13 on the east.

Muskegon Wastewater GMU: That portion of Muskegon County within the boundaries of the Muskegon County wastewater system, east of the Muskegon State Game Area, in sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, and 32, T10N R14W, and sections 1, 2, 10, 11, 12, 13, 14, 24, and 25, T10N R15W, as posted.

Wisconsin

Same zones as for ducks but in addition:

Horicon Zone: That area encompassed by a line beginning at the intersection of State Highway 21 and the Fox River in Winnebago County and extending westerly along State 21 to the west boundary of Winnebago County, southerly along the west boundary of Winnebago County to the north boundary of Green Lake County, westerly along the north boundaries of Green Lake and Marquette Counties to State 22, southerly along State 22 to State 33, westerly along State 33 to Interstate Highway 39, southerly along Interstate Highway 39 to Interstate Highway 90/94, southerly along I–90/94 to State 60, easterly along State 60 to State 83, northerly along State 83 to State 175, northerly along State 175 to State 33, easterly along State 33 to U.S. Highway 45, northerly along U.S. 45 to the east shore of the Fond Du Lac River, northerly along the east shore of the Fond Du Lac River to Lake Winnebago, northerly along the western shoreline of Lake Winnebago to the Fox River, then westerly along the Fox River to State 21.

Exterior Zone: That portion of the State not included in the Horicon Zone.

Mississippi River Subzone: That area encompassed by a line beginning at the intersection of the Burlington Northern & Santa Fe Railway and the Illinois State line in Grant County and extending northerly along the Burlington Northern & Santa Fe Railway to the city limit of Prescott in Pierce County, then west along the Prescott city limit to the Minnesota State line.

Brown County Subzone: That area encompassed by a line beginning at the intersection of the Fox River with Green Bay in Brown County and extending southerly along the Fox River to State Highway 29, northwesterly along State 29 to the Brown County line, south, east, and north along the Brown County line to Green Bay, due west to the midpoint of the Green Bay Ship Channel, then southwesterly along the Green Bay Ship Channel to the Fox River.

Sandhill Cranes

Mississippi Flyway

Minnesota

Northwest Goose Zone—That portion of the State encompassed by a line extending east from the North Dakota border along U.S. Highway 2 to State Trunk Highway (STH) 32, north along STH 32 to STH 92, east along STH 92 to County State Aid Highway (CSAH) 2 in Polk County, north along CSAH 2 to CSAH 27 in Pennington County, north along CSAH 27 to STH 1, east along STH 1 to CSAH 28 in Pennington County, north along CSAH 28 to CSAH 54 in Marshall County, north along CSAH 54 to CSAH 9 in Roseau County, north along CSAH 9 to STH 11, west along STH 11 to STH 310, and north along STH 310 to the Manitoba border.

Tennessee

Hunt Zone—That portion of the State south of Interstate 40 and east of State Highway 56.

Closed Zone—Remainder of the State.

Central Flyway

Colorado—The Central Flyway portion of the State except the San Luis Valley (Alamosa, Conejos, Costilla, Hinsdale, Mineral, Rio Grande, and Saguache Counties east of the Continental Divide) and North Park (Jackson County).

Kansas—That portion of the State west of a line beginning at the Oklahoma border, north on I–35 to Wichita, north on I–135 to Salina, and north on U.S. 81 to the Nebraska border.

Montana—The Central Flyway portion of the State except for that area south and west of Interstate 90, which is closed to sandhill crane hunting.

New Mexico

Regular-Season Open Area—Chaves, Curry, De Baca, Eddy, Lea, Quay, and Roosevelt Counties.

Middle Rio Grande Valley Area—The Central Flyway portion of New Mexico in Socorro and Valencia Counties.

Estancia Valley Area—Those portions of Santa Fe, Torrance and Bernallilo Counties within an area bounded on the west by New Mexico Highway 55 beginning at Mountainair north to NM 337, north to NM 14, north to I–25; on the north by I–25 east to U.S. 285; on the east by U.S. 285 south to U.S. 60; and on the south by U.S. 60 from U.S. 285 west to NM 55 in Mountainair.

Southwest Zone—Area bounded on the south by the New Mexico/Mexico border; on the west by the New Mexico/Arizona border north to Interstate 10; on the north by Interstate 10 east to U.S. 180, north to N.M. 26, east to N.M. 27, north to N.M. 152, and east to Interstate 25; on the east by Interstate 25 south to Interstate 10, west to the Luna county line, and south to the New Mexico/Mexico border.

North Dakota

Area 1—That portion of the State west of U.S. 281.

Area 2—That portion of the State east of U.S. 281.

Oklahoma—That portion of the State west of I–35.

South Dakota—That portion of the State west of U.S. 281.

Texas

Zone A—That portion of Texas lying west of a line beginning at the international toll bridge at Laredo, then northeast along U.S. Highway 81 to its junction with Interstate Highway 35 in Laredo, then north along Interstate Highway 35 to its junction with Interstate Highway 10 in San Antonio, then northwest along Interstate Highway 10 to its junction with U.S. Highway 83 at Junction, then north along U.S.

Highway 83 to its junction with U.S. Highway 62, 16 miles north of Childress, then east along U.S. Highway 62 to the Texas-Oklahoma State line.

Zone B—That portion of Texas lying within boundaries beginning at the junction of U.S. Highway 81 and the Texas-Oklahoma State line, then southeast along U.S. Highway 81 to its junction with U.S. Highway 287 in Montague County, then southeast along U.S. Highway 287 to its junction with Interstate Highway 35W in Fort Worth, then southwest along Interstate Highway 35 to its junction with Interstate Highway 10 in San Antonio, then northwest along Interstate Highway 10 to its junction with U.S. Highway 83 in the town of Junction, then north along U.S. Highway 83 to its junction with U.S. Highway 62, 16 miles north of Childress, then east along U.S. Highway 62 to the Texas-Oklahoma State line, then south along the Texas-Oklahoma State line to the south bank of the Red River, then eastward along the vegetation line on the south bank of the Red River to U.S. Highway 81.

Zone C—The remainder of the State, except for the closed areas.

Closed areas—(A) That portion of the State lying east and north of a line beginning at the junction of U.S. Highway 81 and the Texas-Oklahoma State line, then southeast along U.S. Highway 81 to its junction with U.S. Highway 287 in Montague County, then southeast along U.S. Highway 287 to its junction with Interstate Highway 35W in Fort Worth, then southwest along Interstate Highway 35 to its junction with U.S. Highway 290 East in Austin, then east along U.S. Highway 290 to its junction with Interstate Loop 610 in Harris County, then south and east along Interstate Loop 610 to its junction with Interstate Highway 45 in Houston, then south on Interstate Highway 45 to State Highway 342, then to the shore of the Gulf of Mexico, and then north and east along the shore of the Gulf of Mexico to the Texas-Louisiana State line.

(B) That portion of the State lying within the boundaries of a line beginning at the Kleberg-Nueces County line and the shore of the Gulf of Mexico, then west along the County line to Park Road 22 in Nueces County, then north and west along Park Road 22 to its junction with State Highway 358 in Corpus Christi, then west and north along State Highway 358 to its junction with State Highway 286, then north along State Highway 286 to its junction with Interstate Highway 37, then east along Interstate Highway 37 to its junction with U.S. Highway 181, then north and west along U.S. Highway 181 to its junction with U.S. Highway 77 in Sinton, then north and east along U.S. Highway 77 to its junction with U.S. Highway 87 in Victoria, then south and east along U.S. Highway 87 to its junction with State Highway 35 at Port Lavaca, then north and east along State Highway 35 to the south end of the Lavaca Bay Causeway, then south and east along the shore of Lavaca Bay to its junction with the Port Lavaca Ship Channel, then south and east along the Lavaca Bay Ship Channel to the Gulf of Mexico, and then south and west along the shore of the Gulf of Mexico to the Kleberg-Nueces County line.

Wyoming

Regular Season Open Area—Campbell, Converse, Crook, Goshen, Laramie, Niobrara, Platte, and Weston Counties, and portions of Johnson and Sheridan Counties.

Riverton-Boysen Unit—Portions of Fremont County.

Park and Big Horn County Unit—All of Big Horn, Hot Springs, Park and Washakie Counties.

Pacific Flyway

Arizona

Special Season Area—Game Management Units 28, 30A, 30B, 31, and 32.

Idaho

Special Season Area—See State regulations.

Montana

Special Season Area—See State regulations.

Utah

Special Season Area—Rich, Cache, and Unitah Counties and that portion of Box Elder County beginning on the Utah-Idaho State line at the Box Elder-Cache County line; west on the State line to the Pocatello Valley County Road; south on the Pocatello Valley County Road to I–15; southeast on I–15 to SR–83; south on SR–83 to Lamp Junction; west and south on the Promontory Point County Road to the tip of Promontory Point; south from Promontory Point to the Box Elder-Weber County line; east on the Box Elder-Weber County line to the Box Elder-Cache County line; north on the Box Elder-Cache County line to the Utah-Idaho State line.

Wyoming

Bear River Area—That portion of Lincoln County described in State regulations.

Salt River Area—That portion of Lincoln County described in State regulations.

Farson-Eden Area—Those portions of Sweetwater and Sublette Counties described in State regulations.

Uinta County Area—That portion of Uinta County described in State regulations.

All Migratory Game Birds in Alaska

North Zone—State Game Management Units 11–13 and 17–26.

Gulf Coast Zone—State Game Management Units 5–7, 9, 14–16, and 10 (Unimak Island only).

Southeast Zone—State Game Management Units 1–4.

Pribilof and Aleutian Islands Zone—State Game Management Unit 10 (except Unimak Island).

Kodiak Zone—State Game Management Unit 8.

All Migratory Game Birds in the Virgin Islands

Ruth Cay Closure Area—The island of Ruth Cay, just south of St. Croix.

All Migratory Game Birds in Puerto Rico

Municipality of Culebra Closure Area—All of the municipality of Culebra.

Desecheo Island Closure Area—All of Desecheo Island.

Mona Island Closure Area—All of Mona Island.

Verde Closure Area—Those areas of the municipalities of Rio Grande and Loiza delineated as follows: (1) All lands between Routes 956 on the west and 186 on the east, from Route 3 on the north to the juncture of Routes 956 and 186 (Km 13.2) in the south; (2) all lands between Routes 186 and 966 from the juncture of 186 and 966 on the north, to the Caribbean National Forest Boundary on the south; (3) all lands lying west of Route 186 for 1 kilometer from the juncture of Routes 186 and 956 south to Km 6 on Route 186; (4) all lands within Km 14 and Km 6 on the west and the Caribbean National Forest Boundary on the east; and (5) all lands within the Caribbean National Forest Boundary whether private or public.

Cidra Municipality and adjacent areas—All of Cidra Municipality and portions of Aguas Buenas, Caguas, Cayey, and Comerio Municipalities as encompassed within the following boundary: Beginning on Highway 172 as it leaves the municipality of Cidra on the west edge, north to Highway 156, east on Highway 156 to Highway 1, south on Highway 1 to Highway 765, south on Highway 765 to Highway 763, south on Highway 763 to the Rio

Guavate, west along Rio Guavate to Highway 1, southwest on Highway 1 to Highway 14, west on Highway 14 to Highway 729, north on Highway 729 to Cidra Municipality boundary to the point of the beginning.

FINAL REGULATORY ALTERNATIVES FOR DUCK HUNTING DURING THE 2013-14 SEASON

	ATLANTIC FLYWAY			MISSISSIPPI FLYWAY			CENTRAL FLYWAY (a)			PACIFIC FLYWAY (b)(c)		
	RES	MOD	LIB	RES	MOD	LIB	RES	MOD	LIB	RES	MOD	LIB
Beginning Shooting Time	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise	1/2 hr. before sunrise
Ending Shooting Time	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset	Sunset
Opening Date	Oct. 1	Sat. nearest Sept. 24	Sat. nearest Sept. 24	Sat. nearest Oct. 1	Sat. nearest Sept. 24	Sat. nearest Sept. 24	Sat. nearest Oct. 1	Sat. nearest Sept. 24	Sat. nearest Sept. 24	Sat. nearest Oct. 1	Sat. nearest Sept. 24	Sat. nearest Sept. 24
Closing Date	Jan. 20	Last Sunday in Jan.	Last Sunday in Jan.	Sun. nearest Jan. 20	Last Sunday in Jan.	Last Sunday in Jan.	Sun. nearest Jan. 20	Last Sunday in Jan.	Last Sunday in Jan.	Sun. nearest Jan. 20	Last Sunday in Jan.	Last Sunday in Jan.
Season Length (in days)	30	45	60	30	45	60	39	60	74	60	86	107
Daily Bag/	3	6	6	3	6	6	3	6	6	4	7	7
Species/Sex Limits within the Overall Daily Bag Limit												
Mallard (Total/Female)	3/1	4/2	4/2	2/1	4/1	4/2	3/1	5/1	5/2	3/1	5/2	7/2

(a) In the High Plains Mallard Management Unit, all regulations would be the same as the remainder of the Central Flyway, with the exception of season length. Additional days would be allowed under the various alternatives as follows: restrictive - 12, moderate and liberal - 23. Under all alternatives, additional days must be on or after the Saturday nearest December 10.

(b) In the Columbia Basin Mallard Management Unit, all regulations would be the same as the remainder of the Pacific Flyway, with the exception of season length. Under all alternatives except the liberal alternative, an additional 7 days would be allowed.

(c) In Alaska, framework dates, bag limits, and season length would be different from the remainder of the Pacific Flyway. The bag limit would be 5-8 under the restrictive alternative, and 7-10 under the moderate and liberal alternatives. Under all alternatives, season length would be 107 days and framework dates would be Sep. 1 - Jan. 26.

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Reclassification of *Acmispon dendroideus* var. *traskiae* (=*Lotus d.* subsp. *traskiae*) and *Castilleja grisea* as Threatened Throughout Their Ranges; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2012–0007; FXES11130900000C5–123–FF09E32000]

RIN 1018–AY04

Endangered and Threatened Wildlife and Plants; Reclassification of *Acmispon dendroideus* var. *traskiae* (=*Lotus d.* subsp. *traskiae*) and *Castilleja grisea* as Threatened Throughout Their Ranges

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are reclassifying *Acmispon dendroideus* var. *traskiae* (San Clemente Island lotus) and *Castilleja grisea* (San Clemente Island paintbrush) from endangered to threatened. The endangered designation no longer correctly reflects the status of these plants due to substantial improvement in their status. This action is based on a review of the best available scientific and commercial data, which indicate that the ongoing threats are not of sufficient imminence, intensity, or magnitude to indicate that *A. d.* var. *traskiae* and *C. grisea* are presently in danger of extinction across their ranges. While both taxa will continue to be impacted by military training activities and land use, erosion, nonnative plants, and fire, the significant increase in abundance (number of occurrences) of both taxa reduces the severity and magnitude of threats and the likelihood that any one event would affect all occurrences of either taxon. Additionally, the Department of the Navy (Navy) is implementing conservation actions through their Integrated Natural Resources Management Plan and has successfully reduced threats impacting both taxa and their habitat.

DATES: This rule becomes effective on August 26, 2013.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* at Docket Number [FWS–R8–ES–2012–0007]. Comments and materials received, as well as supporting documentation used in the preparation of this rule, will be available for public inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 2177 Salk Avenue, Suite 250, CA 92008.

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES**); by telephone at 760–431–9440; or by facsimile (fax) at 760–431–9624. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

This is a final rule to reclassify *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* as threatened under the Act.

Species addressed. Acmispon (previously listed as *Lotus*) *dendroideus* var. *traskiae* (previously San Clemente Island broom and currently known as San Clemente Island lotus), and *Castilleja grisea* (San Clemente Island paintbrush) are endemic to San Clemente Island, which is located 64 miles (mi) (103 kilometers (km)) west of San Diego, California. Current habitat conditions for *A. d.* var. *traskiae* and *C. grisea* on San Clemente Island are the result of present and historical land use practices. San Clemente Island is owned by the U.S. Department of the Navy and, with its associated offshore range complex, is the primary maritime training area for the Navy Pacific Fleet and Navy Sea, Air and Land teams (SEALs). The island also supports training by the U.S. Marine Corps, the U.S. Air Force, and other military organizations.

Purpose of the Regulatory Action. Under the Endangered Species Act, we may be petitioned to list, delist, or reclassify a species. On May 18, 2010, we received a petition dated May 13, 2010, from the Pacific Legal Foundation, requesting, among other actions, that we reclassify *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* from endangered to threatened under the Act, based on the analysis and recommendations contained in the 2007 5-year reviews for these taxa. In 2011, we published a 90-day finding, which concluded that the petition contained substantial information indicating reclassification of the two San Clemente Island plants may be warranted. In 2012, we published a 12-month finding and proposed rule, and found that the petitioned action to downlist *A. d.* var. *traskiae* and *C. grisea* was warranted. Threats to these taxa, though ongoing, have been reduced since listing and are being managed by the Navy through implementation of their Integrated Natural Resources Management Plan. Occurrences of both taxa have increased in number as a result. Therefore, we have determined in this final rule that *A. d.* var. *traskiae* and *C. grisea* no longer meet the definition of endangered under the Endangered Species Act. Instead, both taxa will be reclassified from endangered to threatened to afford continued protection from ongoing threats.

This rule changes the listing of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* from endangered to threatened.

Basis for the Regulatory Action. The increase in the number of occurrences of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* throughout the current range of each taxon demonstrates the success of the Navy's continued management activities on San Clemente Island. As a result, both taxa have increased their distribution and threats have been sufficiently reduced such that they are no longer in danger of extinction throughout all or a significant portion of their range. Therefore, these taxa no longer meet the definition of endangered under the Endangered Species Act. However, impacts due to military training activities, erosion, nonnatives, and fire are ongoing and the best available information indicates these taxa are likely to become endangered within the foreseeable future throughout all or a significant portion of their ranges. Therefore, we are reclassifying *A. d.* var. *traskiae* and *C. grisea* from endangered to threatened. *All comments we received support this action.*

Acronyms Used

We use several acronyms throughout the preamble to this proposed rule. To assist the reader, we set them forth here:

AFP = Artillery Firing Point
AVMA = Assault Vehicle Maneuver Area
BMP = Best Management Practices
CESA = California Endangered Species Act (State of California)
CDFW = California Department of Fish and Wildlife (formerly CDFG, California Department of Fish and Game)
CNDDB = California Natural Diversity Database
DPS = Distinct Population Segment
EO = California Natural Diversity Database element occurrence
GIS = Geographic Information System
INRMP = Integrated Natural Resources Management Plan
IOA = Infantry Operations Areas
IPCC = Intergovernmental Panel on Climate Change
MOFMP = Military Operations and Fire Management Plan
Navy = United States Department of the Navy
NEPA = National Environmental Policy Act (Federal)
NPPA = Native Plant Protection Act (State of California)
OMB = Office of Management and Budget
PL = Point Location
SEALs = Navy Sea, Air, and Land teams

SERG = San Diego State University Soil Ecology and Restoration Group
SHOBA = Shore Bombardment Area
SPR = Significant Portion of the Range
SWAT = Special Warfare Training Areas
TAR = Training Area Ranges
USFWS; Service = United States Fish and Wildlife Service

Background

This is a final rule to reclassify *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* as threatened under the Act. It is our intent to discuss in this final rule only those topics directly relevant to the reclassification of *A. d.* var. *traskiae* and *C. grisea* under the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*). For more information on the biology and ecology of these taxa, refer to the 12-month finding and proposed rule to reclassify *A. d.* var. *traskiae* and *C. grisea* from endangered to threatened, which published in the **Federal Register** on May 16, 2012 (77 FR 29078).

Previous Federal Actions

Acmispon dendroideus var. *traskiae* and *Castilleja grisea* were listed as endangered under the Act on August 11, 1977 (42 FR 40682). Subsequently, a Recovery Plan for Channel Island species, including *A. d.* var. *traskiae* and *C. grisea,* was finalized in 1984 (USFWS 1984, pp. 1–165), and 5-year status reviews were completed for each of these taxa in 2007 (USFWS 2007a, pp. 1–22; USFWS 2007b, pp. 1–19) and 2012 (USFWS 2012a, pp. 1–11; USFWS 2012b, pp. 1–9). These status reviews recommended reclassification of *A. d.* var. *traskiae* and *C. grisea* from endangered to threatened status.

On May 18, 2010, we received a petition dated May 13, 2010, from the Pacific Legal Foundation requesting that the Service delist *Oenothera californica* (*avita*) subsp. *eurekensis* (Eureka Valley evening-primrose) and *Swallenia alexandrae* (Eureka Valley dunegrass), and downlist tidewater goby (*Eucyclogobius newberryi*), *Malacothamnus clementinus* (San Clemente Island bush mallow), *Acmispon dendroideus* (*Lotus scoparius* subsp.) var. *traskiae,* and *Castilleja grisea* from endangered to threatened under the Act. The petition was based on the analysis and recommendations contained in the 2007 5-year reviews for these taxa. In a letter to the petitioner dated September 10, 2010, we acknowledged receipt of the petition and initiated a review of the petition under a provision of section 4 of the Act. We stated that we anticipated making an initial 90-day finding in Fiscal Year 2011 (based on available staffing and funding) as to whether or not the petition presented substantial information indicating that the requested action may be warranted.

On January 19, 2011, we published a 90-day finding (76 FR 3069). In the 90-day finding, we concluded that the petition and information in our files provided substantial information that indicated the delisting of *Oenothera californica* (*avita*) subsp. *eurekensis* and *Swallenia alexandrae,* and downlisting of tidewater goby, *Malacothamnus clementinus, Acmispon dendroideus* (*Lotus scoparius* subsp.) var. *traskiae,* and *Castilleja grisea* may be warranted, and announced that we were initiating status reviews for these species. On May 16, 2012, we announced the completion of our status review of the three San Clemente Island plant taxa, and issued a proposed rule to reclassify *A. d.* var. *traskiae* and *C. grisea* from endangered to threatened (we found reclassification of *M. clementinus* was not warranted) (77 FR 29078, USFWS 2012, p. 29078). This document is our final rule to reclassify *A. d.* var. *traskiae* and *C. grisea* from endangered to threatened (the 12-month findings for *O. c. (avita)* subsp. e*urekensis, S. alexandrae,* and tidewater goby will be addressed in separate documents).

Taxonomic Correction

Acmispon dendroideus var. *traskiae* has undergone taxonomic realignments since it was listed in 1977 (42 FR 40682; August 11, 1977). In our proposed rule to reclassify this taxon as a threatened species, we accepted the change of scientific name to *Acmispon dendroideus* (Greene) Brouillet var. *traskiae* (Noddin) Brouillet from *Lotus dendroideus* subsp. *traskiae.* This change was supported by morphological and molecular data (Allan and Porter 2000, p. 1876; Sokoloff 2000, p. 128; Brouillet 2008, p. 389). Please see the Species Description and Taxonomy—*Acmispon dendroideus* var. *traskiae* section of the proposed rule for a detailed explanation of this taxonomic correction.

Changes From Proposed Rule

(1) In the proposed rule to reclassify *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea,* we defined occurrences of the two taxa by mapping smaller groupings of plants (point locations) and combining point locations that fall within 0.25 mi (402 m) of one another with any corresponding California Natural Diversity Database (CNDDB) polygons representing elemental occurrences. Since publication of the proposed rule, most of the point locations have been assigned elemental occurrence numbers in CNDDB, and many elemental occurrences in CNDDB have been combined.

(2) The Navy informed us that the West Cove occurrence of *Castilleja grisea* was an error. Therefore, we removed the West Cove occurrence from our records and revised discussions of the taxon in this rule. This change has no effect on our finding regarding the reclassification of the taxon; although we recognize one less occurrence of the species, more individual *C. grisea* plants have been identified since the publication of the proposed rule, indicating that the plant's abundance is continuing to increase in response to the Navy's recovery efforts.

