AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

FEDERAL REGISTER

Vol. 79 Wednesday,
No. 180 September 17, 2014

Pages 55603–55962

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.ofr.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.fdsys.gov*, a service of the U.S. Government Printing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 59, 1 (January 2, 1994) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Printing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $749 plus postage, or $808, plus postage, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $165, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Printing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 77 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Printing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**

General online information **202–512–1530; 1–888–293–6498**

Single copies/back copies:

Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

Printed on recycled paper.

Contents

Federal Register

Vol. 79, No. 180

Wednesday, September 17, 2014

Agricultural Marketing Service
RULES
National Sheep Industry Improvement Center, 55603

Agriculture Department
See Agricultural Marketing Service
See Food and Nutrition Service
See Food Safety and Inspection Service
See Foreign Agricultural Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 55744

Air Force Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 55761–55762

Antitrust Division
NOTICES
Changes under National Cooperative Research and Production Act:
National Armaments Consortium, 55830

Antitrust
See Antitrust Division

Army Department
NOTICES
Privacy Act; Systems of Records, 55762–55764

Broadcasting Board of Governors
NOTICES
Privacy Act; Systems of Records, 55747–55749

Coast Guard
RULES
International Convention on Standards of Training, Certification and Watchkeeping for Seafarers:
Amendments and Changes to National Endorsements; Corrections, 55657–55658

Commerce Department
See Industry and Security Bureau
See National Oceanic and Atmospheric Administration

Commodity Futures Trading Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Large Trader Reporting for Physical Commodity Swaps, 55759–55760

Community Living Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Evidence-Based Falls Prevention Program Standardized Data Collection, 55799–55800
Single-Source Cooperative Agreements:
Gerontology Institute, University of Massachusetts Boston, 55800

Copyright Office, Library of Congress
RULES
Changes to Recordation Practices, 55633–55636
PROPOSED RULES
Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 55687–55694
Fees for Submitting Corrected Electronic Title Appendices, 55694–55695
Verification of Statements of Account Submitted by Cable Operators and Satellite Carriers, 55696–55712

Corporation for National and Community Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 55760–55761

Defense Department
See Air Force Department
See Army Department
See Navy Department
RULES
Investigative and Adjudicative Guidance for Issuing the Common Access Card, 55622–55633
PROPOSED RULES
Assistance to Non-Government, Entertainment-Oriented Media Productions, 55679–55687

Energy Department
See Energy Efficiency and Renewable Energy Office
See Federal Energy Regulatory Commission
NOTICES
Applications to Import and Export Gas:
Alaska LNG Project LLC, 55764–55768
Meetings:
Commission to Review the Effectiveness of the National Energy Laboratories, 55768–55769
Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation, 55768

Energy Efficiency and Renewable Energy Office
NOTICES
Residential Refrigerator and Refrigerator-Freezer Test Procedures; Waivers:
GE Appliances, 55775–55781
Panasonic Appliances Refrigeration Systems Corporation of America Corp., 55769–55772
Sub-Zero, 55772–55775

Environmental Protection Agency
RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
Arizona; Redesignation of Phoenix-Mesa Area to Attainment for the 1997 8-Hour Ozone Standard, 55645–55653
California, San Joaquin Valley Unified Air Pollution Control District, New Source Review, 55637–55641
Indiana; Open Burning Rule, 55641–55645
National Oil and Hazardous Substances Pollution Contingency Plan:
Partial Deletion of the California Gulch Superfund Site National Priorities List; Withdrawal, 55657

Pesticide Tolerances; Exemptions from Requirements:
Butanedioic acid, 2-methylene-, polymer with 2,5-fuandione, sodium and ammonium salts, hydrogen peroxide-initiated, 55653–55656
PROPOSED RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
Indiana; Open Burning Rule, 55712
Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction, etc., 55920–55956
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 55791–55792
Cross-Media Electronic Reporting:
Oklahoma; Authorized Program Revision Approval, 55792–55793
Meetings:
Information Session; Stakeholder Input on Implementation of the Water Infrastructure Finance and Innovation Act of 2014, 55794
Office of Pesticide Programs, 55793–55794
Privacy Act; Systems of Records, 55794–55796

Executive Office for Immigration Review
PROPOSED RULES
List of Pro Bono Legal Service Providers for Aliens in Immigration Proceedings, 55662–55673
Separate Representation for Custody and Bond Proceedings, 55659–55662

Executive Office of the President
See Presidential Documents

Federal Aviation Administration
RULES
Airworthiness Directives:
Embraer S.A. Airplanes, 55604–55606
Restricted Areas:
R–2901A, B, G, H, J, K, L and N; Avon Park, FL; Amendments, 55606–55608
PROPOSED RULES
Airworthiness Directives:
Bombardier, Inc. Airplanes, 55673–55675
Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Airplanes, 55675–55679
NOTICES
Meetings:
Mini Global II Project, 55868
Petitions for Exemption; Summaries, 55868–55869

Federal Communications Commission
PROPOSED RULES
Petitions for Reconsideration of Action in Rulemaking Proceeding, 55742–55743
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 55796–55798

Federal Contract Compliance Programs Office
PROPOSED RULES
Government Contractors:
Prohibitions Against Pay Secrecy Policies and Actions, 55712–55742

Federal Energy Regulatory Commission
NOTICES
Applications:
Natural Gas Pipeline Co. of America, LLC, 55781–55782
Authorizations for Continued Project Operation:
Exelon Generation Co., LLC; Conowingo Hydroelectric Project, 55782
Exelon Generation Co., LLC; Muddy Run Pumped Storage Project, 55782
York Haven Power Co., LLC; York Haven Hydroelectric Project, 55783
Combined Filings, 55783–55786
License Amendment Applications:
Duke Energy Carolinas, LLC; Keowee–Toxaway Hydroelectric Project, 55787–55788
Mr. Ray F. Ward; Ward Mill Hydroelectric Project, 55786–55787
Meetings, 55788
Meetings; Sunshine Act, 55788–55790
Preliminary Determinations of Qualifying Conduit Hydropower Facilities:
Berlin, NH; Ammonoosuc Water Treatment Plant Hydroelectric Project, 55790–55791

Federal Highway Administration
NOTICES
Final Federal Agency Actions on Proposed Highway in California, 55869

Federal Maritime Commission
NOTICES
Agreements Filed, 55799

Federal Reserve System
NOTICES
Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 55799

Federal Trade Commission
RULES
Mail or Telephone Order Merchandise Rule, 55615–55622

Fish and Wildlife Service
PROPOSED RULES
Endangered and Threatened Wildlife and Plants:
Removal of the Valley Elderberry Longhorn Beetle from the Federal List; Withdrawal, 55874–55917

Food and Drug Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Food and Drug Administration Approval to Market a New Drug, 55801–55804
Medical Devices; Exception from General Requirements for Informed Consent, 55800–55801
Threshold of Regulation for Substances Used in Food-Contact Articles, 55800
Emergency Use Authorizations:
In Vitro Diagnostic Device for Detection of Ebola Zaire Virus, 55804–55812
Guidance:
Abbreviated New Drug Application Submissions—Refuse to Receive for Lack of Proper Justification of Impurity Limits, 55813–55814
Abbreviated New Drug Application Submissions—Refuse-to-Receive Standards, 55813

Meetings:
Cardiovascular and Renal Drugs Advisory Committee, 55814–55815
Electronic Cigarettes and the Public Health; Workshop, 55815–55816

Food and Nutrition Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Special Supplemental Nutrition Program for Women, Infants and Children Forms; The Integrity Profile, 55744–55745

Food Safety and Inspection Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Qualitative Feedback on Agency Service Delivery, 55745–55746

Foreign Agricultural Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 55747

Foreign Assets Control Office
NOTICES
Blocking or Unblocking of Persons and Properties, 55869–55870
Foreign Narcotics Kingpin Designation Act; Additional Designations, 55870–55871

Health and Human Services Department
See Community Living Administration
See Food and Drug Administration
See National Institutes of Health

Homeland Security Department
See Coast Guard
See U.S. Customs and Border Protection

Housing and Urban Development Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
HOPE VI Public Housing Programs, 55822–55823
Office of Economic Resilience Progress Report Template, 55821–55822
Performance Review Board Appointments, 55823–55824
Privacy Act; Systems of Records, 55824–55826

Industry and Security Bureau
RULES
Russian Sanctions:
Addition of Persons to the Entity List and Restrictions on Certain Military End Uses and Military End Users, 55608–55615

Interior Department
See Fish and Wildlife Service

International Trade Commission
NOTICES
Investigations; Determinations, Modifications, and Rulings, etc.:
Certain Digital Media Devices, Including Televisions, Blu-Ray Disc Players, Home Theater Systems, Tablets and Mobile Phones, etc., 55827–55828
Certain Sulfentrazone, Sulfentrazone Compositions, and Processes for Making Sulfentrazone, 55826–55827

Justice Department
See Antitrust Division
See Executive Office for Immigration Review
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for an Amended Federal Firearms License, 55829–55830
Notification of Change of Mailing or Premise Address, 55828–55829

Labor Department
See Federal Contract Compliance Programs Office

Library of Congress
See Copyright Office, Library of Congress

National Archives and Records Administration
NOTICES
Records Schedules, 55830–55831

National Institutes of Health
NOTICES
Meetings:
Center for Scientific Review, 55818–55819
National Cancer Institute, 55817–55819
National Institute on Aging, 55816–55817
National Institute on Deafness and Other Communication Disorders, 55818
Office of the Director, National Institutes of Health, 55820

National Oceanic and Atmospheric Administration
RULES
Snapper–Grouper Fishery of the South Atlantic:
2014 Recreational Accountability Measure and Closure for the South Atlantic Porgy Complex, 55658
NOTICES
Meetings:
Mid-Atlantic Fishery Management Council; Correction, 55749
Takes of Marine Mammals Incidental to Specified Activities:
San Francisco Bay Area Water Emergency Transportation Authority Central Bay Operations and Maintenance Facility Project, Alameda, CA, 55749–55759

National Science Foundation
NOTICES
Meetings:
Advisory Committee for Cyberinfrastructure, 55831–55832
Proposal Review Panel for Polar Programs, 55832

Navy Department
NOTICES
Intents to Grant Exclusive Patent Licenses:
Grey Matter, LLC, 55764

Nuclear Regulatory Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 55832–55833
Fiscal Years 2014–2018 Strategic Plan, 55833
Guidance:
Acute Uranium Standards for Integrated Safety Analyses, 55834–55835

Proposed Revisions to Radioactive Waste Management, 55835–55836

Personnel Management Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Evidence to Prove Dependency of a Child, 55837–55838
Financial Resources Questionnaire/Notice of Amount Due Because of Annuity Overpayment, 55837
Verification of Full-Time School Attendance, 55836–55837
Excepted Service:
July 2014, 55838–55842

Presidential Documents
PROCLAMATIONS
Special Observances:
National Hispanic Heritage Month (Proc. 9166), 55957–55960
National Hispanic-Serving Institutions Week (Proc. 9167), 55961–55962

Securities and Exchange Commission
NOTICES
Applications:
SSgA MasterTrust and SSgA Funds Management, Inc., 55842–55843
Self-Regulatory Organizations; Proposed Rule Changes:
BATS Exchange, Inc., 55864–55867
BATS Y-Exchange, Inc., 55843–55845
EDGX Exchange, Inc., 55850
ICE Clear Europe Ltd., 55848–55850
NASDAQ Stock Market LLC, 55851–55859
NYSE Arca, Inc., 55845–55848, 55859–55864
Trading Suspension Orders:
Adarna Energy Corp., et al., 55867
Asian Dragon Group, Inc., et al., 55867

Transportation Department
See Federal Aviation Administration
See Federal Highway Administration
NOTICES
Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits, 55867–55868

Treasury Department
See Foreign Assets Control Office

U.S. Customs and Border Protection
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Qualitative Feedback on Agency Service Delivery, 55820–55821

Veterans Affairs Department
NOTICES
Meetings:
Voluntary Service National Advisory Committee, 55871

Separate Parts In This Issue

Part II
Interior Department, Fish and Wildlife Service, 55874–55917

Part III
Environmental Protection Agency, 55920–55956

Part IV
Presidential Documents, 55957–55962

Reader Aids

Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

3 CFR

Proclamations:

9166 55959
9167 55961

7 CFR

63 55603

8 CFR

Proposed Rules:

1003 (2 documents) 55959, 55662
1240 55662
1241 55662

14 CFR

39 55604
73 55606

Proposed Rules:

39 (2 documents) 55673, 55675

15 CFR

744 55608
746 55608

16 CFR

435 55615

32 CFR

157 55622

Proposed Rules:

238 55679

37 CFR

201 55633

Proposed Rules:

201 (3 documents) 55687, 55694, 55696

40 CFR

52 (3 documents) 55637, 55641, 55645
81 55645
180 55653
300 55657

Proposed Rules:

52 (2 documents) 55712, 55920

41 CFR

Proposed Rules:

60–1 55712

46 CFR

11 55657

47 CFR

Proposed Rules:

73 55742

50 CFR

622 55658

Proposed Rules:

17 55874

Rules and Regulations

Federal Register

Vol. 79, No. 180

Wednesday, September 17, 2014

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

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 63

[Doc. No. AMS–LPS–14–0028]

National Sheep Industry Improvement Center

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Affirmation of interim rule as a final rule.

SUMMARY: The Agricultural Marketing Service (AMS) is affirming without changes, its interim rule to promulgate rules and regulations as provided under the Agriculture Act of 2014 (2014 Farm Bill). The Agricultural Marketing Service (AMS) amends the National Sheep Industry Improvement Center (NSIIC) regulations to redesignate the statutory authority from the Consolidated Farm and Rural Development Act to the Agricultural Marketing Act of 1946, amends the definition of Act consistent with the redesignated statutory authority, and amends the regulations by increasing the administrative cap for the use of the fund from 3 percent to 10 percent.

DATES: *Effective Date:* September 18, 2014.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Payne, Director, Research and Promotion Division, Livestock, Poultry, and Seed Program; Telephone 202/720–5705; Fax: 202/720–1125; or email *Kenneth.Payne@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This action affirms the interim rule (79 FR 31843) published in the **Federal Register** on June 3, 2014, which redesignates the statutory authority for the program from section 375 (7 U.S.C. 2008j) of the Consolidated Farm and Rural Development Act to section 210 of the Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627). In addition, the definition of ''Act'' is amended under section 63.1 to be consistent with the redesignated statutory authority, and amends the regulations by increasing the administrative cap for the use of the fund from 3 percent to 10 percent. This section also affirms information contained in the interim rule concerning Executive Orders 12866, 13563, 12988, 13175, 13132, and the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. Chapter 35). Further for this action, the Office of Management and Budget has determined that this action is not significant under Executive Order 12866 and therefore has not been reviewed by OMB.

Background Information

The NSIIC was initially authorized under the Consolidated Farm and Rural Development Act (Act). The Act, as amended, was passed as part of the 1996 Farm Bill (Pub. L. 104–127). The initial legislation included a provision that privatized the NSIIC 10 years after its ratification or once the full appropriation of $50 million was disbursed. Subsequently, the NSIIC was privatized on September 30, 2006 (72 FR 28945).

In 2008, the NSIIC was re-established under Title XI of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246), also known as the 2008 Farm Bill. Section 11009 of the 2008 Farm Bill repealed the requirement in section 375(e)(6) of the Act to privatize the NSIIC. Additionally, the 2008 Farm Bill provided for $1,000,000 in mandatory funding for fiscal year 2008 from the Commodity Credit Corporation for the NSIIC to remain available until expended, as well as authorization for appropriations in the amount of $10 million for each of fiscal years 2008 through 2012. In July 2010, the U.S. Department of Agriculture (USDA) promulgated rules and regulations establishing the NSIIC, consistent with the Food, Conservation, and Energy Act of 2008 (75 FR 43031). The rule established the NSIIC and a Board that will manage and be responsible for the general supervision of the activities of the NSIIC, with oversight from the USDA. The NSIIC is authorized to use funds to make grants to eligible entities in accordance with a strategic plan.

The authorizing legislation established in the United States Department of the Treasury the NSIIC Revolving Fund (Fund). The Fund was available to the NSIIC, without fiscal year limitation, to carry out the authorized programs and activities of the NSIIC. The law provides authority for amounts in the Fund to be used for direct loans, loan guarantees, cooperative agreements, equity interests, investments, repayable grants, and grants to eligible entities, either directly or through an intermediary, in accordance with a strategic plan submitted by the NSIIC to the Secretary. In accordance with the 2014 Farm Bill, AMS amends the NSIIC regulations at 7 CFR part 63 as provided for herein.

The current program authorizes a grant-only program administered by the NSIIC Board. Based on funding, the Board announces that proposals may be submitted to the Board for consideration from eligible entities. The Board determines how funds are allocated. Proposals submitted to the Board must be consistent with the purpose of the NSIIC.

Comments

On June 3, 2014, USDA published in the **Federal Register** (79 FR 31843) an interim rule with a request for comments to be received by July 3, 2014. USDA received no comments.

List of Subjects in 7 CFR Part 63

Administrative practice and procedure, Advertising, Lamb and Lamb products, Goat and Goat products, Consumer Information, Marketing agreements, Reporting and recordkeeping requirements.

PART 63—NATIONAL SHEEP INDUSTRY IMPROVEMENT CENTER

■ Accordingly, the interim rule that amended 7 CFR part 63, which was published on June 3, 2014, (79 FR 31843), is adopted as a final rule without change.

Dated: September 11, 2014.

Rex A. Barnes,

Associate Administrator.

[FR Doc. 2014–22125 Filed 9–16–14; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–0390; Directorate Identifier 2014–CE–013–AD; Amendment 39–17969; AD 2014–19–01]

RIN 2120–AA64

Airworthiness Directives; Embraer S.A. Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are superseding an airworthiness directive (AD) 2013–22–20 for Embraer S.A. Model EMB–505 airplanes. This AD results from mandatory continuing airworthiness information (MCAI) issued by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as cracks beyond acceptable limits in the carbon discs of the left hand (LH) and right hand (RH) brake assemblies. We are issuing this AD to require actions to address the unsafe condition on these products.

DATES: This AD is effective October 22, 2014.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of October 22, 2014.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0390; or in person at the 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.

For service information identified in this AD, contact EMBRAER S.A., Phenom Maintenance Support, Avenida Brigadeiro Faria Lima, 2170, São José dos Campos—SP, CEP: 12227–901—PO Box: 36/2, Brasil; telephone: (+55 12) 3927–1000; fax: (+55 12) 3927–6600, ext. 1448; email: *phenom.reliability@embraer.com.br;* Internet: *http://www.embraerexecutivejets.com/en-US/customer-support/Pages/Service-Center-Network.aspx.* You may view this referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

FOR FURTHER INFORMATION CONTACT: Jim Rutherford, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4165; fax: (816) 329–4090; email: *jim.rutherford@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to add an AD that would apply to Embraer S.A. Model EMB–505 airplanes. The NPRM was published in the **Federal Register** on June 19, 2014 (79 FR 35099), and proposed to supersede AD 2013–22–20, Amendment 39–17652 (78 FR 67018, November 8, 2013).

The NPRM proposed to correct an unsafe condition for the specified products and was based on mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country. The MCAI states that:

> This AD was prompted by reports that identified additional locations where inspections and corrective actions on the Left Hand (LH) and Right Hand (RH) brake assemblies are needed. We are issuing this AD to detect cracks beyond acceptable limit in the carbon discs of the brake assembly, which may result in reduced brake capability and loss of brake parts in the runway.
>
> Since this condition may occur in other airplanes of the same type and affects flight safety, a corrective action is required. Thus, sufficient reason exists to request compliance with this AD in the indicated time limit without prior notice.

The MCAI requires an inspection to determine if the airplane has the affected part number brake assembly installed and an inspection for cracks of the affected brake assembly with repair or replacement as necessary. The MCAI can be found in the AD docket on the Internet at: *http://www.regulations.gov/#!documentDetail;D=FAA-0;2014-0390-0001.*

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the relevant data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (79 FR 35099, June 19, 2014) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Costs of Compliance

We estimate that this AD will affect 117 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with Part 1 of the inspection and 3 work-hours per product to comply with Part 2 of the inspection requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD on U.S. operators to be $19,890, or $170 per product for Part 1 of the inspection, and $29,835, or $255 per product for Part 2 of the inspection.

In addition, we estimate that any necessary follow-on actions would take 1.5 work-hours and require parts costing $2,405, for a cost of $2,532.50 per product per side for repair or 3 work-hours and require parts costing $26,177, for a cost of $26,432 per product per side for replacement.

We have no way of determining the number of products that may need these actions.

According to the manufacturer, all of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage for affected individuals. As a result, we have included all costs in our cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

We determined that this 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 this AD:

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

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

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

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

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0390; 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 the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

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 removing Amendment 39–17652 (78 FR 67018; November 8, 2013) and adding the following new AD:

2014–19–01 Embraer S.A.: Amendment 39–17969; Docket No. FAA–2014–0390; Directorate Identifier 2014–CE–013–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective October 22, 2014.

(b) Affected ADs

This AD supersedes AD 2013–22–20, Amendment 39–17652 (78 FR 67018, November 8, 2013).