Current information for each occurrence of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* is presented in table 1 and in figures 1 and 2. Groups of plants were described in the past using many different terms including: Point localities, populations, occurrences, and element occurrences. Unless referring to a specific author's research and language, we refer to identifiable and separable groups of plants as ''occurrences'' in this final rule. We defined these occurrences by mapping smaller groupings of plants (point locations) and combining point locations that fall within 0.25 mi (402 m) of one another with any corresponding California Natural Diversity Database (CNDDB) polygons. These combined points meet the broader California Department of Fish and Wildlife (CDFW) definition of an element occurrence, which is a record of an observation or series of observations. Information for each occurrence of these two taxa is described in table 1.

TABLE 1—DISTRIBUTION AND STATUS OF OCCURRENCES OF *Acmispon dendroideus* var. *traskiae* (SAN CLEMENTE ISLAND LOTUS) AND *Castilleja grisea* (SAN CLEMENTE ISLAND PAINTBRUSH)

Location description (occurrences)	Element occurrence (EO) No. and point location (PL) [1]	Status [2] at listing; year of first record	Current status (reference)	Current threats [3]	Military use [4]
Acmispon dendroideus var. ***traskiae***					
Eagle Canyon	EO 1, 21; 9 PLs.	extant; 1980 CNDDB.	extant (Junak 2006, SERG 2008, CNDDB 2013).	A: land use, erosion, nonnatives, fire; E: movement, fire, climate.	low military value; area recently closed.
Bryce Canyon	EO 1; 14 PLs	unknown	Extant (SERG 2009, CNDDB 2013).	A: nonnatives, fire; E: fire, climate.	low military value; area recently closed.
North Mosquito Cove	EO 1; 14 PLs	extant; 1939 herbarium record.	Extant (SERG 2010)	A: land use, erosion, nonnatives, fire; E: movement, fire, climate.	low military value; area recently closed.
Canchalagua Canyon (including south Mosquito Cove).	EO 4, 23; 21 PLs.	unknown	extant (SERG 2011)	A: land use, erosion, nonnatives, fire; E: movement, fire, climate.	low military value; area recently closed.
Thirst Canyon (including Vista Canyon).	EO 20, 8 PLs	unknown	Extant (SERG 2009, CNDDB 2013).	A: nonnatives, fire; E: fire, climate.	medium military value.
Cave Canyon	EO 22, 42, 43; 3 PLs.	unknown	presumed extant (Junak 1997, CNDDB 2013).	A: nonnatives, fire; E: fire, climate.	medium military value.
Horse Canyon	EO 41; 2 PLs	unknown	presumed extant (Junak 1997, CNDDB 2013).	A: nonnatives, fire; E: fire, climate.	medium military value.
Pyramid Head	EO 5; 1 PL	extant; 1979 CNDDB.	presumed extant (Junak 1997).	A: nonnatives, fire; E: fire, climate.	high military value; area closed.
SHOBA Boundary (north to Twin Dams Canyon).	EO 17, 18, 19, 33; 8 PLs.	unknown	presumed extant (Junak 1996, CNDDB 2013).	A: nonnatives; E: climate	medium military value.
Twin Dams Canyon	EO 32; 2 PLs	unknown	Extant (Junak 2006, CNDDB 2013).	A: nonnatives; E: climate	medium military value.
Horton Canyon (including Stone, Burn's, and Horton Canyons).	EO 13; 27 PLs.	unknown	Extant (SERG 2010)	A: erosion, nonnatives; E: climate.	medium military value.
Tota Canyon	EO 13; 7 PLs	unknown	presumed extant (SERG 2010, CNDDB 2013).	A: erosion, nonnatives; E: climate.	low military value.
Lemon Tank Canyon (including Nanny Canyon).	EO 16, 25; 19 PLs.	unknown	extant (Junak 2004, CNDDB 2013).	A: erosion, nonnatives; E: movement, climate.	low military value; area partially closed.
Larkspur Canyon	EO 24; 2 PLs	unknown	extant (SERG 2011, CNDDB 2013).	A: erosion, nonnatives, fire; E: movement, fire, climate.	low military value.
Chamish Canyon	EO 3; 1 PL	extant; 1980 CNDDB.	presumed extant (Junak 1997).	A: erosion, nonnatives, fire; E: movement, fire, climate.	low military value.
Box Canyon	EO 40; 2 PLs	unknown	presumed extant (Junak 1997, CNDDB 2013).	A: nonnatives; E: climate	low military value.
Norton Canyon	EO 36, 38, 39; 1 PL.	unknown	extant (Junak 2004, CNDDB 2013).	A: nonnatives; E: climate, hybridization.	low military value.
Upper Middle Ranch Canyon.	EO 10, 5 PLs	unknown	extant (Junak 2004)	A: erosion, nonnatives; E: climate.	low military value.
Lower Middle Ranch Canyon.	EO 37; 3 PLs	unknown	extant (SERG 2008, CNDDB 2013).	A: nonnatives; E: climate	low military value.
Waymuck Canyon	EO 34; 4 PLs	unknown	extant (SERG 2011, CNDDB 2013).	A: nonnatives; E: climate	high military value.
Warren Canyon	EO 35, 12; 20 PLs.	unknown	extant (SERG 2011, CNDDB 2013).	A: erosion, nonnatives; E: movement, climate.	high military value.
Middle Wallrock Canyon.	EO 29, 31; 10 PLs.	unknown	extant (Junak 2004, CNDDB 2013).	A: nonnatives; E: movement, climate.	high military value.
Upper Wallrock Canyon.	EO 30; 3 PLs	unknown	extant (Junak 2006, CNDDB 2013).	A: erosion, nonnatives; E: climate.	high military value.
Seal Cove Terraces	EO 14, 27, 28; 3 PLs.	unknown	extant (Junak 2004, CNDDB 2013).	A: erosion, nonnatives, fire; E: movement, fire, climate.	high military value.
Eel Cove Canyon (including terraces).	EO 26; 6 PLs	unknown	extant (SERG 2010, CNDDB 2013).	A: erosion, nonnatives, fire; E: movement, fire, climate.	high military value.
Middle Island Plateau	EO 7; 6 PLs	unknown	extant (Tierra Data 2007)	A: land use, erosion, nonnatives, fire; E: movement, fire, climate.	high military value.

TABLE 1—DISTRIBUTION AND STATUS OF OCCURRENCES OF *Acmispon dendroideus* var. *traskiae* (SAN CLEMENTE ISLAND LOTUS) AND *Castilleja grisea* (SAN CLEMENTE ISLAND PAINTBRUSH)—Continued

Location description (occurrences)	Element occurrence (EO) No. and point location (PL) [1]	Status [2] at listing; year of first record	Current status (reference)	Current threats [3]	Military use [4]
Wilson Cove	EO 11; 52 PLs.	extant; 1981 CNDDB.	extant (SERG 2010)	A: land use, erosion, nonnatives, fire; E: movement, fire, climate, hybridization.	high military value.
North Wilson Cove	EO 9; no PLs	extant; 1959 herbarium record.	Unknown	A: erosion, nonnatives; E: climate.	high military value.
North Island Terraces.	EO 15; no PLs.	unknown	presumed extant (CNDDB 1996).	A: erosion, nonnatives; E: movement, climate.	medium military value.
Castilleja grisea					
Thirst Canyon (including Vista Canyon).	EO 3; 21 PLs	extant; 1980 CNDDB.	extant (SERG 2010)	A: nonnatives, fire; E: climate.	medium military value.
Eagle Canyon (including Grove Canyon).	EO 3; 50 PLs	extant; 1979 herbarium record.	extant (Tierra Data 2006)	A: land use, erosion, nonnatives, fire; E: movement, climate.	low military value; area recently closed.
Bryce Canyon	EO 3, 50; 43 PLs.	extant; 1979 GIS data.	extant (SERG 2010, CNDDB 2013).	A: land use, erosion, nonnatives, fire; E: movement, climate.	low military value; area recently closed.
Canchalagua Canyon (including south Mosquito Cove and Matriarch Canyon).	EO 3, 29; 56 PLs.	extant; 1963 herbarium record.	extant (SERG 2011, CNDDB 2013).	A: land use, erosion, nonnatives, fire, fire management; E: movement, climate.	low military value; area recently closed.
Knob Canyon	EO 2; 21 PLs	extant; 1979 CNDDB.	extant (Tierra Data 2006, SERG 2008).	A: land use, erosion, nonnatives, fire, fire management; E: movement, climate.	low military value; area recently closed.
Pyramid Head	EO 1; 25 PLs	extant; 1965 herbarium record.	extant (SERG 2011)	A: land use, erosion, nonnatives, fire; E: movement, climate.	high military value; partially recently closed.
Snake Canyon (including Sun Point).	EO 1; 4 PLs	extant; 1939 CNDDB.	presumed extant (Junak 1997).	A: nonnatives, fire; E: fire, climate.	high military value; area closed.
Upper Chenetti Canyon.	EO 34, 53; 1 PL.	unknown	extant (Junak 2004, CNDDB 2013).	A: nonnatives, erosion, fire, fire management; E: fire, climate.	high military value; area closed.
Horse Beach Canyon	EO 25; 49 PLs.	extant; 1939 herbarium record.	presumed extant (Junak 2006).	A: land use, erosion, nonnatives, fire, fire management; E: movement, fire, climate.	high military value; area closed.
China Canyon	EO 25, 28, 50; 6 PLs.	extant; 1939 herbarium record.	presumed extant (Junak 1997; SERG 2009, CNDDB 2013).	A: land use, erosion, nonnatives, fire, fire management; E: movement, fire, climate.	high military value; area closed.
Red Canyon	EO 36; no PLs.	extant; 1975 herbarium record.	presumed extant (CNDDB 1986).	A: land use, erosion, nonnatives, fire, fire management; E: movement, fire, climate.	high military value; area closed.
Kinkipar Canyon	EO 52; 2 PLs	unknown	extant (SERG 2006, CNDDB 2013).	A: nonnatives, fire; E: climate.	medium military value.
Cave Canyon	EO 17, 38; 9 PLs.	extant; 1980 CNDDB.	extant (SERG 2009, CNDDB 2013).	A: nonnatives, fire; E: climate.	medium military value.
Horse Canyon	EO 26, 67; 6 PLs.	unknown	extant (SERG 2010, CNDDB 2013).	A: nonnatives, fire; E: climate.	medium military value.
Upper Horse Canyon	EO 19; 1 PL	extant; 1979 CNDDB.	extant (Junak 2004)	A: erosion, nonnatives, fire; E: climate.	medium military value.
SHOBA Boundary (north to and including Twin Dams Canyon).	EO 3; 55 PLs	extant; 1965 CNDDB.	extant (Junak 2006, SERG 2011).	A: nonnatives; E: climate	medium military value.
Horton Canyon (including Stone and Burn's Canyons).	EO 3; 24 PLs	extant; 1981 CNDDB.	extant (Junak 2006, SERG 2010).	A: erosion, nonnatives; E: climate.	medium military value.

TABLE 1—DISTRIBUTION AND STATUS OF OCCURRENCES OF *Acmispon dendroideus* var. *traskiae* (SAN CLEMENTE ISLAND LOTUS) AND *Castilleja grisea* (SAN CLEMENTE ISLAND PAINTBRUSH)—Continued

Location description (occurrences)	Element occurrence (EO) No. and point location (PL) [1]	Status [2] at listing; year of first record	Current status (reference)	Current threats [3]	Military use [4]
Lemon Tank Canyon (including Tota Canyon).	EO 3; 14 PLs	unknown	extant (SERG 2010)	A: land use, erosion, nonnatives, fire; E: movement, fire, climate.	low military value; area closed.
Nanny Canyon	EO 13, 60; 3 PLs.	extant; 1979 CNDDB.	extant (Junak 2004, CNDDB 2013).	A: nonnatives; E: movement, climate.	low military value; area partially closed.
Larkspur Canyon (including Chamish Canyon).	EO 14, 68; 15 PLs.	extant; 1981 CNDDB.	extant (SERG 2006–2011, CNDDB 2013).	A: land use, erosion, nonnatives, fire; E: movement, fire, climate.	low military value.
Box Canyon	EO 20, 66; 22 PLs.	extant; 1979 CNDDB.	extant (SERG 2011, CNDDB 2013).	A: nonnatives; E: fire, climate.	low military value.
Upper Norton Canyon.	EO 20; 6 PLs	extant; 1979 CNDDB.	extant (SERG 2011)	A: nonnatives; E: fire, climate.	low military value.
Middle Ranch Canyon.	EO 24, 65; 8 PLs.	extant; 1981 CNDDB.	extant (SERG 2008, CNDDB 2013).	A: nonnatives; E: climate ...	low military value.
Waymuck Canyon	EO 22; 1 PL	unknown	extant (Junak 2004)	A: nonnatives; E: climate ...	high military value.
Plain northeast of Warren Canyon.	EO 63, 64; 4 PLs.	unknown	extant (Tierra Data 2007, CNDDB 2013).	A: land use, erosion, nonnatives; E: movement, climate.	medium military value.
Seal Cove Terraces	EO 62; 2 PLs	unknown	extant (CNDDB 1985, SERG 2010, CNDDB 2013).	A: erosion, nonnatives, fire; E: movement, fire, climate.	high military value.
Eel Cove Canyon (including terraces).	EO 61; 3 PLs	unknown	extant (Junak 2004, CNDDB 2013).	A: nonnatives, fire; E: movement, fire, climate.	high military value.
Terrace Canyon (south to terraces around Spray).	EO 55, 56, 57, 58, 59, 69; 6 PLs.	unknown	presumed extant (SERG 2004, CNDDB 2013).	A: erosion, nonnatives; E: movement, climate.	high military value.

[1] EO: element occurrence, as defined and described according to the California Natural Diversity Database. PL: point locations of plants.
[2] Threats identified in the listing rule for these two taxa include: Factor A: habitat modification by feral animals; Factor C: grazing by animals; Factor E: nonnative plants.
[3] Current threats: Nonnatives = Nonnative Plants; Movement = Movement of Vehicles and Troops; Climate = Climate Change; Genetic = Genetic Diversity.
[4] Military value as defined in the Navy's 2002 INRMP. Values defined according to the management emphasis, with high-value areas designated for maximum military use and low-value areas retaining the greatest flexibility for maintaining natural resource values.

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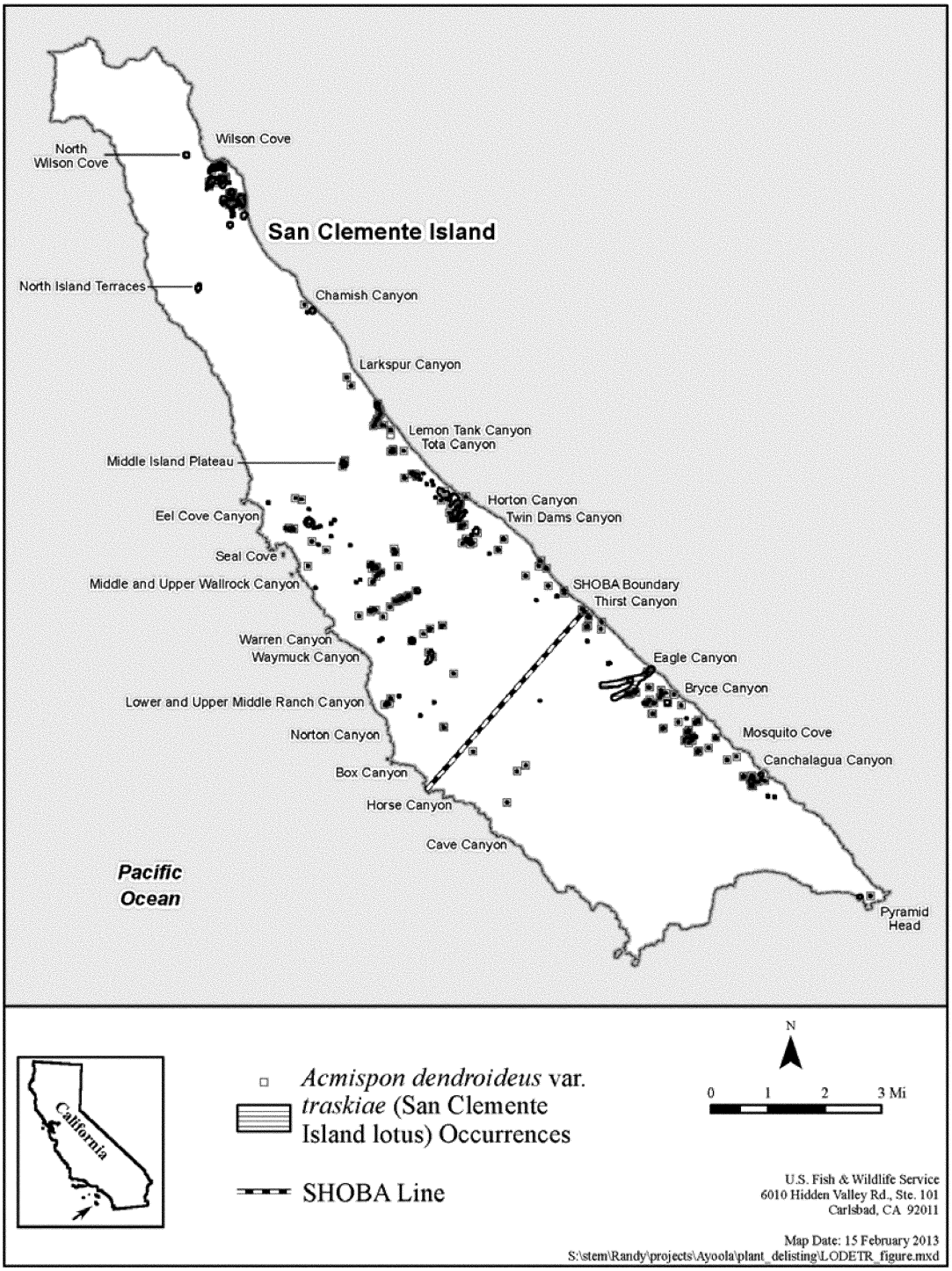

Figure 1. Distribution of 29 occurrences of *Acmispon dendroideus* var. *traskiae* (San Clemente Island lotus) on San Clemente Island, Los Angeles County, California. General geographic location of each occurrence is indicated by name. Squares represent point locations and horizontal striped polygons represent element occurrences.

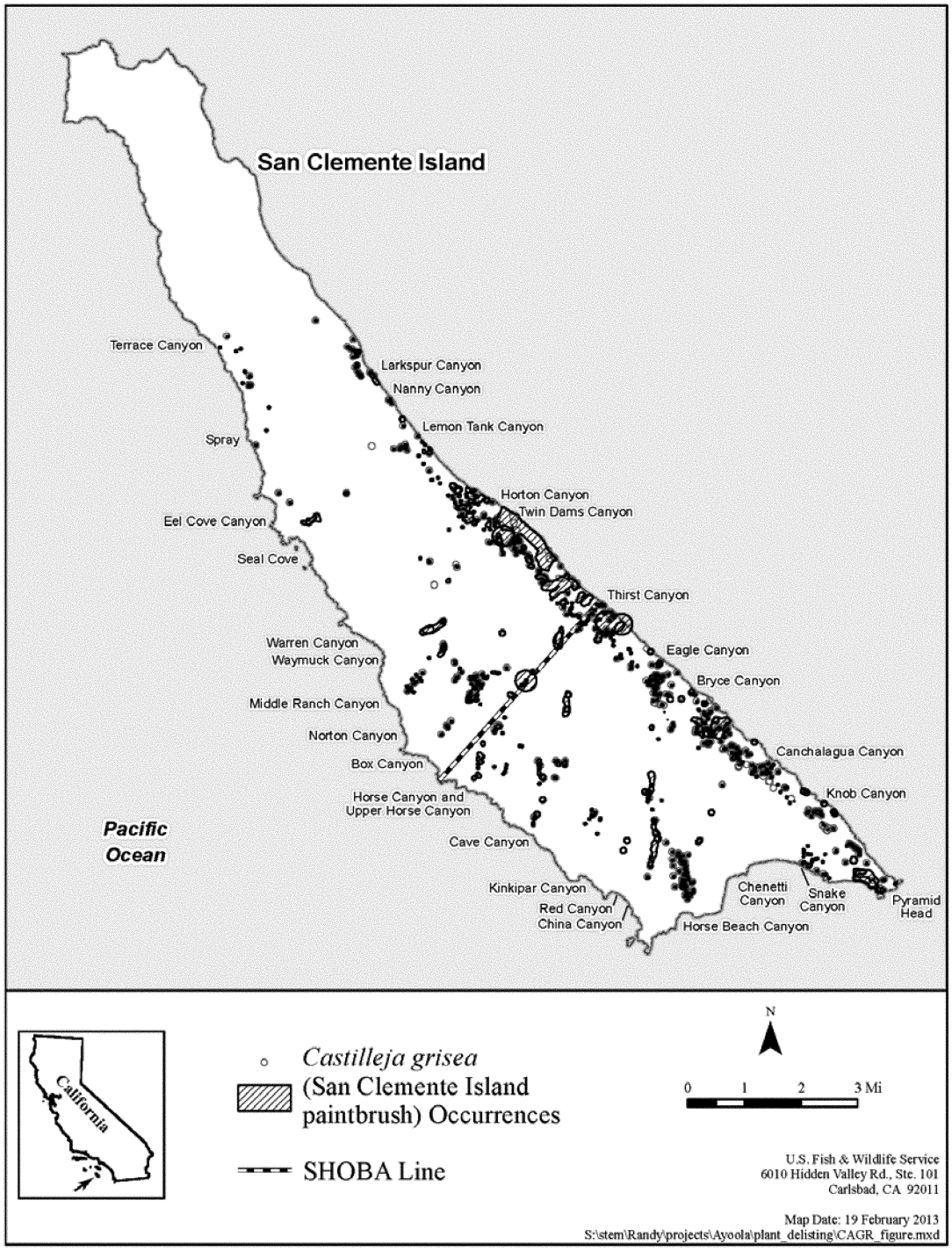

Figure 2. Distribution of 28 occurrences of *Castilleja grisea* (San Clemente Island paintbrush) on San Clemente Island, Los Angeles County, California. General geographic location of each occurrence is indicated by name. Circles represent point locations and diagonal striped polygons represent element occurrences.

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(3) In the proposed rule, we discussed a study by Liston *et al.* (1990), who performed genetic analysis on 38 plants (6 *Acmispon argophyllus* var. *argenteus* and 32 *Acmispon dendroideus* var. *traskiae*) in the vicinity of Wilson Cove to determine the extent of hybridization between the two taxa (Liston *et al.* 1990, pp. 239–244). Liston *et al.* (1990, p. 240) detected 4 hybrids out of the 38 plants examined (11 percent). Since publication of the proposed rule, we received information from a peer reviewer regarding a more recent study. Dr. Mitchell McGlaughlin (University of Northern Colorado, 2012, pers. comm.) in collaboration with Dr. Kaius Helenurm analyzed 219 *A. d.* var.

traskiae and *A. argophyllus* var. *argenteus* plants and found evidence of hybridization in 12 plants (approximately 5 percent). The hybrid plants were found at Wilson Cove, Pyramid Head, Bryce Canyon, Eagle Canyon, Waymuck Canyon (between 1 and 4 hybrids were documented at each site out of an average of 20 plants sampled per site) (McGlaughlin 2012, pers. comm). McGlaughlin (2012, pers. comm.) concludes that the data indicate hybridization between these taxa is relatively rare and may not represent a significant threat to *A. d.* var. *traskiae.* Further details of this study are discussed below in the Five-Factor Analysis for *A. d.* var. *traskiae.*

Recovery

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. The Act directs that, to the maximum extent practicable, we incorporate into each plan:

(1) Site-specific management actions that may be necessary to achieve the plan's goals for conservation and survival of the species;

(2) Objective, measurable criteria, which when met would result in a determination, in accordance with the provisions of section 4 of the Act, that the species be removed from the list; and

(3) Estimates of the time required and cost to carry out the plan.

Revisions to the list (adding, removing, or reclassifying a species) must reflect determinations made in accordance with sections 4(a)(1) and 4(b) of the Act. Section 4(a)(1) requires that the Secretary determine whether a species is endangered or threatened (or not) because of one or more of five threat factors. Objective, measurable criteria, or recovery criteria contained in recovery plans, help indicate when we would anticipate an analysis of the five threat factors under section 4(a)(1) would result in a determination that a species is no longer endangered or threatened. Section 4(b) of the Act requires that the determination be made ''solely on the basis of the best scientific and commercial data available.''

While recovery plans are intended to provide guidance to the Service, States, and other partners on methods of minimizing threats to listed species and on criteria that may be used to determine when recovery is achieved, they are not regulatory documents and cannot substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the Act. Determinations to remove a species from the list made under section 4(a)(1) of the Act must be based on the best scientific and commercial data available at the time of the determination, regardless of whether that information differs from the recovery plan.

In the course of implementing conservation actions for a species, new information is often gained that requires recovery efforts to be modified accordingly. There are many paths to accomplishing recovery of a species, and recovery may be achieved without all criteria being fully met. For example, one or more recovery criteria may have been exceeded while other criteria may not have been accomplished, yet the Service may judge that, overall, the threats have been minimized sufficiently, and the species is robust enough, that the Service may reclassify the species from endangered to threatened or perhaps delist the species. In other cases, recovery opportunities may have been recognized that were not known at the time the recovery plan was finalized. These opportunities may be used instead of methods identified in the recovery plan.

Likewise, information on the species may be learned that was not known at the time the recovery plan was finalized. The new information may change the extent that criteria need to be met for recognizing recovery of the species. Overall, recovery of species is a dynamic process requiring adaptive management, planning, implementing, and evaluating the degree of recovery of a species that may, or may not, fully follow the guidance provided in a recovery plan.

Thus, while the recovery plan provides important guidance on the direction and strategy for recovery, and indicates when a rulemaking process may be initiated, the determination to remove a species from the Federal List of Endangered and Threatened Plants (50 CFR 17.12) is ultimately based on an analysis of whether a species is no longer endangered or threatened. The following discussion provides a brief review of recovery planning for *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea,* as well as an analysis of the recovery criteria and goals as they relate to evaluating the status of the taxa.

In 1984, we published the California Channel Islands Species Recovery Plan (Recovery Plan) that addresses seven listed taxa (including *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea*) and three candidate taxa distributed among three of the Channel Islands (USFWS 1984). Recovery plans are intended to guide actions to recover listed species and to provide measurable objectives against which to measure progress towards recovery. Following guidance in effect at that time, the Recovery Plan was not focused on criteria that specifically addressed the point at which threats identified for each species in the listing rule would be removed or sufficiently ameliorated. Given the threats in common to the species addressed, the Recovery Plan is broad in scope and focuses on restoration of habitats and ecosystem function. Instead of specific criteria, it included six general objectives covering all of the plant and animal species:

Objective 1: Identify present adverse impacts to biological resources and strive to eliminate them.

Objective 2: Protect known resources from further degradation by: (a) Removal of feral herbivores, carnivores, and selected exotic plant species; (b) control of erosion in sensitive locations; and (c) direct military operations and adverse recreational uses away from biologically sensitive areas.

Objective 3: Restore habitats by revegetation of disturbed areas using native species.

Objective 4: Identify areas of San Clemente Island where habitat restoration and population increase of certain addressed taxa may be achieved through a careful survey of the island and research on habitat requirements of each taxon.

Objective 5: Delist or upgrade the listing status of those taxa that achieve vigorous, self-sustaining population levels as the result of habitat stabilization, restoration, and preventing or minimizing adverse human-related impacts.

Objective 6: Monitor effectiveness of recovery effort by undertaking baseline quantitative studies and subsequent followup work (USFWS 1984, pp. 106–107).

Progress has been made toward achieving these objectives. Our review of the Recovery Plan focuses on the actions identified that promote the recovery of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea.* The Recovery Plan adopts a generalized strategy of eliminating or controlling selected nonnative species and restoring habitat conditions on the Channel Islands to support viable, self-sustaining occurrences of each of the addressed taxa. The Recovery Plan states that ''[o]nce the threats to these taxa have been removed or minimized and the habitats are restored, adequately protected, and properly managed, reclassification for some taxa may be considered'' (USFWS 1984, p. 108).

Actions specified in the Recovery Plan that are pertinent to recovery of the endangered San Clemente Island plant taxa include:

(1) Removing feral animals;

(2) Removing or controlling selected nonnative plants;

(3) Controlling erosion;

(4) Revegetating eroded and disturbed areas;

(5) Reintroducing and reestablishing listed plant species populations;

(6) Modifying existing management plans to minimize habitat disturbance and incorporate recovery actions into natural resource management plans;

(7) Protecting habitat by minimizing habitat loss and disturbance and by preventing the introduction of additional nonnative organisms;

(8) Determining the habitat and other ecological requirements of the listed plant taxa (such as reproductive biology and fire tolerance);

(9) Evaluating the success of management actions;

(10) Increasing public support for recovery efforts; and

(11) Using existing laws and regulations to protect each taxon.

Recovery Plan Implementation

The primary objective of the Recovery Plan is to restore endangered and threatened species to nonlisted status. Though the specific sizes and numbers of occurrences needed for self-sustaining populations for each species were not identified, habitat restoration and protection that would result in achieving self-sustaining populations were discussed (see Objective 5). The Recovery Plan stated that reclassification of these taxa may be considered after threats have been removed or sufficiently minimized and the habitat is restored. Specific criteria for determining when threats have been removed or sufficiently minimized were not identified in the Recovery Plan, but six objectives were described in general to achieve recovery of the Channel Island species. This section provides a summary of actions and activities that have been implemented according to the 1984 Recovery Plan (USFWS 1984, pp. 106–107) and contribute to achievement of these objectives.

Objective 1: Identify present adverse impacts to biological resources and strive to eliminate them.

The Navy has taken significant steps to eliminate incidental impacts to *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* by educating Navy personnel stationed on San Clemente Island. The Navy also created the position of Island Operations Manager to increase support for recovery efforts on the island. This individual's role is to act as a liaison between the Navy's natural resource branch and other island users (Larson 2009, pers. comm.). The Island Operations Manager educates users of the island to the uniqueness and fragility of the island's ecosystem, and briefs new operational groups as they come onto the island (Larson 2009, pers. comm.). These briefings inform operational groups of the Navy's natural resource management responsibilities under the law, and may include additional information about threats to, and locations of, listed taxa.

The Recovery Plan recommends that existing laws and regulations be used to protect *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* from threats on San Clemente Island. Based on the occurrence of these taxa on federally owned land, the primary laws with potential to protect them include the National Environmental Policy Act (NEPA) and the Act. NEPA requires Federal action agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. The Navy has implemented NEPA since its enactment in 1970. Likewise, the Navy has a history of consultation and coordination with us under the Act regarding the effects of various San Clemente Island activities on federally listed species since taxa on the island were first listed in 1977. Finally, pursuant to the Sikes Act Improvement Act (Sikes Act), the Navy adopted an Integrated Natural Resources Management Plan (INRMP) for San Clemente Island in 2002 that helps guide the management and protection of these taxa (Navy 2002, pp. 1.1–8.12).

The Sikes Act (16 U.S.C. 670) authorizes the Secretary of Defense to develop cooperative plans with the Secretaries of Agriculture and the Interior for natural resources on public lands (see *Sikes Act Improvement Act* section under *Factor D. Inadequacy of Existing Regulatory Mechanisms* below for further discussion). An INRMP is a plan that is intended ''. . . to guide installation commanders in managing their natural resources in a manner that is consistent with the sustainability of those resources while ensuring continued support of the military mission'' (Navy 2002, p. 1–1). To achieve this, the INRMP identifies goals and objectives for specified management units and their natural resources. The following objectives have been incorporated as part of the INRMP to address the Recovery Plan task of incorporating recovery actions into existing management plans (Navy 2002, pp. 4–38–4–40):

(1) Protect, monitor, and restore plants and cryptograms (soil crusts composed of living cyanobacteria, algae, fungi, or moss) in order to manage for their long-term sustainability on the island;

(2) Conduct status surveys for listed plants;

(3) Ensure that Management Focus Plants have a network of suitable sites;

(4) Perform studies to determine the pollinators of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea;* and

(5) Continue to apply genetic research and management approaches to rare plant management.

Through these mechanisms, the Navy is required to identify and address all threats to these species during the INRMP planning process. If possible, threats are ameliorated, eliminated, or mitigated through this procedure. The Navy has strived to fulfill this objective through both internal planning (INRMP) and through compliance with Federal law (consultations with us under the Act and preparing environmental review documents under NEPA). As discussed below under the five factors, the actions taken by the Navy under the INRMP have not completely eliminated all adverse impacts, but their efforts have greatly reduced many of the current threats impacting these taxa. These contributions to the elimination of adverse impacts partially fulfill, but do not fully achieve, the objective for the two species.

Objective 2: Protect known resources from further degradation by: (a) removal of feral herbivores, carnivores, and selected exotic plant species; (b) control of unnatural erosion in sensitive locations; and (c) directing military operations and adverse recreational uses away from biologically sensitive areas.

In 1992, the Navy fulfilled a major part of this objective by removing the last of the feral goats and pigs from San Clemente Island. Nonnative plants have also been targeted for removal from San Clemente Island, and efforts to control nonnatives have been implemented on an annual basis since approximately 1993 (O'Connor 2009a, pers. comm.; Munson 2013, pers. comm.). The specific nonnative plants targeted and amount of money allocated to this program are adjusted on an annual basis (O'Connor 2009b, pers. comm.; Munson 2013, pers. comm.). The effectiveness of this program was improved by providing authorization to apply herbicides (O'Connor 2009b, pers.

comm.; Munson 2013, pers. comm.). Priorities in the nonnative plant program are currently focused on new nonnatives to the island and particularly destructive nonnative species.

The Navy is also taking steps to minimize the effects of erosion on the island. Erosion control measures are being incorporated into project designs to minimize the potential to exacerbate existing erosion (O'Connor 2009c, pers. comm.; Munson 2013, pers. comm.). With the expansion of military operational areas, the Navy committed to prepare and implement an erosion control plan that will minimize soil erosion within and adjoining the operational areas (Navy 2008b, pp. 5–30; USFWS 2008 p. 62). The Navy is nearing finalization of the erosion control plan, and has agreed not to conduct training activities that may lead to impacts from erosion until the plan is successfully implemented (Munson 2013, pers. comm.). The Navy is using best management practices (BMPs) when creating and approving projects that might contribute to erosion on the island (Munson 2013, pers. comm.). It is, however, unclear whether erosion control measures will be implemented consistently in areas that are closed to monitoring and access due to unexploded ordnance. The proposed erosion control plan includes development and application of BMPs such as: establishing setbacks and buffers from steep slopes, drainages, and sensitive resources; constructing site-specific erosion control structures; conducting revegetation and routine maintenance; and monitoring and adjusting the BMPs as appropriate. The Navy has taken steps to reduce the threat of erosion on the island and contribute to the achievement of this objective.

The Navy is taking precautions to avoid plants when possible to minimize direct impacts to *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* resulting from military activities. For example, in the Military Operations and Fire Management Plan (MOFMP), the Navy proposed to develop a Training Area Range (TAR) that contained *A. d.* var. *traskiae* within its boundaries. After consultation with the Service, the Navy revised these boundaries to avoid most of the *A. d.* var. *traskiae* and minimize the impact of training on the species (USFWS 2008, p. 118).

This objective has been largely met for *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea.* Feral herbivores have been removed, erosion control measures are being implemented, and military activities are avoiding direct impacts to plants whenever possible. The Navy is also developing an erosion control plan for military activities.

Objective 3: Restore habitats by revegetation of disturbed areas using native species.

Since 2001, the Navy has contracted with the San Diego State University Soil Ecology and Restoration Group (SERG) to propagate and outplant (transplant individuals from the greenhouse to vegetative communities) native species on the island (Howe 2009, pers. comm.; Munson 2013, pers. comm.). The SERG has outplanted about 4,000 native plants in the past 5 years, and thousands of native plants were outplanted by SERG before that time (Munson 2013, pers. comm.). There have been about 4,000 recruits documented at outplanting sites (Munson 2013, pers. comm.). This program has not included propagation and outplanting of listed plant taxa, except in one instance to replace *Acmispon dendroideus* var. *traskiae* plants that were extirpated during a scrap metal removal project (Munson 2011, pers. comm.). The outplanting of native species is primarily focused on restoring sensitive habitats on the island and improving habitat conditions for endangered animal taxa (such as the San Clemente loggerhead shrike (*Lanius ludovicianus mearnsi*)), with some revegetation of eroded and disturbed areas (O'Connor 2009b, pers. comm.; Munson 2013, pers. comm.). Although only one of the restoration efforts was specifically designed for the benefit of one of the plant taxa addressed in this rule, restoration of the island's vegetation communities should help improve habitat suitability for both taxa by reducing the spread of invasive nonnative plants and restoring ecological processes. Although progress has been made toward restoring disturbed areas, areas still exist (e.g., especially within SHOBA) that need further restoration of native species. Therefore, while restoration is occurring, the objective has not been fully met at this time for *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea.*

Objective 4: Identify areas of San Clemente Island where habitat restoration and population increase of certain addressed taxa may be achieved through a careful survey of the island and research on habitat requirements of each taxon.

A number of studies have addressed the ecology, taxonomy, and genetics of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* since they were listed. Evans and Bohn (1987, pp. 537–545) observed insects on plants, collected seeds, and studied the germination of *A. d.* var. *traskiae* and *C. grisea.* Junak and Wilken (1998, pp. 1–426) studied flowering and fruiting in natural populations and performed germination trials with collected seeds from both taxa. Allan (1999, pp. 46–105) observed pollinators and germinated seeds collected from *A. d.* var. *traskiae.* Liston *et al.* (1990) confirmed suspected hybridization between *A. d.* var. *traskiae* and *A. argophyllus* var. *argenteus* using genetic techniques. Additionally, Allan (1999, pp. 46–105) surveyed the genetics of a number of taxa within the genus *Lotus,* including a group that includes *A. d.* var. *traskiae,* to compare genetic divergence between California mainland and island taxa. Helenurm *et al.* (2005, pp. 1221–1227) studied patterns of genetic variation among occurrences of *C. grisea.* These studies have helped to elucidate potential plant pollinators and mating systems, develop plant propagation techniques, and design management strategies that take into consideration genetic factors. There is a growing body of knowledge on the habitat requirements and life history of listed species on the island. This research, encouraged and supported by the Navy, will continue to contribute to achieving Objective 4 and to planning successful restoration of habitat and recovery of both taxa. Additional surveys and research necessary to identify appropriate restoration, management, and recovery actions include: research on the degree of hybridization in *A. d.* var. *traskiae* and study of the host plants of *C. grisea.* Thus, this objective has not been fully achieved at this time for these taxa.

Objective 5: Delist or upgrade the listing status of those taxa that achieve vigorous, self-sustaining population levels as the result of habitat stabilization, restoration, and preventing or minimizing adverse human-related impacts.

The distributions of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* have increased substantially over much of the island since listing. There are now vigorous, self-sustaining occurrences of *A. d.* var. *traskiae* and *C. grisea* on San Clemente Island, as described above. Threats to these taxa have also been reduced due to management actions carried out by the Navy (USFWS 2007a, pp. 1–22; USFWS 2007b, pp. 1–19). Although the goal of delisting has not yet been met, the objective to improve the status of *A. d.* var. *traskiae* and *C. grisea* to the point they can be reclassified has been met.

Objective 6: Monitor effectiveness of recovery efforts by undertaking baseline quantitative studies and subsequent followup work.

To evaluate the success of management actions undertaken to benefit listed plant taxa, the Navy implemented a long-term vegetation monitoring study (Tierra Data Inc. 2005, pp. i–96 and Appendices) and commissioned sensitive plant surveys (Junak and Wilken 1998, pp. 1–416; Junak 2006, pp. 1–176). Overall, vegetation trend monitoring reveals that the cover of both native and nonnative plant species has changed since the removal of feral goats and pigs, but the response of individual species and vegetative communities has varied, with some species and communities exhibiting greater changes than others. Discerning long-term vegetative community trends is difficult because the vegetative community study was preceded by a wet year that likely had a strong influence on the data collected (Tierra Data Inc. 2005, p. 29). Within the few monitoring plots that included *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea,* occurrence counts varied among years and did not provide a clear indication of trend (Tierra Data Inc. 2005, pp. 79–80). The clearest indication of the success of feral animal removals for listed taxa was obtained from rare plant survey data (Junak and Wilken 1998, pp. 1–416, GIS data; Junak 2006, pp. 1–176, GIS data; Tierra Data Inc. 2008, pp. 1–24, appendices and GIS data; SERG 2009–2011, GIS data). These surveys have added substantially to the number of documented occurrences of each taxon.

Rare plant surveys and island flora studies have documented many more locations occupied by *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* than were known at the time of listing. Since listing, 23 additional occurrences of *A. d.* var. *traskiae,* and 10 additional occurrences of *C. grisea* have been documented (Table 1). It is unknown whether the higher number of occurrences represents detections due to increased survey efforts, recruitment from the seed bank, or recolonization by the plants as a result of management actions implemented by the Navy to conserve listed species on the island. However, this improvement in the documented status of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* suggests that feral goats and pigs were a significant threat to each. Thus, their improved status may largely be due to the implementation of a single action identified in the Recovery Plan. Because portions of the island remain closed, monitoring effectiveness of recovery efforts is not being fully implemented. Occurrences for each species, as described in the proposed rule, are closed to access for monitoring or any recovery efforts. Thus, Objective 6 cannot be fully met for the two taxa under current operational closure directives.

Summary of Recovery Plan Implementation

In summary, while the Recovery Plan does not include taxon-specific downlisting or delisting criteria for measuring the recovery of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea,* many of the actions identified in the Recovery Plan have been implemented to benefit these taxa. Most significantly, the Navy removed feral goats and pigs from San Clemente Island in 1992. The improvement in the documented status of each of these listed plant taxa suggests that the removal of these animals was integral to establishing vigorous, self-sustaining occurrences.

Threats are reduced in areas occupied by *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea,* and many of the objectives have been met in part or full for these two taxa. Additionally, the ecology and genetics of each of these taxa have been studied, and a number of programs are now in place to improve habitat suitability, prevent introductions of nonnative species, guide and track management efforts, and protect occurrences of these plant taxa. We investigated other potential threats for these taxa and concluded that they do not pose significant impacts at all occurrences. Based on our review of the Recovery Plan, we conclude that the status of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* has improved due to activities being implemented by the Navy on San Clemente Island. The effects of these activities on the status of both taxa are discussed in further detail below.

Summary of Comments and Recommendations

In the proposed rule published on May 16, 2012 (77 FR 29078), we requested that all interested parties submit written comments on the proposal by July 16, 2012. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. Newspaper notices inviting general public comment were published in the San Diego Union-Tribune. We did not receive any requests for a public hearing.

During the comment period for the proposed rule, we received two comment letters (one from a peer reviewer and one from the Navy) directly addressing the proposed reclassification of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* with threatened status. All substantive information provided during the comment period has either been incorporated directly into this final determination or addressed below.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinion from four knowledgeable individuals with scientific expertise that included familiarity with the two plant taxa and their habitat, biological needs, recovery efforts, and threats. We received a response from one of the peer reviewers.

We reviewed all comments received from the peer reviewer for substantive issues and new information regarding the listing of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea.* In general, the peer reviewer expressed support for reclassifying the two taxa as threatened, and supported our finding that downlisting of *Malacothamnus clementinus* is not warranted at this time. The peer reviewer also provided additional information about *A. d.* var. *traskiae,* and provided general technical and grammatical corrections. The peer reviewer expressed four comments that are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

(1) *Comment:* The peer reviewer expressed agreement with our finding regarding *Malacothamnus clementinus* (downlisting not warranted), but was concerned that portions of the island are closed to biological resource managers and the effects of these closures may greatly impact the management and survival of the species. The reviewer indicated that being able to access the closed sites will be important to future determinations regarding the status of the species. The peer reviewer also expressed concern with other aspects of our discussion of *M. clementinus,* its biology, and threats.

Our Response: We agree that access to all sites supporting *Malacothamnus clementinus* occurrences for monitoring and management of the species and its habitat is a consideration for future determinations regarding the status of the plant. We will continue to work with the Navy to find ways to monitor and manage occurrences in areas that are closed to resource managers.

Because we found downlisting of *Malacothamnus clementinus* not warranted in our 2012 finding (77 FR 29078), it is not addressed in this document. However, we appreciate the peer reviewer's comments and suggestions, and will consider them when evaluating the species' status in the future.

(2) *Comment:* The peer reviewer expressed agreement with our finding regarding *Acmispon dendroideus* var. *traskiae* (downlisting is warranted). The reviewer also provided summaries of unpublished conservation genetics data for the taxon, suggesting that: (a) Hybridization is occurring between *A. d.* var. *traskiae* and *A. argophyllus* var. *argenteus,* but at a lower level than suggested in previous work by Liston *et al.* (1990); and (b) the occurrence at Wilson Cove has been modified over time by translocation of *A. d.* var. *traskiae* plants from throughout the island to that location.

Our Response: We have incorporated these data into this final downlisting rule where appropriate.

(3) *Comment:* The peer reviewer expressed agreement with our finding regarding *Castilleja grisea* (downlisting is warranted) and our proposal to downlist the species.

Our Response: We appreciate the peer reviewer's review of our finding and proposal to downlist *Castilleja grisea.*

(4) *Comment:* The peer reviewer identified technical and grammatical errors in the preamble of our finding and proposed downlisting rule.

Our Response: We thank the reviewer for these observations and we made corrections in this final downlisting rule where appropriate.

Comments From U.S. Navy

(5) *Comment:* The Navy expressed appreciation for our recommendation to downlist *Castilleja grisea* and *Acmispon dendroideus* var. *traskiae,* and encouraged us to move forward with a final downlisting rule. However, the Navy did not agree with our finding regarding *Malacothamnus clementinus* (downlisting not warranted) and explained why they believe this species should also be downlisted. They also provided additional information regarding the current status and ongoing management of *M. clementinus.*

Our Response: We thank the Navy for their review. This final rule reclassifies *Castilleja grisea* and *Acmispon dendroideus* var. *traskiae* from endangered to threatened.

On May 16, 2012, in response to a petition seeking its downlisting, the Service made a finding that downlisting was not warranted for *Malacothamnus clementinus* (77 FR 29078). The 2012 finding was finalized based upon the best available information, and it constitutes our final determination on the subject petition for that species, in accordance with section 4(b)(3)(B)(i) of the Act. *Malacothamnus clementinus* will therefore not be evaluated in this document. However, we thank the Navy for the additional information they provided, which will be considered when we evaluate the status of *M. clementinus* in the future. While not addressed in this document, we will through separate correspondence respond to the Navy's comments regarding *Malacothamnus clementinus.*

Summary of Changes From Proposed Rule

We have not made any substantive changes in this final rule, based on the comments that were received during the comment period. The two commenters were in favor of downlisting *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* (see Summary of Comments and Recommendations section above). The range of both taxa has expanded since listing, and the threats continue to be reduced through conservation actions implemented by the Navy. Therefore, as proposed, we are reclassifying *A. d.* var. *traskiae* and *C. grisea* from endangered to threatened.

Summary of Factors Affecting the Taxa

Section 4 of the Act and its implementing regulations (50 CFR 424) set forth procedures for listing species, reclassifying species, or removing species from the Federal Lists of Endangered and Threatened Wildlife and Plants. ''Species'' is defined by the Act as including any species or subspecies of fish or wildlife or plants, and any distinct vertebrate population segment of fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). Once the ''species'' is determined, we then evaluate whether that species may be endangered or threatened because of one or more of the five factors described in section 4(a)(1) of the Act. Those factors are:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

We must consider these same five factors in reclassifying or delisting a species. Listing, reclassifying, or delisting may be warranted based on any of the above threat factors, either singly or in combination. For species that are already listed as threatened or endangered, an analysis of threats is an evaluation of both the threats currently facing the species and the threats that are reasonably likely to affect the species in the foreseeable future following the delisting or downlisting.