(c) Applicability

This AD applies to Embraer S.A. Models EMB–505 airplanes, all serial numbers, that are:

(1) Equipped with a part number (P/N) DAP00097–01 or P/N DAP00097–02 brake assembly; and

(2) certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 32: Landing Gear.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as cracks beyond acceptable limits in the carbon discs of the left hand (LH) and right hand (RH) brake assemblies. We are issuing this AD to detect and correct cracking of the stator pressure plate and possible loss of brake parts on the runway, which could result in reduced brake capability and a possible runway excursion.

(f) Actions and Compliance

Unless already done, do the following actions in paragraphs (f)(1) through (f)(14) of this AD, including all subparagraphs.

(1) If the number of flight cycles is unknown, calculate the compliance times for flight cycles in this AD by multiplying the number of hours time-in-service (TIS) on the brake assembly by .71 to come up with the number of cycles. For the purposes of this AD, some examples are below:

(i) 500 hours TIS equates to 355 flight cycles; and

(ii) 12 hours equates to 9 flight cycles.

(2) Do a general visual inspection (GVI) for cracks in the stator pressure plate on both the LH and RH brake assemblies following Part 1 of the Accomplishment Instructions in Embraer Phenom Service Bulletin No. 505–32–0011, Revision 01, dated March 31, 2014. Use the compliance times in paragraphs (f)(2)(i) and (f)(2)(ii) of this AD:

(i) For brake assemblies with 300 flight cycles or less since new or since the last overhaul: Before or upon accumulating 150 flight cycles after October 22, 2014 (the effective date of this AD) or within the next 30 flight cycles after October 22, 2014 (the effective date of this AD), whichever occurs later, and repetitively thereafter at intervals not to exceed 60 flight cycles or the next tire change, whichever occurs first.

(ii) For brake assemblies with more than 300 flight cycles since new or since the last overhaul: Within the next 10 flight cycles after October 22, 2014 (the effective date of this AD), and repetitively thereafter at intervals not to exceed 60 flight cycles or the next tire change, whichever occurs first.

(3) If no cracks are found during any of the inspections required in paragraph (f)(2) of this AD, continue the repetitive inspection intervals required in paragraph (f)(2) of this AD, including all subparagraphs.

(4) If any crack is found in the stator pressure plate during any of the inspections required in paragraph (f)(2) of this AD, before further flight, do a detailed inspection (DET) following Part 1 of the Accomplishment Instructions in Embraer Phenom Service Bulletin No. 505–32–0011, Revision 01, dated March 31, 2014.

(5) If no cracks beyond the acceptable limits are found during the DET required in paragraph (f)(4) of this AD, continue the repetitive inspection intervals required in paragraph (f)(2) of this AD, including all subparagraphs.

(6) If cracks that exceed the acceptable limits are found during the DET required in paragraph (f)(4) of this AD, before further flight, repair the brake assembly following Appendix 2 of Embraer Phenom Service Bulletin No. 505–32–0011, Revision 01, dated March 31, 2014; or replace the brake assembly with a brake assembly that has been inspected and found free of cracks that exceed the acceptable limits following the Accomplishment Instructions of Embraer Phenom Service Bulletin No. 505–32–0011, Revision 01, dated March 31, 2014.

Note 1 to paragraph (f)(6) of this AD: Appendix 2 of Embraer Phenom Service Bulletin No. 505–32–0011, Revision 01, dated March 31, 2014, consists of Meggitt Aircraft Braking System Service Bulletin No. SB–32–1625, Revision A, dated October 17, 2013. This service bulletin is incorporated as pages 27 through 40 of Embraer Phenom Service Bulletin No. 505–32–0011, Revision 01, dated March 31, 2014.

(7) At the next tire change or 30 days after October 22, 2014 (the effective date of this AD), whichever occurs later, do a DET for cracks on the external visible surface of the thrust stator, double stator, and rotors following Part 2 of the Accomplishment Instructions in Embraer Phenom Service Bulletin No. 505–32–0011, Revision 01, dated March 31, 2014.

(8) If no crack is detected or if any crack within the acceptable limits shown in Figure 4 Detail G of Embraer Phenom Service Bulletin No. 505–32–0011, Revision 01, dated March 31, 2014, is detected in the inspection required in paragraph (f)(7) of this AD, repeat the inspection required by paragraph (f)(7) of this AD at each tire change or at each maintenance action that requires wheel removal, whichever occurs first.

(9) If any crack within the acceptable limits shown in Figure 4 Detail H of Embraer Phenom Service Bulletin No. 505–32–0011, Revision 01, dated March 31, 2014, is detected in the inspection required in paragraph (f)(7) of this AD, the affected brake assembly must be replaced within 40 flight cycles.

(10) If any crack beyond the acceptable limits shown in Figure 4 Detail H of Embraer Phenom Service Bulletin No. 505–32–0011, Revision 01, dated March 31, 2014, is detected, the affected brake assembly must be replaced before the next flight.

(11) After any repair or replacement of the brake assembly, the brake assembly P/N DAP00097–01 or P/N DAP00097–02 is subject to the inspections required in

paragraphs (f)(2) through (f)(10), including all subparagraphs as applicable, of this AD.

(12) For the purposes of this AD, a GVI is a visual examination of an interior or exterior area, installation or assembly, to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance, unless otherwise specified. A mirror may be necessary to enhance visual access to all exposed surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or drop-light. It may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.

(13) For the purposes of this AD, a DET is an intensive examination of a specific item, installation or assembly, to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirrors, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate access procedures may be required.

(14) As of November 8, 2013 (the effective the date of AD 2013–22–20) and to October 22, 2014 (the effective date of this AD), do not install on any airplane a brake assembly P/N DAP00097–01 or P/N DAP00097–02 unless it is inspected per the requirements of AD 2013–22–20 and continues to be crack free or the cracks do not exceed the allowable limits; and as of October 22, 2014 (the effective date of this AD), do not install on any airplane a brake assembly P/N DAP00097–01 or P/N DAP00097–02 unless it is inspected per the requirements of this AD and continues to be crack free or the cracks do not exceed the allowable limits.

(g) Credit for Actions Done Following Previous Service Information

This AD provides credit for the inspections required in paragraphs (f)(2) and (f)(6) of this AD, if those actions were performed before October 22, 2014 (the effective date of this AD), using Embraer Alert Service Bulletin (ASB) 505–32–A011, original issue, dated September 13, 2013; Embraer Alert Service Bulletin (ASB) 505–32–A011, Revision 01, dated November 01, 2013; Embraer Alert Service Bulletin (ASB) 505–32–A011, Revision 02, dated December 19, 2013; or Embraer Phenom Service Bulletin No. 505–32–0011, original issue, dated February 11, 2014.

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Jim Rutherford, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4165; fax: (816) 329–4090; email: *jim.rutherford@faa.gov.* Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

(3) *Reporting Requirements:* For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(i) Related Information

Refer to MCAI Agência Nacional De Aviação Civil (ANAC) AD No.: 2014–04–01, dated April 16, 2014, for related information. The MCAI can be found in the AD docket on the Internet at: *http://www.regulations.gov/#!documentDetail;D=FAA-2014-0390-0001.*

(j) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless the AD specifies otherwise.

(i) Embraer Phenom Service Bulletin No. 505–32–0011, Revision 01, dated March 31, 2014.

(ii) Reserved.

(3) For Embraer S.A. service information identified in this AD, contact EMBRAER S.A., Phenom Maintenance Support, Avenida Brigadeiro Faria Lima, 2170, São José dos Campos—SP, CEP: 12227–901—PO Box: 36/2, Brasil; telephone: (+55 12) 3927–1000; fax: (+55 12) 3927–6600, ext. 1448; email: *phenom.reliability@embraer.com.br;* Internet: *http://www.embraerexecutivejets.com/en-US/customer-support/Pages/Service-Center-Network.aspx.*

(4) You may view this service information at FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Kansas City, Missouri, on September 8, 2014.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014–21913 Filed 9–16–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2014–0703; Airspace Docket No. 13–ASO–22]

RIN 2120–AA66

Amendment of Restricted Areas R–2901A, B, G, H, J, K, L and N; Avon Park, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action makes minor adjustments to the latitude/longitude positions of two points in the descriptions of restricted areas R–2901A, B, G, H, J, K, L and N at the Avon Park Air Force Range, FL. The corrections are the result of more accurate digital plotting of the points.

DATES: Effective date 0901 UTC, November 13, 2014.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace Policy and Regulations Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Background

A review of the descriptions of restricted areas R–2901A, B, G, H, J, K, L and N at the Avon Park Air Force Range, FL, identified the need to update two points common to the boundaries of several of the restricted areas. The changes are needed to fix slight mismatches in the descriptions of common boundaries between the areas. Because the differences are minor, they are not apparent on Sectional Aeronautical Charts, but with the transition to more precise digital charting databases, the mismatches require resolution.

This action does not affect the descriptions of restricted areas R–2901C, D, E, F, I or M at the Avon Park Range.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 73 to update certain latitude/longitude coordinates in the boundary descriptions of restricted areas R–2901A, B, G, H, J, K, L, and N, Avon Park, FL. A review of the descriptions revealed slight mismatches in the common boundaries shared by these areas. Specifically, the point ''lat. 27°32′31″ N., long. 81°07′29″ W.'' is changed by 6 seconds of longitude to read ''lat. 27°32′31″ N., long. 81°07′23″ W.'' This point appears in the boundary descriptions of R–2901A, B, G, J, K, L and N.

This action also changes the point ''lat. 27°29′31″ N., long. 81°05′29″ W.'' by 2 seconds of longitude to read ''lat. 27°29′31″ N., long. 81°05′27″ W.'' This point appears in the boundary descriptions of R–2901B, G, H, J, K, L and N; and in the designated altitudes description of R–2901N.

This is a minor editorial change to provide more accurate points in the descriptions of the affected restricted areas. It does not change the actual location or use of the restricted areas; therefore, I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary.

The FAA has determined that this action only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation: (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); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as amends the boundary descriptions of restricted areas at the Avon Park, FL, range complex to more accurately align common airspace boundaries.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1E, Environmental Impacts: Policies and Procedures, paragraph 311d. This airspace action is a minor editorial change to the technical descriptions of the affected restricted areas to reflect more accurate digital plotting data. It does not alter the actual location or use of the restricted areas at the Avon Park Air Force Range, FL; therefore, it is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exists that warrant preparation of an environmental assessment.

List of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 73, as follows:

PART 73—SPECIAL USE AIRSPACE

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 73.29 [Amended]

■ 2. Section 73.29 is amended as follows:

* * * * *

R–2901A Avon Park, FL [Amended]

By removing the current boundaries and inserting the following:

Boundaries. Beginning at lat. 27°44′46″ N., long. 81°25′19″ W.; to lat. 27°44′46″ N., long. 81°11′39″ W.; to lat. 27°35′01″ N., long. 81°08′59″ W.; to lat. 27°32′31″ N., long. 81°07′23″ W.; to lat. 27°29′01″ N., long. 81°13′29″ W.; to lat. 27°32′37″ N., long. 81°16′46″ W.; to lat. 27°32′33″ N., long. 81°21′39″ W.; to lat. 27°42′01″ N., long. 81°25′19″ W.; to the point of beginning.

R–2901B Avon Park, FL [Amended]

By removing the current boundaries and inserting the following:

Boundaries. Beginning at lat. 28°00′01″ N., long. 81°20′59″ W.; to lat. 28°00′01″ N., long. 81°13′59″ W.; to lat. 27°44′46″ N., long. 81°13′59″ W.; to lat. 27°44′46″ N., long. 81°11′39″ W.; to lat. 27°35′01″ N., long. 81°08′59″ W.; to lat. 27°32′31″ N., long. 81°07′23″ W.; to lat. 27°29′31″ N., long. 81°05′27″ W.; to lat. 27°21′01″ N., long. 80°59′59″ W.; to lat. 27°16′46″ N., long. 81°05′59″ W.; to lat. 27°24′46″ N., long. 81°10′59″ W.; to lat. 27°30′46″ N., long. 81°17′49″ W.; to lat. 27°32′33″ N., long. 81°21′39″ W.; to lat. 27°42′01″ N., long. 81°25′19″ W.; to lat. 27°55′01″ N., long. 81°25′19″ W.; to the point of beginning.

R–2901G Avon Park, FL [Amended]

By removing the current boundaries and inserting the following:

Boundaries. Beginning at lat. 27°29′01″ N., long. 81°13′29″ W.; to lat. 27°32′31″ N., long. 81°07′23″ W.; to lat. 27°29′31″ N., long. 81°05′27″ W.; to lat. 27°24′46″ N., long. 81°10′59″ W.; to the point of beginning.

R–2901H Avon Park, FL [Amended]

By removing the current boundaries and inserting the following:

Boundaries. Beginning at lat. 27°24′46″ N., long. 81°10′59″ W.; to lat. 27°29′31″ N., long. 81°05′27″ W.; to lat. 27°21′01″ N., long. 80°59′59″ W.; to the point of beginning.

R–2901J Avon Park, FL [Amended]

By removing the current boundaries and inserting the following:

Boundaries. Beginning at lat. 28°00′01″ N., long. 81°20′59″ W.; to lat. 28°00′01″ N., long. 81°13′59″ W.; to lat. 27°44′46″ N., long. 81°13′59″ W.; to lat. 27°44′46″ N., long. 81°11′39″ W.; to lat. 27°35′01″ N., long. 81°08′59″ W.; to lat. 27°32′31″ N., long. 81°07′23″ W.; to lat. 27°29′31″ N., long. 81°05′27″ W.; to lat. 27°21′01″ N., long. 80°59′59″ W.; to lat. 27°16′46″ N., long. 81°05′59″ W.; to lat. 27°24′46″ N., long. 81°10′59″ W.; to lat. 27°30′46″ N., long. 81°17′49″ W.; to lat. 27°32′33″ N., long. 81°21′39″ W.; to lat. 27°42′01″ N., long. 81°25′19″ W.; to lat. 27°55′01″ N., long. 81°25′19″ W.; to the point of beginning.

R–2901K Avon Park, FL [Amended]

By removing the current boundaries and inserting the following:

Boundaries. Beginning at lat. 28°00′01″ N., long. 81°20′59″ W.; to lat. 28°00′01″ N., long. 81°13′59″ W.; to lat. 27°44′46″ N., long. 81°13′59″ W.; to lat. 27°44′46″ N., long. 81°11′39″ W.; to lat. 27°35′01″ N., long. 81°08′59″ W.; to lat. 27°32′31″ N., long. 81°07′23″ W; to lat. 27°29′31″ N., long. 81°05′27″ W., to lat. 27°21′01″ N., long. 80°59′59″ W.; to lat. 27°16′46″ N., long. 81°05′59″ W.; to lat. 27°24′46″ N., long. 81°10′59″ W.; to lat. 27°30′46″ N., long. 81°17′49″ W.; to lat. 27°32′33″ N., long. 81°21′39″ W.; to lat. 27°42′01″ N., long. 81°25′19″ W.; to lat. 27°55′01″ N., long. 81°25′19″ W.; to the point of beginning.

R–2901L Avon Park, FL [Amended]

By removing the current boundaries and inserting the following:

Boundaries. Beginning at lat. 28°00′01″ N., long. 81° 20′59″ W.; to lat. 28°00′01′ N., long. 81° 13′59″ W.; to lat. 27°44′46″ N., long. 81°

13′59″ W.; to lat. 27°44′46″ N., long. 81°
11′39″ W.; to lat. 27°35′01″ N., long. 81°
08′59″ W.; to lat. 27°32′31″ N., long. 81°
07′23″ W.; to lat. 27°29′31″ N., long. 81°
05′27″ W.; to lat. 27°21′01″ N., long. 80°
59′59″ W.; to lat. 27°16′46″ N., long. 81°
05′59″ W.; to lat. 27°24′46″ N., long. 81°
10′59″ W.; to lat. 27°30′46″ N., long. 81°
17′49″ W.; to lat. 27°32′33″ N., long. 81°
21′39″ W.; to lat. 27°42′01″ N., long. 81°
25′19″ W.; to lat. 27°55′01″ N., long. 81°
25′19″ W.; to the point of beginning.

R–2901N Avon Park, FL [Amended]

By removing the current boundaries and designated altitudes and inserting the following:

Boundaries. Beginning at lat. 27°32′33″ N., long. 81°21′39″ W.; to lat. 27°32′37″ N., long. 81°16′46″ W.; to lat. 27°29′01″ N., long. 81°13′29″ W.; to lat. 27°32′31″ N., long. 81°07′23″ W.; to lat. 27°29′31″ N., long. 81°05′27″ W.; to lat. 27°21′01″ N., long. 80°59′59″ W.; to lat. 27°16′46″ N., long. 81°05′59″ W.; to lat. 27°24′46″ N., long. 81°10′59″ W.; to lat. 27°30′46″ N., long. 81°17′49″ W.; to the point of beginning.

Designated altitudes. 5,000 feet MSL to but not including 14,000 feet MSL north of a line from lat. 27°24′46″ N., long. 81°10′59″ W.; to lat. 27°29′31″ N., long. 81°05′27″ W.; 4,000 feet MSL to but not including 14,000 feet MSL south of that line.

Issued in Washington, DC, on September 11, 2014.

Ellen Crum,

Acting Manager, Airspace Policy and Regulations Group.

[FR Doc. 2014–22231 Filed 9–16–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 744 and 746

[Docket No. 1408114668–4758–01]

RIN 0694–AG28

Russian Sanctions: Addition of Persons to the Entity List and Restrictions on Certain Military End Uses and Military End Users

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This final rule amends the Export Administration Regulations (EAR) to impose additional sanctions implementing U.S. policy toward Russia. Specifically, in this rule, the Bureau of Industry and Security (BIS) amends the EAR by adding ten entries to the Entity List. The persons who are added to the Entity List have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States. These persons will be listed on the Entity List under the destination of Russia. BIS is also amending the EAR to impose license requirements for items destined to Russia when those items are intended for a military end use or military end user.

DATES: *Effective date:* This rule is effective September 17, 2014.

FOR FURTHER INFORMATION CONTACT: For the Entity List-related changes contact the Chair, End-User Review Committee, Office of the Assistant Secretary, Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Fax: (202) 482–3911, Email: *ERC@bis.doc.gov.*

For the changes for Restrictions on Certain Military End Uses and Military End Users, contact Eileen Albanese, Director, Office of National Security and Technology Transfer Controls, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–0092, Fax: (202) 482–482–3355, Email: *rpd2@bis.doc.gov.* For emails, include ''Russia'' in the subject line.

SUPPLEMENTARY INFORMATION:

Background

This final rule amends the Export Administration Regulations (EAR) to impose additional sanctions implementing U.S. policy toward Russia. Specifically, in this rule the Bureau of Industry and Security (BIS) amends the EAR by adding ten persons to the Entity List. The persons who are added to the Entity List have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States. These persons will be listed on the Entity List under the destination of Russia. BIS is also amending the EAR to impose license requirements for items destined to Russia when those items are intended for a military end use or military end user.

Entity List

The Entity List (Supplement No. 4 to Part 744) notifies the public about entities that have engaged in activities that could result in an increased risk of the diversion of exported, reexported or transferred (in-country) items to weapons of mass destruction (WMD) programs, activities sanctioned by the State Department and activities contrary to U.S. national security or foreign policy interests. Certain exports, reexports, and transfers (in-country) to entities identified on the Entity List require licenses from BIS and are usually subject to a policy of denial. The availability of license exceptions in such transactions is very limited. The license review policy for each entity is identified in the license review policy column on the Entity List and the availability of license exceptions is noted in the **Federal Register** notices adding persons to the Entity List. BIS places entities on the Entity List based on certain sections of part 744 (Control Policy: End-User and End-Use Based) of the EAR.

The End-User Review Committee (ERC), composed of representatives of the Departments of Commerce (Chair), State, Defense, Energy and, where appropriate, the Treasury, makes all decisions regarding additions to, removals from, or other modifications to the Entity List. The ERC makes all decisions to add an entry to the Entity List by majority vote and all decisions to remove or modify an entry by unanimous vote. The Departments represented on the ERC approved these changes to the Entity List.

Addition to the Entity List in this rule

This rule adds ten persons to the Entity List on the basis of § 744.11 (License requirements that apply to entities acting contrary to the national security or foreign policy interests of the United States) of the EAR. Under § 744.11(b) (Criteria for revising the Entity List), persons for whom there is reasonable cause to believe, based on specific and articulable facts, have been involved, are involved, or pose a significant risk of being or becoming involved in, activities that are contrary to the national security or foreign policy interests of the United States and those acting on behalf of such persons may be added to the Entity List. The persons being added to the Entity List have been determined to be involved in activities that are contrary to the national security or foreign policy interests of the United States.

Entity Additions Consistent With Executive Order 13661

Five entities are added based on activities that are described in Executive Order 13661 (79 FR 15533), *Blocking Property of Additional Persons Contributing to the Situation in Ukraine,* issued by the President on March 16, 2014. This Order expanded the scope of the national emergency declared in Executive Order 13660, finding that the actions and policies of the Government of the Russian Federation with respect to Ukraine—including the deployment of Russian Federation military forces in Crimea (Occupied)—undermine democratic processes and institutions in Ukraine; threaten its peace, security,

stability, sovereignty, and territorial integrity; and contribute to the misappropriation of its assets, and thereby constitute an unusual and extraordinary threat to the national security and foreign policy of the United States.