Under section 3 of the Act, a species is ''endangered'' if it is in danger of extinction throughout all or a significant portion of its range, and is ''threatened'' if it is likely to become endangered in the foreseeable future throughout all or a significant portion of its range. The word ''range'' refers to the range in which the species currently exists, and the word ''significant'' refers to the value of that portion of the range being considered to the conservation of the species. The ''foreseeable future'' is the period of time over which events or effects reasonably can or should be anticipated, or trends extrapolated. Based on currently available data and this analysis, the period over which we can anticipate or extrapolate trends is approximately 40 years. This determination is based on the following: We listed *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* 36 years ago. Since then, recovery has been slow, but the status of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* has improved in response to the complete removal of goats and pigs in 1992. Additionally, the Navy has worked to develop and implement management plans to reduce threats for the conservation of listed plants and their habitat on the island. As a result, we have observed an increase in the distribution and abundance of both taxa over the past 20 years. However, we anticipate military land use and other threats will continue to affect both species throughout their ranges into the future. While threats remain on the island, management plans are in place, and we now have a better understanding of how the status of these taxa and habitats may continue to recover on the island. We expect that it will take an equivalent number of years of additional monitoring to determine the effectiveness of current and planned management in reducing and ameliorating those threats and determine the species' response to those efforts. Therefore, based on currently available data and for the purposes of this analysis, we acknowledge the foreseeable future, the period over which we can anticipate effects or extrapolate trends, is approximately 40 years.

We considered and evaluated the best available scientific and commercial information for this analysis. Information pertaining to *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* in relation to the five factors provided in section 4(a)(1) of the Act is discussed below. For the purposes of this analysis, we will first evaluate whether the currently listed species should be considered threatened or endangered throughout all their ranges. If we determine that the species are threatened, then we will consider whether there are any significant portions of their ranges where they are in danger of extinction or likely to become endangered within the foreseeable future. The five factors listed under section 4(a)(1) of the Act and their applications to *A. d.* var. *traskiae* and *C. grisea* are presented below.

Acmispon dendroideus var. traskiae (San Clemente Island lotus)

In the 2007 status review, we acknowledged that the predominant threat at listing (grazing and rooting from feral herbivores) was ameliorated with the removal of goats and pigs from the island in 1992 (USFWS 2007a, pp. 1–22). Threats to *Acmispon dendroideus* var. *traskiae* identified in the 2007 status review include: (1) Erosion, (2) invasive nonnative species, (3) fire, (4) land use, (5) lack of access to SHOBA, and (6) hybridization. Impacts to habitat from erosion, nonnatives, fire, and land use are discussed below under *Factor A,* and hybridization is discussed under *Factor E* below. In 2007, lack of access to SHOBA was described as a threat because it ''can undermine the effectiveness of invasive species control programs that often rely on treatments during a particular time in an organism's life cycle'' (USFWS 2007a, p. 16). While lack of access to portions of the island still limits our ability to fully assess the status of the taxon, lack of access to SHOBA is not considered a threat. Rather, the lack of access contributes to uncertainty in assessing threats and the taxon's response to those threats and to actions taken to ameliorate threats. In this finding, we focus on threats responsible for impacting the listed entity or habitat where it occurs, not our inability to access these areas.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The final listing rule (42 FR 40682; August 11, 1977) identified the following threats to *Acmispon dendroideus* var. *traskiae:* habitat alteration and destruction, competition from nonnative species, and direct predation caused by nonnative herbivores (goats and pigs). With the final removal of these herbivores in 1992, the vegetation on San Clemente Island has rebounded, and the status of many rare plant occurrences, including *A. d.* var. *traskiae,* has improved (Junak and Wilken 1998, p. 18; Junak 2006a, pers. comm.). Although the principle threat to *A. d.* var. *traskiae* identified in the final listing rule has been eliminated, erosion as a result of overgrazing and invasive nonnative plants are ongoing threats to habitat of *A. d.* var. *traskiae.* We also identified habitat alteration and disturbance from the Navy's use of the island for military operations and training as threats to the habitats occupied by *A. d.* var. *traskiae* in the Recovery Plan and the 2007 status review (USFWS 1984, pp. 58–63; USFWS 2007a, pp. 11, 12). Fire is an additional threat to habitat recognized since listing. Below, we discuss impacts of the following threats that affect the habitat or range of *A. d.* var. *traskiae:* (1) Land use, (2) erosion, (3) nonnative plants, and (4) fire.

Land Use

In this section we describe threats considered likely based on land use designations. At the time of listing, the Navy had acquired the island, although military operations were not intense and feral grazers were still on the island. Since listing, training activities and land use by the Navy have increased significantly. Since it was first listed in 1977, the Navy has consulted and coordinated with us regarding the effects of various activities on *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* (USFWS 2002, pp. 1–21; USFWS 2003, p. 1; USFWS 2004, pp. 1–2; USFWS 2008, pp. 1–237). These consultations have addressed numerous activities including training, fire management, the installation of wind turbines, missile tests, maintenance and construction of Ridge Road and the assault vehicle maneuver route, construction of berthing buildings, and development and use of training areas.

Most recently, training activities approved in the Military Operations and Fire Management Plan (MOFMP) include substantial increases in vehicle and foot traffic in the Infantry Operations Areas (IOA) (Navy 2008b, pp. 2–1 to 2–52). Examples of projected increases in training levels relative to a representative year of training prior to 2008 include: 11 percent increase in naval fire support exercises, 23 percent increase in land bombing exercises, 150 percent increase in explosive ordnance disposal, 60 percent increase in artillery operations, 90 percent increase in land demolitions, 19 percent increase in land navigation exercises, and 96 percent increase in SEAL platoon operations (USFWS 2008, p. 11).

We considered the status and distribution of *Acmispon dendroideus* var. *traskiae,* and the various management, avoidance, and minimization measures in place, including those the Navy will implement with the new MOFMP, in our 2008 biological opinion (we also considered impacts to *Castilleja grisea*). We concluded that ongoing and likely impacts from the proposed increases in military training activities would not jeopardize the continued existence of *A. d.* var. *traskiae* and *C. grisea* (USFWS 2008, p. 90).

Eight of 29 *Acmispon dendroideus* var. *traskiae* occurrences (28 percent) occur within SHOBA, which supports a variety of training operations involving both live and inert munitions fire (Eagle Canyon, Bryce Canyon, North Mosquito Cove, Canchalagua Canyon, Thirst Canyon, Cave Canyon, Horse Canyon, and Pyramid Head). Most of the land area of the SHOBA serves as a buffer from the Impact Areas, although military training in parts of SHOBA could result in habitat alteration due to off-highway vehicle and large-scale troop movements through the military impact and training areas (IOA and AVMA). Most of the occurrences within SHOBA are located along the eastern escarpment, which should provide a level of protection from training impacts. Large-scale troop movements are less likely in this area, because of the extreme slope of the escarpment. Training impacts may become difficult to assess and manage with the recent closure of the eastern escarpment due to unexploded ordnance.

Four of 29 *Acmispon dendroideus* var. *traskiae* occurrences (14 percent) are within or partially within the IOA and may experience direct impacts (Canchalagua Canyon, Middle Island Plateau, North Mosquito Cove, and Eagle Canyon). Nine occurrences (31 percent) are within 1,000 ft (305 m) of the IOA, and could experience diffuse or accidental impacts associated with troop movement (Upper Middle Ranch Canyon, Warren Canyon, Horton Canyon, Upper Wallrock Canyon, Tota Canyon, Lemon Tank Canyon, Larkspur Canyon, Chamish Canyon, and North Island Terraces). These areas near the IOA are at less risk of disturbance than the occurrences within the IOA, and would only be likely to sustain diffuse or accidental impacts to the habitat. While the increase in military training

could affect the taxon, the Navy through implementation of the INRMP will avoid and minimize impacts to individuals or occurrences of *A. d.* var. *traskiae* (as a rare plant taxon), to the extent practicable while meeting operational needs (Navy 2002, p. 1–2).

Because of the taxon's close proximity to Navy facilities, military activities have the potential to impact habitat at one of the largest known occurrences of *Acmispon dendroideus* var. *traskiae,* near Wilson Cove. All construction, maintenance, and training activities in the Wilson Cove area go through a site approval request process. Through this process, the areas are assessed to see if the activities will potentially impact any listed species, including *A. d.* var. *traskiae.* Part of this occurrence is within a TAR where tactical training and movement are projected to occur, possibly causing habitat damage through troop traffic (USFWS 2008, pp. 119–120). The Navy recently did work at Wilson Cove that affected *A. d.* var. *traskiae;* they assessed the impact to be a loss of habitat occupied by 50 plants. The Navy worked to salvage plant material and outplant back to the site. Thus far, this outplanting has been successful, the habitat has rebounded, and more plants are present in the area than before the work was done (Munson 2013, pers. comm.).

The majority of *Acmispon dendroideus* var. *traskiae* occurrences (24 of 29 occurrences, 83 percent) are located outside of heavily impacted training areas. Though five occurrences (17 percent; Wilson Cove, Canchalagua Canyon, Middle Island Plateau, North Mosquito Cove, and Eagle Canyon) are partially or wholly within the boundaries of an IOA or TAR, many of the impacts to these occurrences would be diffuse, and are unlikely to have a high impact on the species' habitat. Although land use is likely to impact *A. d.* var. *traskiae* habitat, the Navy has demonstrated its commitment to help conserve and manage listed species on the island. Land use appears to pose a high-magnitude threat to the habitat of a small percentage of the occurrences of *A. d.* var. *traskiae* on San Clemente Island.

Erosion

Erosion and associated soil loss caused by browsing of feral goats and rooting of feral pigs likely modified the island's habitat (Navy 2002, p. 1–14). Defoliation from overgrazing on San Clemente Island increased erosion over much of the island, especially on steep slopes where denuded soils can quickly wash away during storm events (Johnson 1980, p. 107; Navy 2002, pp. 1–14, 3–9; Tierra Data Inc. 2007, pp. 6–7). Erosion was identified in the INRMP as a threat to the canyon woodland habitat and maritime desert scrub where *Acmispon dendroideus* var. *traskiae* occurs (Navy 2002, p. 4–3). Gullying and other processes may concentrate surface runoff to unnatural levels, leading to accelerated erosion in the canyons below (Tierra Data Inc. 2007, p. 6). *Acmispon dendroideus* var. *traskiae* occurs within steep canyon areas where such concentration of flows may be a threat to its habitat or range.

Although more vegetative cover is now present than at the time of listing, erosion is still a threat to the recovery of *Acmispon dendroideus* var. *traskiae,* especially in areas where it grows in close proximity to roads. The Navy studied the potential for erosion from several proposed military activities (Tierra Data Inc. 2007, pp. 1–45, Appendices). Increased military activities are expected to cause erosion through soil compaction or other soil disturbances in occupied habitat areas associated with roadways or vehicle maneuver areas, especially where the taxon is located within training area boundaries (IOA) (Tierra Data Inc. 2007, p. 12). The four *A. d.* var. *traskiae* occurrences within or partially within the IOA are likely to be further impacted by erosion (Table 1). Three of these occurrences (Canchalagua Canyon, North Mosquito Cove, and Eagle Canyon) are along the eastern escarpment, which has recently been closed to biological monitoring due to unexploded ordnance. The threat of erosion to this area will be difficult to assess if the closure remains into the future. The nine occurrences near the IOA (within 1,000 ft (305 m)) could experience erosion from nearby training activities.

Roads can concentrate water flow causing incised channels and erosion of slopes (Forman and Alexander 1998, pp. 216–217). This increased erosion around roads can degrade habitat, especially along the steep canyons associated with the eastern escarpment of the island. Nine of 29 *Acmispon dendroideus* var. *traskiae* occurrences (31 percent) are within 500 ft (152 m) of a road on the island (Eel Cove Canyon, Seal Cove Terraces, Lemon Tank Canyon, Wilson's Cove, North Wilson's Cove, Upper Middle Ranch Canyon, Eagle Canyon, North Mosquito Cove, and Canchalagua Canyon) (Forman and Alexander 1998, p. 217). These occurrences could be subject to diffuse disturbance and road effects that degrade habitat quality. The largest known occurrence of *A. d.* var. *traskiae,* Wilson Cove, occurs on gradual or steep slopes where erosion is evident (USFWS 2008, p. 117). Military activities in this area have the potential to adversely affect the taxon's habitat due to its proximity to Navy facilities and the level of human activity and traffic in the area.

The Navy incorporates erosion control measures into all site-feasibility studies and project planning, design, and construction to minimize the potential to exacerbate existing erosion and avoid impacts to listed species (Munson 2013, pers. comm.). The INRMP requires that all projects include erosion conservation work and associated funding (Navy 2002, p. 4–89). These conservation actions include best management practices for construction and engineering, choosing sites that are capable of sustaining disturbance with minimum soil erosion, and stabilizing disturbed sites with native plants (Navy 2002, pp. 4–89—4–91). Additionally, the Navy has agreed not to conduct training activities that may lead to impacts from erosion until an erosion control plan is successfully implemented. They are developing the erosion control plan for San Clemente Island to reduce the impacts of erosion to *Acmispon dendroideus* var. *traskiae* habitat in areas likely to experience increased and expanded military operations (Munson 2013, pers. comm.). This erosion control plan will address military operations associated with the IOA, Assault Vehicle Maneuver Area (AVMA), and Artillery Firing Point (AFP).

The processes and results of erosion are threats to the habitat of *Acmispon dendroideus* var. *traskiae,* particularly to 17 of 29 occurrences that are within an IOA, within 1,000 ft (305 m) of an IOA, or within 500 ft (152 m) of a road. Erosion may lead to overall habitat degradation and the loss of individuals or groupings of plants in a given area. However, this taxon has persisted despite current levels of erosion. The processes and results of erosion are island-wide threats to the habitat or range of *A. d.* var. *traskiae,* particularly to the 17 occurrences in or adjacent to military training areas or roads. Therefore, erosion is still considered a threat to the habitat of *A. d.* var. *traskiae.*

Nonnative Species

Spread of nonnative plants into *Acmispon dendroideus* var. *traskiae* habitat is another threat identified in the final listing rule (42 FR 40682). Nonnative plants can diminish the abundance or survival of native species by altering natural ecosystem processes such as fire regimes, nutrient cycling,

hydrology, and energy budgets, and by competing with native plants for water, space, light, and nutrients (Zink *et al.* 1995, p. 307; Brooks 1999, pp. 16–17; Mack *et al.* 2000, p. 689). By 1992, researchers had documented 99 nonnative plant species on San Clemente Island (Kellogg and Kellogg 1994, p. 5), and transfer of nonnative species to the island continues to be a problem (Dunn 2006, pers. comm.; Junak 2006b, pers. comm.; Kellogg 2006, pers. comm.; O'Connor 2009c, pers. comm.).

Nonnative species of particular concern include *Avena barbata* (slender oat), *Bromus* spp. (bromes), *Foeniculum vulgare* (sweet fennel), and *Brassica tournefortii* (Sahara mustard), which have already invaded the habitat of most *Acmispon dendroideus* var. *traskiae* occurrences. Another nonnative species, *Carpobrotus edulis* (iceplant), also appears to be hindering the recovery of *A. d.* var. *traskiae* (Allan 1999, p. 92). This nonnative species occupies large areas of Wilson Cove where it may alter the habitat (Allan 1999, p. 92) by changing vegetation structure and creating an environment less hospitable to *A. d.* var. *traskiae.* Since nonnative herbivores were removed from the island, the most significant structural alteration to the habitat has been the proliferation of nonnative annual grasses, such as *Avena* spp. (oats), *Bromus* spp., and *Vulpia myuros* (annual fescue). Annual grasses vary in abundance with rainfall, potentially changing the vegetative community from shrubs to grasses and increasing the fuel load in wet years (see Factor A—Fire section below).

Although previous invasions of nonnatives probably occurred through introductions in grazing fodder, current nonnative species invasions are typically introduced by military activities and training on the island. Nonnative plants constitute a rangewide threat to the habitat of all native plants on San Clemente Island, including all occurrences of *Acmispon dendroideus* var. *traskiae.* Roadsides tend to provide conditions (high disturbance, seed dispersal from vehicles, ample light and water) preferable to nonnative species (Forman and Alexander 1998, p. 210). The nine occurrences within 500 ft (152 m) of roads on the island may be subject to diffuse disturbance and road effects that degrade habitat quality along the road, including impacts caused by nonnative plants species (Forman and Alexander 1998, p. 217).

Potential impacts from nonnative plants to habitats on San Clemente Island are minimized through annual implementation of the Navy's island-wide nonnative plant control program (O'Connor 2009b, pers. comm.; Munson 2013, pers. comm.). The focus of the nonnative plant species program is to control plants on the island with the potential to adversely impact habitat of federally listed species, which includes eradication of isolated occurrences of nonnatives, and early detection and eradication of new nonnative species (Navy 2008b, p. 5–28). This program targets nonnative species for elimination using herbicide and mechanical removal, with priorities currently focused on new invasions and particularly destructive nonnative species. Nonnative species management targets are identified and prioritized annually by Navy natural resource managers (Munson 2013, pers. comm.). These tactics are successful in isolating and limiting some species, such as *Foeniculum vulgare,* to a few locations (Howe 2011, pers. comm.; Munson 2013, pers. comm.). To reduce the potential for transport of nonnative plants to San Clemente Island, military and nonmilitary personnel inspect tactical ground vehicles and remove any visible plant material, dirt, or mud prior to transporting the vehicles to San Clemente Island (USFWS 2008, p. 63). This cleaning helps prevent nonnative plants from reaching the island, but once there, nonnative plants are easily spread from one area to another by the movement of vehicles.

Acmispon dendroideus var. *traskiae* has persisted on the island and, despite the continued risk of encroachment to habitat by nonnatives, the range of this taxon has expanded from 6 to 29 occurrences since listing. Impacts from nonnative plants may be a persistent, but low-level, threat to *A. d.* var. *traskiae* habitat.

Fire

Fire was not considered a threat to habitat occupied by *Acmispon dendroideus* var. *traskiae* at the time of listing (42 FR 40682; August 11, 1977). Since that time, however, over 50 percent of the island has experienced at least one wildfire (Navy 2002, Map 3–3, p. 3–32), and some habitat has burned multiple times with very short intervals between fires (Navy 2002, Map 3–4, p. 3–33). Between 1990 and 2004, the island experienced 114 wildfires suspected to be from Navy operational sources (Navy 2008a, pp. 5–18, 5–19). The majority of fires are concentrated in SHOBA, potentially impacting habitat occupied by eight occurrences within Impact Areas I and II where military training exercises employ live ordnance and incendiary devices (Eagle Canyon, Bryce Canyon, North Mosquito Cove, Canchalagua Canyon, Thirst Canyon, Cave Canyon, Horse Canyon, and Pyramid Head). Fires are also occasionally ignited by activities north of SHOBA, such as training activities near Eel Point (possibly impacting Seal Cove Terraces and Eel Cove Canyon occurrences) (Navy 2002, Map 3–4, p. 3–33).

Increased fire frequency resulting from intensified military uses could lead to localized changes in vegetation on San Clemente Island, which could be detrimental to *Acmispon dendroideus* var. *traskiae* habitat. The Navy recently approved a significant expansion in the number of locations where live fire and demolition training will take place (Navy 2008a, pp. 2–3—2–38), including TAR north of SHOBA (TAR 17—Eel Cove Canyon and Seal Cove Terraces, and TAR 14 and 15—Larkspur and Chamish Canyon). These higher levels of training have not occurred in recent history, and will likely expand from current levels. In addition to demolitions, certain proposed munitions exercises involve the use of incendiary devices, such as illumination rounds, white phosphorous, and tracer rounds, which pose a high risk of fire ignition. Additionally, smoke, flares, and pyrotechnics are proposed for use within TAR 11 (Wilson's Cove) toward the eastern shore, and expanded live fire and demolition training is proposed within TAR 16 (Middle Island Plateau) toward the center of the island. It is likely that the fire pattern on the island will change in response to this increase in ignition sources, with fires becoming more common within and adjoining the training areas north of SHOBA.

At the time of listing, fire was not identified as a habitat threat because of lack of fire history and the low intensity of military training on the island. Since that time, military training has significantly increased, and we have better records of the fire frequency on the island. Approximately 14 of the 29 occurrences of *Acmispon dendroideus* var. *traskiae* fall within areas that may be subject to recurrent fire associated with military training (Table 1). This includes locations that fall within 1,000 ft (305 m) of TAR, where the Navy conducts live fire and demolition training, and occurrences within SHOBA (SHOBA serves as a buffer for Impact Areas I and II). Fires that escape designated training areas may threaten habitat on other parts of the island, but because of the broad distribution of the species, one fire is unlikely to spread throughout the entire range. The Navy's implementation of the MOFMP will limit the frequency with which fires escape impact areas and TAR. Through

the annual review process, the Navy identifies mechanisms to reduce fire return intervals within areas where this taxon is concentrated (USFWS 2008, pp. 91–122). The Navy's implementation of an MOFMP will help to reduce the risk of habitat conversion by fire, although the habitat of *A. d.* var. *traskiae* could be altered by increased fire frequency and spread of nonnative grass. Although the threat is ameliorated through the MOFMP, fire remains an island-wide threat to *A. d.* var. *traskiae* habitat, particularly to the 14 occurrences that fall within areas that may be subject to recurrent fire associated with military training.

Summary of Factor A

San Clemente Island was used for sheep ranching, cattle ranching, goat grazing, and pig farming from 1850 until 1934 (Navy 2002, pp. 3–4). These grazers were not completely removed from the island until 1992, and their effects on the taxon and its habitat as well as other threats led us to classify *Acmispon dendroideus* var. *traskiae* as endangered in the 1977 listing rule (42 FR 40682). Currently, *A. d.* var. *traskiae* habitat is threatened by destruction and modification caused by land use, erosion, nonnative plants, and fire. To help reduce these threats, the Navy is implementing an MOFMP, an INRMP, and an island-wide nonnative species control program (Navy 2002, pp. 1–1—8–12; USFWS 2008, pp. 1–237). The MOFMP has been helpful in informing strategic decisions for training using live fire or incendiary devices. The Navy has also agreed not to conduct training activities that may lead to impacts from erosion until an erosion control plan is successfully implemented. Natural resource managers have been successful in decreasing the prevalence of particularly destructive nonnatives, such as *Foeniculum vulgare.* Though increased impacts associated with military training could threaten the taxon in the future, 24 of 29 occurrences (83 percent) of *A. d.* var. *traskiae* fall outside of training areas (IOA or TAR) where the most intensive habitat disturbances are likely to occur. Impacts to the habitat from land use, erosion, nonnative plants, and fire are ongoing, and though they have been reduced due to the expanded range of *A. d.* var. *traskiae* and conservation efforts discussed above, we expect these threats will continue to impact *A. d.* var. *traskiae* habitat now and in the future as recovery of the taxon and its habitat continues.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

In the listing rule (42 FR 40682; August 11, 1977), we did not identify any threats from overutilization, and no new information indicates that overutilization is a threat to *Acmispon dendroideus* var. *traskiae.* Although voucher herbarium specimens of *A. d.* var. *traskiae* and seeds have been collected for research and seed banking, overutilization of *A. d.* var. *traskiae* for any purpose is not currently considered a threat nor is expected to be in the future.

Factor C. Disease or Predation

Grazing of feral goats and rooting of feral pigs were considered a direct threat to *Acmispon dendroideus* var. *traskiae* in the final listing rule (42 FR 40682; August 11, 1977). As stated above, however, nonnative mammalian herbivores were removed from San Clemente Island by 1992, and this threat was ameliorated, as recognized in our 2007 status review (USFWS 2007a, p. 13). Currently, no other predators or diseases on San Clemente Island are known to pose a significant threat to *A. d.* var. *traskiae* and none are expected to pose a threat in the future.

Factor D. Inadequacy of Existing Regulatory Mechanisms

The Act requires us to examine the adequacy of existing regulatory mechanisms with respect to those existing and foreseeable threats that may affect *Acmispon dendroideus* var. *traskiae.* The inadequacy of existing regulatory mechanisms was not considered a threat to *A. d.* var. *traskiae* at listing (42 FR 40682; August 11, 1977). Since it was listed as endangered, the Act has been and continues to be the primary Federal law that affords protection to *A. d.* var. *traskiae.* Our responsibilities in administering the Act include sections 7, 9, and 10.