Specifically, Executive Order 13661 includes a directive that all property and interests in property that are in the United States, that hereafter come within the United States, or that are or thereafter come within the possession or control of any United States person (including any foreign branch) of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: Persons determined by the Secretary of the Treasury to be operating in the defense or related materiel sector in the Russian Federation. Under Section 8 of the Order, all agencies of the United States Government are directed to take all appropriate measures within their authority to carry out the provisions of the Order. The Department of the Treasury's Office of Foreign Assets Control, pursuant to Executive Order 13661 and on behalf of the Secretary of the Treasury, has designated the following five persons as operating in the defense or related materiel sector of the Russian Federation: Almaz-Antey Air Defense Concern Main System Design Bureau, JSC; Tikhomirov Scientific Research Institute of Instrument Design, JSC; Kalinin Machine Plant, JSC; Mytishchinski Mashinostroitelny Zavod, OAO; and Dolgoprudny Research Production Enterprise, OAO.

In conjunction with those designations, the Department of Commerce adds the five persons to the Entity List under this rule and imposes a license requirement for exports, reexports, or transfers (in-country) for all items subject to the EAR to those persons. This license requirement implements an appropriate measure within the authority of BIS to carry out the provisions of Executive Order 13661. Almaz-Antey Air Defense Concern Main System Design Bureau, JSC is one of the world's largest defense industry complexes, specializing in development of anti-air, anti-missile and space defense systems. Tikhomirov Scientific Research Institute of Instrument Design, JSC specializes in the development of weaponry control systems for fighter planes and mobile medium range anti-aircraft surface to air missile (SAM) defense vehicles. Kalinin Machine Plant, JSC designs and manufactures machines for military and civil applications. Mytishchinski Mashinostroitelny Zavod, OAO manufactures and supplies ordnance and accessories, including naval, aircraft, anti-aircraft and field artillery products. Dolgoprudny Research Production Enterprise, OAO develops and manufactures high-technology defense products. Therefore, pursuant to § 744.11 of the EAR, the conduct of these five persons raises sufficient concern that prior review of exports, reexports, or transfers (in-country) of items subject to the EAR involving these five persons, and the possible imposition of license conditions or license denials on shipments to these persons, will enhance BIS's ability to protect the foreign policy and national security interests of the United States. License applications for exports, reexports and transfers (in-country) to these persons will be reviewed with a presumption of denial.

Entity Additions Consistent With Executive Order 13662

In addition, five entities are added based on activities that are described in Executive Order 13662 (79 FR 16169), *Blocking Property of Additional Persons Contributing to the Situation in Ukraine,* issued by the President on March 20, 2014. This Order expanded the scope of the national emergency declared in Executive Order 13660 of March 6, 2014 and Executive Order 13661 of March 16, 2014. Specifically, EO 13662 expanded the scope to include sectors of the Russian Federation economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, such as financial services, energy, metals and mining, engineering, and defense and related materiel.

The Department of the Treasury's Office of Foreign Assets Control, pursuant to Executive Order 13662 and on behalf of the Secretary of the Treasury, has designated the following five persons as operating in the energy sector of the Russian Federation. Gazprom, OAO has major business lines in geological exploration, production, transportation, storage, processing and sales of gas, gas condensate and oil, sales of gas as a vehicle fuel as well as generation and marketing of heat and electric power. Gazpromneft is a Russian oil company engaged primarily in oil and gas exploration and production, the sale and distribution of crude oil, and the production and sale of petroleum products. Lukoil, OAO is a company in Russia's petroleum industry. Rosneft is a company in Russia's petroleum industry whose activities include hydrocarbon exploration and production, upstream offshore projects, hydrocarbon refining, and crude oil, gas and product marketing in Russia and abroad. Surgutneftegas is a Russian oil and gas company.

Therefore, BIS adds the following five Russian energy entities to the Entity List to impose a license requirement for the export, reexport or transfers (in-country) of all items subject to the EAR to those companies when the exporter, reexporter or transferor knows that the item will be used directly or indirectly in exploration for, or production of, oil or gas in Russian deepwater (greater than 500 feet) or Arctic offshore locations or shale formations in Russia, or are unable to determine whether the item will be used in such projects. License applications for such transactions will be reviewed with a presumption of denial when for use directly or indirectly for exploration or production from deepwater (greater than 500 feet), Arctic offshore, or shale projects in Russia that have the potential to produce oil. This license requirement implements an appropriate measure within the authority of BIS to carry out the provisions of Executive Order 13662.

The license requirements for all ten persons added to the Entity List apply to any transaction in which items are to be exported, reexported, or transferred (in-country) to any of the persons or in which such persons act as purchaser, intermediate consignee, ultimate consignee, or end-user. In addition, no license exceptions are available for exports, reexports, or transfers (in-country) to the persons being added to the Entity List in this rule.

This final rule adds the following ten persons to the Entity List:

Russia

1. *Almaz-Antey Air Defense Concern Main System Design Bureau, JSC* (a.k.a., A.A. Raspletin Main System Design Bureau; a.k.a. Almaz-Antey GSKB; a.k.a. Almaz-Antey GSKB Imeni Academician A.A. Raspletin; a.k.a. Almaz-Antey MSDB; a.k.a. Almaz-Antey PVO 'Air Defense' Concern Lead Systems Design Bureau OAO 'Open Joint-Stock Company' Imeni Academician A.A. Raspletin; a.k.a. Golovnoye Sistemnoye Konstruktorskoye Byuro Open Joint-Stock Company of Almaz-Antey PVO Concern Imeni Academician A.A. Raspletin; a.k.a. Joint Stock Company Almaz-Antey Air Defense Concern Main System Design Bureau, Named by Academician A.A. Raspletin; a.k.a. Joint Stock Company Almaz-Antey Air Defense Concern Main System Design Bureau; a.k.a. Almaz-Antey; a.k.a. JSC 'Almaz-Antey' MSDB, f.k.a., Otkrytoe Aktsionernoe Obshchestvo Nauchno

Proizvodstvennoe Obedinenie Almaz Imeni Akademika A.A. Raspletina; a.k.a. GSKB)

Address: 16–80, Leningradsky Prospect, Moscow 125190, Russia;

2. *Dolgoprudny Research Production Enterprise, OAO,* (a.k.a. olgoprudnenskoye NPP OAO; a.k.a. Dolgoprudny; a.k.a. -Dolgoprudny Research Production Enterprise; a.k.a. Otkrytoe Aktsionernoe Obshchestvo Doigoprudnenskoe Nauchno Proizvodstvennoe Predpriyatie; a.k.a. *OAO 'Dolgoprudny Research Production Enterprise'*)

Address: 1 Pl. Sobina, Dolgoprudny, Moskovskaya obl. 141700, Russia;

Alt Address: Proshchad Sobina 1, Dolgoprudny 141700, Russia;

* 3. *Gazprom, OAO* (a.k.a. Open Joint Stock Company Gazprom; a.k.a. OAO Gazprom; a.k.a. Gazprom)

Address: 16 Nametkina St., Moscow, Russia GSP–7, 117997, Russia;

Alt Address: 16 Nametkina ul., Moscow 117991, Russia;

* 4. *Gazprom Neft* (a.k.a. Gazprom Neft OAO; a.k.a. JSC Gazprom Neft; a.k.a. Open Joint-Stock Company Gazprom Neft; f.k.a. Sibirskaya Neftyanaya Kompaniya OAO)

Address: Let. A. Galernaya, 5, ul, St. Petersburg 190000, Russia;

Alt Address: Ul. Pochtamtskaya, 3–5, St. Petersburg 190000, Russia;

Alt Address: 3–5 Pochtamtskaya St., St. Petersburg 190000, Russia; and

Alt Address: 125 A. Profsoyuznaya Street, Moscow 117647, Russia;

5. *Kalinin Machine Plant, JSC,* a.k.a., Kalinin Machine-Building Plant Open Joint-Stock Company; a.k.a. Kalinin Machinery Plant-BRD; a.k.a. Mashinostroitel'NYI Zavod IM. M.I. Kalinina, G. Yekaterinburg OAO; a.k.a. Mzik OAO; a.k.a. Open-End Joint-Stock Company 'Kalinin Machinery Plant. YEKATERINBURG'; a.k.a. Otkrytoe Aktsionernoe Obshchestvo Mashinostroitelny Zavod IM.M.I.Kalinina, G.Ekaterinburg)

Address: 18 prospekt Kosmonavtov, Ekaterinburg 620017, Sverdlovskaya obl., Russia;

* 6. *Lukoil, OAO* (a.k.a. Lukoil; a.k.a. Lukoil Oil Company; a.k.a. Neftyanaya Kompaniya Lukoil OOO; a.k.a. NK Lukoil OAO)

Address: 11 Sretenski boulevard, Moscow 101000, Russia;

7. *Mytishchinski Mashinostroitelny Zavod, OAO,* (a.k.a., JSC Mytishchinski Machine-Building Plant; *a.k.a.* Otkrytoe Aktsionernoe Obshchestvo 'Mytishchinski Mashinostroitelny ZAVOD')

Address: 4 ul. Kolontsova Mytishchi, Mytishchinski Raion, Moskovskayaobl 141009, Russia;

Alt. Address: UL Koloncova, d.4, Mytishi, Moscow region 141009, Russia;

* 8. *Rosneft* (a.k.a. Open Joint-Stock Company Rosneft Oil Company; a.k.a. OAO Rosneft Oil Company; a.k.a. Oil Company Rosneft; a.k.a. OJSC Rosneft Oil Company; a.k.a. Rosneft Oil Company)

Address: 26/1, Sofiyskaya Embankment, 117997, Moscow, Russia;

* 9. *Surgutneftegas* (a.k.a. Open Joint Stock Company Surgutneftegas; a.k.a. Otkrytoe Aktsionernoe Obshchestvo Surgutneftegaz; a.k.a. Surgutneftegas OAO; a.k.a. Surgutneftegas OJSC; a.k.a. Surgutneftegaz OAO)

Address: ul. Grigoriya Kukuyevitskogo, 1, bld. 1, Khanty-Mansiysky Autonomous Okrug—Yugra, the city of Surgut, Tyumenskaya Oblast 628415, Russia;

Alt Address: korp. 1 1 Grigoriya Kukuevitskogo ul., Surgut, Tyumenskaya oblast 628404, Russia;

Alt Address: Street Kukuevitskogo 1, Surgut, Tyumen Region 628415, Russia;

10. *Tikhomirov Scientific Research Institute of Instrument Design, JSC* (a.k.a., JSC NIIP, f.k.a., Otkrytoe Aktsionernoe Obshchestvo Nauchno Issledovatelski Institut Priborostroeniya Imeni V.V. Tikhomirova; a.k.a. Scientific Research Institue of Instrument Design; a.k.a. JSC V. *Tikhomirov Scientific Research Institute of Instrument Design.*)

Address: 3 Ul. Gagarina, Zhukovski, Moskovskaya Obl 140180, Russia;

Alt. Address: Gagarin Str, 3, Zhukovsky 140180, Russia.

Military End-Use Restriction

It is the policy of the United States Government to facilitate U.S. exports for civilian end uses, while preventing exports that would enhance the military capability of certain destinations, thereby threatening the national security and foreign policy of the United States and its allies. In furtherance of this policy, BIS established a license requirement for certain items intended for ''military end uses'' in a final rule published June 19, 2007 (72 FR 33646). Specifically, that final rule established a control, based on knowledge of a ''military end use,'' on exports and reexports of certain items on the Commerce Control List (CCL) that otherwise would not require a license to a specified destination. The ''military end use'' control initially applied to certain items exported, reexported or transferred (in country) to the People's Republic of China.

''Military End Use'' and ''Military End User'' License Requirements for Certain Items Destined for Russia

In this rule, BIS amends § 744.21 of the EAR to apply ''military end use'' and ''military end user'' license requirements to Russia. Specifically, BIS amends § 744.21 by adding ''or Russia'' after ''People's Republic of China'' and ''PRC'', wherever those names appear, including in the heading of the section. Items subject to these license requirements are those listed in Supplement No. 2 to Part 744. This final rule also adds a paragraph (g) to define the term ''military end user'' for purposes of § 744.21. The definition of ''military end user'' this rule adds to § 744.21 is the same definition of ''military end user'' that is defined in § 744.17 of the EAR.

Foreign Policy Report

The extension of the military end use controls to Russia in this rule is the imposition of a foreign policy control. Section 6(f) of the Export Administration Act requires that a report be delivered to Congress before imposing such controls. The report was delivered to Congress on September 12, 2014.

Export Administration Act

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as amended by Executive Order 13637 of March 8, 2013, 78 FR 16129 (March 13, 2013) and as extended by the Notice of August 7, 2014, 79 FR 46959 (August 11, 2014), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222 as amended by Executive Order 13637.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been determined to be not

significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves collections previously approved by OMB under control number 0694–0088, Simplified Network Application Processing System, which includes, among other things, license applications and carries a burden estimate of 43.8 minutes for a manual or electronic submission.

Total burden hours associated with the PRA and OMB control number 0694–0088 are not expected to significantly increase as a result of this rule. You may send comments regarding the collection of information associated with this rule, including suggestions for reducing the burden, to Jasmeet K. Seehra, Office of Management and Budget (OMB), by email to *Jasmeet_K._Seehra@omb.eop.gov,* or by fax to (202) 395–7285.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public comment and a delay in effective date are inapplicable because this regulation involves a military or foreign affairs function of the United States. (*See* 5 U.S.C. 553(a)(1)). BIS implements this rule to advance U.S. policy toward Russia and therefore protect U.S. national security or foreign policy interests by preventing items from being exported, reexported, or transferred (in country) to the persons being added to the Entity List and items intended for certain end uses. If this rule were delayed to allow for notice and comment and a delay in effective date, then entities being added to the Entity List by this action would continue to be able to receive items without a license and to conduct activities contrary to the national security or foreign policy interests of the United States. In addition, publishing a proposed rule would give these parties notice of the U.S. Government's intention to place them on the Entity List and would create an incentive for these persons to either accelerate receiving items subject to the EAR to conduct activities that are contrary to the national security or foreign policy interests of the United States, and/or to take steps to set up additional aliases, change addresses, and other measures to try to limit the impact of the listing on the Entity List once a final rule was published. BIS also implements this rule to protect U.S. national security or foreign policy objectives from being undermined by immediately restricting the export, reexport or transfer (in-country) of certain items to Russia for military end uses. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

List of Subjects

15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

15 CFR Part 746

Exports, Reporting and recordkeeping requirements.

Accordingly, parts 744 and 746 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

PART 744—[AMENDED]

■ 1. The authority citation for 15 CFR part 744 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 12947, 60 FR 5079, 3 CFR, 1995 Comp., p. 356; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of August 7, 2014, 79 FR 46959 (August 11, 2014); Notice of September 18, 2013, 78 FR 58151 (September 20, 2013); Notice of November 7, 2013, 78 FR 67289 (November 12, 2013); Notice of January 21, 2014, 79 FR 3721 (January 22, 2014).

■ 2. Section 744.21 is revised to read as follows:

§ 744.21 Restrictions on Certain 'Military end uses' in the People's Republic of China (PRC) or for a 'Military end use' or 'Military end user' in Russia.

(a)(1) *General prohibition.* In addition to the license requirements for items specified on the Commerce Control List (CCL), you may not export, reexport, or transfer (in-country) any item subject to the EAR listed in Supplement No. 2 to Part 744 to the PRC or Russia without a license if, at the time of the export, reexport, or transfer (in-country), either:

(i) You have ''knowledge,'' as defined in § 772.1 of the EAR, that the item is intended, entirely or in part, for a 'military end use,' as defined in paragraph (f) of this section, in the PRC or for a 'military end use' or 'military end user' in Russia; or

(ii) You have been informed by BIS, as described in paragraph (b) of this section, that the item is or may be intended, entirely or in part, for a 'military end use' in the PRC or for a 'military end use' or 'military end-user' in Russia.

(2) *General prohibition.* In addition to the license requirements for 9x515 and ''600 series'' items specified on the Commerce Control List (CCL), you may not export, reexport, or transfer (in-country) any 9x515 or ''600 series'' item, including items described in a .y paragraph of a 9x515 or ''600 series'' ECCN, to the PRC or Russia without a license.

(b) *Additional prohibition on those informed by BIS.* BIS may inform you either individually by specific notice, through amendment to the EAR published in the **Federal Register**, or through a separate notice published in the **Federal Register**, that a license is required for specific exports, reexports, or transfers (in-country) of any item because there is an unacceptable risk of use in or diversion to 'military end use' activities in the PRC or for a 'military end use' or 'military end-user' in Russia. Specific notice will be given only by, or at the direction of, the Deputy Assistant Secretary for Export Administration. When such notice is provided orally, it will be followed by written notice within two working days signed by the Deputy Assistant Secretary for Export Administration or the Deputy Assistant Secretary's designee. The absence of BIS notification does not excuse the exporter from compliance with the license requirements of paragraph (a) of this section.

(c) *License exception.* Despite the prohibitions described in paragraphs (a) and (b) of this section, you may export, reexport, or transfer (in-country) items subject to the EAR under the provisions

of License Exception GOV set forth in § 740.11(b)(2)(i) and (ii) of the EAR.

(d) *License application procedure.* When submitting a license application pursuant to this section, you must state in the ''additional information'' block of the application that ''this application is submitted because of the license requirement in § 744.21 of the EAR (Restrictions on Certain Military End Uses in the People's Republic of China or for a 'Military End Use' or 'Military End User' in Russia).'' In addition, either in the additional information block of the application or in an attachment to the application, you must include for the PRC all known information concerning the military end use of the item(s) and for Russia, all known information concerning the 'military end use' and 'military end users' of the item(s). If you submit an attachment with your license application, you must reference the attachment in the ''additional information'' block of the application.

(e) *License review standards.* (1) Applications to export, reexport, or transfer items described in paragraph (a) of this section will be reviewed on a case-by-case basis to determine whether the export, reexport, or transfer would make a material contribution to the military capabilities of the PRC or Russia, and would result in advancing the country's military activities contrary to the national security interests of the United States. When it is determined that an export, reexport, or transfer would make such a contribution, the license will be denied.

(2) Applications may be reviewed under chemical and biological weapons, nuclear nonproliferation, or missile technology review policies, as set forth in §§ 742.2(b)(4), 742.3(b)(4) and 742.5(b)(4) of the EAR, if the end use may involve certain proliferation activities.

(3) Applications for items requiring a license for other reasons that are destined to the PRC for a 'military end use' or that are destined to Russia for a 'military end use' or 'military end-user' also will be subject to the review policy stated in paragraph (e)(1) of this section.

(f) *Military end use.* In this section, 'military end use' means: Incorporation into a military item described on the U.S. Munitions List (USML) (22 CFR part 121, International Traffic in Arms Regulations); incorporation into a military item described on the Wassenaar Arrangement Munitions List (as set out on the Wassenaar Arrangement Web site at *http://www.wassenaar.org*); incorporation into items classified under ECCNs ending in ''A018'' or under ''600 series'' ECCNs; or for the ''use,'' ''development,'' or ''production'' of military items described on the USML or the Wassenaar Arrangement Munitions List, or items classified under ECCNs ending in ''A018'' or under ''600 series'' ECCNs.

Note to paragraph (f) of this section: *As defined in Part 772 of the EAR, ''use'' means operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing; ''development'' is related to all stages prior to serial production, such as: Design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts; and ''production'' means all production stages, such as: Product engineering, manufacturing, integration, assembly (mounting), inspection, testing, quality assurance.*

For purposes of this section, ''operation'' means to cause to function as intended; ''installation'' means to make ready for use, and includes connecting, integrating, incorporating, loading software, and testing; ''maintenance'' means performing work to bring an item to its original or designed capacity and efficiency for its intended purpose, and includes testing, measuring, adjusting, inspecting, replacing parts, restoring, calibrating, overhauling; and ''deployment'' means placing in battle formation or appropriate strategic position.

(g) *Military end user.* In this section, the term 'military end-user' means the national armed services (army, navy, marine, air force, or coast guard), as well as the national guard and national police, government intelligence or reconnaissance organizations, or any person or entity whose actions or functions are intended to support 'military end uses' as defined in paragraph (f) of this section.

■ 3. Supplement No. 4 to part 744 is amended by adding under Russia, in alphabetical order, ten Russian entities.

The additions read as follows:

Supplement No. 4 to Part 744—Entity List

Country	Entity	License requirement	License review policy	Federal Register citation
*	* *	*	* *	*
RUSSIA				
*	* *	*	* *	*
	Almaz-Antey Air Defense Concern Main System Design Bureau, JSC (a.k.a., A.A. Raspletin Main System Design Bureau; a.k.a. Almaz-Antey GSKB; a.k.a. Almaz-Antey GSKB Imeni Academician A.A. Raspletin; a.k.a. Almaz-Antey MSDB; a.k.a. Almaz-Antey PVO 'Air Defense' Concern Lead Systems Design Bureau OAO 'Open Joint-Stock Company' Imeni Academician A.A. Raspletin; a.k.a. Golovnoye Sistemnoye Konstruktorskoye Byuro Open Joint-Stock Company of Almaz-Antey PVO Concern Imeni Academician A.A. Raspletin; a.k.a. Joint Stock Company Almaz-Antey Air Defense Concern Main System Design Bureau, Named by Academician A.A. Raspletin; a.k.a. Joint Stock Company Almaz-Antey Air Defense Concern Main System Design Bureau; a.k.a. Almaz-Antey; a.k.a. JSC 'Almaz-Antey' MSDB, f.k.a., Otkrytoe Aktsionernoe Obshchestvo Nauchno Proizvodstvennoe Obedinenie Almaz Imeni Akademika A.A. Raspletina; a.k.a. GSKB). Address: 16–80, Leningradsky Prospect, Moscow 125190, Russia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial ..	79 FR [INSERT FR PAGE NUMBER] 9/17/2014.
*	* *	*	* *	*
	Dolgoprudny Research Production Enterprise, OAO (a.k.a. olgoprudnenskoye NPP OAO; a.k.a. Dolgoprudny; a.k.a. Dolgoprudny Research Production Enterprise; a.k.a. Otkrytoe Aktsionernoe Obshchestvo Doigoprudnenskoe Nauchno Proizvodstvennoe Predpriyatie; a.k.a. OAO 'Dolgoprudny Research Production Enterprise'). Address: 1 Pl. Sobina, Dolgoprudny, Moskovskaya obl. 141700 , Russia. Alt Address: Proshchad Sobina 1, Dolgoprudny 141700, Russia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial ..	79 FR [INSERT FR PAGE] 9/17/2014.
*	* *	*	* *	*
	Gazprom, OAO (a.k.a. Open Joint Stock Company Gazprom; a.k.a. OAO Gazprom; a.k.a. Gazprom). Address: 16 Nametkina St., Moscow, Russia GSP–7, 117997, Russia. Alt Address: 16 Nametkina ul., Moscow 117991, Russia.	For all items subject to the EAR when used in projects specified in § 746.5 of the EAR.	See § 746.5(b) of the EAR.	79 FR [INSERT FR PAGE NUMBER] 9/17/2014.
	Gazprom Neft (a.k.a. Gazprom Neft OAO; a.k.a. JSC Gazprom Neft; a.k.a. Open Joint-Stock Company Gazprom Neft; f.k.a. Sibirskaya Neftyanaya Kompaniya OAO). Address: Let. A. Galernaya, 5, ul, St. Petersburg 190000, Russia. Alt Address: Ul. Pochtamtskaya, 3–5, St. Petersburg 190000, Russia. Alt Address: 3–5 Pochtamtskaya St., St. Petersburg 190000, Russia. Alt Address: 125 A. Profsoyuznaya Street, Moscow 117647, Russia.	For all items subject to the EAR when used in projects specified in § 746.5 of the EAR.	See § 746.5(b) of the EAR.	79 FR [INSERT FR PAGE NUMBER] 9/17/2014.

Country	Entity	License requirement	License review policy	Federal Register citation
*	* *	*	* *	*
	Kalinin Machine Plant, JSC (a.k.a., Kalinin Machine-Building Plant Open Joint-Stock Company; a.k.a. Kalinin Machinery Plant-BRD; a.k.a. Mashinostroitel'NYI Zavod IM. M.I. Kalinina, G. Yekaterinburg OAO; a.k.a. Mzik OAO; a.k.a. Open-End Joint-Stock Company 'Kalinin Machinery Plant. YEKATERINBURG'; a.k.a. Otkrytoe Aktsionernoe Obshchestvo Mashinostroitelny Zavod IM.M.I.Kalinina, G.Ekaterinburg). Address: 18 prospekt Kosmonavtov, Ekaterinburg 620017, Sverdlovskaya obl., Russia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial ..	79 FR [INSERT FR PAGE NUMBER] 9/17/2014.
*	* *	*	* *	*
	Lukoil, OAO ..... (a.k.a. Lukoil; a.k.a. Lukoil Oil Company; a.k.a. Neftyanaya Kompaniya Lukoil OOO; a.k.a. NK Lukoil OAO). Address: 11 Sretenski boulevard, Moscow 101000, Russia.	For all items subject to the EAR when used in projects specified in § 746.5 of the EAR.	See § 746.5(b) of the EAR.	79 FR [INSERT FR PAGE NUMBER] 9/17/2014.
*	* *	*	* *	*
	Mytishchinski Mashinostroitelny Zavod, OAO (a.k.a., JSC Mytishchinski Machine-Building Plant; a.k.a. Otkrytoe Aktsionernoe Obshchestvo 'Mytishchinski Mashinostroitelny ZAVOD'). Address: 4 ul. Kolontsova Mytishchi, Mytishchinski Raion, Moskovskayaobl 141009, Russia. Alt. Address: UL Koloncova, d.4, Mytishi, Moscow region 141009, Russia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial ..	79 FR [INSERT FR PAGE NUMBER] 9/17/2014.
	Rosneft (a.k.a. Open Joint-Stock Company Rosneft Oil Company; a.k.a. OAO Rosneft Oil Company; a.k.a. Oil Company Rosneft; a.k.a. OJSC Rosneft Oil Company; a.k.a. Rosneft Oil Company). Address: 26/1, Sofiyskaya Embankment, 117997, Moscow, Russia.	For all items subject to the EAR when used in projects specified in § 746.5 of the EAR.	See § 746.5(b) of the EAR.	79 FR [INSERT FR PAGE NUMBER] 9/17/2014.
*	* *	*	* *	*
	Surgutneftegas (a.k.a. Open Joint Stock Company Surgutneftegas; a.k.a. Otkrytoe Aktsionernoe Obshchestvo Surgutneftegaz; a.k.a. Surgutneftegas OAO; a.k.a. Surgutneftegas OJSC; a.k.a. Surgutneftegaz OAO). Address: ul. Grigoriya Kukuyevitskogo, 1, bld. 1, Khanty-Mansiysky Autonomous Okrug—Yugra, the city of Surgut, Tyumenskaya Oblast 628415, Russia. Alt Address: korp. 1 1 Grigoriya Kukuevitskogo ul., Surgut, Tyumenskaya oblast 628404, Russia. Alt Address: Street Kukuevitskogo 1, Surgut, Tyumen Region 628415, Russia.	For all items subject to the EAR when used in projects specified in § 746.5 of the EAR.	See § 746.5(b) of the EAR.	79 FR [INSERT FR PAGE NUMBER] 9/17/2014.
*	* *	*	* *	*
	Tikhomirov Scientific Research Institute of Instrument Design, JSC (a.k.a., JSC NIIP, f.k.a., Otkrytoe Aktsionernoe Obshchestvo Nauchno Issledovatelski Institute Priborostroeniya Imeni V.V. Tikhomirova; a.k.a. Scientific Research Institute of Instrument Design; a.k.a. JSC V. Tikhomirov Scientific Research Institute of Instrument Design.). Address: 3 Ul. Gagarina, Zhukovski, Moskovskaya Obl 140180, Russia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial ..	79 FR [INSERT FR PAGE NUMBER] 9/17/2014.

Country	Entity	License requirement	License review policy	Federal Register citation
*	*	*	*	*

PART 746—[AMENDED]

■ 4. The authority citation for 15 CFR part 746 continues to read as follows:

Authority: 50 U.S.C. app. 2401 et seq.; 50 U.S.C. 1701 et seq.; 22 U.S.C. 287c; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; 22 U.S.C. 6004; 22 U.S.C. 7201 et seq.; 22 U.S.C. 7210; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 614; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp., p. 899; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13338, 69 FR 26751, 3 CFR, 2004 Comp., p 168; Presidential Determination 2003–23 of May 7, 2003, 68 FR 26459, May 16, 2003; Presidential Determination 2007–7 of December 7, 2006, 72 FR 1899 (January 16, 2007); Notice of May 7, 2014, 79 FR 26589 (May 9, 2014); Notice of August 7, 2014, 79 FR 46959 (August 11, 2014).

■ 5. Section 746.5 is amended by revising paragraph (a)(1) to read as follows:

§ 746.5 Russian industry sector sanctions.

(a) *License requirements*—(1) *General prohibition.* As authorized by Section 6 of the Export Administration Act of 1979, a license is required to export, reexport or transfer (in-country) any item subject to the EAR listed in Supplement No. 2 to this part and items specified in ECCNs 0A998, 1C992, 3A229, 3A231, 3A232, 6A991, 8A992, and 8D999 when you know that the item will be used directly or indirectly in exploration for, or production of, oil or gas in Russian deepwater (greater than 500 feet) or Arctic offshore locations or shale formations in Russia, or are unable to determine whether the item will be used in such projects. Such items include, but are not limited to, drilling rigs, parts for horizontal drilling, drilling and completion equipment, subsea processing equipment, Arctic-capable marine equipment, wireline and down hole motors and equipment, drill pipe and casing, software for hydraulic fracturing, high pressure pumps, seismic acquisition equipment, remotely operated vehicles, compressors, expanders, valves, and risers. You should be aware that other provisions of the EAR, including parts 742 and 744, also apply to exports and reexports to Russia. License applications submitted to BIS under this section may include the phrase ''section 746.5'' in Block 9 (Special Purpose) in Supplement No. 1 to part 748.

* * * * *

Dated: September 12, 2014.

Eric L. Hirschhorn,

Under Secretary of Commerce for Industry and Security.

[FR Doc. 2014–22207 Filed 9–15–14; 11:15 am]

BILLING CODE 4310–33–P

FEDERAL TRADE COMMISSION

16 CFR Part 435

RIN 3084–AB07

Mail or Telephone Order Merchandise Rule

AGENCY: Federal Trade Commission (''Commission'' or ''FTC'').

ACTION: Final rule.

SUMMARY: The Commission adopts final amendments to its Trade Regulation Rule previously entitled ''Mail or Telephone Order Merchandise,'' including revising its name to ''Mail, Internet, or Telephone Order Merchandise'' (the ''Rule''). The final Rule is based upon the comments received in response to an Advance Notice of Proposed Rulemaking (''ANPR''), a Notice of Proposed Rulemaking (''NPRM''), a Staff Report, and other information. This document contains the text of the final Rule and the Rule's Statement of Basis and Purpose (''SBP''), including a Regulatory Analysis.

DATES: The provisions of the final Rule will become effective on December 8, 2014.

ADDRESSES: This document is available on the Internet at the Commission's Web site, *www.ftc.gov.* The complete record of this proceeding is also available at that Web site.

FOR FURTHER INFORMATION CONTACT: Jock Chung, (202) 326–2984, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Room CC–9528, 600 Pennsylvania Ave. NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The final amendments modify the Rule in four ways. First, they clarify that the Rule covers all Internet merchandise orders, regardless of the method consumers use to access the Internet. Second, they permit refunds and refund notices by any means at least as fast and reliable as first class mail. Third, they clarify sellers' refund obligations for orders using payment methods not specifically enumerated in the Rule (''non-enumerated payments''). Finally, they require sellers to process any third party credit card refunds by seven working days after a buyer's right to a refund vests.

Statement of Basis and Purpose

I. Background

The Rule prohibits sellers from soliciting mail, Internet, or telephone order sales unless they have a reasonable basis to expect that they can ship the ordered merchandise within the time stated on the solicitation or, if no time is stated, within 30 days. The Rule further requires a seller to seek the buyer's consent to the delayed shipment when the seller learns that it cannot ship within the time stated or, if no time is stated, within 30 days. If the buyer does not consent, the seller must promptly refund all money paid for the unshipped merchandise.

The Commission promulgated the Mail Order Merchandise Rule in 1975 to ensure sellers either shipped mail-ordered merchandise on time or offered cancellations and refunds for merchandise.[1] In 1993, the Commission amended the Rule to cover merchandise ordered by telephone (including merchandise ordered through the Internet using telephone Internet access), and renamed it the Mail or Telephone Order Merchandise Rule.[2]

On September 11, 2007, as part of its rule review process,[3] the Commission published a request for public comment,[4] which also served as an ANPR.[5] It then published an NPRM in 2011.[6] In April 2013, Commission staff issued a Staff Report to the Commission.[7]

[1] 40 FR 51582 (Nov. 5, 1975).

[2] 58 FR 49096 (Sept. 21, 1993).

[3] The Commission reviews all its rules and guides periodically to ensure that they remain relevant. These periodic reviews seek information about the costs and benefits of the Commission's rules and guides as well as their economic and regulatory impact. The information obtained assists the Commission in identifying rules and guides that warrant modification or rescission.

[4] 72 FR 51728 (Sept. 11, 2007).

[5] 15 U.S.C. 57a(b)(2)(A).

[6] 76 FR 60765 (Sept. 30, 2011).

[7] *See* Bureau of Consumer Protection, Staff Report to the Federal Trade Commission and Proposed Revised Trade Regulation Rule (16 CFR Part 435) (Apr. 2013) (''Staff Report''). The Staff Report is

Continued

A. ANPR

The ANPR requested public comment on the costs, benefits and continuing need for the Rule. More specifically, it requested comment on the costs and benefits of amending the Rule to: (1) Explicitly cover all Internet merchandise orders, (2) permit refunds and refund notices by any means at least as fast and reliable as first class mail, and (3) specify requirements for making refunds by means other than cash, check, money order or credit. After reviewing the comments, the Commission concluded that the benefits of the Rule outweighed its costs. Consequently, it took two actions on September 30, 2011. First, it retained the Rule with minor technical amendments.[8] Doing so provided the public with the immediate benefit of the technical amendments. Second, it issued an NPRM with proposals that addressed the three specific issues detailed above.[9]

B. NPRM

The NPRM proposed four amendments. First, it proposed clarifying that the Rule covers all Internet merchandise orders by amending the Rule's name, coverage section, and the ''order sales'' definition.[10] Second, it proposed allowing sellers the flexibility to use methods other than first class mail to deliver refunds and refund notices.[11] Third, it proposed clarifying sellers' obligations for orders using payment methods other than the four specified in the current Rule: Cash, check, money order, or credit.[12] Finally, it proposed amending the Rule to require third party credit sale refunds within the same seven-working-day period as it proposed for non-enumerated payment refunds.[13]

In response, the Commission received four comments. Three supported the proposed amendments. One advocated eliminating the Rule, but did not address any of the proposed amendments.

C. Staff Report

Pursuant to the Rule amendment process announced in the NPRM, the Commission's Bureau of Consumer Protection issued the Staff Report in April 2013.[14] The Staff Report explained the history of the Rule amendment proceeding, summarized the issues raised during the various notice and comment periods, and addressed comments received in response to the NPRM. It recommended that the Commission amend the Rule as proposed in the NPRM for the reasons set forth in the NPRM. Staff received no comments in response.

II. Analysis of the Amendments

To amend the Rule, the Commission must address: (1) The prevalence of the acts or practices addressed by the rule; (2) the manner and context in which the acts or practices are deceptive or unfair; (3) the economic effect of the rule, taking into account the effect on small businesses and consumers; and (4) the effect of the rule on state and local laws.[15]

A. Prevalence of Acts or Practices Addressed by the Rule

In the NPRM, the Commission cited evidence from commenters, consumer complaints, and law enforcement actions of shipment and refund failures for Internet orders of merchandise.[16] This evidence demonstrates that deceptive and unfair practices remain prevalent in merchandise orders via the Internet.

B. Manner and Context in Which the Acts or Practices Are Deceptive or Unfair

A representation, omission, or practice is deceptive if it is material and likely to mislead a reasonable consumer.[17] The Commission found when it amended the Rule that reasonable consumers expect that merchandise ordered by mail or telephone, including merchandise ordered over the Internet using a modem, will be shipped in the time expressly represented or, if no time is specified, within 30 days.[18] The Commission further found that shipment time is important to consumers.[19] Consequently, the Commission determined that shipment time claims imply that the seller has a reasonable basis for expecting that it can ship within that time. Such claims are therefore deceptive if the seller lacks a reasonable basis for the claims.[20]

An act or practice is unfair if it causes substantial injury that is not outweighed by offsetting consumer or competitive benefits, and that consumers could not reasonably have avoided. The Commission determined, in promulgating and amending the Rule, that where a seller fails to notify a buyer of shipment delays, that seller unilaterally changes the terms of the contract.[21] The Commission further found that unilaterally changing the contract causes substantial injury to consumers, who are unable to cancel their orders and purchase the merchandise more quickly elsewhere.[22] Moreover, consumers are unable to reasonably avoid this injury, and the harm is not outweighed by any corresponding benefits to consumers or merchants.[23] Consequently, the Commission found that failure to offer refunds is unfair.[24]

C. The Economic Effect of the Rule

During the Rule amendment proceeding, the Commission solicited comment on the economic impact of the Rule, as well as the costs and benefits of each proposed amendment. The record demonstrates that the final Rule's requirements will continue to protect consumers from unfair or deceptive shipment or refund claims, clarify the Rule's coverage and refund requirements for non-enumerated payments, and minimize sellers' costs, including costs for small businesses, by permitting flexibility in the means of transmission and form for refunds.

D. The Effect of the Rule on State and Local Laws

Section 435.3(b) of the final Rule continues to provide that the Commission does not intend to preempt action by state or local governments or supersede any provisions of any state or local laws, except to the extent that they conflict with the Rule. A law does not conflict with the Rule if it affords buyers equal or greater protection.

available at *http://www.ftc.gov/os/2013/04/130429mtorstaffreport.pdf.* The Commission published a notice in the **Federal Register** announcing the availability of, and seeking comment on, the Staff Report. *See* 78 FR 25908 (May 3, 2013).

[8] 76 FR 60715 (Sept. 30, 2011). The amendments alphabetized the Rule's definitions, and placed the definitions before the substantive provisions.

[9] 76 FR 60765.

[10] *Id.* at 60767–60768.

[11] *Id.* at 60768.

[12] *Id.* at 60768–60770.

[13] *Id.* at 60770.

[14] *See* Staff Report, available at *http://www.ftc.gov/os/2013/04/130429mtorstaffreport.pdf. See* n.7.

[15] Rules of Practice, 16 CFR 1.14(a)(1)(i)–(iv). In addition, in accordance with 16 CFR 1.14(a)(1)(v), the regulatory analysis is provided at Section VI of this SBP.

[16] 76 FR at 60767.

[17] *Cliffdale Associates, Inc.,* 103 F.T.C. 110, 174 (1984).

[18] 58 FR at 49105.

[19] *Id.* at 49106.

[20] *Id.* at 49105–06.

[21] *Id.* at 49106.

[22] *Id.*

[23] *Id.*

[24] *Id.*

III. The Purposes and Descriptions of the Amendments

A. Clarify the Rule's Coverage

The amendments clarify that the Rule covers all Internet merchandise orders, regardless of the method consumers use to access the Internet. When the Commission amended the Rule in 1993 to cover Internet merchandise orders made through the telephone, it intended to cover all orders placed over the Internet,[25] which at that time required a telephone line to connect. Since that time, new methods of Internet access, such as cable access, have taken over the market. This leaves an ambiguity about the Rule's Internet coverage. To rectify this problem, the amendments expressly cover all Internet access, including orders placed over the Internet using shopping applications (known as ''apps'').

The final Rule does not cover face-to-face transactions in which a seller's representative merely receives product or inventory information through the Internet; in such instances, buyers do not order merchandise via the Internet.[26]

The record indicates that explicitly covering all Internet order sales meets buyers' expectations that their legal protections are independent of their means of Internet access. Moreover, there is no reason to believe that buyers who access the Internet using a non-telephonic connection need less protection than those that do so via telephonic connection.[27] Amending the Rule in this manner also is consistent with the Commission's longstanding intent that the Rule address all Internet merchandise orders.[28] Furthermore, the amendment will not impose new costs on sellers, who cannot distinguish between Internet access methods in fulfilling customer orders and who already comply with the Rule for all Internet orders.[29]

B. Timing and Method of Refunds

The Rule currently covers all payment methods, but only sets explicit requirements when buyers pay by cash, check, money order, or credit. Specifically, in these circumstances the Rule requires sellers to provide refunds within certain times, using certain methods, depending on how consumers originally paid. The amendments address the timing of refunds for third party credit transactions, the means of delivering refunds, and the timing and method for non-enumerated payment refunds.

First, the amendments alter the time within which sellers must provide refunds for third party credit transactions (*e.g.,* Visa or MasterCard) from one billing cycle to 7 working days. This change should not place any additional burden on sellers because they already must comply with Regulation Z, which has a 7 working day refund period.[30] The period for first party cards (*e.g.,* a retailer that itself issues the credit card, rather than a separate entity, such as a bank or finance company, that issues the credit card for the retailer)[31] remains one billing cycle. The record provides no support for a policy change and Reg. Z does not set a specific time period for these transactions.[32]

Second, the amendments allow increased flexibility by permitting refund deliveries by any means that is at least as fast and reliable as first class mail for all payment methods. This change should provide sellers with the authority to deliver refunds by cheaper and more convenient means, if available, and thus provide buyers with quicker refunds.

Third, for non-enumerated payment methods, the amendments address both the means and timing of refunds. The amendments provide alternative methods for making refunds when consumers pay by non-enumerated means: (1) Sellers can always use cash, checks or money orders; or (2) they can use the same method as that used by the buyer. Additionally, the amendments make clear that sellers must provide refunds within 7 working days when a buyer uses a non-enumerated payment method. These changes harmonize the rules for refunding enumerated and non-enumerated payments, thus simplifying compliance.

IV. Section-by-Section Analysis of Amendments to Part 435

A. Title of Part 435

The amendments insert the term ''Internet'' into the Rule's title to clarify that it covers all sales in which the buyer has ordered merchandise via the Internet.

B. Section 435.1: Definitions

The final Rule begins with a list of defined terms in alphabetical order. The final Rule contains amendments to four of those definitions.