Section 7(a)(1) of the Act requires all Federal agencies, including the Navy, to utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of endangered and threatened species. Section 7(a)(2) of the Act requires Federal agencies, including the Navy and us, to ensure that actions funded, authorized, or carried out do not ''jeopardize'' the continued existence of a listed species. Section 7(a)(2) of the Act also requires Federal agencies to ensure that such actions do not result in the destruction or adverse modification of habitat in areas designated as critical habitat; however, we have not designated or proposed critical habitat for this taxon.

The section 7(a)(2) prohibition against jeopardy applies to plants as well as animals, but other protections of the Act are more limited for plant species. Section 9(a)(2) does not prohibit the taking of a protected plant, thus no incidental take statement is prepared in the analysis of effects associated with a project. A non-jeopardy opinion for plants, therefore, would not include reasonable and prudent measures to minimize the impact of incidental take. However, voluntary conservation recommendations may be included, which are discretionary actions the action agency can implement relevant to the proposed action.

Under section 9(a)(2) of the Act, with respect to endangered plant taxa, it is unlawful to remove and reduce to possession (collect) any endangered plants from areas under Federal jurisdiction, or to maliciously damage or destroy endangered plants in any such area. Protections provided plants listed as threatened are the same, except that the Code of Federal Regulations stipulates protections are not extended to seeds of cultivated specimens of threatened plants (50 CFR 17.71). This change in protections would not have an effect on the conservation of *Acmispon dendroideus* var. *traskiae,* because conservation of this taxon does not require protection for seeds of cultivated plants.

The Navy has consulted and coordinated with us regarding the effects of various activities on *Acmispon dendroideus* var. *traskiae* (and *Castilleja grisea*) since they were first listed in 1977. We concluded that ongoing and likely impacts from the proposed increases in military training activities on the island would not jeopardize the continued existence of *A. d.* var. *traskiae* or *C. grisea* (USFWS 2008, pp. 1–237). We continue to coordinate with the Navy to protect these taxa and their habitats.

Listing *Acmispon dendroideus* var. *traskiae* provided a variety of protections, including the prohibitions against removing or destroying plants within areas under Federal jurisdiction and the conservation mandates of section 7 for all Federal agencies. These protections would continue to be afforded to *A. d.* var. *traskiae* if it is downlisted. In the following discussion, we evaluate additional protections provided by other regulatory mechanisms to determine whether they effectively reduce or remove threats to *A. d.* var. *traskiae.*

Other Federal Protections

National Environmental Policy Act (NEPA)

All Federal agencies are required to adhere to the National Environmental Policy Act (NEPA) of 1970 (42 U.S.C. 4321 *et seq.*) for projects they fund, authorize, or carry out. The Council on Environmental Quality's regulations for implementing NEPA (40 CFR parts 1500–1518) state that agencies shall include a discussion on the environmental impacts of the various project alternatives (including the proposed action), any adverse environmental effects that cannot be avoided, and any irreversible or irretrievable commitments of resources involved (40 CFR part 1502). NEPA itself is a disclosure law, and does not require subsequent minimization or mitigation measures by the Federal agency involved. Although Federal agencies may include conservation measures for *Acmispon dendroideus* var. *traskiae* as a result of the NEPA process, any such measures are typically voluntary in nature and are not required by the statute. NEPA does not itself regulate activities that might affect *A. d.* var. *traskiae,* but it does require full evaluation and disclosure of information regarding the effects of contemplated Federal actions on sensitive species and their habitats. On San Clemente Island, the Navy must meet the NEPA requirements for actions significantly affecting the quality of the human environment. Typically, the Navy prepares Environmental Assessments and Environmental Impact Statements on operational plans and new or expanding training actions. Absent the listing of *A. d.* var. *traskiae,* we would expect the Navy to continue to meet the procedural requirements of NEPA for its actions, including evaluating the environmental impacts to rare plant species and other natural resources. However, as explained above, NEPA does not itself regulate activities that might affect species listed as endangered or threatened under the Act.

Sikes Act Improvement Act (Sikes Act)

The Sikes Act (16 U.S.C. 670) authorizes the Secretary of Defense to develop cooperative plans with the Secretaries of Agriculture and the Interior for natural resources on public lands. The Sikes Act Improvement Act of 1997 requires Department of Defense installations to prepare INRMPs that provide for the conservation and rehabilitation of natural resources on military lands consistent with the use of military installations to ensure the readiness of the Armed Forces. An INRMP is a plan intended ''. . . to guide installation commanders in managing their natural resources in a manner that is consistent with the sustainability of those resources while ensuring continued support of the military mission'' (Navy 2002, p. 1–1). INRMPs are developed in coordination with the State and the Service, and are generally updated every 5 years. Although an INRMP is technically not a regulatory mechanism because its implementation is subject to funding availability, it is an important guiding document that helps to integrate natural resource protection with military readiness and training.

San Clemente Island Integrated Natural Resources Management Plan (INRMP)

Pursuant to the Sikes Act, the Navy adopted an INRMP for San Clemente Island that identifies multiple objectives for protecting *Acmispon dendroideus* var. *traskiae* and its habitat to help to reduce threats to this taxon (Navy 2002). The INRMP discloses actions through the NEPA process and to comply with such legislation and regulations as the Endangered Species Act, Federal Noxious Weed Act of 1974 (7 U.S.C. 2801), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601), the Resource Conservation and Recovery Act (42 U.S.C. 6901), and Soil Conservation Act (16 U.S.C. 3B).

Goals and objectives in the INRMP for specified management units on the island are identified based on each unit's ranking for both military and natural resource value. Natural resource management objectives for the management units are stepped down from broader natural resource objectives identified for species and habitats. Natural resource objectives of relevance to the protection of *A. d.* var. *traskiae* in the INRMP include: ''Protect, monitor, and restore plants and cryptograms in order to manage for their long-term sustainability on the island'' (Navy 2002, p. 4–39).

The INRMP specifically includes the following objectives for *Acmispon dendroideus* var. *traskiae* management: removal of nonnatives, restoration of native grasses and scrub species, monitoring of the taxon, studies of response to fire, and studies and inventory of insect pollinators (Navy 2002, p. D–11). To date, multiple INRMP management strategies have been implemented for the conservation of *A. d.* var. *traskiae.* Other INRMP strategies that target the plant communities within which this taxon occurs include: controlling erosion, with priority given to locations where erosion may be affecting listed species; producing a new vegetation map; reducing nonnative plant cover from 1992–1993 baseline levels; managing the size and intervals of fires; experimenting with fire management to improve native plant dominance while protecting sensitive plant occurrences; and conducting genetic and biological studies of *A. d.* var. *traskiae* and *Castilleja grisea* across the island.

To date, the Navy has implemented multiple INRMP management strategies, or aspects of them that benefit both taxa. They have implemented rare plant surveys and documented new occurrences of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* on the island. Genetic research and natural history studies have also been performed. The Navy has made concerted efforts to control escape of fire from military training activities, and they have annually implemented nonnative plant species control activities, with a focus on species that have the potential to compete with listed species (O'Connor 2009b, pers. comm.; Munson 2013, pers. comm.). Overall, considerable progress has been made toward the identified INRMP goals to maintain sustainable occurrences and implement strategies that help reduce threats to *A. d.* var. *traskiae* and *C. grisea.*

The INRMP is an important guiding document that helps to integrate the military's mission with natural resource protection on San Clemente Island. Although the INRMP includes objectives targeted toward habitat protection of optimal *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* habitat, the Navy's operational needs may diverge from INRMP natural resource goals. For example, control measures for erosion, fire, and nonnatives described in the INRMP may not be implemented effectively or consistently in those areas that are operationally closed due to the presence of unexploded ordnance. The MOFMP, Erosion Control Plan, and nonnative plant species control conducted on the island are discussed above under *Acmispon dendroideus* var. *traskiae —Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range.* The INRMP provides protection to covered taxa whether they are listed as endangered or threatened under the Act, and additionally covers taxa that are not listed, but require special management. However, as noted under the other factors, while the INRMP helps to ameliorate threats and provides some protection for *A. d.* var. *traskiae* occurrences, those occurrences within Impact Areas or operationally closed

areas may not benefit from the conservation measures. While the INRMP has reduced the severity of threats and contributed to conservation of the species, it still allows for land use consistent with military readiness and training. Thus, Navy activities will continue to impact *A. d.* var. *traskiae* as described under Factor A.

The Navy is currently revising the 2002 INRMP, and future iterations of this plan may differ from the existing INRMP. Pending completion of the new INRMP, the Navy continues to implement the 2002 INRMP. We expect that the revised INRMP will continue to manage for natural resource conservation to the maximum extent practicable based on the Navy's historical commitment to implement beneficial management actions for native flora and fauna, and their continued cooperation with the Service to provide conservation actions that benefit taxa such as *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* and their habitat.

Federal Noxious Weed Act

The Federal Noxious Weed Act of 1975 (88 Stat. 2148, 7 U.S.C. 2801) established a Federal program that has subsequently been largely superseded by other statutes, including the Plant Protection Act (7 U.S.C. 7701, et seq.), to control the spread of noxious weeds. The 1990 amendment to the Federal Noxious Weed Act (7 U.S.C. 2814), has been retained, and requires each Federal land-managing agency to: designate an office or person adequately trained in managing undesirable plant species to develop and coordinate a program to control such plants on the agency's land; establish and adequately fund this plant management program through the agency's budget process; complete and implement cooperative agreements with the States regarding undesirable plants on agency land; and establish integrated management systems (as defined in the section) to control or contain undesirable plants targeted under the cooperative agreements. In accordance with this direction, the Navy (through implementation of their INRMP) works to control the introduction of nonnative plant species to the island and to control or remove those currently present, which are actions that assist in protecting *Acmispon dendroideus* var. *traskiae* habitat.

Soil Conservation and Domestic Allotment Act

The Soil Conservation and Domestic Allotment Act of 1935 (16 U.S.C. 590(a, b), 49 Stat. 163) recognized that the wastage of soil and moisture resources on farm, grazing, and forest lands of the Nation, resulting from soil erosion, is a menace to the national welfare. The Act further provided for the control and prevention of soil erosion to preserve natural resources, control floods, prevent impairment of reservoirs, and maintain the navigability of rivers and harbors, protect public health and public lands, and relieve unemployment, and authorized the Secretary of Agriculture to coordinate and direct all activities with relation to soil erosion. In order to effectuate this policy, the Secretary of Agriculture authorizes, from time to time, that the following actions may be performed on lands owned or controlled by the United States or any of its agencies, with the cooperation of the agency having jurisdiction: Conduct surveys, investigations, and research relating to the character of soil erosion and the preventive measures needed; publish the results of any such surveys, investigations, or research; disseminate information concerning such methods; conduct demonstrational projects in areas subject to erosion by wind or water; and carry out preventative measures, including, but not limited to, engineering operations, methods of cultivation, the growing of vegetation, and changes in use of land. These measures are addressed through various objectives outlined in the Navy's INRMP, and implementation of these measures assist *Acmispon dendroideus* var. *traskiae* by encouraging management actions that prevent and control erosion, thus protecting *Acmispon dendroideus* var. *traskiae* habitat.

State Protections

Since the time of listing, *Acmispon dendroideus* var. *traskiae* has benefited from additional State protections under the Native Plant Protection Act (NPPA) and California Endangered Species Act (CESA; listed 1982). Both the NPPA and CESA include prohibitions forbidding the ''take'' of State-listed species (California Fish & Game Code, Sections 1908 and 2080). With regard to prohibitions of unauthorized take under NPPA, landowners are exempt from this prohibition for plants to be taken in the process of habitat modification. Where landowners are notified by the State that a rare or endangered plant is growing on their land, the landowners are required to notify CDFW 10 days in advance of changing land use in order to allow salvage of listed plants (California Fish & Game Code, Section 1913). Sections 2081(b) and (c) of CESA allow CDFW to issue incidental take permits for State-listed threatened and endangered species if:

(1) The authorized take is incidental to an otherwise lawful activity;

(2) The impacts of the authorized take are minimized and fully mitigated;

(3) The measures required to minimize and fully mitigate the impacts of the authorized take are roughly proportional in extent to the impact of the taking on the species, maintain the applicant's objectives to the greatest extent possible, and are capable of successful implementation;

(4) Adequate funding is provided to implement the required minimization and mitigation measures and to monitor compliance with and the effectiveness of the measures; and

(5) Issuance of the permit will not jeopardize the continued existence of a State-listed species.

However, the range of *Acmispon dendroideus* var. *traskiae* is restricted to a Federal military installation, so listing under NPPA and CESA may afford protection to this species only in rare instances when the lead agency is a non-Federal agency or when proposed activities fall under other State laws.

Summary of Factor D

The inadequacy of existing regulatory mechanisms was not indicated as a threat to *Acmispon dendroideus* var. *traskiae* at the time of listing or in the recent status review. Because San Clemente Island is under Federal ownership, various laws, regulations, and policies administered by the Federal Government provide protective mechanisms for the species and its habitat. Primary Federal laws that provide some benefit for the species and its habitat include the Act, NEPA, Sikes Act, Federal Noxious Weed Act, and the Soil Conservation and Domestic Allotment Act.

The regulatory mechanisms outlined above help to reduce threats for the conservation of *Acmispon dendroideus* var. *traskiae.* In continuance of a long history of cooperative conservation efforts, the Navy implements several conservation actions that benefit this plant taxon. The Navy has implemented an MOFMP to reduce the risk of fire on the island and a nonnative plant species control program. In response to the conservation actions proposed and the current status of the listed taxon, we issued a non-jeopardy biological opinion on the Navy's MOFMP. The provisions included in the San Clemente Island INRMP provide for protection of *A. d.* var. *traskiae* occurrences and adaptive management of its habitat in order to help address threats to the plant from military

activities and nonnative plants. Implementation may not be extended to occurrences in operationally closed areas, but only three occurrences of the taxon occur in these areas. *Acmispon dendroideus* var. *traskiae* occurrences are afforded protection through Federal mechanisms, and thus the inadequacy of existing regulatory mechanisms is not considered a current threat to the taxon. However, the Act is the primary law providing protection to this taxon; in the absence of the Act, the existing regulatory mechanisms are not adequate to conserve *A. d.* var. *traskiae* throughout its range.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

The 1977 listing rule identified nonnatives as a threat to *Acmispon dendroideus* var. *traskiae* under Factor E (42 FR at 40684; August 11, 1977). In this 5-factor analysis, impacts from nonnative plants are discussed above under *Factor A* as a threat to habitat. Other threats attributable to Factor E that have been identified since listing include: (1) Movement of vehicles and troops, (2) fire, (3) climate change, and (4) hybridization. Factor E addresses threats to individuals of the species, rather than the habitat modification threats that are discussed in Factor A. Therefore, while some threats are discussed in both sections, in this section we are focusing on the direct impacts to individuals of *A. d.* var. *traskiae.*

Movement of Vehicles and Troops

Military training activities within SWAT, TAR, and the IOA often entail the movement of vehicles and troops over the landscape, which has the potential of trampling or crushing individual plants. SWATs are large areas that typically support the movement of small groups to reach an objective or destination. The dispersed movement of troops through these areas is likely to result in occasional trampling of plants, with minor or temporary impacts at the occurrence level. TARs are generally smaller areas designated to accommodate intensive use and bombardment. Plants located within TARs are, therefore, more vulnerable to being trampled by vehicle and troop movements, particularly as the level of military training increases in these areas.

Use of the IOA, at its highest intensity, involves the movement of battalion-sized landings of troops (1,500 individuals) from the northern to southern end of the island several times a year (Navy 2008b, pp. 2–1 to 2–52). During such operations, the Navy anticipates that about half of the troops will travel on roads in vehicles, while the other half will proceed on foot (Navy 2008b, pp. 2–1 to 2–52). Thirteen occurrences of *A. d.* var. *traskiae* are partially or wholly within the boundaries of a training area (IOA, TAR, or SWAT). Loss of individual plants from proposed increases in troop and vehicle movements within SWAT, TAR, and the IOA is likely to increase, though this will not significantly impact the survival and recovery of this taxon because of the diffuse nature of this threat and the location of much of the taxon along the eastern escarpment, away from military training activities (USFWS 2008, pp. 113–122). Based on the distribution of *Acmispon dendroideus* var. *traskiae* occurrences, and type of troop movements likely to occur, impacts due to trampling and crushing are considered a low-level threat to its long-term persistence.

Fire

Although not specifically mentioned in the listing rule, intense or frequent fires threaten individuals at 14 of 29 (48 percent) of *Acmispon dendroideus* var. *traskiae* occurrences. In the *Factor A* discussion above, we addressed impacts of fire on the habitat. This section covers the discrete threat to individuals or occurrences of *A. d.* var. *traskiae.* It is unknown if *A. d.* var. *traskiae* is adapted to periodic fires, though it is likely that this taxon is resilient to occasional fires (Navy 2002, p. D–10; Tierra Data Inc. 2005, p. 80). Adult plants have been lost in fires, but subsequent recruitment from the seed bank resulted in replacement numbers of juvenile plants (Tierra Data Inc. 2005, p. 80). Aside from this observation, the relationship between fire and the life history of *A. d.* var. *traskiae* has not been adequately studied. Additionally, the taxon's tolerance to fire frequency is unknown. The seed bank may become depleted in areas that burn more frequently if individuals burn before they produce seeds. Although an individual plant has the ability to produce vast amounts of seed, the seed bank must be replenished regularly for the taxon to persist (Junak and Wilken 1998, p. 257).

Acmispon dendroideus var. *traskiae* occurs in some areas of the island that may experience elevated fire frequency, such as in SHOBA and surrounding Eel Point (Eagle Canyon, Bryce Canyon, North Mosquito Cove, Canchalagua Canyon, Thirst Canyon, Cave Canyon, Horse Canyon, Pyramid Head, Seal Cove Terraces, and Eel Cove Canyon) (discussed in *A. d.* var. *traskiae—Factor A*). Increased fire frequency from intensified military use could also lead to localized changes in vegetation, resulting in indirect adverse effects on *A. d.* var. *traskiae.* The potential for frequent fire at many of the occurrences within SHOBA is reduced by their location on the eastern escarpment of the island, away from Impact Areas I and II. However, this threat may become difficult to assess with the recent closure of the eastern escarpment area due to unexploded ordnance. The Navy's fire management practices are anticipated to minimize frequency of ignitions as well as the spread of fires (as described above in *Factor A*).

The Navy conducts annual reviews of fire management and fire occurrence that allow for adaptive management. While the threat of fire remains, these measures should minimize loss of individuals or occurrences of *Acmispon dendroideus* var. *traskiae.* At the present time, fire management does not pose a threat as fuelbreak locations have not been proposed in the vicinity of this taxon. Although the Navy has planned and implemented fire management, fire continues to threaten 14 occurrences of *A. d.* var. *traskiae.* Due to the continued impacts of fire within SHOBA, fire remains a Factor E threat to the existence of *A. d.* var. *traskiae.*

Climate Change

Consideration of climate change is a component of our analyses under the Endangered Species Act, and applies to our analysis of both taxa. In general terms, ''climate change'' refers to a change in the state of the climate (whether due to natural variability, human activity, or both) that can be identified by changes in the mean or variability of its properties, and that persists for an extended period—typically decades or longer (Intergovernmental Panel on Climate Change (IPCC) 2007a, p. 78).

Changes in climate are occurring. Examples include warming of the global climate system over recent decades, and substantial increases in precipitation in some regions of the world and decreases in other regions (for these and other examples see IPCC 2007a, p. 30; Solomon *et al.* 2007, pp. 35–54, 82–85).

Most of the observed increase in global average temperature since the mid-20th century cannot be explained by natural variability in climate, and is very likely due to the observed increase in greenhouse gas concentrations in the atmosphere as a result of human activities, particularly emissions of carbon dioxide from fossil fuel use (IPCC 2007a, p. 5 and Figure SPM.3; Solomon *et al.* 2007, pp. 21–35).

Therefore, to project future changes in temperature and other climate conditions, scientists use a variety of climate models (which include consideration of natural processes and variability) in conjunction with various scenarios of potential levels and timing of greenhouse gas emissions (e.g., Meehl *et al.* 2007 entire; Ganguly *et al.* 2009, pp. 11555, 15558; Prinn *et al.* 2011, pp. 527, 529).

The projected magnitude of average global warming for this century is very similar under all combinations of models and emissions scenarios until about 2030. Thereafter, the projections show greater divergence across scenarios. Despite these differences in projected magnitude, however, the overall trajectory is one of increased warming throughout this century under all scenarios, including those which assume a reduction of greenhouse gas emissions (Meehl *et al.* 2007, pp. 760–764; Ganguly *et al.* 2009, pp. 15555–15558; Prinn *et al.* 2011, pp. 527, 529). (For examples of other global climate projections, see IPCC 2007b, p. 8).

Various types of changes in climate can have direct or indirect effects on species and these may be positive or negative depending on the species and other relevant considerations, including interacting effects with existing habitat fragmentation or other nonclimatic variables. Vulnerability to climate change has three main components: Exposure to changes in climate, sensitivity to such changes, and adaptive capacity (IPCC 2007a, p. 89; Glick *et al* 2011, pp. 19–22). Because aspects of these components can vary by species and situation, as can interactions among climatic and nonclimatic conditions, there is no single way to conduct our analyses. We use the best scientific and commercial data available to identify potential impacts and responses by species that may arise in association with different components of climate change, including interactions with nonclimatic conditions.

As is the case with all potential threats, if a species is currently affected or is expected to be affected in a negative way by one or more climate-related impacts, this does not necessarily mean the species meets the definition of a threatened or endangered species as defined under the Act. The impacts of climate change and other conditions would need to be to the level that the species is in danger of extinction, or likely to become so, throughout all or a significant portion of its range. If a species is listed as threatened or endangered, knowledge regarding the species' vulnerability to, and impacts from, climate-associated changes in environmental conditions can be used to help devise appropriate strategies for its recovery.

While projections from global climate model simulations are informative and in some cases are the only or the best scientific information available, various downscaling methods are being used to provide higher-resolution projections that are more relevant to the spatial scales used to assess impacts to a given species (see Glick *et al,* 2011, pp. 58–61). With regard to the area of analysis for the San Clemente Island and specifically for the taxa at issue here, downscaled projections are available at least with respect to southern California.

San Clemente Island is located within a Mediterranean climatic regime, but with a significant maritime influence. Climate change models indicate a 1.8 to 5.4 degrees Fahrenheit (1 to 3 degrees Celsius) increase in average temperature for southern California by the year 2070 (Field *et al.* 1999, p. 5; Cayan *et al.* 2008, p. S26; PRBO 2011, p. 40). Over the same timespan, a 10 to 37 percent decrease in annual precipitation is predicted (PRBO 2011, p. 40), though other models predict little to no change in annual precipitation (Field *et al.* 1999, pp. 8–9; Cayan *et al.* 2008, p. S26). Although the island has a short rainy season, the presence of fog during the summer months helps to reduce drought stress for many plant species (Halvorson *et al.* 1988, p. 111; Fischer *et al.* 2009, p. 783). However, fog projections remain uncertain (Field *et al.* 1999, pp. 21–22). Researchers also have substantial uncertainty in precipitation projections, and relatively little consensus concerning precipitation patterns and projections for southwestern California (PRBO 2011, p. 40). San Clemente Island typically gets less rainfall than the neighboring mainland areas (Tierra Data 2005, p. 4). Therefore, the models may underestimate the effects of precipitation changes on island vegetation. Additionally, changes in sea level and temperature may be more acute on small islands due to their high vulnerability (surrounded by ocean) and low adaptive capacity (from limited size) (IPCC 2007b, p. 1). Less rainfall and warmer air temperatures could limit the range of *Acmispon dendroideus* var. *traskiae* in the future, although no research has directly explored the effects of climate change on the taxon.

Since listing of *Acmispon dendroideus* var. *traskiae,* the potential impact of ongoing, accelerated climate change has become a recognized threat to the flora and fauna of the United States (IPCC 2007a, pp. 1–52; PRBO 2011, pp. 1–68). However, the impacts of predicted future climate change to *A. d.* var. *traskiae* remain unclear. The best available information does not provide sufficient certainty on how and when climate change will affect the taxon, the extent of average temperature increases in California, or potential changes to the level of threat posed by fire on San Clemente Island. The most recent literature on climate change includes predictions of hydrological changes, higher temperatures, and expansion of drought areas (IPCC 2007a, pp. 1–18). While we recognize that climate change is an important issue with potential effects to listed species and their habitats, the best available information does not inform accurate predictions regarding its impacts to *A. d.* var. *traskiae* at this time.