1. Section 435.1(a): Mail, Internet, or telephone order sales

Section 435.1(a), previously the definition for ''Mail or telephone order sales,'' is amended to become the definition for ''Mail, Internet, or telephone order sales.'' The term ''via the Internet'' is inserted to clarify that the final Rule covers all sales in which the buyer has ordered merchandise via the Internet.

2. Section 435.1(b): Prompt refund

Section 435.1(b) sets time periods and specifies transmission methods for making refunds. Section 435.1(b)(1) is amended by:

- Inserting a reference to Section 435.1(d)(2)(ii), which sets refund requirements for third party credit sales, *i.e.,* credit sales where a third party is the creditor. This reference requires sellers to send refunds for third party credit sales within seven working days of a buyer's right to a refund vesting. Setting the same prompt refund requirements for third party credit sales and non-enumerated payment sales limits the need for sellers to distinguish between different types of card payments.
- Inserting a reference to new Section 435.1(d)(3), which sets refund requirements for non-enumerated payments. This reference requires sellers to send refunds for non-enumerated payments within 7 working days of a buyer's right to a refund vesting, the same time period as for third party credit sales.
- Inserting ''any means at least as fast and reliable as'' before ''first class mail'' to permit sellers the flexibility to make refunds by alternate means.
- Inserting the following text to set the time period for a refund and permit a seller the flexibility to make refunds by alternate means where it has discovered that it cannot provide a refund by the same method as payment was tendered:

''Provided, however, that where the seller cannot provide a refund by the

[25] 72 FR at 51729.

[26] It does, however, cover merchandise orders placed via the Internet, even if the buyer is in the seller's store at the time the buyer places the order. For example, the Rule covers a purchase where a buyer orders merchandise via the Internet using a smartphone while in the seller's store.

[27] 76 FR at 60767–60768.

[28] *Id. See also* 72 FR at 51729.

[29] *Id.* at 60768.

[30] *See* 12 CFR 1026.12(e). In this situation, the credit card issuer then has 3 working days after receipt of the refund to credit the account.

[31] The credit agreement usually reveals who in fact is the card issuer.

[32] Reg Z requires that creditors (which includes sellers that are creditors, among others) must refund credit balances following specific timing requirements, in certain circumstances. This includes when a credit balance is on the account and a consumer makes a written request for a refund. 12 CFR 1026.11(a)(2). In the circumstances described, creditors must comply with Reg Z's stricter timing requirements.

same method payment was tendered, prompt refund shall mean a refund sent in the form of cash, check, or money order, by any means at least as fast and reliable as first class mail, within seven (7) working days of the date on which the seller discovers it cannot provide a refund by the same method as payment was tendered.''

Section 435.1(b)(2) sets time periods and specifies transmission methods for refunds for credit payments where the seller is the creditor. It is amended by inserting ''any means at least as fast and reliable as'' before ''first class mail'' to permit sellers the flexibility to make refunds by alternate means.

The final Rule deletes ''to the buyer'' from Sections 435.1(b)(1) and (2) and moves this text to the definition for Refunds, Section 435.1(d). This amendment consolidates the Rule's specifications for refund recipients in the definition for Refunds, Section 435.1(d).

3. Section 435.1(c): Receipt of a properly completed order

Section 435.1(c) establishes the starting point for calculating the time by which sellers must ship orders, notify consumers of shipment delays, offer to cancel orders, or make refunds. It is amended by:

- Inserting ''or other payment methods'' to the list of payment methods. This amendment sets the starting point for calculating requirements for covered merchandise orders that use non-enumerated payments.
- Substituting ''a payment by means other than cash or credit as'' in place of ''the check or money order'' in Sections 435.1(c) and 435.1(c)(1). This amendment expands the previous requirement for sellers that receive notice of dishonored checks or money orders to include sellers that receive notice of dishonored non-enumerated payments.

4. Section 435.1(d): Refunds

Section 435.1(d) prescribes payment methods for refunds. As amended, it also prescribes the recipients for refunds.

Section 435.1(d)(1) specifies refund requirements for cash, check, or money order payments. It is amended by inserting ''sent to the buyer.'' This moves the requirement that sellers send refunds for this type of payment to the buyer from Section 435.1(b)(1).

Section 435.1(d)(2) specifies refund requirements for credit sales. It is amended by:

- Inserting ''sent to the buyer'' into Section 435.1(d)(2)(i) to specify the recipient for refunds where the seller is a creditor. This moves the requirement that sellers send refunds for credit payments where the seller is a creditor to buyers from Section 435.1(b)(2).
- In Section 435.1(d)(2)(ii), deleting ''a copy of'' and inserting ''and a copy of the credit memorandum or the like sent to the buyer that includes the date that the seller sent the credit memorandum or the like to the third party creditor and the amount of the charge to be removed.'' This amendment now makes explicit the previously implicit requirement that sellers must send a credit memorandum or the like to the third party creditor.[33] It also moves the requirement that sellers send refunds to buyers for credit payments where a third party is the creditor from Section 435.1(b)(2).
- In Section 435.1(d)(2)(iii), adding ''sent to the buyer.'' This moves the requirement that sellers send refunds to the buyer for credit sales where partial payment is made by cash, check, or money order from Section 435.1(b)(1).

Section 435.1(d)(3) is a new section that specifies refund requirements for non-enumerated payment sales. It permits sellers to use the same payment method as the buyer to refund non-enumerated payments when that is the simplest or cheapest means available. In addition, where appropriate, sellers can make refunds by cash, check, or money order. This provides flexibility where refunding: (1) By the original payment method is not possible (*e.g.,* because the buyer has closed his or her debit card account, or value cannot be returned to the buyer's prepaid gift card); or (2) by cash, check, or money order is cheaper or easier (*e.g.,* refunding by wire payment would require a seller to pay wire fees).

Section 435.1(d)(3)(iii) specifies that where a seller has not yet accessed a buyer's funds, a seller can simply notify the buyer that it has cancelled the order.

C. Section 435.2 The Rule

The title and preamble to Section 435.2 and preamble to Section 435.2(a)(1) are amended by inserting ''Internet'' and ''via the Internet'' to clarify that the Rule covers all Internet merchandise orders.

V. Paperwork Reduction Act

The Rule contains various information collection requirements for which the Commission has obtained clearance under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* (''PRA''), Office of Management and Budget (''OMB'') Control Number 3084–0106. OMB renewed 3-year PRA clearance for the Rule on April 15, 2013, effective through April 30, 2016.

As discussed above, the Commission is making a limited number of amendments designed to clarify the Rule and provide sellers with methods for satisfying the Rule's refund requirements. As described above, to the extent that the amendments expand the Rule's coverage, they do so in a way that will not result in significantly higher costs because sellers generally have already aligned their practices with the amendments.[34]

In the Commission's view, there are no additional ''collection of information'' requirements included in the amendments to submit to OMB for clearance under the PRA. Consequently, the amendments will not affect the PRA ''burden'' associated with the Rule's requirements.

VI. Regulatory Analysis and Regulatory Flexibility Act Requirements

Under Section 22 of the FTC Act, 15 U.S.C. 57b–3, the Commission must issue a regulatory analysis for a proceeding to amend a rule only when it: (1) Estimates that the amendment will have an annual effect on the national economy of $100 million or more; (2) estimates that the amendment will cause a substantial change in the cost or price of certain categories of goods or services; or (3) otherwise determines that the amendment will have a significant effect upon covered entities or upon consumers. The Commission has determined that the final Rule will not have such effects on the national economy; on the cost of ordering merchandise by mail, telephone, or over the Internet; or on covered parties or consumers. The record indicates that sellers already treat Internet orders in the same manner as mail or telephone orders and that they do not charge buyers until the time of shipment, so the amendments generally will not require sellers to alter their behavior and would not impose additional costs on most sellers. As noted in the Paperwork Reduction Act discussion above, the Commission estimates each business affected by the final Rule will likely incur only minimal compliance costs, if any.

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–612, requires that the Commission conduct an analysis of the anticipated economic impact of the

[33] 76 FR at 60770 n. 35. The Rule previously required the seller to send the buyer ''a copy of an appropriate credit memorandum or the like to the third party creditor,'' which implicitly required the seller to send an original credit memorandum to the third party creditor.

[34] 76 FR 60772.

amendments on small entities. The purpose of a regulatory flexibility analysis is to ensure that an agency consider the impacts on small entities and examine regulatory alternatives that could achieve the regulatory purpose while minimizing burdens on small entities. Section 605 of the RFA, 5 U.S.C. 605, provides that such an analysis is not required if the agency head certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities.

The Commission believes that the amendments will not have a significant economic impact upon small entities, although it may affect a substantial number of small businesses. Specifically, the amendments are limited and designed to clarify the Rule and define for sellers how to satisfy the Rule's refund requirement. In the Commission's view, the amendments will not have a significant or disproportionate impact on the costs of small entities that solicit orders for merchandise to be ordered through the mail, by telephone, or via the Internet. To the extent that the amendments expand the Rule's coverage, they do so in a way that will not result in significantly higher costs because sellers generally have already aligned their practices with the amendments in the final Rule. Specifically, expanding the Rule to clarify its application to all Internet merchandise orders will not result in significantly higher costs as the record indicates that sellers currently treat all Internet orders as being subject to the Rule. Moreover, defining the timing and method of refunding non-enumerated payment methods should not have a significant cost impact on small entities because sellers typically do not access buyer funds until merchandise shipment, and thus there are only a limited number of refunds issued. For the same reason, requiring refunds for third party credit sales within 7 working days should not have a significant impact on small entities. Therefore, based on available information, the Commission believes that the final Rule will not have a significant economic impact on a substantial number of small businesses, and this document serves as notice to the Small Business Administration of the agency's certification of no significant impact.

Although the Commission certifies under the RFA that the amendments will not have a significant impact on a substantial number of small entities, the Commission has determined, nonetheless, that it is appropriate to publish a Final Regulatory Flexibility Analysis in order to address the impact of the final Rule on small entities. Therefore, the Commission has prepared the following analysis:

A. Need for and Objectives of the Amendments

Based upon the record, including public comments, the Commission is amending the Rule to respond to the development of new technologies and changed commercial practices.

The objective of the amendments is to clarify that the Rule covers all Internet merchandise orders, allow sellers to provide refunds and refund notices to buyers by any means at least as fast and reliable as first class mail, clarify sellers' obligations under the Rule for sales made using payment methods not specifically enumerated in the Rule, and require sellers to process any third party credit card refund within 7 working days of a buyer's right to a refund vesting. The legal basis for the amendments is Section 18 of the FTC Act, 15 U.S.C. 57a, which authorizes the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices in or affecting commerce that are unfair or deceptive within the meaning of Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

B. Significant Issues Raised in Public Comments

None of the comments disputed the Initial Regulatory Flexibility Analysis in the NPRM. The Small Business Administration did not submit comments.

C. Small Entities to Which the Amendments Will Apply

Under the Small Business Size Standards issued by the Small Business Administration, Mail-Order Houses qualify as small businesses if their sales are less than $35.5 million annually. The Commission estimates that the amendments will not have a significant impact on small businesses because, according to the record, sellers already comply in many respects with the requirements of the amendments.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements, Including Classes of Covered Small Entities and Professional Skills Needed To Comply

The Rule currently does not have any reporting or recordkeeping requirements. The Commission does not anticipate the final Rule to have any additional reporting or record keeping requirements. As explained earlier in this document, the amendments clarify that the Rule covers all Internet merchandise sales regardless of how buyers access the Internet, allows sellers to provide refunds and refund notices by means at least as fast and reliable as first class mail, and clarifies sellers' obligations under the Rule for sales made using non-enumerated payment methods. The small entities potentially covered by these amendments include all such entities subject to the Rule. The professional skills necessary for compliance with the amendments include clerical personnel.

E. Significant Alternatives to the Final Rule

The Commission has not proposed any specific small entity exemption or other significant alternatives, as the amendments simply clarify the scope of the Rule (*i.e.,* Internet sales), provide additional compliance options (*e.g.,* for refunds and refund notices), and require certain actions (*e.g.,* refunds) consistent with the Rule's previous requirements. Under these limited circumstances, the Commission does not believe a special exemption for small entities or significant compliance alternatives are necessary or appropriate to minimize the compliance burden, if any, on small entities while achieving the intended purposes of the Rule. Furthermore, the compliance alternatives incorporated into the Rule benefit all covered entities.

List of Subjects in 16 CFR Part 435

Internet order merchandise, Mail order merchandise, Telephone order merchandise, Trade practices.

For the reasons set forth in the preamble, the Federal Trade Commission revises 16 CFR part 435 to read as follows:

PART 435—MAIL, INTERNET, OR TELEPHONE ORDER MERCHANDISE

Sec.
435.1 Definitions.
435.2 Mail, Internet, or telephone order sales.
435.3 Limited applicability.

Authority: 15 U.S.C. 57a.

§ 435.1 Definitions.

For purposes of this part:

(a) *Mail, Internet, or telephone order sales* shall mean sales in which the buyer has ordered merchandise from the seller by mail, via the Internet, or by telephone, regardless of the method of payment or the method used to solicit the order.

(b) *Prompt refund* shall mean:

(1) Where a refund is made pursuant to paragraph (d)(1), (d)(2)(ii), (d)(2)(iii), or (d)(3) of this section, a refund sent by

any means at least as fast and reliable as first class mail within seven (7) working days of the date on which the buyer's right to refund vests under the provisions of this part. Provided, however, that where the seller cannot provide a refund by the same method payment was tendered, *prompt refund* shall mean a refund sent in the form of cash, check, or money order, by any means at least as fast and reliable as first class mail, within seven (7) working days of the date on which the seller discovers it cannot provide a refund by the same method as payment was tendered;

(2) Where a refund is made pursuant to paragraph (d)(2)(i) of this section, a refund sent by any means at least as fast and reliable as first class mail within one (1) billing cycle from the date on which the buyer's right to refund vests under the provisions of this part.

(c) *Receipt of a properly completed order* shall mean, where the buyer tenders full or partial payment in the proper amount in the form of cash, check, or money order; authorization from the buyer to charge an existing charge account; or other payment methods, the time at which the seller receives both said payment and an order from the buyer containing all of the information needed by the seller to process and ship the order. Provided, however, that where the seller receives notice that a payment by means other than cash or credit as tendered by the buyer has been dishonored or that the buyer does not qualify for a credit sale, *receipt of a properly completed order* shall mean the time at which:

(1) The seller receives notice that a payment by means other than cash or credit in the proper amount tendered by the buyer has been honored;

(2) The buyer tenders cash in the proper amount; or

(3) The seller receives notice that the buyer qualifies for a credit sale.

(d) *Refund* shall mean:

(1) Where the buyer tendered full payment for the unshipped merchandise in the form of cash, check, or money order, a return of the amount tendered in the form of cash, check, or money order sent to the buyer;

(2) Where there is a credit sale:

(i) And the seller is a creditor, a copy of a credit memorandum or the like or an account statement sent to the buyer reflecting the removal or absence of any remaining charge incurred as a result of the sale from the buyer's account;

(ii) And a third party is the creditor, an appropriate credit memorandum or the like sent to the third party creditor which will remove the charge from the buyer's account and a copy of the credit memorandum or the like sent to the buyer that includes the date that the seller sent the credit memorandum or the like to the third party creditor and the amount of the charge to be removed, or a statement from the seller acknowledging the cancellation of the order and representing that it has not taken any action regarding the order which will result in a charge to the buyer's account with the third party;

(iii) And the buyer tendered partial payment for the unshipped merchandise in the form of cash, check, or money order, a return of the amount tendered in the form of cash, check, or money order sent to the buyer.

(3) Where the buyer tendered payment for the unshipped merchandise by any means other than those enumerated in paragraph (d)(1) or (2) of this section:

(i) Instructions sent to the entity that transferred payment to the seller instructing that entity to return to the buyer the amount tendered in the form tendered and a statement sent to the buyer setting forth the instructions sent to the entity, including the date of the instructions and the amount to be returned to the buyer; or

(ii) A return of the amount tendered in the form of cash, check, or money order sent to the buyer; or

(iii) A statement from the seller sent to the buyer acknowledging the cancellation of the order and representing that the seller has not taken any action regarding the order which will access any of the buyer's funds.

(e) *Shipment* shall mean the act by which the merchandise is physically placed in the possession of the carrier.

(f) *Telephone* refers to any direct or indirect use of the telephone to order merchandise, regardless of whether the telephone is activated by, or the language used is that of human beings, machines, or both.

(g) The *time of solicitation* of an order shall mean that time when the seller has:

(1) Mailed or otherwise disseminated the solicitation to a prospective purchaser;

(2) Made arrangements for an advertisement containing the solicitation to appear in a newspaper, magazine or the like or on radio or television which cannot be changed or cancelled without incurring substantial expense; or

(3) Made arrangements for the printing of a catalog, brochure or the like which cannot be changed without incurring substantial expense, in which the solicitation in question forms an insubstantial part.

§ 435.2 Mail, Internet, or telephone order sales.

In connection with mail, Internet, or telephone order sales in or affecting commerce, as ''commerce'' is defined in the Federal Trade Commission Act, it constitutes an unfair method of competition, and an unfair or deceptive act or practice for a seller:

(a)(1) To solicit any order for the sale of merchandise to be ordered by the buyer through the mail, via the Internet, or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer:

(i) Within that time clearly and conspicuously stated in any such solicitation; or

(ii) If no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer. Provided, however, where, at the time the merchandise is ordered the buyer applies to the seller for credit to pay for the merchandise in whole or in part, the seller shall have fifty (50) days, rather than thirty (30) days, to perform the actions required in this paragraph (a)(1)(ii).

(2) To provide any buyer with any revised shipping date, as provided in paragraph (b) of this section, unless, at the time any such revised shipping date is provided, the seller has a reasonable basis for making such representation regarding a definite revised shipping date.

(3) To inform any buyer that it is unable to make any representation regarding the length of any delay unless:

(i) The seller has a reasonable basis for so informing the buyer; and

(ii) The seller informs the buyer of the reason or reasons for the delay.

(4) In any action brought by the Federal Trade Commission, alleging a violation of this part, the failure of a respondent-seller to have records or other documentary proof establishing its use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time set forth in this part will create a rebuttable presumption that the seller lacked a reasonable basis for any expectation of shipment within said applicable time.

(b)(1) Where a seller is unable to ship merchandise within the applicable time set forth in paragraph (a)(1) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel the buyer's order and receive a prompt refund. Said offer shall be made

within a reasonable time after the seller first becomes aware of its inability to ship within the applicable time set forth in paragraph (a)(1) of this section, but in no event later than said applicable time.

(i) Any offer to the buyer of such an option shall fully inform the buyer regarding the buyer's right to cancel the order and to obtain a prompt refund and shall provide a definite revised shipping date, but where the seller lacks a reasonable basis for providing a definite revised shipping date the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the delay.

(ii) Where the seller has provided a definite revised shipping date which is thirty (30) days or less later than the applicable time set forth in paragraph (a)(1) of this section, the offer of said option shall expressly inform the buyer that, unless the seller receives, prior to shipment and prior to the expiration of the definite revised shipping date, a response from the buyer rejecting the delay and cancelling the order, the buyer will be deemed to have consented to a delayed shipment on or before the definite revised shipping date.

(iii) Where the seller has provided a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph (a)(1) of this section or where the seller is unable to provide a definite revised shipping date and therefore informs the buyer that it is unable to make any representation regarding the length of the delay, the offer of said option shall also expressly inform the buyer that the buyer's order will automatically be deemed to have been cancelled unless:

(A) The seller has shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and has received no cancellation prior to shipment; or

(B) The seller has received from the buyer within thirty (30) days of said applicable time, a response specifically consenting to said shipping delay. Where the seller informs the buyer that it is unable to make any representation regarding the length of the delay, the buyer shall be expressly informed that, should the buyer consent to an indefinite delay, the buyer will have a continuing right to cancel the buyer's order at any time after the applicable time set forth in paragraph (a)(1) of this section by so notifying the seller prior to actual shipment.

(iv) Nothing in this paragraph shall prohibit a seller who furnishes a definite revised shipping date pursuant to paragraph (b)(1)(i) of this section, from requesting, simultaneously with or at any time subsequent to the offer of an option pursuant to paragraph (b)(1) of this section, the buyer's express consent to a further unanticipated delay beyond the definite revised shipping date in the form of a response from the buyer specifically consenting to said further delay. Provided, however, that where the seller solicits consent to an unanticipated indefinite delay the solicitation shall expressly inform the buyer that, should the buyer so consent to an indefinite delay, the buyer shall have a continuing right to cancel the buyer's order at any time after the definite revised shipping date by so notifying the seller prior to actual shipment.

(2) Where a seller is unable to ship merchandise on or before the definite revised shipping date provided under paragraph (b)(1)(i) of this section and consented to by the buyer pursuant to paragraph (b)(1)(ii) or (iii) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to a further delay or to cancel the order and to receive a prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of its inability to ship before the said definite revised date, but in no event later than the expiration of the definite revised shipping date. Provided, however, that where the seller previously has obtained the buyer's express consent to an unanticipated delay until a specific date beyond the definite revised shipping date, pursuant to paragraph (b)(1)(iv) of this section or to a further delay until a specific date beyond the definite revised shipping date pursuant to paragraph (b)(2) of this section, that date to which the buyer has expressly consented shall supersede the definite revised shipping date for purposes of paragraph (b)(2) of this section.

(i) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where the seller lacks a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the further delay.

(ii) The offer of a renewed option shall expressly inform the buyer that, unless the seller receives, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer specifically consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if the seller is in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date. Provided, however, that where the seller offers the buyer the option to consent to an indefinite delay the offer shall expressly inform the buyer that, should the buyer so consent to an indefinite delay, the buyer shall have a continuing right to cancel the buyer's order at any time after the old definite revised shipping date or any date superseding the old definite revised shipping date.

(iii) Paragraph (b)(2) of this section shall not apply to any situation where a seller, pursuant to the provisions of paragraph (b)(1)(iv) of this section, has previously obtained consent from the buyer to an indefinite extension beyond the first revised shipping date.

(3) Wherever a buyer has the right to exercise any option under this part or to cancel an order by so notifying the seller prior to shipment, to fail to furnish the buyer with adequate means, at the seller's expense, to exercise such option or to notify the seller regarding cancellation.

(4) Nothing in paragraph (b) of this section shall prevent a seller, where it is unable to make shipment within the time set forth in paragraph (a)(1) of this section or within a delay period consented to by the buyer, from deciding to consider the order cancelled and providing the buyer with notice of said decision within a reasonable time after it becomes aware of said inability to ship, together with a prompt refund.

(c) To fail to deem an order cancelled and to make a prompt refund to the buyer whenever:

(1) The seller receives, prior to the time of shipment, notification from the buyer cancelling the order pursuant to any option, renewed option or continuing option under this part;

(2) The seller has, pursuant to paragraph (b)(1)(iii) of this section, provided the buyer with a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph (a)(1) of this section or has notified the buyer that it is unable to make any representation regarding the length of the delay and the seller:

(i) Has not shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and

(ii) Has not received the buyer's express consent to said shipping delay within said thirty (30) days;

(3) The seller is unable to ship within the applicable time set forth in paragraph (b)(2) of this section, and has

not received, within the said applicable time, the buyer's consent to any further delay;

(4) The seller has notified the buyer of its inability to make shipment and has indicated its decision not to ship the merchandise;

(5) The seller fails to offer the option prescribed in paragraph (b)(1) of this section and has not shipped the merchandise within the applicable time set forth in paragraph (a)(1) of this section.

(d) In any action brought by the Federal Trade Commission, alleging a violation of this part, the failure of a respondent-seller to have records or other documentary proof establishing its use of systems and procedures which assure compliance, in the ordinary course of business, with any requirement of paragraph (b) or (c) of this section will create a rebuttable presumption that the seller failed to comply with said requirement.

§ 435.3 Limited applicability.

(a) This part shall not apply to:

(1) Subscriptions, such as magazine sales, ordered for serial delivery, after the initial shipment is made in compliance with this part;

(2) Orders of seeds and growing plants;

(3) Orders made on a collect-on-delivery (C.O.D.) basis;

(4) Transactions governed by the Federal Trade Commission's Trade Regulation Rule entitled ''Use of Prenotification Negative Option Plans,'' 16 CFR Part 425.

(b) By taking action in this area:

(1) The Federal Trade Commission does not intend to preempt action in the same area, which is not inconsistent with this part, by any State, municipal, or other local government. This part does not annul or diminish any rights or remedies provided to consumers by any State law, municipal ordinance, or other local regulation, insofar as those rights or remedies are equal to or greater than those provided by this part. In addition, this part does not supersede those provisions of any State law, municipal ordinance, or other local regulation which impose obligations or liabilities upon sellers, when sellers subject to this part are not in compliance therewith.

(2) This part does supersede those provisions of any State law, municipal ordinance, or other local regulation which are inconsistent with this part to the extent that those provisions do not provide a buyer with rights which are equal to or greater than those rights granted a buyer by this part. This part also supersedes those provisions of any State law, municipal ordinance, or other local regulation requiring that a buyer be notified of a right which is the same as a right provided by this part but requiring that a buyer be given notice of this right in a language, form, or manner which is different in any way from that required by this part. In those instances where any State law, municipal ordinance, or other local regulation contains provisions, some but not all of which are partially or completely superseded by this part, the provisions or portions of those provisions which have not been superseded retain their full force and effect.

(c) If any provision of this part, or its application to any person, partnership, corporation, act or practice is held invalid, the remainder of this part or the application of the provision to any other person, partnership, corporation, act or practice shall not be affected thereby.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2014–22092 Filed 9–16–14; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 157

[Docket ID: DOD–2012–OS–0167]

RIN 0790–AI97

DoD Investigative and Adjudicative Guidance for Issuing the Common Access Card (CAC)

AGENCY: Under Secretary of Defense for Intelligence, DoD.

ACTION: Interim final rule.

SUMMARY: This interim final rule establishes policy, assigns responsibilities, and prescribes procedures for investigating and adjudicating eligibility to hold the DoD Common Access Card (CAC). The CAC is the DoD personal identity verification (PIV) credential. Individuals appropriately sponsored for a DoD CAC must be investigated and adjudicated in accordance with this part.

Prior to this rule, DoD components have been implementing investigative and adjudicative requirements for Homeland Security Presidential Directive—12 (HSPD–12) based solely on broad guidance issued by the U.S. Office of Personnel Management (OPM). This interim final rule elaborates on OPM guidance for component adjudicators who determine, based on review of investigative case files, whether to grant CAC eligibility to individuals who require: Physical access to DoD facilities or non-DoD facilities on behalf of DoD; logical access to information systems (whether on site or remotely); or remote access to DoD networks that use only the CAC logon for user authentication.

The adjudicator's role is discussed further in the **SUPPLEMENTARY INFORMATION**. The interim final rule provides the adjudicator with conditions that may be disqualifying and circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk.

DATES: *Effective Date:* This rule is effective September 17, 2014. Comments must be received by November 17, 2014.

ADDRESSES: You may submit comments, identified by docket number and/or RIN 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, Suite 02G09, Alexandria VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) 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: Dr. Kelly Buck, 703–604–1130.

SUPPLEMENTARY INFORMATION:

Background

The adjudicator's role is to ensure a CAC is not issued to individuals if: (a) The individual is known to be or reasonably suspected of being a terrorist, (b) the employer is unable to verify the individual's claimed identity, (c) there is a reasonable basis to believe the individual has submitted fraudulent information concerning his or her identity, (d) there is a reasonable basis to believe the individual will attempt to gain unauthorized access to classified documents, information protected by the Privacy Act, information that is proprietary in nature, or other sensitive or protected information, (e) there is a reasonable basis to believe the individual will use an identity credential outside the workplace

unlawfully or inappropriately, (f) there is a reasonable basis to believe the individual will use Federally-controlled information systems unlawfully, make unauthorized modifications to such systems, corrupt or destroy such systems, or engage in inappropriate uses of such systems, (g) there is a reasonable basis to believe, based on the individual's misconduct or negligence in employment, that issuance of a CAC poses an unacceptable risk, (h) there is a reasonable basis to believe, based on the individual's criminal or dishonest conduct, that issuance of a CAC poses an unacceptable risk, (i) there is a reasonable basis to believe, based on the individual's material, intentional false statement, deception, or fraud in connection with Federal or contract employment, that issuance of a CAC poses an unacceptable risk, (j) there is a reasonable basis to believe, based on the nature or duration of the individual's alcohol abuse without evidence of substantial rehabilitation, that issuance of a CAC poses an unacceptable risk, (k) there is a reasonable basis to believe, based on the nature or duration of the individual's illegal use of narcotics, drugs, or other controlled substances without evidence of substantial rehabilitation, that issuance of a CAC poses an unacceptable risk, (l) a statutory or regulatory bar prevents the individual's contract employment; or would prevent Federal employment under circumstances that furnish a reasonable basis to believe that issuance of a CAC poses an unacceptable risk; or (m) the individual has knowingly and willfully engaged in acts or activities designed to overthrow the U.S. Government by force.

I. Purpose

a. The Need for the Regulatory Action and How the Action Will Meet That Need

This interim final rule establishes policy, assigns responsibilities, and prescribes procedures for investigating and adjudicating eligibility to hold the DoD CAC. The CAC is the DoD personal identity verification (PIV) credential.

On August 27, 2004, the President issued Homeland Security Policy Directive 12, ''Policy for a Common Identification Standard for Federal Employees and Contractors, which mandated a requirement for a common identification standard for secure and reliable forms of identification for federal employees and contractors. Pursuant to section 2.3(b) of Executive Order 13467, on July 31, 2008, the U.S. Office of Personnel Management OPM issued its final government-wide credentialing standards and mandated that all Federal departments and agencies use them in determining whether to issue or revoke PIV cards to their employees and contractor personnel, including those who are non-United States citizens.

Pending the issuance of this interim final rule, the DoD promulgated two Directive-type memoranda: DTM 08–006, ''DoD Implementation of Homeland Security Presidential Directive—12 (HSPD–12), issued on November 26, 2008, established DoD policy for implementation of HSPD–12. Pursuant to DTM 08–006, DTM 08–003, ''Next Generation Common Access Card (CAC) Implementation Guidance,'' December 1, 2008, was issued to provide interim implementation guidance governing the CAC. DTM 08–006 was subsequently cancelled with issuance of DoDI 1000.13, ''Identification (ID) Cards for members of the Uniformed Services, Their Dependents, and Other Eligible Individuals,'' January 23, 2014. DTM 08–003 was subsequently cancelled with issuance of DoD Manual 1000.13, Volume 1, ''DoD Identification (ID) Cards: ID Card Life-Cycle,'' January 23, 2014. This interim final rule implements HSPD–12 for the DoD by establishing policy and assigning responsibilities for investigating and adjudicating eligibility to hold a CAC, procedures upon revocation of a CAC, and processing of appeals.

b. Legal Authority for the Regulatory Action

Homeland Security Presidential Directive-12, ''Policy for a Common Identification Standard for Federal Employees and Contractors,'' August 27, 2014, requires the government-wide standard for secure and reliable forms of identification for Federal employees and contractors. The Department of Commerce issued Federal Information Processing Standard 201–2 as the standard. Executive Order 13467 of June 30, 2008, ''Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information'' established the Office of Personnel Management (OPM) to serve as the Suitability Executive Agent regarding suitability and eligibility for logical and physical access. As such, OPM issued the ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12'' on July 31, 2008.

II. Summary of the Major Provisions

This rule:

a. Provides investigative requirements and credentialing standards for issuing, denying, or revoking a CAC.

b. Provides guidance for applying credentialing standards during adjudication.

c. Provides for an appeal process.

d. Establishes procedures upon revocation of a CAC.

III. Costs and Benefits

The interim final rule does not impose direct costs onto the public because costs associated with the implementation of the investigation and adjudicative standards will be borne by the Department. However, the HSPD–12 mandate will increase overall costs for the DoD to investigate and adjudicate individuals covered by the Instruction who would not otherwise undergo an adjudication to determine suitability for the competitive service, eligibility for a national security sensitive position, or fitness for appointment to the excepted service or to perform work under a Government contract. The costs to the Department are not driven by the policy contained in this interim final rule, but rather HSPD–12 and the U.S. Department of Commerce's National institute of Standards and Technology's Federal Information Processing Standards Publication 201–2 (FIPS 201–2), August 2013, mandate for investigating and adjudicating eligibility to hold a CAC.

This interim final rule provides for protections against unauthorized access to federal facilities and federally controlled information systems and other sensitive or protected information. This policy manages risk and creates efficiencies by ensuring persons are vetted to uniform national standards. Standardized investigative and adjudicative guidance will eliminate inter-agency variations that have existed in the quality and security of identification used to gain access to secure facilities where there is potential for terrorist attacks. Establishing a mandatory, Department-wide standard for secure and reliable forms of identification that the Department issues to its employees and contractors enhances security, increases Government efficiency, reduces identity fraud, and protects personal privacy.

Implementing policies and procedures that apply across the Department will also result in significant intra-agency efficiencies. Absent this Department-wide guidance—which leverages already established processes and capabilities—the individual components may handle HSPD–12 compliance in multiple ways, duplicating effort and expending

valuable resources. Thus the cost of complying with the HSPD–12 mandate will be even greater in the absence of DoD-wide policy and procedures.

Interim Final Rule Justification

This rule is being published as an interim final rule as DoD's current efforts to comply with HSPD–12 need extensive procedural guidance to ensure consistency of implementation of 32 CFR part 156 and DoD Instruction 5200.02. This interim final rule provides DoD components and Component Heads with detailed policy and procedures specific to the DoD regarding investigation, adjudication, and appeals for DoD CAC issuance. This rule consolidates, clarifies, and elaborates DoD CAC policy as appropriate to ensure that Components' policies and procedures for CAC applications, investigations, adjudications, management, oversight, and appeals are aligned across the Department using consistent standards and practices in cost-effective, timely, and efficient ways.

If this rule is not published as an interim final rule, it will prolong the vulnerability of DoD's personnel, information, and facilities to risks that are created by a current lack of uniformity in how DoD Components define and implement roles, responsibilities and requirements associated with DoD CAC-issuance. As one example, circumstances surrounding the shooting at the Washington Navy Yard highlight the importance of consistent and specific requirements for revocation and retrieval of credentials for personnel who have been identified as posing unacceptable risks. As such, this policy mandates revocation and retrieval of credentials and timely updates to physical and logical accesses, when appropriate, to prevent use of invalidated credentials.

Additionally, to better consistently protect DoD's personnel, systems, and facilities, the DoD Components' concurred with applying both basic and supplemental credentialing standards and this policy helps codify that agreement. As such, the DoD ensures that all behaviors that suggest unacceptable risks to life, safety, or health of DoD personnel, information, or property are uniformly considered in all adjudications for credentials.

To ensure that all individuals are consistently afforded opportunity to respond to any official decision that they are not acceptable risks for issuance of a CAC, this interim rule provides standard procedures for use across the DoD by individuals who wish to appeal denials or revocations of CACs.

This rule is subject to update whenever additional policy guidance is provided by the Office of Management and Budget or the U.S. Office of Personnel Management. Further, DoD will consider public comments received in response to this interim rule in the formation of the Department's final rule.

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

We have consulted with the Office of Management and Budget (OMB) and determined this interim final rule meets the criteria for a significant regulatory action under Executive Order 12866, as supplemented by *Executive Order 13563,* and was subject to OMB review.

Sec. 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) requires 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 2014, that threshold is approximately $141 million. This document will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

It has been certified that 32 CFR part 157 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

This rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. This collection has been approved by the Office of Management and Budget under OMB Control Number 0704–0415 titled ''Application for Department of Defense Common Access Card—DEERS Enrollment''.

Executive Order 13132, ''Federalism''

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. This document will not have a substantial effect on State and local governments.

List of Subjects in 32 CFR Part 157

Common Access Card (CAC), Contractors; Federal employees, Federal facilities, Federally-controlled information systems, HSPD–12 credentialing standards, Identity verification, Personal identity verification (PIV) card, Sensitive or protected information, Terrorist; Unauthorized access.

Accordingly 32 CFR part 157 is added to read as follows:

PART 157—DOD INVESTIGATIVE AND ADJUDICATIVE GUIDANCE FOR ISSUING THE COMMON ACCESS CARD (CAC)

Sec.
157.1 Purpose.
157.2 Applicability.
157.3 Definitions.
157.4 Policy.
157.5 Responsibilities.
157.6 Procedures.

Authority: HSPD–12, E.O 13467, E.O. 13488, FIPS 201–2, and OPM Memorandum.

§ 157.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures for investigating and adjudicating eligibility to hold a Common Access Card (CAC). The CAC is the DoD personal identity verification (PIV) credential.

§ 157.2 Applicability.

This part applies to:

(a) the Office of the Secretary of Defense, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (hereinafter referred to collectively as the ''DoD Components'').

(b) The Commissioned Corps of the U.S. Public Health Service (USPHS), under agreement with the Department of Health and Human Services, and the National Oceanic and Atmospheric Administration (NOAA), under agreement with the Department of Commerce.

§ 157.3 Definitions.

These terms and their definitions are for the purpose of this part.

Actionable information. Information that potentially justifies an unfavorable credentialing determination.

CAC. The DoD Federal PIV card.

Contractor. Defined in Executive Order 13467, ''Reforming Processes Related to Sustainability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information''.

Contractor employee fitness. Defined in E.O. 13467.

Debarment. A prohibition from taking a competitive service examination or from being hired (or retained in) a covered position for a specific time period..

Drugs. Mood and behavior-altering substances, including drugs, materials, and other chemical compounds identified and listed in 21 U.S.C. 801–830 (also known as ''The Controlled Substances Act of 1970, as amended'') (e.g., marijuana or cannabis, depressants, narcotics, stimulants, hallucinogens), and inhalants and other similar substances.

Drug abuse. The illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Employee. Defined in E.O. 12968, ''Access to Classified Information''.

Fitness. Defined in E.O. 13488, ''Granting Reciprocity on Excepted Service and Federal Contractor Employee Fitness and Reinvestigating Individuals in Positions of Public Trust''.

Fitness determination. Defined in E.O. 13488.

Logical and physical access. Defined in E.O. 13467.

Material. Defined in 5 CFR part 731.

Reasonable basis. A reasonable basis to believe occurs when a disinterested observer, with knowledge of the same facts and circumstances, would reasonably reach the same conclusion.

Terrorism. Defined in 19 U.S.C. 2331.

Unacceptable risk. A threat to the life, safety, or health of employees, contractors, vendors, or visitors; to the U.S. Government physical assets or information systems; to personal property; to records, including classified, privileged, proprietary, financial, and medical records; or to the privacy rights established by The Privacy Act of 1974, as amended, or other law that is deemed unacceptable when making risk management determinations.

U.S. National. Defined in U.S. OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12'' (available at *http://www.opm.gov/investigate/resources/final_credentialing_standards.pdf*).

§ 157.4 Policy.

It is DoD policy that:

(a) Individuals appropriately sponsored for a CAC consistent with DoD Manual 1000.13, Volume 1, ''DoD Identification Cards: ID Card Life-Cycle,'' January 23, 2014, (available at *http://www.dtic.mil/whs/directives/corres/pdf/100013_vol1.pdf*) must be investigated and adjudicated in accordance with this part. Individuals not CAC eligible may be processed for local or regional base passes in accordance with Under Secretary of Defense for Intelligence (USD(I)) policy guidance for DoD physical access control consistent with DoD Regulation 5200.08–R, ''Physical Security Program'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/520008r.pdf*) and local installation security policies and procedures.

(b) A favorably adjudicated National Agency Check with Inquiries (NACI) or equivalent in accordance with revised Federal investigative standards is the minimum investigation required for a final credentialing determination for a CAC.

(c) Individuals requiring a CAC must meet the credentialing standards in accordance with the U.S. Office of Personnel Management (OPM) Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12''; and U.S. Office of Personnel Management Memorandum, ''Introduction of Credentialing, Suitability, and Security Clearance Decision-Making Guide (available at *http://www.opm.gov/investigate/resources/decision_making_guide.pdf*) and this part.

(d) A CAC may be issued on an interim basis based on a favorable National Agency Check or a Federal Bureau of Investigation (FBI) National Criminal History Check (fingerprint check) adjudicated by appropriate approved automated procedures or by a trained security or human resource (HR) specialist and successful submission to the investigative service provider (ISP) of a NACI, or a personnel security investigation (PSI) equal to or greater in scope than a NACI. Additionally, the CAC applicant must present two identity source documents, at least one of which is a valid Federal or State government-issued picture identification.

(e) The subsequent final credentialing determination will be made upon receipt of the completed investigation from the ISP.

(f) Discretionary judgments used to render an adjudicative determination for issuing the CAC are inherently governmental functions and must only be performed by trained U.S. Government personnel who have successfully completed required training and possess a minimum level of investigation (NACI or equivalent in accordance with revised Federal investigative standards). Established administrative processes in 32 CFR part 156 and DoD Directive 5220.6, ''Defense Industrial Personnel Security Clearance Review Program'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/522006p.pdf*) must be applied.

(g) Adjudications rendered for eligibility for access to classified information, eligibility to hold a sensitive position, suitability, or fitness for Federal employment based on a NACI or higher level investigation may result in a concurrent CAC decision for that position.

(h) Favorable credentialing adjudications from another Federal department or agency will be reciprocally accepted in accordance with conditions stated in the procedural guidance in this part. Reciprocity must be based on final favorable adjudication only.

(i) CAC applicants or holders may appeal CAC denial or revocation in accordance with the conditions stated in the procedural guidance in this part. Appeals must be processed as indicated in the procedural guidance in this part.

(j) Non-U.S. nationals at foreign locations are not eligible to receive a CAC on an interim basis. Special considerations for conducting background investigations of non-U.S. nationals are addressed in U.S. OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12.'' An interim CAC may be issued to non-U.S. nationals in the U.S. or U.S. territories if they have resided in the U.S. or U.S. territory for at least 3 years, and they satisfy the requirements of paragraph (e) of this section and paragraph (a)(4)(ii)(A) of § 157.6.

(k) Individuals who have been denied a CAC or have had a CAC revoked due to an unfavorable credentialing determination are eligible to reapply for a credential 1 year after the date of final adjudicative denial or revocation.

(l) Individuals with a statutory or regulatory bar are not eligible for reconsideration while under debarment, see paragraph (d)(6) of § 157.6.