Hybridization

Acmispon dendroideus var. *traskiae* is known to hybridize with *Acmispon argophyllus* var. *argenteus.* In 1990, Liston *et al.* (p. 240) confirmed hybridization between co-occurring populations of *A. d.* var. *traskiae* and *A. a.* var. *argenteus* in Wilson Cove. At that time, they detected only 4 hybrid individuals out of 38 individuals tested, and failed to detect hybridization in another area of co-occurrence at the southern end of the island.

Liston *et al.* (1990, pp. 240–243) offered three hypotheses for the scarcity of confirmed hybrid individuals. First, hybrids may have reduced fitness and be selected against, or be sterile and thus unable to produce viable seed even if backcrossed to the parent taxa. In this situation, hybridization would not be a threat to the genetic integrity of *Acmispon dendroideus* var. *traskiae.* Second and conversely, if the fertile hybrids are recent in origin (within the last 20 years), and because both parental taxon are long-lived woody perennials, few hybrid individuals would be expected due to the slower development and lifespan of the taxa. If this assumption is correct, then the genetic integrity of the largest known occurrence of *A. d.* var. *traskiae* in Wilson Cove, and the other occurrences containing hybrids, might be at risk of introgressive hybridization (introduction of genes from one species to another resulting in fertile hybrids). Introgressive hybridization could lead to the loss of genetic variation and lower fitness of *A. d.* var. *traskiae.* Finally, the limited number of hybrid plants (four) might be an artifact of the genetic testing method used by the study. A single diagnostic locus was used to detect hybrids, so although first-generation hybrids would be detected, later generations would be more difficult to

detect (Liston *et al.* 1990, pp. 240–243). If this is the case, the study could have underestimated the extent of hybridization between the two taxa.

Liston *et al.* (1990, p. 243) suggested further investigation of these hypotheses before management recommendations are made to the Navy. Hybridization may threaten, and could diminish, the genetic diversity of the taxon, especially in the already disturbed occurrence of Wilson Cove (Allan 1999, pp. 91–92). Allan (1999, p. 91) stated that *Acmispon dendroideus* var. *traskiae* should be ''closely monitored.'' The more recent data from McGlaughlin (2012, pers. comm.) suggest that hybridization among *A. d.* var. *traskiae* and *A. argophyllus* var. *argenteus* may be a rare event and may not be a substantial threat. For now, hybridization with *A. a.* var. *argenteus* remains a concern at the largest of the 29 occurrences (Wilson's Cove) and the 4 other areas where hybrids have been found. Biologists have also observed other unconfirmed hybrids (no genetic testing done) elsewhere on the island (e.g., Norton Canyon) (Howe 2009, pers. comm.; Braswell 2011, pers. obs.). Additional information is needed to determine the extent and magnitude of this threat to *A. d.* var. *traskiae.*

Summary of Factor E

Threats associated with military activities and fire continue to impact *Acmispon dendroideus* var. *traskiae* at 18 of 29 occurrences (62 percent) on San Clemente Island (Wilson Cove, Canchalagua Canyon, Middle Island Plateau, North Mosquito Cove, Eagle Canyon, Larkspur Canyon, Chamish Canyon, Lemon Tank Canyon, Seal Cove Terraces, Eel Cove Canyon, Middle Wallrock Canyon, Warren Canyon, North Island Terraces, Bryce Canyon, Thirst Canyon, Cave Canyon, Horse Canyon, and Pyramid Head). Incidental trampling and crushing of individual plants is likely to increase with increases in training levels on the island. However, the Navy is implementing conservation measures that will improve conditions for *A. d.* var. *traskiae,* which has expanded its distribution on the island. Military training activities have the potential to ignite fires that can spread to habitat supporting this taxon, though the majority of the occurrences are outside of the areas designated for live fire and demolition. In preparation for these training efforts, the Navy implemented a fire management plan within the MOFMP that will limit the frequency of fires escaping the Impact Areas.

Climate change may also likely impact *Acmispon dendroideus* var. *traskiae,* though the magnitude of this threat is largely unknown. The genetic integrity of *A. d.* var. *traskiae* may be threatened by hybridization with *A. argophyllus* var. *argenteus* at one of the largest occurrences and requires further investigation; however, the rate of hybridization appears to be rare.

Overall, the threats described under Factor E are either of unknown magnitude (climate change), of low likelihood (hybridization), or have been reduced through conservation measures implemented by the Navy (fire and military activities). Although impacts to *Acmispon dendroideus* var. *traskiae* due to fire and military activities have been reduced, we expect impacts will continue now and in the future.

Combination of Factors—Acmispon dendroideus var. traskiae

A species may be affected by more than one threat in combination. Within the preceding review of the five listing factors, we have identified multiple threats that may have interrelated impacts on *Acmispon dendroideus* var. *traskiae* (these interrelated impacts also occur for *Castilleja grisea*). For example, fires (Factor A and E) may be more intense or frequent in the habitat if greater amounts of nonnative grass (Factor A) are present in the vegetative community. Similarly, fires (Factor A and E) also may become more frequent if the climate changes (Factor E) into a drier, hotter environment. The movement of vehicles and troops (Factor E) and land use (Factor A) can also create more disturbance and erosion (Factor A) in *A. d.* var. *traskiae* habitat (as well as *C. grisea* habitat). The historical past on San Clemente is an illustration of interacting threats: Nonnative herbivores (Factor C) ate and killed much of the vegetation, causing greater impacts of erosion (Factor A) on the island. Thus, the taxons' productivity may be reduced because of these threats, either singularly or in combination. However, it is not necessarily easy to determine (nor is it necessarily determinable) whether a particular threat is the primary threat having the greatest effect on the viability of the species, or whether it is exacerbated by or working in combination with other potential threats to have cumulative or synergistic effects on the species. While the combination of factors is a threat to the existence of *A. d.* var. *traskiae,* we are unable to determine the magnitude or extent of cumulative or synergistic effects of the combination of factors on the viability of the taxon at this time.

Castilleja grisea (San Clemente Island paintbrush)

In the 2007 status review, we stated that the predominant threat at listing (nonnative herbivores) was removed from San Clemente Island in 1992 (USFWS 2007b, pp. 1–19). Additional threats to *Castilleja grisea* that we identified in 2007 include: (1) Erosion, (2) invasive nonnative species, (3) fire, (4) land use, and (5) lack of access to SHOBA. The first four of these threats are discussed below under *Factor A.* As discussed previously, lack of access to SHOBA is not considered a threat, though it limits our ability to assess all occurrences of the taxon reviewed here.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Their Habitat or Range

Under this listing factor in the final listing rule, we identified habitat modification by browsing feral goats and rooting feral pigs as threats to *Castilleja grisea* and other island taxa (42 FR 40682). As discussed above, the Navy removed the last of the remaining feral goats and pigs from San Clemente Island in 1992 (Kellogg and Kellogg 1994, p. 5), which resulted in improved habitat conditions, and led to changes in the cover of native and nonnative plants on the island (Tierra Data Inc. 2005, pp. i–96; Kellogg 2006, pers. comm.). The Recovery Plan identified habitat alteration and disturbance from the Navy's use of the island for military operational and training needs as additional threats to the habitats occupied by *C. grisea* (USFWS 1984, pp. 58–63). Additional threats identified since listing include alteration of habitats on San Clemente Island by military training activities, fire, and fire management. Below, we discuss the impacts of the following threats that affect the habitat or range of *C. grisea:* (1) Land use, (2) erosion, (3) nonnative plants, (4) fire, and (5) fire management.

Land Use

The distribution of *Castilleja grisea* includes 28 occurrences distributed across the southern 15.5 mi (25 km) of the island, particularly along the eastern escarpment. Training activities approved in the MOFMP would include substantial increases in vehicle and foot traffic in the IOA, leading to habitat modification. Ten of the 28 occurrences (36 percent) are within or partially within the IOA and experience direct habitat impacts (plain northeast of Warren Canyon, Larkspur Canyon, Lemon Tank Canyon, Eagle Canyon, Bryce Canyon, Horse Beach Canyon, China Canyon, Knob Canyon,

Canchalagua Canyon, and Pyramid Head). An additional three occurrences (11 percent) are near the IOA (within 1,000 ft (305 m)) and could experience diffuse or accidental impacts to *C. grisea* habitat (Thirst Canyon, SHOBA Boundary Occurrence, and Upper Horse Canyon). Recent area closures due to unexploded ordnance could make habitat impacts from training difficult to assess for 10 occurrences in the future (36 percent; Nanny Canyon, Lemon Tank Canyon, Eel Point, Eagle Canyon, Bryce Canyon, Horse Beach Canyon, China Canyon, Knob Canyon, Canchalagua Canyon, and Pyramid Head).

The southern portion of *Castilleja grisea's* distribution extends through SHOBA where impacts to the habitat are likely. Certain munitions exercises involve the use of incendiary devices, such as illumination rounds, white phosphorous, and tracer rounds, which pose a high risk of fire ignition (USFWS 2008, pp. 11–13). Because of the elevated risk of fire associated with training activities, the Navy targets live and inert munitions fire toward Impact Areas I and II within SHOBA where bombardments and land demolition are concentrated. Four occurrences (14 percent) are within or partially within Impact Areas (China Canyon, Red Canyon, Upper Chenetti Canyon, and Horse Beach Canyon). Currently, the Impact Areas are closed to nonmilitary personnel, so the plant's status at these four occurrences is unknown, as well as the status of any conservation action that would otherwise be expected to be implemented in these areas (USFWS 2008, p. 50).

Also within SHOBA, an occurrence of *Castilleja grisea* is located in lower Horse Beach Canyon, above Horse Beach. Horse Beach (TAR 21) is used for special warfare training activities that include the use of live fire, illumination rounds, and tracers. Training activities within parts of SHOBA pose a direct threat to habitat due to associated ground disturbance and land demolition. Twelve of the 28 occurrences (43 percent) are at least partially within the boundaries of a training area (IOA, TAR, AVMA, or Impact Area) (Plain northeast of Warren Canyon, Larkspur Canyon, Lemon Tank Canyon, Eagle Canyon, Bryce Canyon, China Canyon, Knob Canyon, Canchalagua Canyon, Pyramid Head, Red Canyon, Upper Chenetti Canyon, and Horse Beach Canyon). The other 16 occurrences are located outside of heavily impacted training areas. Within training areas, many of the impacts to these 12 occurrences would be diffuse and are unlikely to have a high impact on the species. The Navy has demonstrated their efforts to help conserve and manage listed species on the island by ameliorating habitat impacts through implementation of the MOFMP and INRMP. Impacts to the habitat from land use are likely to continue in the future, but appear to pose a high-magnitude threat to the habitat of a small number of occurrences of *C. grisea* on San Clemente Island.

Erosion

Erosion and associated soil loss caused by browsing of feral goats and rooting of feral pigs likely modified the island's habitat (Navy 2002, p. 1–14). Overgrazing on San Clemente Island resulted in defoliation, which led to increased erosion over much of the island, especially on steep slopes where denuded soils can be quickly washed away during storm events (Johnson 1980, p. 107; Navy 2002, pp. 1–14, 3–9; Tierra Data Inc. 2007, pp. 6–7). There may be residual impacts from historical grazing, and vegetation may be slow to recover and hold soil. In the INRMP, erosion was identified as a threat to the canyon woodland habitat and maritime desert scrub, which is habitat for *Castilleja grisea* (Navy 2002, pp. 4–3, 4–12). The process of soil erosion can lead to destruction of terraces, steep slopes, and canyons that support the growth and reproduction of *C. grisea* (Navy 2002, p. D–23).

Increased military activities where *Castilleja grisea* occurs within training area boundaries are expected to increase erosion associated with roadways, through soil compaction and other soil disturbances. The impacts from erosion are anticipated along the ridgeline of the eastern escarpment, affecting eight occurrences (Pyramid Head, Knob Canyon, Canchalagua Canyon, Bryce Canyon, Eagle Canyon, Thirst Canyon, SHOBA Boundary occurrence, and Horton Canyon) (Tierra Data Inc. 2007, pp. 12–18; Navy 2008a, p. G–8). Closure of the eastern escarpment within SHOBA due to unexploded ordnance could make assessing this threat and implementing conservation measures in these eight occurrences difficult in the future.

The Navy studied the potential for erosion from several proposed military activities (Tierra Data Inc. 2007, pp. 1–45, Appendices). Approximately 12 *Castilleja grisea* occurrences fall partially or wholly within the boundaries of a designated training area (IOA, TAR, AVMA, or Impact Area), and are likely to be impacted by erosion. Fourteen occurrences of *C. grisea* are at least partially within 500 ft (152 m) of a road (paved or unpaved) (China Canyon, Horse Beach Canyon, Pyramid Head, Knob Canyon, Canchalagua Canyon, Bryce Canyon, Eagle Canyon, Upper Horse Canyon, Plain northeast of Warren Canyon, Horton Canyon, Seal Cove Terraces, Lemon Tank Canyon, Larkspur Canyon, and Terrace Canyon) (Forman and Alexander 1998, p. 217). These occurrences could be subject to diffuse disturbance and road effects that degrade the habitat quality. Roads can concentrate water flow, causing incised channels and erosion of slopes (Forman and Alexander 1998, pp. 216–217). This increased erosion near roads can degrade habitat, especially along the steep canyons and ridges.

Along the eastern escarpment, *Castilleja grisea* is found in steep canyons in proximity to roads where it may be vulnerable to runoff during storm events (Navy 2008a, pp. G–4, G–8). At the southern end of the species' range, one occurrence is downslope from Horse Beach Canyon Road along a poorly maintained dirt road that is proposed to serve as part of the Assault Vehicle Maneuver Corridor. This location is likely to have an elevated risk from erosion (USFWS 2008, p. 99).

The Navy incorporates erosion control measures into all site feasibility studies and project design to minimize the potential to exacerbate existing erosion and avoid impacts to listed species (Munson 2013, pers. comm.). The INRMP requires that all projects include erosion conservation work (Navy 2002, p. 4–89). These conservation actions include best management practices, choosing sites that are capable of sustaining disturbance with minimum soil erosion, and stabilizing disturbed sites (Navy 2002, pp. 4–89–4–91). An erosion control plan for San Clemente Island is in the development stage, with expectations to reduce impacts of erosion where *Castilleja grisea* occurs in areas with increased and expanded military operations (Munson 2013, pers. comm.). This erosion control plan will address military operations associated with the IOA, AVMA and AFP.

In areas that will not be covered under the erosion control plan, erosion control measures are already being incorporated into project designs to minimize the potential to exacerbate existing erosion and avoid impacts to listed species (Munson 2013, pers. comm.). Additionally, the Navy has agreed not to conduct training activities that may lead to impacts from erosion until the plan is successfully implemented. The processes and results of erosion cause island-wide impacts to *C. grisea,* particularly to the occurrences in or adjacent to military training areas or roads. Sixteen occurrences of *C.*

grisea (57 percent) are in areas that could be subject to, and threatened by, erosion from training activities or road use (Plain northeast of Warren Canyon, Larkspur Canyon, Lemon Tank Canyon, Eagle Canyon, Bryce Canyon, China Canyon, Knob Canyon, Canchalagua Canyon, Pyramid Head, Red Canyon, Upper Chenetti Canyon, Horse Beach Canyon, Upper Horse Canyon, Horton Canyon, Seal Cove Terraces, and Terrace Canyon). Occurrences in operationally closed areas may not be afforded the conservation measures outlined by the Navy.

Despite existing levels of erosion on the island, the distribution of *Castilleja grisea* has increased since listing. The Navy incorporates erosion control measures into all projects to minimize the potential to exacerbate existing erosion and avoid impacts to habitat and listed species. Although the Navy works to ameliorate the threat of erosion, management efforts are not possible in areas that are closed to natural resource personnel. Erosion is an island-wide threat to *C. grisea,* particularly to the 16 occurrences in or adjacent to military training areas or roads. Therefore, erosion is still considered a threat to the habitat of *C. grisea.*

Nonnative Plants

One of the threats to *Castilleja grisea* identified in the final listing rule was the spread of nonnative plants into its habitat (42 FR 40682, 40684). Nonnatives can alter habitat structure, ecological processes such as fire regimes, nutrient cycling, hydrology, and energy budgets, as well as compete for water, space, light, and nutrients (for discussion of nonnatives on San Clemente Island, see above discussion on Nonnative Species under *Acmispon dendroideus* var. *traskiae—Factor A*). *Castilleja grisea* is often associated with native maritime desert scrub vegetation types, where nonnative grasses are present but not a dominant component of the plant community (Tierra Data Inc. 2005, pp. 29–42).

Although previous invasions of nonnative species were probably introduced in grazing fodder, current invasions are typically introduced and spread around the island by military activities and training (see above discussion on Nonnative Species under *Acmispon dendroideus* var. *traskiae—Factor A*). Nonnative plants constitute a rangewide threat to all native plants on San Clemente Island, including all occurrences of *Castilleja grisea.* A total of 9 occurrences (32 percent) are within 500 ft (152 m) of Ridge Road or China Point Road, and may be subject to diffuse disturbance and road effects that degrade the habitat quality along the road (China Canyon, Horse Beach Canyon, Pyramid Head, Knob Canyon, Canchalagua Canyon, Bryce Canyon, Eagle Canyon, Plain northeast of Warren Canyon, and Lemon Tank Canyon) (Forman and Alexander 1998, p. 217). Roadsides tend to create conditions preferred by nonnative species (high disturbance, seed dispersal from vehicles, ample light and water) (Forman and Alexander 1998, p. 210). Nonnatives, including *Foeniculum vulgare* and *Mesembryanthemum crystallinum* (crystalline iceplant), have been found in the disturbed shoulders along the road between Ridge Road and China Point in SHOBA (Braswell 2011, pers. obs.).

Potential impacts from nonnative plants are expected to be minimized by annual implementation of the Navy's island-wide nonnative plant control program (O'Connor 2009b, pers. comm.; Munson 2013, pers. comm.; see above discussion on Nonnative Species under *Acmispon dendroideus* var. *traskiae—Factor A*). This program targets nonnative species for elimination using herbicide and mechanical removal, prioritizing species that are new to the island or are particularly destructive. The program has been successful at isolating and limiting some species, such as *Foeniculum vulgare,* to a few locations (Howe 2011, pers. comm.). To reduce the potential for transport of nonnative plants to San Clemente Island, military and nonmilitary personnel inspect tactical ground vehicles, and remove any visible plant material, dirt, or mud prior to going onto the island (USFWS 2008, p. 63). This precaution helps to control the movement of nonnative plants onto the island, but once on the island nonnatives are easily spread by the movement of vehicles from one area to another. Although nonnative plants will continue to pose a rangewide risk to *C. grisea,* it is a threat of low intensity, and the Navy has taken steps to curtail habitat conversion from nonnative plants.

Nonnative plant species are an island-wide threat to the native vegetative community. The Navy has taken preventative and conservation measures through funding and implementing nonnative plant species control on the island. Management and control of nonnative plants, however, is not in place at the four occurrences that are closed to natural resource managers. However, outside of these areas, *Castilleja grisea* has persisted on the island. Despite the continued risk of encroachment by nonnatives, *Castilleja grisea* remains on the island, and its range has continued to expand. Impacts from nonnative plants are a persistent, but low-level, threat to *C. grisea* habitat.

Fire

Fire was not considered a threat to *Castilleja grisea* habitat at the time of listing (42 FR 40682; August 11, 1977). Since that time, however, over 50 percent of the island has experienced at least one wildfire (Navy 2002, Map 3–3, p. 3–32). The majority of fires are concentrated in SHOBA, potentially impacting 15 of 28 occurrences (54 percent; Thirst Canyon, Eagle Canyon, Bryce Canyon, Canchalagua Canyon, Knob Canyon, Pyramid Head, Snake Canyon, Upper Chenetti Canyon, Horse Beach Canyon, China Canyon, Red Canyon, Kinkipar Canyon, Cave Canyon, Horse Canyon, and Upper Horse Canyon). Seven occurrences occur within the eastern escarpment in SHOBA where impacts from fire are less likely (Thirst Canyon, Eagle Canyon, Bryce Canyon, Canchalagua Canyon, Knob Canyon, Pyramid Head, and Snake Canyon). Recent closure of this area limits the ability to assess the status and manage habitat at these occurrences.

Because of the elevated risk of fire associated with training activities, the Navy targets live and inert munitions fire towards two delineated Impact Areas. The risk of frequent fire is higher in Impact Areas I and II, potentially affecting the habitat of four occurrences. The effects of fire, and the state of plants within the Impact Areas, are currently unknown due to closure of the area (USFWS 2008, p. 50). Fires are occasionally ignited by activities north of SHOBA, posing a low-magnitude threat to the habitat at 13 occurrences (46 percent; SHOBA Boundary, Horton Canyon, Lemon Tank Canyon, Nanny Canyon, Larkspur Canyon, Box Canyon, Upper Norton Canyon, Middle Ranch Canyon, Waymuck Canyon, Plain northeast of Warren Canyon, Seal Cove Terraces, Eel Cove Canyon, and Terrace Canyon) (Navy 2002, Map 3–4, p. 3–33).

Increased fire frequency from intensified military use could lead to localized changes in vegetation (see above discussion on fire frequency under *Acmispon dendroideus* var. *traskiae—Factor A*). The Navy has significantly expanded the number of locations where live fire and demolition training will take place (USFWS 2008, pp. 21–37), including TAR north of SHOBA (TAR 17—Eel Cove Canyon and Seal Cove Terraces, and TAR 14 and 15—Larkspur Canyon). In addition to demolitions, the Navy has proposed certain munitions exercises involving the use of incendiary devices, such as

illumination rounds, white phosphorous, and tracer rounds, which pose a high risk of fire ignition. They have also approved expanded live fire and demolition training within TAR 16 (Lemon Tank Canyon) toward the center of the island. The fire pattern on the island will likely change due to this increase in ignition sources, with fires becoming more common within and adjoining the training areas north of SHOBA.

At the time of listing, we did not identify fire as a threat because of lack of fire history and the low intensity of military training on the island. Since that time, military training has significantly increased, and we have better records of the fire frequency on the island. Approximately 18 occurrences (64 percent) of *Castilleja grisea* fall within areas that may be subject to recurrent fires associated with military training. This includes locations that fall within SHOBA that serve as a buffer for Impact Areas I and II, and occurrences near live fire and demolition training areas. Occurrences of *C. grisea* have been discovered within and outside of the impact areas in SHOBA (Junak and Wilken 1998, p. 298; Navy 2002, p. D–20), indicating that the species is tolerant of at least occasional fire. High fire frequency may be a potential threat that could limit the distribution of *C. grisea* by overwhelming its tolerance threshold (Brooks *et al.* 2004, p. 683; Jacobson *et al.* 2004, p. 1). Frequent fire may exceed a plant taxon's capacity to persist by depleting seed banks and reducing reproductive output when fire occurs at higher than natural frequencies in *C. grisea* habitat (Zedler *et al.* 1983, pp. 811–815).

Within the Impact Areas or operationally closed zones, the Navy is not implementing fire suppression and firefighting because of safety hazards from the presence of unexploded ordnance. Fires that escape designated training areas threaten other parts of the island, though it is unlikely that one fire is capable of spreading throughout the entire range of the species due to its broad distribution across the island. The Navy's implementation of the MOFMP will limit the frequency with which fires escape Impact Areas and TAR. Through the annual review process, the Navy will identify mechanisms to reduce fire return intervals within areas and habitats where this taxon is concentrated (USFWS 2008, pp. 91–122). Although the threat is ameliorated through the MOFMP, fire remains an island-wide threat to *C. grisea* habitat, particularly to the habitat at the 18 occurrences that fall within areas that may be subject to recurrent fire associated with military training.