(m) The Deputy Secretary of Defense directed all reports of investigations conducted as required for compliance with Homeland Security Presidential

Directive-12, ''Policy for a Common Identification Standard for Federal Employees and Contractors'' (available at *http://www.dhs.gov/homeland-security-presidential-directive-12*) to be sent to the consolidated DoD Central Adjudications Facility.

(n) When eligibility is denied or revoked, CACs shall be recovered whenever practicable, and shall immediately be rendered inoperable. In addition, agencies' physical and logical access systems shall be immediately updated to eliminate the use of a CAC for access.

§ 157.5 Responsibilities.

(a) The USD(I) must:

(1) In coordination with the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) and the General Counsel of the Department of Defense (GC, DoD), establish adjudication procedures to support CAC credentialing decisions in accordance with DoD Manual 1000.13, Volume 1, ''DoD Identification (ID) Cards; ID Card Life-Cycle''; U.S. Office of Personnel Management Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12''; U.S. Office of Personnel Management Memorandum, ''Introduction of Credentialing, Suitability, and Security Clearance Decision-Making Guide; Office of Management and Budget Memorandum M–05–24, ''Implementation of Homeland Security Presidential Directive (HSPD) 12—Policy for a Common Identification Standard for Federal Employees and Contractors'' (available at *http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-24.pdf*); U.S. Office of Personnel Management Federal Investigations Notice Number 06–04, ''HSPD 12—Advanced Fingerprint Results'' (available at *http://www.opm.gov/extra/investigate/FIN06_04.pdf*); Homeland Security Presidential Directive-12, ''Policy for a Common Identification Standard for Federal Employees and Contractors''; 5 U.S.C. 552, 552a and 7313; Federal Information Processing Standards Publication 201–2, ''Personal Identity Verification (PIV) of Federal Employees and Contractors'' (available at *http://csrc.nist.gov/publications/PubsFIPS.html*); Executive Order 13467, ''Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information''; Executive Order 13488, ''Granting Reciprocity on Excepted Service and Federal Contractor Employee Fitness and Reinvestigating Individuals in Positions of Public Trust''; 15 U.S.C. 278g–3; 40 U.S.C. 11331; and U.S. Office of Personnel Management Federal Investigations Notice Number 10–05, ''Reminder to Agencies of the Standards for Issuing Identity Credentials Under HSPD–12'' (available at *http://www.opm.gov/investigate/fins/2010/fin10-05.pdf*) for issuing a CAC to Service members and DoD civilian personnel.

(2) In coordination with the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and the GC, DoD, establish adjudication procedures to support a CAC credentialing decision for contractors in accordance with the terms of applicable contracts and the references cited in paragraph (a)(1) of this section, the Federal Acquisition Regulation (available at *http://www.acquisition.gov/far/current/pdf/FAR.pdf*), and the Defense Federal Acquisition Regulation Supplement (available at *http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html*).

(3) Issue, interpret, and clarify CAC investigative and adjudicative guidance in coordination with the Suitability Executive Agent as necessary.

(b) The USD(P&R) must, in coordination with the GC, DoD, implement CAC PSI and adjudication procedures established herein as necessary to support issuance of a CAC to Service members and DoD civilian personnel in accordance with the references cited in paragraph (a)(1) of this section.

(c) The USD(AT&L) must, in coordination with the GC, DoD, implement CAC PSI and adjudication procedures established by the USD(I) for contractors in accordance with the terms of applicable contracts and the references cited in paragraph (a)(1) of this section, Federal Acquisition Regulation, current edition; and Defense Federal Acquisition Regulation Supplement, current edition.

(d) The GC, DoD must:

(1) Provide advice and guidance as to the legal sufficiency of procedures and standards involved in adjudicating CAC investigations.

(2) Perform functions relating to the DoD Homeland Security Presidential Directive (HSPD)–12 Program in accordance with DoD Directive 5220.6, ''Defense Industrial Personnel Security Clearance Review Program'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/522006p.pdf*) and DoD Directive 5145.01, ''General Counsel of the Department of Defense'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/514501p.pdf*) including maintenance and oversight of the Defense Office of Hearings and Appeals (DOHA) and its involvement in contractor CAC revocations as specified in paragraph (b)(6)(i)(B) of § 157.6 of this part.

(3) Coordinate on USD(P&R) implementation of CAC PSI and adjudication procedures, in accordance with the references cited in paragraph (a)(1) of this section, for Service members and DoD civilian personnel, and USD(AT&L) implementation of USD(I) procedures for CAC PSI and adjudication in accordance with the terms of applicable contracts and the references cited in paragraph (a)(1) of this section, Federal Acquisition Regulation and Defense Federal Acquisition Regulation Supplement.

(e) The Heads of the DoD Components must:

(1) Comply with and implement this part.

(2) Provide resources for PSIs, adjudication, appeals, and recording of final adjudicative results in a centralized database.

(3) Require individuals sponsored for a CAC to meet eligibility requirements stated in DTM 08–003.

(4) Provide appeals boards for those individuals appealing CAC denial or revocation as specified in paragraph (b)(6)(i)(A) of § 157.6.

(5) Enforce requirements for reporting of derogatory information, unfavorable administrative actions, and adverse actions to personnel security, HR, and counterintelligence official(s), as appropriate.

(6) Require all PSIs submitted for non-DoD personnel to be supported by and comply with DoD PIV procedures in contracts that implement requirements of paragraphs 4.1303 and 52.204–9 of Federal Acquisition Regulation, current edition.

(7) Require all investigations and adjudications required for non-DoD personnel to be in response to a current, active contract or agreement and that the number of personnel submitted for investigation and adjudication does not exceed the specific requirements of that contract or agreement while ensuring compliance with HSPD–12.

§ 157.6 Procedures.

(a) *CAC Investigative Procedures*— (1) *Investigative Requirements.* (i) A personnel security investigation (NACI or greater) completed by an authorized ISP is required to support a CAC credentialing determination based on the established credentialing standards promulgated by OPM Memorandum, ''Final Credentialing Standards for

Issuing Personal Identity Verification Cards Under HSPD–12''.

(ii) Individuals identified as having a favorably adjudicated investigation on record, equivalent to or greater than the NACI, do not require an additional investigation for CAC issuance.

(iii) There is no requirement to reinvestigate CAC holders unless they are subject to reinvestigation for national security or suitability reasons as specified in applicable DoD issuances.

(2) *Submission of Investigations.* Investigative packages must be submitted promptly by HR or security personnel to the authorized ISP. Fingerprints for CAC applicants must be taken by HR or security personnel. DoD Components using the OPM as the ISP may request advanced fingerprint check results in accordance with OPM Federal Investigations Notice Number 06–04.

(3) *Reciprocity.* (i) The sponsoring Component must not re-adjudicate CAC determinations for individuals transferring from another Federal department or agency, provided:

(A) The individual's former department or agency verifies possession of a valid PIV.

(B) The individual has undergone the required NACI or other equivalent (or greater) suitability or national security investigation and received favorable adjudication from the former department or agency.

(C) There is no break in service 2 years or more and the individual has no actionable information since the date of the last completed investigation.

(ii) Interim CAC determinations are not eligible to be transferred or reciprocally accepted. Reciprocity must be based on final favorable adjudication only.

(4) *Foreign (Non-U.S.) Nationals.* DoD Components must apply the credentialing process and standards in this part to non-U.S. nationals who work as employees or contractor employees for the DoD. However, special considerations apply to non-U.S. nationals.

(i) *At Foreign Locations.* (A) DoD Components must initiate and ensure completion of a background investigation before applying the credentialing standards to a non-U.S. national at a foreign location. The background investigation must be favorably adjudicated before a CAC can be issued to a non-U.S. national at a foreign location. The type of background investigation may vary based on standing reciprocity treaties concerning identity assurance and information exchanges that exist between the U.S. and its allies or agency agreements with the host country.

(B) The investigation of a non-U.S. national at a foreign location must be consistent with a NACI, to the extent possible, and include a fingerprint check against the FBI criminal history database, an FBI investigations files (name check) search, and a name check against the terrorist screening database.

(ii) *At U.S.-Based Locations and in U.S. Territories (Other than American Samoa and Commonwealth of the Northern Mariana Islands).* (A) Individuals who are non-U.S. nationals in the United States or U.S. territory for 3 years or more must have a NACI or equivalent investigation initiated after employment authorization is appropriately verified.

(B) Non-U.S. nationals who have been in the United States or U.S. territory for less than 3 years do not meet the investigative requirements for CAC issuance. DoD Components may delay the background investigation of a Non-U.S. national who has been in the U.S. or U.S. territory for less than 3 years until the individual has been in the United States or U.S. territory for at least 3 years. In the event of such a delay, an alternative facility access identity credential may be issued at the discretion of the relevant DoD Component official, as appropriate based on a risk determination in accordance with DoD 5200.08–R, ''Physical Security Program'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/520008r.pdf*) and U.S. Office of Personnel Management Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12.''

(C) The U.S. territories of American Samoa and the Commonwealth of the Northern Mariana Islands are not included in the ''United States'' as defined by the Immigration and Nationality Act of 1952, as amended (Pub. L. 82–414).

(5) *Investigations Acceptable for CAC Adjudication.* A list of investigations acceptable for CAC adjudication is located in the Table. These investigations are equivalent to or greater than a NACI. This list will be updated by the USD(I) as revisions to the Federal investigative standards are implemented.

TABLE—FAVORABLY ADJUDICATED INVESTIGATIONS ACCEPTABLE FOR CAC ADJUDICATION

Investigation	Description
ANACI	Access National Agency Check and Inquires.
BGI–0112	Upgrade Background Investigation (1–12 months from LBI).
BGI–1336	Upgrade Background Investigation (13–36 months from LBI).
BGI–3760	Upgrade Background Investigation (37–60 months from LBI).
BI	Background Investigation.
BIPN	Background Investigation plus Current National Agency Check.
BIPR	Periodic Reinvestigation of Background Investigation.
BITN	Background Investigation (10 year scope).
CNCI	Child Care National Agency Check plus Written Inquires and Credit.
IBI	Interview Oriented Background Investigation.
LBI	Limited Background Investigation.
LBIP	Limited Background Investigation plus Current National Agency Check.
LBIX	Limited Background Investigation—Expanded.
MBI	Moderate Risk Background Investigation.
MBIP	Moderate Risk Background Investigation plus Current National Agency Check.
MBIX	Moderate Risk Background Investigation—Expanded.
NACB	National Agency Check/National Agency Check plus Written Inquires and Credit Check plus Background Investigation Requested.
NACI	National Agency Check and Inquires.
NACLC	National Agency Check with Law and Credit.
NACS	National Agency Check/National Agency Check plus Written Inquires and Credit Check plus Single Scope B.I. Requested.
NACW	National Agency Check plus Written Inquires and Credit.

TABLE—FAVORABLY ADJUDICATED INVESTIGATIONS ACCEPTABLE FOR CAC ADJUDICATION—Continued

Investigation	Description
NACZ	National Agency Check plus Written Inquires and Credit plus Special Investigative Inquiry.
NLC	National Agency Check, Local Agency Check and Credit.
NNAC	National Agency Check plus Written Inquires and Credit Plus Current National Agency Check.
NSI	NSI—NACI/Suitability Determination.
PRI	Periodic Reinvestigation.
PRS	Periodic Reinvestigation Secret.
PRSC	Periodic Reinvestigation Secret or Confidential.
PPR	Phased Periodic Reinvestigation.
SPR	Secret Periodic Reinvestigation.
SSBI	Single Scope Background Investigation.
SSBI–PR	Periodic Reinvestigation for SSBI.

(b) *CAC Adjudicative Procedures.*—(1) *Guidance for Applying Credentialing Standards During Adjudication.* (i) As established in Homeland Security Presidential Directive–12, credentialing adjudication considers whether or not an individual is eligible for long-term access to Federally controlled facilities and/or information systems. The ultimate determination to authorize, deny, or revoke the CAC based on a credentialing determination of the PSI must be made after consideration of applicable credentialing standards in OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12.''

(ii) Each case is unique. Adjudicators must examine conditions that raise an adjudicative concern, the overriding factor for all of these conditions is unacceptable risk. Factors to be applied consistently to all information available to the adjudicator are:

(A) The nature and seriousness of the conduct. The more serious the conduct, the greater the potential for an adverse CAC determination.

(B) The circumstances surrounding the conduct. Sufficient information concerning the circumstances of the conduct must be obtained to determine whether there is a reasonable basis to believe the conduct poses a risk to people, property or information systems.

(C) The recency and frequency of the conduct. More recent or more frequent conduct is of greater concern.

(D) The individual's age and maturity at the time of the conduct. Offenses committed as a minor are usually treated as less serious than the same offenses committed as an adult, unless the offense is very recent, part of a pattern, or particularly heinous.

(E) Contributing external conditions. Economic and cultural conditions may be relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk if the conditions are currently removed or countered (generally considered in cases with relatively minor issues).

(F) The absence or presence of efforts toward rehabilitation, if relevant, to address conduct adverse to CAC determinations.

(*1*) Clear, affirmative evidence of rehabilitation is required for a favorable adjudication (e.g., seeking assistance and following professional guidance, where appropriate; demonstrating positive changes in behavior and employment).

(*2*) Rehabilitation may be a consideration for most conduct, not just alcohol and drug abuse. While formal counseling or treatment may be a consideration, other factors (such as the individual's employment record) may also be indications of rehabilitation.

(iii) CAC adjudicators must successfully complete formal training through a DoD CAC adjudicator course from the Defense Security Service Center for Development of Security Excellence or a course approved by the Suitability Executive Agent.

(2) *Credentialing Standards.* HSPD–12 credentialing standards contained in OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12'' must be used to render a final determination whether to issue or revoke a CAC based on results of a qualifying PSI.

(i) *Basic Standards.* CAC credentialing standards and the adjudicative guidelines described in paragraph (c) of this section are designed to guide the adjudicator who must determine, based on results of a qualifying PSI, whether CAC issuance is consistent with the basic standards, would create an unacceptable risk for the U.S. Government, or would provide an avenue for terrorism.

(ii) *Supplemental Standards.* The supplemental standards are intended to ensure that the issuance of a CAC to an individual does not create unacceptable risk. The supplemental credentialing standards must be applied, in addition to the basic credentialing standards. In this context, an unacceptable risk refers to an unacceptable risk to the life, safety, or health of employees, contractors, vendors, or visitors; to the Government's physical assets or information systems; to personal property; to records, including classified, privileged, proprietary, financial, or medical records; or to the privacy of data subjects.

The supplemental credentialing standards, in addition to the basic credentialing standards, must be used for CAC adjudication of individuals who are not also subject to the following types of adjudication:

(A) Eligibility to hold a sensitive position or for access to classified information,

(B) Suitability for Federal employment in the competitive service, or

(C) Qualification for Federal employment in the excepted service.

(3) *Application of the Standards.* (i) CAC credentialing standards shall be applied to all DoD civilian employees, Service members, and contractors who are CAC eligible, have been sponsored by a DoD entity, and require: (a) Physical access to DoD facilities or non-DoD facilities on behalf of DoD; (b) logical access to information systems (whether on site or remotely); or (c) remote access to DoD networks that use only the CAC logon for user authentication.

(ii) If an individual is found unsuitable for competitive civil service consistent with 5 CFR part 731, ineligible for access to classified information pursuant to E.O. 12968, or disqualified from appointment in the excepted service or from working on a contract, the unfavorable decision may be sufficient basis for non-issuance or revocation of a CAC, but does not necessarily mandate this result.

(4) *Adjudication.* The CAC adjudicators will consider the information provided by the CAC PSI in rendering a CAC credentialing

determination. The determination will be unfavorable if there is a reasonable basis to conclude that a disqualifying factor in accordance with the basic CAC credentialing standards is substantiated, or when there is a reasonable basis to conclude that derogatory information or conduct relating to supplemental CAC credentialing standards presents an unacceptable risk for the U.S. Government.

(i) If a DoD Component or DOHA proposes to deny or revoke a CAC under conditions other than those cited in paragraph (b)(3)(ii) of this section, the DoD Component or DOHA, as appropriate in accordance with paragraph (b)(6)(i) of this section, must issue the individual a written statement (also known as a letter of denial (LOD) or revocation (LOR)) identifying the disqualifying condition(s). The statement must contain a summary of the concerns and supporting adverse information, instructions for responding, and copies of the relevant CAC credentialing standards and adjudicative guidelines from this section. The written LOD or LOR must be as comprehensive and detailed as permitted by the requirements of national security and to protect sources that were granted confidentiality, and as allowed pursuant to provisions of 5 U.S.C. 552 and 552a. (Section 552a is also known and hereinafter referred to as ''The Privacy Act of 1974, as amended.'')

(ii) The individual may elect to respond in writing to the DoD Component or DOHA, as appropriate, within 30 calendar days from the date of the LOD or LOR. Failure to respond to the LOD or LOR will result in automatic CAC denial or revocation.

(iii) When, subsequent to issuance of an interim or final CAC, the U.S. Government receives credible information that raises questions as to whether a current CAC holder continues to meet the applicable credentialing standards, the DoD Component may reconsider the credentialing determination using the procedures in this part.

(5) *Denial or Revocation.* (i) DoD Components must deny or revoke a CAC if the individual fails to respond to the LOD or LOR within the specified time-frame or the response to the written statement has not provided a basis to reverse the decision.

(ii) Denial or revocation of a CAC must comply with applicable governing laws and regulations:

(A) The U.S. Coast Guard shall afford individuals appeal rights as established in applicable Department of Homeland Security and U.S. Coast Guard Issuances.

(B) CAC provides Service members with Geneva Convention protection in accordance with DoD Instruction 1000.1, ''Identification (ID) Cards Required by the Geneva Conventions'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/100001p.pdf*), and authorized benefits (e.g. medical) and must not be revoked or denied pursuant to the provisions of this part. CAC for Military Service members will be surrendered only upon separation, discharge, or retirement.

(C) In certain instances a CAC provides other benefits or specific privileges to civilian employees (e.g. medical, post exchange and commissary) when assigned overseas long-term; or protected status to civilian employees and contractors who are accompanying U.S. forces during overseas deployments in accordance with DoD Instruction 1000.1. CAC for DoD civilians or contractors in this circumstance will not be revoked pursuant to the provisions of this part, but may be surrendered as part of other adverse employment or contracting actions or procedures.

(iii) When eligibility is denied or revoked, the CAC shall be recovered whenever practicable, and shall immediately be rendered inoperable. In addition, agency's physical and logical access systems shall immediately be updated to eliminate the use of the CAC for access.

(6) *Appeals.* (i) Individuals who have been denied a CAC or have had a CAC revoked due to an unfavorable credentialing determination must be entitled to appeal the determination in accordance with the following procedures:

(A) Except as stated in paragraph (b)(6)(ii) of this section, new civilian and contractor applicants who have been denied a CAC may elect to appeal to a three member board composed of not more than one security representative and one human resources representative.

(B) Contractor employees who have had their CAC revoked may appeal the unfavorable determination to the DOHA in accordance with the established administrative process set out in DoD Directive 5220.6.

(ii) This appeal process does not apply when a CAC is denied or revoked as a result of either an unfavorable suitability determination consistent with 5 CFR part 731 or a decision to deny or revoke eligibility for access to classified information or eligibility for a sensitive national security position, since the person is already entitled to seek review in accordance with applicable suitability or national security procedures. Likewise, there is no right to appeal when the decision to deny the CAC is based on the results of a separate determination to disqualify the person from an appointment in the excepted service or to bar the person from working for or on behalf of a Federal department or agency.

(iii) The DoD Component will notify the individual in writing of the final determination and provide a statement that this determination is not subject to further appeal.

(7) *Recording Final Determination.* Immediately following final adjudication, the sponsoring activity must record the final eligibility determination (e.g., active, revoked, denied) in the OPM Central Verification System as directed by OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12.'' DoD Component records will document the adjudicative rationale. Adjudicative records shall be made available to authorized recipients as required for appeal purposes.

(c) *Basic Adjudicative Standards.* (1) A CAC will not be issued to a person if the individual is known to be or reasonably suspected of being a terrorist.

(i) A CAC must not be issued to a person if the individual is known to be or reasonably suspected of being a terrorist. Individuals entrusted with access to Federal property and information systems must not put the U.S. Government at risk or provide an avenue for terrorism.

(ii) Therefore, conditions that may be disqualifying include evidence that the individual has knowingly and willfully been involved with reportable domestic or international terrorist contacts or foreign intelligence entities, counterintelligence activities, indicators, or other behaviors described in DoD Directive 5240.06, ''Counterintelligence Awareness and Reporting (CIAR)'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/524006p.pdf*).

(2) A CAC will not be issued to a person if the employer is unable to verify the individual's claimed identity.

(i) A CAC must not be issued to a person if the DoD component is unable to verify the individual's claimed identity. To be considered eligible for a CAC, the individual's identity must be clearly authenticated. The CAC must not be issued when identity cannot be authenticated.

(ii) Therefore, conditions that may be disqualifying include:

(A) The individual claimed it was not possible to provide two identity source documents from the list of acceptable documents in Form I–9, Office of Management and Budget No. 1115–0136, ''Employment Eligibility Verification,''(available at *http://www.uscis.gov/files/form/i-9.pdf*) or provided only one identity source document from the list of acceptable documents.

(B) The individual did not appear in person as required by Federal Information Processing Standards Publication 201–2.