Fire Management

Fire suppression techniques are used by the Navy on San Clemente Island as described in the MOFMP, including creation of firebreaks (bare soil created through manual or herbicide removal of vegetation), use of fire retardants (spraying of fire retardants along fire breaks), and aerial drops of saltwater from aircraft. All of these activities have the potential to impact *Castilleja grisea* individuals and occurrences. However, within the MOFMP, the Navy proposed the implementation of a fire management plan directed at fire suppression, fire prevention, and fuels management (Navy 2008b, p. 3.11–62). This plan was developed to provide flexibility for the timing of military training and will modify the level of fire suppression resources required to be present during training activities (Navy 2008b, p. 3.11–62). The Navy also committed to conducting an annual review of fire management and fire occurrences that will allow for adaptive management and changes in the MOFMP (USFWS 2008, pp. 91–122).

The Navy maintains fuelbreaks within SHOBA along the boundaries of Impact Areas I and II to prevent the spread of fire outside of the areas (USFWS 2008, p. 57). Four documented occurrences of *Castilleja grisea* are within the Impact Areas; these occurrences are likely exposed to impacts from higher intensity training, such as bombardment and weapon fire. Some of these occurrences are near fuelbreaks and may be impacted by erosion or invasive nonnative plants caused by fuelbreak maintenance. Additionally, occurrences on the eastern escarpment near the firebreaks on Ridge Road (Canchalagua Canyon, Knob Canyon) might be impacted by the creation and maintenance of firebreaks (USFWS 2008, p. 57).

The Navy uses herbicides and strip burning to create fuelbreaks on the island, and maintains these fuelbreaks with continued use of herbicides and fire retardant (Phos-Chek D75F) (USFWS 2008, pp. 97–98). The use of fire retardant or herbicide, as proposed in the MOFMP, results in the loss of *Castilleja grisea* habitat within the fuelbreak footprint (USFWS 2008, p. 81). The use of Phos-Chek may also allow or facilitate the expansion and persistence of nonnative species due to the fertilizing effect of this retardant (Larson *et al.* 1999, p. 115; Kalabokidis 2000, p. 130). Fire retardants act as a source of nitrogen and phosphorous, which are nutrients that can affect plant species composition (Larson and Duncan 1982, p. 702). The Navy has begun a study on the effects of Phos-Chek on San Clemente Island vegetation, and has avoided application of Phos-Chek within 300 ft (91.4 m) of mapped listed species (including *C. grisea*) to the extent allowable with fuelbreak installation (USFWS 2008, pp. 97–98).

We anticipate the Navy will construct additional fuelbreaks to minimize the risk of fire spreading from areas of live fire and demolition training north of SHOBA (USFWS 2008, p. 98). In the MOFMP, the Navy agreed to conduct preseason briefings for firefighting personnel on the guidelines for fire suppression, and the limitations associated with the use of Phos-Chek and saltwater drops (USFWS 2008, pp. 97–98). The impact of saltwater on the habitat of *Castilleja grisea* has not yet been assessed. However, if salt persists in the soil, the composition of the plant community could change to favor more salt-tolerant taxa.

To minimize the potential for effects to listed species, the Navy considers the documented locations of listed species on the island as fuelbreak lines are developed (Navy 2009, p. 4–32). The majority of *Castilleja grisea* habitat is not impacted by fire management, and only 6 occurrences (21 percent) are associated with fuelbreaks. Even if expanded in conjunction with increased levels of training activities, the benefits of fuelbreaks outweigh the detrimental impacts of recurrent fire to *C. grisea* habitat. The threat of fire management to *C. grisea* habitat is restricted mainly to occurrences within SHOBA, and particularly to occurrences in the Impact Areas. Because of the isolated nature of this threat and its role in prevention of fire, fire management is a low-magnitude threat to *C. grisea* habitat.

Summary of Factor A

The habitat of *Castilleja grisea* is threatened by destruction and modification of habitat associated with land use, erosion, the spread of nonnatives, fire, and fire management. To help ameliorate these threats, the Navy is implementing an MOFMP, an INRMP, and the island-wide control of nonnative plants (Navy 2002, pp. 1–1–8–12; USFWS 2008, pp. 1–237). The MOFMP has been helpful in informing strategic decisions for training using live fire or incendiary devices. The Navy has agreed not to conduct training activities that may lead to impacts from erosion until an erosion control plan is successfully implemented (Munson 2013, pers. comm.). Natural resource

managers have been successful at decreasing the prevalence of particularly destructive nonnatives, such as *Foeniculum vulgare.* In recent years, the Navy has strictly prohibited access to Impact Areas I and II within SHOBA for biological monitoring and conservation actions (USFWS 2008, p. 50), so the status of the four occurrences in these areas remains unknown. Recently, closures along the eastern escarpment in SHOBA have also limited the monitoring and management of four occurrences (Knob Canyon, Canchalagua Canyon, Bryce Canyon, and Eagle Canyon). However, 16 occurrences (57 percent) of *C. grisea* fall outside Impact Areas, IOA, AVMA, TAR, and fuelbreaks, where the most intensive habitat disturbances are likely to take place. Threats posed by land use, erosion, nonnatives, fire, and fire management are ongoing, and though impacts have been reduced due to the expanded range of *C. grisea* and conservation efforts, we expect these threats will continue to impact *C. grisea* habitat now and in the future as recovery of the species and its habitat continues.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

In the listing rule (42 FR 40682; August 11, 1977), we did not identify any threats from overutilization, and there is no new information to indicate that overutilization is a threat to *Castilleja grisea.* Although voucher herbarium specimens of *C. grisea* and seeds have been collected for research and seed banking, overutilization of *C. grisea* for any purpose is not currently considered a threat nor expected to be in the future.

Factor C. Disease or Predation

Grazing of feral goats and rooting of feral pigs were considered a direct threat to *Castilleja grisea* in the final listing rule (42 FR 40682; August 11, 1977). As stated above, this threat was ameliorated by the removal of all goats and pigs from San Clemente Island in 1992, as recognized in our 2007 status review (USFWS 2007b, p. 11). Currently, no other predators or diseases on San Clemente Island are known to pose a significant threat to *C. grisea,* nor are they expected to become a threat in the future.

Factor D. Inadequacy of Existing Regulatory Mechanisms

The Act requires us to examine the adequacy of existing regulatory mechanisms with respect to those existing and foreseeable threats that may affect *Castilleja grisea.* The inadequacy of existing regulatory mechanisms was not indicated as a threat to *C. grisea* at the time of listing (42 FR 40682; August 11, 1977). Since it was listed as endangered, *C. grisea* has been and continues to be primarily protected by the Act. Our responsibilities in administering the Act include sections 7, 9, and 10 (for more information on our responsibilities, see above discussion under *Acmispon dendroideus* var. *traskiae—Factor D*). Critical habitat has not been designated or proposed for this taxon.

Listing *Castilleja grisea* as endangered provided a variety of protections, including the prohibitions against removing or destroying plants within areas under Federal jurisdiction and the conservation mandates of section 7 for all Federal agencies. These protections would continue to be afforded to *C. grisea* if it is downlisted. For plants listed as threatened, protections are the same, except that the Code of Federal Regulations stipulates protections are not extended to seeds of cultivated specimens of threatened plants (50 CFR 17.71). This change in protections would not have an effect on the conservation of *C. grisea,* because conservation of this taxon does not require protection for seeds of cultivated plants. In the following discussion, we evaluate protections provided by other regulatory mechanisms to determine whether they effectively remove threats to *C. grisea.*

Other Federal Protections

National Environmental Policy Act (NEPA)

All Federal agencies are required to adhere to the National Environmental Policy Act (NEPA) of 1970 (42 U.S.C. 4321 *et seq.*) for projects they fund, authorize, or carry out. The Council on Environmental Quality's regulations for implementing NEPA (40 CFR parts 1500–1518) state that agencies shall include a discussion on the environmental impacts of the various project alternatives (including the proposed action), any adverse environmental effects that cannot be avoided, and any irreversible or irretrievable commitments of resources involved (40 CFR part 1502). The NEPA itself is a disclosure law, and does not require subsequent minimization or mitigation measures by the Federal agency involved. Although Federal agencies may include conservation measures for *Castilleja grisea* as a result of the NEPA process, any such measures are typically voluntary in nature and are not required by the statute. NEPA does not itself regulate activities that might affect *C. grisea,* but it does require full evaluation and disclosure of information regarding the effects of contemplated Federal actions on sensitive species and their habitats.

On San Clemente Island, the Navy must meet the NEPA requirements for actions significantly affecting the quality of the human environment. Typically, the Navy prepares Environmental Assessments and Environmental Impact Statements on operational plans and new or expanding training actions. Absent the listing of *Castilleja grisea,* we would expect the Navy to continue to meet the procedural requirements of NEPA for its actions, including evaluating the environmental impacts to rare plant species and other natural resources. However, as explained above, NEPA does not itself regulate activities that might affect species listed as endangered or threatened under the Act.

Sikes Act Improvement Act (Sikes Act)

The Sikes Act (16 U.S.C. 670) authorizes the Secretary of Defense to develop cooperative plans with the Secretaries of Agriculture and the Interior for natural resources on public lands. The Sikes Act Improvement Act of 1997 requires Department of Defense installations to prepare INRMPs that provide for the conservation and rehabilitation of natural resources on military lands consistent with the use of military installations to ensure the readiness of the Armed Forces. An INRMP is a plan intended ". . . to guide installation commanders in managing their natural resources in a manner that is consistent with the sustainability of those resources while ensuring continued support of the military mission" (Navy 2002, p. 1–1). INRMPs are developed in coordination with the State and the Service, and are generally updated every 5 years. Although an INRMP is technically not a regulatory mechanism because its implementation is subject to funding availability, it is an important guiding document that helps to integrate the military's mission with natural resource protection.

San Clemente Island Integrated Natural Resources Management Plan (INRMP)

Pursuant to the Sikes Act, the Navy adopted an INRMP for San Clemente Island that identifies multiple objectives for protecting *Castilleja grisea* and its habitat to help reduce threats to this taxon (Navy 2002). The INRMP also disclosed actions through the NEPA process, and to comply with such legislation and regulations as the

Endangered Species Act, the Federal Noxious Weed Act of 1974 (7 U.S.C. 2801), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601), the Resource Conservation and Recovery Act (42 U.S.C. 6901), and the Soil Conservation Act (16 U.S.C. 3B) (see INRMP section above under *Acmispon dendroideus* var. *traskiae—Factor D*).

Natural resource objectives of relevance to the protection of *Castilleja grisea* in the INRMP include an objective to: ''Protect, monitor, and restore plants and cryptograms in order to manage for their long-term sustainability on the island'' (Navy 2002, p. 4–39). The INRMP specifically includes the following objectives for *C. grisea* management: recovery of native shrub communities that are host plants for the species, the removal of nonnatives, monitoring of the species, studies of preferred host plants, study of plant's response to fire, and studies and inventory of insect pollinators (Navy 2002, pp. D–20, D–21). Multiple INRMP management strategies have been implemented for the conservation of *C. grisea.* Other INRMP strategies that target the plant communities within which this species occurs include: controlling erosion, with priority given to locations where erosion may be affecting listed species; producing a new vegetation map; reducing nonnative plant cover; managing the size and intervals of fires; experimenting with fire management to improve native plant dominance while protecting sensitive plant occurrences; and conducting genetic and biological studies of *C. grisea* across the island.

The MOFMP, Erosion Control Plan, and nonnative plant species control conducted on the island are discussed above under *Castilleja grisea—Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range.* As noted under the other factors, while the INRMP helps to ameliorate threats and provides some protection for *C. grisea* occurrences, those occurrences within Impact Areas or operationally closed areas may not benefit from the conservation measures. While the INRMP has reduced the severity of threats and contributed to conservation of the species, it still allows for land use consistent with military readiness and training. Thus, Navy activities will continue to impact *C. grisea* and habitat where it occurs, as described under Factor A and E.

See also the section above for *Acmispon dendroideus* var. *traskiae* for discussion related to the Federal Noxious Weed Act and the Soil Conservation and Domestic Allotment Act, which also apply to *Castilleja grisea.*

State Protections

Since the time of listing, *Castilleja grisea* has benefited from additional State protections under the Native Plant Protection Act (NPPA) and California Endangered Species Act (CESA; listed 1982) (see State Protections for *Acmispon dendroideus* var. *traskiae* above, which provides additional information that also applies to *C. grisea*). However, the range of *C. grisea* is restricted to a Federal military installation, so listing under NPPA and CESA may only afford protection to this species in rare instances when the lead agency is a non-Federal agency or when proposed activities fall under other State laws.

Summary of Factor D

The regulatory mechanisms above help to reduce threats for the conservation of *Castilleja grisea.* In continuance of a long history of cooperative conservation efforts, the Navy implemented several conservation actions that benefit this plant taxon. The Navy has implemented an MOFMP to reduce the risk of fire on the island and a nonnative plant species control program. In response to the conservation actions proposed and the current status of the listed taxon, we issued a non-jeopardy biological opinion on the Navy's MOFMP. The provisions included in the San Clemente Island INRMP provide protection to all *C. grisea* occurrences and adaptive management of its habitat in order to help address threats to the plant from military activities and nonnative plants. However, as indicated in the discussion under Factor A, not all management tools described in the INRMP are in place, and conservation management may not be implemented at four occurrences that have been closed to natural resource managers. *Castilleja grisea* occurrences are afforded protection through Federal mechanisms, and thus the inadequacy of existing regulatory mechanisms is not considered a current threat to the species. However, the Act is the primary law providing protection to this taxon; in the absence of the Act, the existing regulatory mechanisms are not adequate to conserve *C. grisea* throughout its range.

Factor E. Other Natural or Manmade Factors Affecting Their Continued Existence

The 1977 listing rule identified competition from nonnative plants as a threat to *Castilleja grisea* under ''*Other Natural or Manmade Factors Affecting Their Continued Existence''* (42 FR 40682; August 11, 1977). In this 5-factor analysis, we discuss impacts from nonnative plants above under *Factor A* as a threat to habitat. Other Factor E threats identified since listing that currently impact *C. grisea* plants include: (1) Movement of vehicles and troops, (2) fire, and (3) climate change. Factor E addresses threats to individuals of the species, rather than the habitat modification threats that are discussed in Factor A. Therefore, while some threats are discussed in both sections, in this section we are focusing on the direct impacts to individuals of *C. grisea.*

Movement of Vehicles and Troops

Military training activities within training areas often entail the movement of vehicles and troops over the landscape with the potential of trampling or crushing individual plants (for discussion of SWAT, TAR, and IOA, see above discussion for *Acmispon dendroideus* var. *traskiae—Factor E*). Based on the distribution of *Castilleja grisea* occurrences and type of troop movements likely to occur, impacts due to trampling and crushing are likely to occur within the IOA or AVMA, along roads, and in the Impact Areas. Specifically, major troop movements and vehicle landings are planned through Horse Beach and the Horse Beach Canyon occurrence, with troops and assault vehicles moving north along Horse Beach Road from the beach (USFWS 2008, pp. 30, 41). These operations could affect the Horse Beach Canyon and China Canyon occurrences (USFWS 2008, pp. 85–86). The status of these plants is currently unknown because of closure of the Impact Areas (USFWS 2008, p. 50).

Fifteen of the 28 documented occurrences of *Castilleja grisea* are partially or wholly within the boundaries of a training area (IOA, TAR, AVMA, SWAT, or Impact Area), and may be impacted by trampling (Terrace Canyon, Larkspur Canyon, Nanny Canyon, Lemon Tank Canyon, Seal Cove Canyon, Eel Cove Canyon, Plain northeast of Warren Canyon, Eagle Canyon, Bryce Canyon, Horse Beach Canyon, China Canyon, Red Canyon, Knob Canyon, Canchalagua Canyon, and Pyramid Head). Recent documentation of *C. grisea* within these training areas suggests that, while the individual plants have the potential to be impacted by the activities described above, they are able to sustain themselves under the recent levels of traffic from vehicles and troops associated with training activities

(SERG 2009–2011, GIS data). Steep slopes along the eastern escarpment may also afford the eight *C. grisea* occurrences there some topographic protection from vehicle and troop movements. The anticipated loss of individual plants from proposed increases in troop and vehicle movement is likely to increase in the future, though this will likely be a low-level impact to the survival and recovery of *C. grisea* because it is diffuse and managed by the Navy (USFWS 2008, pp. 91–102).

Fire

Although not specifically mentioned in the listing rule, intense or frequent fires could threaten *Castilleja grisea.* In the *Factor A* discussion above, we addressed impacts of fire on the habitat; this section covers the discrete threats to individuals of *C. grisea.* It is unknown if *C. grisea* is adapted to periodic fires, though it is likely that this taxon is resilient to occasional fires (Navy 2002, p. D–10; Tierra Data Inc. 2005, p. 80). *Castilleja grisea* has recently been documented in portions of Horse Beach Canyon that burned up to three times since 1979, and a large occurrence was discovered in Pyramid Cove the year following a fire (Navy 1996, p. 5–2). The mechanisms and conditions under which *C. grisea* can tolerate fire, and at what frequency, are unknown. At higher than natural fire frequencies, fire has the potential to exceed a plant's capacity to persist by depleting seed banks and reducing reproductive output (Zedler *et al.* 1983, pp. 811–815). The response of *C. grisea* to fire may also be governed by the response of its host species to fire.

Castilleja grisea occurs in some areas of the island that may experience elevated fire frequency, such as SHOBA and especially the Impact Areas (Red Canyon, China Canyon, Horse Beach Canyon, Upper Chenetti Canyon) (discussed in *Factor A* above). The potential for frequent fire at many of the occurrences within SHOBA is reduced by their location on the eastern side of the island, away from Impact Areas I and II. In conjunction with its expansion of training activities, the Navy implemented a fire management plan within the MOFMP that is focused on fire prevention, fuels management, and fire suppression. These measures should minimize the frequency and spread of fires that could result in loss of *C. grisea* individuals.

Castilleja grisea is likely to withstand occasional fires, as demonstrated through its stability on the island since listing. Fires may escape the military training areas and spread to other areas of the island, but are not likely to disturb the entire distribution of *C. grisea* at one time because this taxon is widely distributed across San Clemente Island. Also, the species is associated with steep canyon areas where fires are less likely to impact the plant. Nine *C. grisea* occurrences (32 percent) are more vulnerable to the spread of fire associated with military training (Eel Cove Canyon, Seal Cove Terraces, Red Canyon, China Canyon, Horse Beach Canyon, Upper Chenetti Canyon, Larkspur Canyon, Lemon Tank Canyon, and Snake Canyon). These occurrences include locations that fall within 0.5 mi (805 m) of TAR, or within Impact Areas where live fire and demolition training will be performed.

The Navy's fire management practices minimize ignitions as well as the spread of fires (as described above in Factor A). The Navy is conducting annual reviews of fire management and fire occurrences that will allow for adaptive management. These measures should minimize the frequency and spread of fires that could result in loss of individuals of *C. grisea.* Although, in areas operationally closed to natural resource managers, conservation actions may not be implemented, and the plant's status remains unknown. We anticipate that the Navy's implementation of the MOFMP will limit the frequency with which fires escape Impact Areas and TAR and that, through the annual review process, the Navy will identify mechanisms to reduce fire return intervals in areas not designated for incendiary use (USFWS 2008, pp. 91–122). Therefore, the impact of fire on individual *C. grisea* plants is likely a low-level threat to long-term persistence of this taxon.

Climate Change

For general information regarding climate change impacts, see above discussion on climate change under *Acmispon dendroideus* var. *traskiae—Factor E.* Since listing of *Castilleja grisea* (USFWS 1977, p. 40684), the potential impacts of ongoing, accelerated climate change have become a recognized threat to the flora and fauna of the United States (IPCC 2007a, pp. 1–52; PRBO 2011, pp. 1–68) (for discussion of climate change scenarios in California, see *Acmispon dendroideus* var. *traskiae—Factor E* above). San Clemente is located within a Mediterranean climatic regime, but with a significant maritime influence. Climate change models predict an increase in average temperature for southern California. There is substantial uncertainty in precipitation projections, and relatively little consensus concerning precipitation patterns and projections for southwestern California (PRBO 2011, p. 40). Less rainfall and warmer air temperatures could limit the range of *C. grisea,* although there is no direct research on the effects of climate change on the species. *Castilleja grisea* occurs in great numbers on the eastern side of the island, where fog contributes to a wetter climate. This area could become drier if fog is less frequent, possibly affecting moisture availability for *C. grisea.* The impacts of predicted future climate change to *C. grisea* remain unclear. While we recognize that climate change is an important issue with potential effects to listed species and their habitats, information is not available to make accurate predictions regarding its effects to *C. grisea* at this time.

Summary of Factor E

Castilleja grisea continues to be impacted by military activities and fire at 16 of the 28 (57 percent) occurrences on San Clemente Island. Military training activities have the potential to ignite fires within *C. grisea* habitat, though only a few of the occurrences are within the Impact Areas and TAR where the highest impacts are concentrated. The threat from fire is reduced by implementation of the Navy's MOFMP, which should limit the frequency of fires escaping from the Impact Areas, although suppression will not likely occur within the boundaries of the Impact Areas. Threats from trampling and crushing of individual plants are likely to increase due to increases in training on the island. However, *C. grisea* has expanded its distribution on the island, and the Navy is implementing conservation measures that will continue to improve conditions for this taxon. Finally, climate change may likely influence this taxon, though the magnitude of this rangewide threat or how it may affect this taxon is unknown at this time. Given the distribution of the species and the conservation measures that will be implemented by the Navy, the threats described here currently and in the future are either of limited extent or adequately managed to reduce and minimize impacts to the species, while the potential overall threat of climate change remains unknown across this taxon's range. Although these threats are ongoing and could directly impact occurrences of this species, we are of the view that they are not likely to result in serious impacts to most of the known occurrences, now or in the future.

Combination of Factors—Castilleja grisea

A species may be affected by more than one threat in combination. Within the preceding review of the five listing factors, we have identified multiple threats that may have interrelated impacts on the species (see above discussion on Combination of Factors under *Acmispon dendroideus* var. *traskiae—Factor E*). The species' productivity may be reduced because of these threats, either singularly or in combination. However, it is not easy to determine (nor is it necessarily determinable) whether a particular threat is the primary threat having the greatest effect on the viability of the species, or whether it is exacerbated by or working in combination with other potential threats to have cumulative or synergistic effects on the species. While the combination of factors is a threat to the existence of *Castilleja grisea,* we are unable to determine the magnitude or extent of cumulative or synergistic effects of the combination of factors on the viability of the species at this time.

Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea,* including information presented in the May 18, 2010, petition, available in our files, and through our 90-day and 12-month findings and proposed rule in response to this petition, as well as other available published and unpublished information. We also consulted with species experts and Navy staff who are actively managing for the conservation of *A. d.* var. *traskiae* and *C. grisea* on San Clemente Island.

A direct threat identified in the listing rule (42 FR 40682), grazing from feral herbivores, was eliminated by 1992 through the complete removal of goats and pigs from the island (Factors A and C). This action also fulfilled one of the primary goals of the Recovery Plan under Objective 2 (USFWS 1984, p. 107). However, as a result of years of grazing, impacts from nonnative plants and erosion have continued to increase on the island. Our review of the status of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* determined that threats to these species under Factors A and E are present. The Navy's natural resource management and INRMP for the island have substantially helped to reduce impacts from many of the threats to these species. The Navy implements natural resource management through the control of nonnative species, execution of the fire management plan, and avoidance of federally listed species. Despite current impacts from these threats to the habitat and individuals of these taxa, surveys indicate that the range of both has increased since the time of listing. Increased survey efforts and survey accuracy have also shown that these taxa occupy significantly more sites than were known at listing. The extent to which this represents the detection of previously unknown occurrences, recruitment from the existing seed bank, recolonization associated with dispersal events, or positive response to management and conservation efforts is not known. Regardless, the increase of both the range and number of occurrences for both taxa indicates an overall improved status for these taxa since listing.

The surveys and discoveries of new occurrences also contribute to the achievement of objectives in the Recovery Plan (Objective 6; USFWS 1984, p. 107). The Navy has taken measures to locate the heaviest impacts of military operations away from the species to the extent feasible while meeting operational needs, which will minimize, but not fully eliminate, the damage or destruction of individuals or occurrences of *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea,* partially fulfilling Objective 1 of the Recovery Plan (USFWS 1984, p. 107; USFWS 2008, pp. 90, 101, 121).

Acmispon dendroideus var. *traskiae*

Since listing and the removal of feral goats and pigs on San Clemente Island, the distribution of *Acmispon dendroideus* var. *traskiae* has expanded from 6 to 29 occurrences, mainly along the western terraces and eastern escarpment. These significant gains demonstrate alleviation of threats from feral ungulates and that the taxon is persisting despite existing and remaining threats across the landscape. The taxon faces continued impacts to its habitat from military training activities and land use, erosion, nonnative plants, and fire (see *Acmispon dendroideus* var. *traskiae—Factor A*). Impacts from land use include movement of vehicles and troops over the landscape, as well as the use of live fire, demolitions, and bombardments. Much of this activity is concentrated in training areas within the range of *A. d.* var. *traskiae.* However, many of these occurrences are along the eastern escarpment that is more protected from fire and military activity. Additionally, the majority of locations occupied by *A. d.* var. *traskiae* (24 of 29 occurrences, or 83 percent) fall outside of training areas, and thus do not receive intensive habitat disturbance. However, access to the eastern escarpment, within SHOBA and east of Ridge Road, was recently closed for safety concerns. As a result, the status of four occurrences (14 percent) are difficult to monitor now and in the future.

The Navy implemented a nonnative plant management plan and an MOFMP to ameliorate habitat threats to the species. Erosion control measures are incorporated into all project designs to minimize the potential to exacerbate existing erosion and avoid impacts to listed species (Munson 2013, pers. comm.). Additionally, the Navy has agreed not to conduct training activities that may lead to impacts from erosion until an erosion control plan is successfully implemented. It is anticipated that military training activities, erosion, nonnatives, and fire will have ongoing impacts to the taxon's habitat, although impacts from these threats are reduced due to the current distribution of this taxon and existing conservation efforts. As a result, the best available information indicates that the taxon is no longer in danger of extinction. However, ongoing impacts are likely to continue such that the taxon is still likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

Under the Sikes Act, the Navy implemented an INRMP to coordinate the management of natural resources on the island. Providing a framework for military operations, this plan helps to ameliorate threats to the federally listed species on the island, and provides for long-term conservation planning within the scope of military readiness. Provisions included in the INRMP provide some protection for *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* occurrences, and allow adaptive management of the habitat in order to minimize impacts to the taxa from military activities and nonnative plants. Benefits provided to the taxa by the conservation measures in the MOFMP may be limited in the Impact Areas and operationally closed areas because natural resource personnel are not provided access to these areas. Under the INRMP, occurrences of *A. d.* var. *traskiae* will continue to be impacted by military activities necessary for military readiness and training.

As discussed above in relation to Factor D, there are existing regulatory mechanisms that provide protections to *A. d.* var. *traskiae.* However, these existing regulatory mechanisms, absent the protections of the Act, provide

insufficient certainty that efforts needed to address long-term conservation of the species will be implemented, or that they will be effective in reducing the level of threats to *A. d.* var. *traskiae* throughout its range.

Individual *Acmispon dendroideus* var. *traskiae* plants also face threats on the island. Movement of vehicles and troops, fire, climate change, and hybridization with related species all impact the status of the species (see *Acmispon dendroideus* var. *traskiae—Factor E*). The steps that the Navy has taken to minimize impacts and avoid listed species to the extent practicable are ameliorating the threat of trampling individual *A. d.* var. *traskiae* plants caused by training. Hybridization has also been studied (fulfilling Objective 4 of the Recovery Plan), with confirmed hybrids occurring in Wilson Cove (Wilson Cove) and four other locations. The genetic integrity of *A. d.* var. *traskiae* may be threatened by hybridization with *A. argophyllus* var. *argenteus* at a few occurrences, including one of the largest occupied locations, and requires further investigation. Although these threats could directly impact occurrences of this taxon, we are of the view that they will not cause catastrophic decline in the number of *A. d.* var. *traskiae* occurrences at this time or the future.

As discussed above in the Factor Analysis, a species may be affected by more than one threat in combination. For example, fires (Factors A and E) may be more intense or frequent in the habitat if there are greater amounts of nonnative grasses (Factor A) present in the vegetative community. Thus, the species' viability may be reduced because of threats in combination, but we are unable to determine the magnitude or extent of any synergistic effects of the various factors and their impact on *Acmispon dendroideus* var. *traskiae* at this time.

In conclusion, we have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by *Acmispon dendroideus* var. *traskiae.* Though threats still exist (military training activities and land use, erosion, nonnative plants, and fire) and will continue into the foreseeable future, the range of this taxon has substantially increased since listing. The expanded number of occurrences reduces the severity and magnitude of threats and the likelihood that any one event would affect all occurrences of the species. Additionally, the Navy is implementing conservation actions through their INRMP to reduce threats impacting *A. d.* var. *traskiae.* However, ongoing threats from military training activities, erosion, nonnatives, and fire remain throughout its range. After review of the information pertaining to the five threat factors, we find that the ongoing threats are not of sufficient imminence, intensity, or magnitude to indicate that *A. d.* var. *traskiae* is presently in danger of extinction throughout all or a significant portion of its range. Rather, the best available information indicates this species is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range due to the impacts from the ongoing threats throughout the species range. Thus, *A. d.* var. *traskiae* meets the definition of a threatened species.

Castilleja grisea

The known distribution of *Castilleja grisea* has expanded from 19 to 28 documented occurrences since listing, likely due to the removal of feral goats and pigs from the island in 1992. These significant gains demonstrate some alleviation of threats from feral ungulates and that the species is persisting despite existing and remaining threats across the landscape.

Castilleja grisea faces impacts to its habitat or range from military training activities and land use, erosion, nonnative plants, fire, and fire management (see *Castilleja grisea—Factor A*). The movement of vehicles and troops over the landscape, as well as use of live fire, demolitions, and bombardments, results in destruction and degradation of habitat occupied by *C. grisea.* Much of this activity is concentrated in SHOBA within training areas and Impact Areas. Four occurrences are within the Impact Areas, where frequent fire, habitat disturbance (bombardment), and troop and vehicle movement take place in the heavily used ranges. Access to parts of SHOBA, including the eastern escarpment and east of Ridge Road, were recently closed for safety concerns, so the status of the four occurrences may be difficult to assess in the future. However, these areas may be more protected from fire and military activity and are likely less impacted by habitat threats. In addition, a large proportion of *C. grisea* occurrences fall outside Impact Areas, TAR, and fuelbreaks, where the most intensive habitat disturbances are likely to take place. Although threats are being reduced due to the expanded range of *C. grisea* and conservation measures implemented by the Navy, we expect military training activities and land use, erosion, nonnative plants, fire, and fire management will continue to impact *C. grisea* habitat. As a result, the best available information indicates that the taxon is no longer in danger of becoming extinct. However, ongoing habitat disturbances are likely, such that the taxon is still likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

Threats impacting individual plants of *Castilleja grisea* on the island include: Movement of vehicles and troops, fire, and potentially climate change (see *Castilleja grisea—Factor E*). The Navy has ameliorated the threats to individual plants by taking steps to minimize training impacts and measures to avoid endangered species to the extent practicable. The threats described under Factor E are either of limited extent or adequately managed and are not likely to seriously impact most *C. grisea* occurrences.

Under the Sikes Act, the Navy has implemented an INRMP to organize the management of natural resources on the island. Under the INRMP, occurrences of *C. grisea* will continue to be impacted by military activities necessary for military readiness and training.

As discussed in our analysis of Factor D, above, there are existing regulatory mechanisms that provide some level of protection to *C. grisea.* However, existing regulatory mechanisms, absent the protections of the Act, provide insufficient certainty that efforts needed to address long-term conservation of the species will be implemented, or that they will be effective in reducing the level of threats to *Castilleja grisea* throughout its range.

As discussed above in the Factor Analysis, a species may be affected by more than one threat in combination. For example, fires (Factors A and E) may be more intense or frequent in the habitat if there are greater amounts of nonnative grasses (Factor A) present in the vegetative community. Thus, the species' viability may be reduced because of threats in combination. Therefore, the combination of factors is a threat to the existence of *Castilleja grisea,* but we are unable to determine the magnitude or extent of any synergistic effects of the various factors and their impact at this time.

In conclusion, we have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by *Castilleja grisea.* Though threats still exist (military training activities and land use, erosion, nonnative plants, fire, and fire management) and will continue into the foreseeable future, the range of this taxon has substantially increased since

listing. In addition, the Navy continues to implement conservation actions through their INRMP to manage and reduce threats impacting *C. grisea.* The expanded number of occurrences reduces the severity and magnitude of threats and we do not expect that impacts to the species brought on by any of the threats discussed or a combination thereof would destroy enough plants or occurrences to bring about extinction. However, ongoing threats from military training activities, erosion, nonnatives, and fire remain throughout its range. After review of the information pertaining to the five threat factors, we find that the ongoing threats are not of sufficient imminence, intensity, or magnitude to indicate that *C. grisea* is presently in danger of extinction throughout all or a significant portion of its range. Rather, the best available information indicates this species is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range due to the impacts from ongoing threats throughout the species range. Thus, *C. grisea* meets the definition of a threatened species.

Significant Portion of the Range Analysis

Having determined that *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* do not meet the definition of endangered throughout their ranges, we must next consider whether there are any significant portions of their ranges that are in danger of extinction. The Act defines ''endangered species'' as any species which is ''in danger of extinction throughout all or a significant portion of its range,'' and ''threatened species'' as any species which is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The definition of ''species'' is also relevant to this discussion. The Act defines the term ''species'' as follows: ''The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature.'' The phrase ''significant portion of its range'' (SPR) is not defined by the statute, and we have never addressed in our regulations: (1) The consequences of a determination that a species is either endangered or likely to become so throughout a significant portion of its range, but not throughout all of its range; or (2) what qualifies a portion of a range as ''significant.''

Two recent district court decisions have addressed whether the SPR language allows the Service to list or protect less than all members of a defined ''species'': *Defenders of Wildlife* v. *Salazar,* 729 F. Supp. 2d 1207 (D. Mont. 2010), concerning the Service's delisting of the Northern Rocky Mountain gray wolf (74 FR 15123, Apr. 12, 2009); and *WildEarth Guardians* v. *Salazar,* 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010), concerning the Service's 2008 finding on a petition to list the Gunnison's prairie dog (73 FR 6660, Feb. 5, 2008). The Service had asserted in both of these determinations that it had authority, in effect, to protect only some members of a ''species,'' as defined by the Act (i.e., species, subspecies, or DPS), under the Act. Both courts ruled that the determinations were arbitrary and capricious on the grounds that this approach violated the plain and unambiguous language of the Act. The courts concluded that reading the SPR language to allow protecting only a portion of a species' range is inconsistent with the Act's definition of ''species.'' The courts concluded that once a determination is made that a species (i.e., species, subspecies, or DPS) meets the definition of ''endangered species'' or ''threatened species,'' it must be placed on the list in its entirety and the Act's protections applied consistently to all members of that species (subject to modification of protections through special rules under sections 4(d) and 10(j) of the Act).

Consistent with that interpretation, and for the purposes of this finding, we interpret the phrase ''significant portion of its range'' in the Act's definitions of ''endangered species'' and ''threatened species'' to provide an independent basis for listing; thus there are two situations (or factual bases) under which a species would qualify for listing: A species may be endangered or threatened throughout all of its range; or a species may be endangered or threatened in only a significant portion of its range. If a species is in danger of extinction throughout an SPR, it, the species, is an ''endangered species.'' The same analysis applies to ''threatened species.'' Therefore, the consequence of finding that a species is endangered or threatened in only a significant portion of its range is that the entire species shall be listed as endangered or threatened, respectively, and the Act's protections shall be applied across the species' entire range.

We conclude, for the purposes of this finding, that interpreting the SPR phrase as providing an independent basis for listing is the best interpretation of the Act because it is consistent with the purposes and the plain meaning of the key definitions of the Act; it does not conflict with established past agency practice (i.e., prior to the 2007 Solicitor's Opinion), as no consistent, long-term agency practice has been established; and it is consistent with the judicial opinions that have most closely examined this issue. Having concluded that the phrase ''significant portion of its range'' provides an independent basis for listing and protecting the entire species, we next turn to the meaning of ''significant'' to determine the threshold for when such an independent basis for listing exists.

Although there are potentially many ways to determine whether a portion of a species' range is ''significant,'' we conclude, for the purposes of this finding, that the significance of the portion of the range should be determined based on its biological contribution to the conservation of the species. For this reason, we describe the threshold for ''significant'' in terms of an increase in the risk of extinction for the species. We conclude that a biologically based definition of ''significant'' best conforms to the purposes of the Act, is consistent with judicial interpretations, and best ensures species' conservation. Thus, for the purposes of this finding, a portion of the range of a species is ''significant'' if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction.

We evaluate biological significance based on the principles of conservation biology using the concepts of redundancy, resiliency, and representation. *Resiliency* describes the characteristics of a species that allow it to recover from periodic disturbance. *Redundancy* (having multiple populations distributed across the landscape) may be needed to provide a margin of safety for the species to withstand catastrophic events. *Representation* (the range of variation found in a species) ensures that the species' adaptive capabilities are conserved. Redundancy, resiliency, and representation are not independent of each other, and some characteristic of a species or area may contribute to all three. For example, distribution across a wide variety of habitats is an indicator of representation, but it may also indicate a broad geographic distribution contributing to redundancy (decreasing the chance that any one event affects the entire species), and the likelihood that some habitat types are less susceptible to certain threats, contributing to resiliency (the ability of the species to recover from disturbance). None of these concepts is intended to be mutually exclusive, and a portion of a species'

range may be determined to be ''significant'' due to its contributions under any one of these concepts.

For the purposes of this finding, we determine if a portion's biological contribution is so important that the portion qualifies as ''significant'' by asking whether, *without that portion,* the representation, redundancy, or resiliency of the species would be so impaired that the species would have an increased vulnerability to threats to the point that the overall species would be in danger of extinction (i.e., would be ''endangered''). Conversely, we would not consider the portion of the range at issue to be ''significant'' if there is sufficient resiliency, redundancy, and representation elsewhere in the species' range that the species would not be in danger of extinction throughout its range if the population in that portion of the range in question became extirpated (extinct locally).

We recognize that this definition of ''significant'' establishes a threshold that is relatively high. On the one hand, given that the consequences of finding a species to be endangered or threatened in an SPR would be listing the species throughout its entire range, it is important to use a threshold for ''significant'' that is robust. It would not be meaningful or appropriate to establish a very low threshold whereby a portion of the range can be considered ''significant'' even if only a negligible increase in extinction risk would result from its loss. Because nearly any portion of a species' range can be said to contribute some increment to a species' viability, use of such a low threshold would require us to impose restrictions and expend conservation resources disproportionately to conservation benefit: listing would be rangewide, even if only a portion of the range of minor conservation importance to the species is imperiled. On the other hand, it would be inappropriate to establish a threshold for ''significant'' that is too high. This would be the case if the standard were, for example, that a portion of the range can be considered ''significant'' only if threats in that portion result in the entire species' being currently endangered or threatened. Such a high bar would not give the SPR phrase independent meaning, as the Ninth Circuit held in *Defenders of Wildlife* v. *Norton,* 258 F.3d 1136 (9th Cir. 2001).

The definition of ''significant'' used in this finding carefully balances these concerns. By setting a relatively high threshold, we minimize the degree to which restrictions will be imposed or resources expended that do not contribute substantially to species conservation. But we have not set the threshold so high that the phrase ''in a significant portion of its range'' loses independent meaning. Specifically, we have not set the threshold as high as it was under the interpretation presented by the Service in the *Defenders* litigation. Under that interpretation, the portion of the range would have to be so important that current imperilment there would mean that the species would be *currently* imperiled everywhere. Under the definition of ''significant'' used in this finding, the portion of the range need not rise to such an exceptionally high level of biological significance. (We recognize that if the species is imperiled in a portion that rises to that level of biological significance, then we should conclude that the species is in fact imperiled throughout all of its range, and that we would not need to rely on the SPR language for such a listing.) Rather, under this interpretation we ask whether the species would be endangered everywhere without that portion, *i.e.,* if that portion were completely extirpated. In other words, the portion of the range need not be so important that even being in danger of extinction in that portion would be sufficient to cause the remainder of the range to be endangered; rather, the *complete extirpation* (in a hypothetical future) of the species in that portion would be required to cause the remainder of the range to be endangered.

The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that have no reasonable potential to be significant *and* threatened or endangered. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be ''significant,'' and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future. Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the significance question first or the status question first. Thus, if we determine that a portion of the range is not ''significant,'' we do not need to determine whether the species is endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is ''significant.'' In practice, a key part of the portion status analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the species' range that clearly would not meet the biologically based definition of ''significant,'' such portions will not warrant further consideration.

Having determined that *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* are no longer endangered throughout their ranges as a consequence of the threats evaluated under the five factors in the Act, we must next consider whether there are any significant portions of these two species' ranges where they are currently endangered. A portion of a species' range is significant if it is part of the current range of the species and is important to the conservation of the species as evaluated based upon its representation, resiliency, or redundancy.

Acmispon dendroideus var. *traskiae*

Applying the process described above, we evaluated the range of *Acmispon dendroideus* var. *traskiae* to determine if any units could be considered a significant portion of its range. This taxon is an island endemic restricted to a single, small island, with no natural division in its range. Because of its limited range and number of occurrences in close proximity to one another, no portion is likely to have a greater contribution to representation, resiliency, or redundancy than other portions. Furthermore, the existing and potential primary direct and indirect threats from military training activities, nonnative plant species, fire, and erosion are relatively uniform across San Clemente Island, indicating that no portions of its range are experiencing a greater severity or magnitude of threats. We conclude that there are no portions that warrant further consideration under this analysis.

In summary, the primary threats to *Acmispon dendroideus* var. *traskiae* are relatively uniform throughout its range. We determined that none of the existing or potential threats, either alone or in combination with others, currently place *A. d.* var. *traskiae* in danger of extinction throughout all or a significant portion of its range. However, without the continued protections of the Act, this taxon is likely to become endangered throughout its range in the foreseeable future. There is no available information indicating that there has been a range contraction to *A. d.* var. *traskiae* and therefore, we find that lost

historical range does not constitute a significant portion of the range for this species. Threatened status is, therefore, appropriate for *A. d.* var. *traskiae* throughout its entire range.

Castilleja grisea

Applying the process described above, we evaluated the range of *Castilleja grisea* to determine if any units could be considered a significant portion of its range (also see the Significant Portion of the Range Analysis section above for *Acmispon dendroideus* var. *traskiae*). This island endemic is restricted to a single, small island with no natural division in its range. Because of its limited range and number of occurrences in close proximity to one another, no portion is likely to have a greater contribution to its representation, resiliency, or redundancy than other portions. The primary threats to *C. grisea,* military training activities, nonnative plant species, fire, and erosion, are relatively uniform throughout its range (San Clemente Island), indicating that no portion is experiencing a greater severity or magnitude of threats. We conclude that there are no portions that warrant further consideration under this analysis. We determined that none of the existing or potential threats, either alone or in combination with others, currently place *C. grisea* in danger of extinction throughout all of its range. However, without the continued protections of the Act, this taxon is likely to become endangered throughout its range in the foreseeable future. There is no available information indicating that there has been a range contraction to *C. grisea* and therefore, we find that lost historical range does not constitute a significant portion of the range for this species. Threatened status is, therefore, appropriate for *C. grisea* throughout its entire range.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed and preparation of a draft and final recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan identifies site-specific management actions that set a trigger for review of the five factors that control whether a species remains endangered or may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. The final recovery plan for endangered and threatened species of the California Channel Islands, including *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea,* is available on our Web site (*http://www.fws.gov/endangered*), or from our Carlsbad Fish and Wildlife Office (see **ADDRESSES**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribal, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Funding for recovery actions is available from a variety of sources including Federal budgets, State programs, the academic community, and nongovernmental organizations. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Federal agency actions within the taxon's habitat that may require consultation as described in the preceding paragraph include management and other landscape-altering activities on Federal lands administered by the Department of Defense.

Under section 9(a)(2) of the Act, with respect to endangered plant taxa, it is unlawful to remove and reduce to possession (i.e., collect) any such taxon from areas under Federal jurisdiction. Regulations adopted for threatened plants (50 CFR 17.71) refer to the regulations adopted for endangered plant species (50 CFR 17.61) and prohibit any act to remove and reduce to possession any threatened plant from an area under Federal jurisdiction; one exception to the prohibitions for endangered plants that applies to threatened plants is that seeds of cultivated specimens of species treated as threatened are exempt from all the provisions of 50 CFR 17.61.

Effects of This Rule

This final rule revises 50 CFR 17.12(h) to reclassify *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea* from endangered to threatened on the List of Endangered and Threatened Plants and to correct the scientific and common names for *Acmispon dendroideus* var. *traskiae.* This rule formally recognizes that these taxa are no longer presently

in danger of extinction throughout all or a significant portion of their ranges. However, this reclassification does not significantly change the protections afforded these species under the Act. The regulatory protections of section 9 and section 7 of the Act (see *Factor D,* above) would remain in place. Pursuant to section 7 of the Act, all Federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of *A. d.* var. *traskiae* or *C. grisea.* Whenever a species is listed as threatened, the Act allows promulgation of special rules under section 4(d) that modify the standard protections for threatened species found under section 9 of the Act and Service regulations at 50 CFR 17.31 and 17.71, when it is deemed necessary and advisable to provide for the conservation of the species. There are no section 4(d) rules in place or proposed for *A. d.* var. *traskiae* and *C. grisea,* because there is currently no conservation need to do so for these species.

The Recovery Plan for the Endangered and Threatened Species of the California Channel Islands addresses 10 plants (including *Acmispon dendroideus* var. *traskiae* and *Castilleja grisea*) and animals distributed among three of the Channel Islands (USFWS 1984). Recovery actions directed at plant taxa include:

(1) Removing feral animals;

(2) Removing or controlling selected nonnative plants;

(3) Controlling erosion;

(4) Revegetating eroded and disturbed areas;

(5) Reintroducing and reestablishing listed plant species populations;

(6) Modifying existing management plans to minimize habitat disturbance and incorporate recovery actions into natural resource management plans;

(7) Protecting habitat by minimizing habitat loss and disturbance and by preventing the introduction of additional nonnative organisms;

(8) Determining the habitat and other ecological requirements of the listed plant taxa (such as reproductive biology and fire tolerance);

(9) Evaluating the success of management actions;

(10) Increasing public support for recovery efforts; and

(11) Using existing laws and regulations to protect each taxon.

The removal of feral animals has been completed. Reintroduction and reestablishment of listed plant populations are not part of the Navy's conservation strategy for listed plants at this time. However, the Navy will coordinate with us to continue implementing the remainder of the recovery actions as outlined in the Recovery Plan to the extent each action does not interfere with military operations.

Required Determinations

Executive Order 13211

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Paperwork Reduction Act of 1995

Office of Management and Budget (OMB) regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We determined we do not need to prepare an Environmental Assessment or an Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), in connection with regulations adopted pursuant to section 4(a) of the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Author(s)

The primary authors of this package are the staff members of the Carlsbad Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we hereby amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245; unless otherwise noted.

■ 2. Amend § 17.12(h) under ''Flowering Plants'' by:

■ a. Adding an entry for *''Acmispon dendroideus* var. *traskiae''* in alphabetic order to read as follows;

■ b. Revising the entry for ''*Castilleja grisea''* to read as follows; and

■ c. Removing the entry for *''Lotus dendroideus* ssp. *Traskiae''.*

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*		*
Acmispon dendroideus var. traskiae.	San Clemente Island lotus.	U.S.A. (CA)	Fabaceae	T	26	NA	NA

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
*	*	*	*	*	*		*
Castilleja grisea	San Clemente Island Paintbrush.	U.S.A. (CA)	Orobanchaceae	T	26	NA	NA
*	*	*	*	*	*		*

Dated: July 2, 2013.

Rowan W. Gould,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2013–17089 Filed 7–25–13; 8:45 am]

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