(C) The individual refused to cooperate with the documentation and investigative requirements to validate his or her identity.

(D) The investigation failed to confirm the individual's claimed identity.

(iii) No conditions can mitigate inability to verify the applicant's identity.

(3) A CAC will not be issued to a person if there is a reasonable basis to believe the individual has submitted fraudulent information concerning his or her identity.

(i) A CAC must not be issued to a person if there is a reasonable basis to believe the individual has submitted fraudulent information concerning his or her identity in an attempt to obtain the current credential.

(A) Substitution occurred in the identity proofing process; the individual who appeared on one occasion was not the same person that appeared on another occasion.

(B) The fingerprints associated with the identity do not belong to the person attempting to obtain a CAC.

(ii) No conditions can mitigate submission of fraudulent information in an attempt to obtain a current credential.

(4) A CAC will not be issued to a person if there is a reasonable basis to believe the individual will attempt to gain unauthorized access to classified documents, information protected by the Privacy Act, information that is proprietary in nature, or other sensitive or protected information.

(i) Individuals must comply with information-handling regulations and rules. Individuals must properly handle classified and protected information such as sensitive or proprietary information.

(ii) Individuals should not attempt to gain unauthorized access to classified documents or other sensitive or protected information. Unauthorized access to U.S. Government information or improper use of U.S. Government information once access is granted may pose a significant risk to national security, may compromise individual privacy, and may make public information that is proprietary in nature, thus compromising the operations and missions of Federal agencies.

(iii) A CAC must not be issued if there is a reasonable basis to believe the individual will attempt to gain unauthorized access to classified documents, information protected by the Privacy Act of 1974, as amended, information that is proprietary in nature, or other sensitive or protected information.

(iv) Therefore, conditions that may be disqualifying include any attempt to gain unauthorized access to classified, sensitive, proprietary or other protected information.

(v) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) Since the time of the last act or activities, the person has demonstrated a favorable change in behavior.

(B) The behavior happened so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's ability to safeguard protected information.

(5) A CAC will not be issued to a person if there is a reasonable basis to believe the individual will use an identity credential outside the workplace unlawfully or inappropriately.

(i) A CAC must not be issued to a person if there is a reasonable basis to believe the individual will use an identity credential outside the workplace unlawfully or inappropriately.

(ii) Therefore, conditions that may be disqualifying include:

(A) Documented history of fraudulent requests for credentials or other official documentation.

(B) Previous incidents in which the individual used credentials or other official documentation to circumvent rules or regulations.

(C) A history of incidents involving misuse of credentials that put physical assets or personal property at risk.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The behavior happened so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's ability and willingness to use credentials lawfully and appropriately.

(6) A CAC will not be issued to a person if there is a reasonable basis to believe the individual will use Federally-controlled information systems unlawfully, make unauthorized modifications to such systems, corrupt or destroy such systems, or engage in inappropriate uses of such systems.

(i) Individuals must comply with rules, procedures, guidelines, or regulations pertaining to information technology systems and properly protect sensitive systems, networks, and information. The individual should not attempt to use federally-controlled information systems unlawfully, make unauthorized modifications, corrupt or destroy, or engage in inappropriate uses of such systems. A CAC must not be issued to a person if there is a reasonable basis to believe the individual will do so or has done so in the past.

(ii) Therefore, conditions that may be disqualifying include:

(A) Illegal, unauthorized, or inappropriate use of an information technology system or component.

(B) Unauthorized modification, destruction, manipulation of information, software, firmware, or hardware to corrupt or destroy information technology systems or data.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The behavior happened so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's ability and willingness to conform to rules and regulations for use of information technology systems.

(d) *Supplemental Adjudicative Standards.* (1) A CAC will not be issued to a person if there is a reasonable basis to believe, based on the individual's misconduct or negligence in employment, that issuance of a CAC poses an unacceptable risk.

(i) An individual's employment misconduct or negligence may put people, property, or information systems at risk.

(ii) Therefore, conditions that may be disqualifying include:

(A) A previous history of intentional wrongdoing on the job, disruptive, violent, or other acts that may pose an unacceptable risk to people, property, or information systems.

(B) A pattern of dishonesty or rule violations in the workplace which put people, property or information at risk.

(C) A documented history of misusing workplace information systems to view, download, or distribute pornography.

(D) Violation of written or recorded commitments to protect information made to an employer, such as breach(es) of confidentiality or the release of proprietary or other information.

(E) Failure to comply with rules or regulations for the safeguarding of classified, sensitive, or other protected information.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The behavior happened so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's current trustworthiness or good judgment relating to the safety of people and proper safeguarding of property and information systems.

(B) The individual was not adequately warned that the conduct was unacceptable and could not reasonably be expected to know that the conduct was wrong.

(C) The individual made prompt, good-faith efforts to correct the behavior.

(D) The individual responded favorably to counseling or remedial training and has since demonstrated a positive attitude toward the discharge of information-handling or security responsibilities.

(2) A CAC will not be issued to a person if there is a reasonable basis to believe, based on the individual's criminal or dishonest conduct, that issuance of a CAC poses an unacceptable risk.

(i) An individual's conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about his or her reliability or trustworthiness and may put people, property, or information systems at risk. An individual's past criminal or dishonest conduct may put people, property, or information systems at risk.

(ii) Therefore, conditions that may be disqualifying include:

(A) A single serious crime or multiple lesser offenses which put the safety of people at risk or threaten the protection of property or information. A person's convictions for burglary may indicate that granting a CAC poses an unacceptable risk to the U.S. Government's physical assets and to employees' personal property on a U.S. Government facility.

(B) Charges or admission of criminal conduct relating to the safety of people and proper protection of property or information systems, regardless of whether the person was formally charged, formally prosecuted, or convicted.

(C) Dishonest acts (e.g., theft, accepting bribes, falsifying claims, perjury, forgery, or attempting to obtain identity documentation without proper authorization).

(D) Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, or other intentional financial breaches of trust.

(E) Actions involving violence or sexual behavior of a criminal nature that poses an unacceptable risk if access is granted to federally-controlled facilities or federally-controlled information systems. For example, convictions for sexual assault may indicate that granting a CAC poses an unacceptable risk to the life and safety of persons on U.S. Government facilities.

(F) Financial irresponsibility may raise questions about the individual's honesty and put people, property or information systems at risk, although financial debt should not in and of itself be cause for denial.

(G) Deliberate omission, concealment, or falsification of relevant facts or deliberately providing false or misleading information to an employer, investigator, security official, competent medical authority, or other official U.S. Government representative, particularly when doing so results in personal benefit or which results in a risk to the safety of people and proper safeguarding of property and information systems.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The behavior happened so long ago, was minor in nature, or happened under such unusual circumstances that it is unlikely to recur.

(B) Charges were dismissed or evidence was provided that the person did not commit the offense and details and reasons support his or her innocence.

(C) Improper or inadequate advice from authorized personnel or legal counsel significantly contributed to the individual's omission, of information. When confronted, the individual provided an accurate explanation and made prompt, good-faith effort to correct the situation.

(D) Evidence has been supplied of successful rehabilitation, including but not limited to remorse or restitution, job training or higher education, good employment record, constructive community involvement, or passage of time without recurrence.

(3) A CAC will not be issued to a person if there is a reasonable basis to believe, based on the individual's material, intentional false statement, deception, or fraud in connection with Federal or contract employment, that issuance of a CAC poses an unacceptable risk.

(i) The individual's conduct involving questionable judgment, lack of candor, or unwillingness to comply with rules and regulations can raise questions about an individual's honesty, reliability, trustworthiness, and put people, property, or information systems at risk.

(ii) Therefore, conditions that may be disqualifying include material, intentional falsification, deception or fraud related to answers or information provided during the employment process for the current or a prior Federal or contract employment (e.g., on the employment application or other employment, appointment or investigative documents, or during interviews.)

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The misstated or omitted information was so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur.

(B) The misstatement or omission was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation.

(4) A CAC will not be issued to a person if there is a reasonable basis to believe, based on the nature or duration of the individual's alcohol abuse without evidence of substantial rehabilitation, that issuance of a CAC poses an unacceptable risk.

(i) An individual's abuse of alcohol may put people, property, or information systems at risk. Alcohol abuse can lead to the exercise of questionable judgment or failure to control impulses, and may put people, property, or information systems at risk, regardless of whether he or she is diagnosed as an abuser of alcohol or alcohol dependent. A person's long-term abuse of alcohol without evidence of substantial rehabilitation may indicate that granting a CAC poses an unacceptable safety risk in a U.S. Government facility.

(ii) Therefore, conditions that may be disqualifying include:

(A) A pattern of alcohol-related arrests.

(B) Alcohol-related incidents at work, such as reporting for work or duty in an

intoxicated or impaired condition, or drinking on the job.

(C) Current continuing abuse of alcohol.

(D) Failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an abuser of alcohol).

(B) The individual is participating in counseling or treatment programs, has no history of previous treatment or relapse, and is making satisfactory progress.

(C) The individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare. He or she has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in an alcohol treatment program. The individual has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

(5) A CAC will not be issued to a person if there is a reasonable basis to believe, based on the nature or duration of the individual's illegal use of narcotics, drugs, or other controlled substances without evidence of substantial rehabilitation, that issuance of a CAC poses an unacceptable risk.

(i) An individual's abuse of drugs may put people, property, or information systems at risk. Illegal use of narcotics, drugs, or other controlled substances, to include abuse of prescription or over-the-counter drugs, can raise questions about his or her trustworthiness, or ability or willingness to comply with laws, rules, and regulations. For example, a person's long-term illegal use of narcotics without evidence of substantial rehabilitation may indicate that granting a CAC poses an unacceptable safety risk in a U.S. Government facility.

(ii) Therefore, conditions that may be disqualifying include:

(A) Current or recent illegal drug use, serious narcotic, or other controlled substance offense.

(B) A pattern of drug-related arrests or problems in employment.

(C) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution of illegal drugs, or possession of drug paraphernalia.

(D) Diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence.

(E) Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program.

(F) Failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional.

(G) Any illegal drug use after formally agreeing to comply with rules or regulations prohibiting drug use.

(H) Any illegal use or abuse of prescription or over-the-counter drugs.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur (e.g., clear, lengthy break since last use; strong evidence the use will not occur again).

(B) A demonstrated intent not to abuse any drugs in the future, such as:

(*1*) Abstaining from drug use.

(*2*) Disassociating from drug-using associates and contacts.

(*3*) Changing or avoiding the environment where drugs were used.

(C) Abuse of prescription drugs followed a severe or prolonged illness during which these drugs were prescribed and abuse has since ended.

(D) Satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

(6) A CAC will not be issued to a person if a statutory or regulatory bar prevents the individual's contract employment; or would prevent Federal employment under circumstances that furnish a reasonable basis to believe that issuance of a CAC poses an unacceptable risk.

(i) The purpose of this standard is to verify whether there is a bar on contract employment, and whether the contract employee is subject to a Federal employment debarment for reasons that also pose an unacceptable risk in the contracting context. For example, a person's 5-year bar on Federal employment based on a felony conviction related to inciting a riot or civil disorder, as specified in 5 U.S.C. 7313, may indicate that granting a CAC poses an unacceptable risk to persons, property, and assets in U.S. Government facilities.

(ii) Therefore, conditions that may be disqualifying include:

(A) A debarment was imposed by OPM, DoD, or other Federal agencies when the conduct poses an unacceptable risk to people, property, or information systems.

(B) The suitability debarment was based on the presence of serious suitability issues when the conduct poses an unacceptable risk to people, property, or information systems.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) Applicant proves the reason(s) for the debarment no longer exists.

(B) The debarment is job or position-specific and is not applicable to the job currently under consideration.

(7) A CAC will not be issued to a person if the individual has knowingly and willfully engaged in acts or activities designed to overthrow the U.S. Government by force.

(i) Individuals entrusted with access to U.S. Government property and information systems must not put the U.S. Government at risk.

(ii) Therefore, conditions that may be disqualifying include:

(A) Illegal involvement in, support of, training to commit, or advocacy of any act of sabotage, espionage, treason or sedition against the United States of America.

(B) Association or agreement with persons who attempt to or commit any of the acts in paragraph (d)(7)(ii)(A) of this section with the specific intent to further those unlawful aims.

(C) Association or agreement with persons or organizations that advocate, threaten, or use force or violence, or use any other illegal or unconstitutional means in an effort to overthrow or influence the U.S. Government.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The behavior happened so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's current trustworthiness.

(B) The person was not aware of the person's or organization's dedication to illegal, treasonous, or seditious activities or did not have the specific intent to further the illegal, treasonous, or seditious ends of the person or organization.

(C) The individual did not have the specific intent to incite others to

advocate, threaten, or use force or violence, or use any other illegal or unconstitutional means to engage in illegal, treasonous, or seditious activities.

(D) The individual's involvement in the activities was for an official purpose.

Dated: September 11, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–22034 Filed 9–16–14; 8:45 am]

BILLING CODE 5001–06–P

LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 201

[Docket No. 2014–04]

Changes to Recordation Practices

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Final rule.

SUMMARY: The U.S. Copyright Office is amending its regulations for the recordation of copyright transfers and other documents. The rule is intended to reduce the amount of time the Office requires to process certain types of documents submitted for recordation and help to alleviate remitter concerns regarding the receipt of documents for processing. To these ends, the revised regulations encourage remitters to include a cover sheet with the documents they submit for processing; allow remitters to submit long title lists in electronic format; and provide remitters with the option to request return receipts that acknowledge that the Office has received a submission.

DATES: Effective October 17, 2014.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at *jcharlesworth@loc.gov* or by telephone at 202–707–8350; or Sarang V. Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

On July 16, 2014, the Copyright Office published a Notice of Proposed Rulemaking (''NPRM'') setting forth proposed regulatory amendments designed to speed processing of documents submitted for recordation under section 205 of title 17 of the United States Code. *See* 79 FR 41470. The NPRM encompassed three recommended changes to the Office's recordation regulations. First, the NPRM proposed amending the regulations to reflect the fact that the Office has created a Recordation Document Cover Sheet (Form DCS) to assist with the processing of documents submitted for recordation under section 205. As the NPRM explained, remitters are not required to use Form DCS unless they are requesting a return receipt, but use of the form is encouraged to facilitate better recordkeeping and communication between the Office and remitters. *Id.* at 41471. Second, the NPRM proposed a rule to permit (but not require) the submission of electronic lists of titles of copyrighted works associated with remitted documents, where such lists include 100 or more titles. *Id.* at 41471–72. The NPRM noted that submission of lengthy title lists in electronic format would speed processing of documents by eliminating the need for manual transcription of titles into the Office's Public Catalog. *Id.* at 41471. Third, the NPRM specified a procedure by which a remitter could receive a return receipt indicating that the Office had received a document submitted for recordation. *Id.* at 41472.

Five comments were received in response to the NPRM.[1] The Motion Picture Association of America, Inc. (''MPAA'') and Barbara Jones-Binns endorsed the proposed amendments in full, and had no further suggestions.[2] Author Services, Inc., also supported the proposed rule, but stated it would be interested if, as a ''next step,'' the Office would ''move towards being able to submit the titles of documents electronically for less than 100 titles.'' [3] Finally, the Recording Industry Association of America, Inc. (''RIAA'') submitted comments that were largely supportive of the proposed rule, but contained three substantive concerns that are addressed in more detail below.[4]

[1] All comments received in response to the NPRM can be found on the Copyright Office's Web site at *http://copyright.gov/rulemaking/recordation-practices/docket2014-4/comments/.*

[2] *See* Motion Picture Ass'n of Am., Inc., Comments Submitted in Response to U.S. Copyright Office's July 16, 2014 Notice of Proposed Rulemaking (Aug. 15, 2014) (''MPAA Comments''); Barbara Jones-Binns, Comments Submitted in Response to U.S. Copyright Office's July 16, 2014 Notice of Proposed Rulemaking (Aug. 15, 2014).

[3] Author Services, Inc., Comments Submitted in Response to U.S. Copyright Office's July 16, 2014 Notice of Proposed Rulemaking (Aug. 11, 2014).

[4] Recording Industry Ass'n of Am., Inc., Comments Submitted in Response to U.S. Copyright Office's July 16, 2014 Notice of Proposed Rulemaking (Aug. 15, 2014) (''RIAA Comments''). The Office received an additional comment regarding return receipts for electronic deposits submitted as part of registration, an issue that is outside the scope of this rulemaking.

II. Final Rule

No commenter opposed the provisions of the proposed rule relating to Form DCS (section 201.4(b)) or the procedures for obtaining a return receipt (section 201.4(f)). Accordingly, those provisions of the proposed rule are adopted in the final rule without alteration.

With respect to the proposed rule for submission of electronic title lists, commenters universally endorsed the basic approach of allowing remitters to file electronic lists of 100 or more titles, and expressed no concerns regarding the format or submission requirements for electronic title lists. For example, the RIAA ''commend[ed] the Office for its proposal'' and ''agree[d] that [it] should relieve the Office of some of the burden of cataloging recordations of copyright documents involving large numbers of titles and expedite the processing of such documents.'' RIAA Comments at 2.

With respect to the suggestion of Author Services, Inc. that the Office consider allowing submission of electronic title lists containing fewer than 100 titles as a ''next step,'' at this time the Office finds that ''electronic submission will prove more efficient only when indexing 100 or more titles,'' 79 FR at 41472. This view is based on the fact that, when a document pertains to 100 or fewer titles, the Office can create the basic record of the document and manually transcribe all of the titles in a single sitting, and make the record immediately available in the Public Catalog. As a result, while use of an electronic title list is expected to result in a much shorter turnaround time than manual processing of documents pertaining to 100 or more titles, the same cannot be said with respect to documents pertaining to fewer than 100 titles.

The RIAA offered three substantive comments on the proposed rule for submission of electronic title lists. First, it expressed concern with the rule's specification that remitters would be legally responsible for errors in the electronic title lists. RIAA Comments at 2–5. Second, it urged the Office to implement a process of quality control checks for electronic title lists. *Id.* at 2. Third, and finally, it suggested that the Office specify a mechanism for correction of errors in electronic title lists. *Id.* at 5. We address each comment in turn.

1. Remitter Responsibility for Inaccuracies in Electronic Title Lists

The RIAA disagreed with the proposed rule's specification that remitters would bear the legal

consequences of any discrepancies between a paper document and the electronically formatted titles with respect to whether there is effective constructive notice or priority under 17 U.S.C. 205. RIAA Comments at 2–5; *see* 79 FR at 41473. Section 201.4(c)(4)(iii) of the proposed rule stated that the Office will rely on the electronic list of titles for purposes of indexing recorded documents in the Public Catalog and the remitter will bear the consequences of any inaccuracies in the electronic list in relation to the recorded document, including with respect to whether there is effective constructive notice or priority under 17 U.S.C. 205(c). For example, omission of a title from the electronic list such that the title is not properly indexed may affect the ability to claim that the public had constructive notice with respect to that title, even if the title appears in the paper document. If a title appears in the electronic list but is not included in the paper document that is actually recorded, the paper document will control (79 FR at 41473).

As relevant here, section 205(c) of the Copyright Act provides that recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if . . . the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work . . . (17 U.S.C. 205(c)).

Section 205(d), in turn, states that, as between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer (17 U.S.C. 205(d)).

In its comments, the RIAA argues that the electronic title list rule should not suggest that a remitter's failure to provide an accurate list might deprive the remitter of the legal benefits of recordation as provided under the statutory provisions. RIAA Comments at 3. The RIAA reasons that, by making such a suggestion, the rule could ''punish rights holders who make innocent, inadvertent mistakes in preparing electronic lists in the specified format that are submitted for recordation by suggesting that the electronic lists may take precedence over the underlying original document that is submitted for recordation.'' RIAA Comments at 2. The RIAA asserts that such a result would ''deprive remitters of their right to constructive notice.'' *Id.* Instead, in the RIAA's view, a remitter should be entitled to the legal benefits of recordation—constructive notice and priority—even if the remitter provides the Office with an inaccurate electronic title list that causes the document to be indexed and cataloged incorrectly. The RIAA asserts that the contents of the recorded paper document must solely determine questions of constructive notice and priority under the Copyright Act. *Id.* at 3–5. According to the RIAA, any other result would ''improperly subvert the plain language of the Copyright Act and the intent of Congress.'' *Id.* at 2.

As an initial matter, it should be noted that accepting the RIAA's view would seriously undermine the central aim of the electronic title list rule. As the RIAA acknowledges, the rule is meant to ''assist[] the Office in the efficient cataloging of the information contained in the lists.'' RIAA Comments at 3. To effectively achieve that goal, the Office must be able to rely upon the electronic title lists for indexing purposes without having to individually review the titles in the electronic list against those in the paper document to identify and correct discrepancies. If, as the RIAA urges, constructive notice and priority as between conflicting transfers cannot be affected by inaccuracies in the electronic list that is intended to serve as the basis for the Public Catalog index, the rule will be in tension with the statutory design. In other words, for the rule to result in the efficient cataloging of documents submitted for recordation, the burden for creating accurate electronic title lists, and thus the legal consequences for failing to do so, must be on the remitter.

As noted above, section 205(c) provides that constructive notice will attach ''only if . . . the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work.'' 17 U.S.C. 205(c). This language indicates Congress's intent that, before constructive notice can attach, the public should be able to find the document by title or registration number through a reasonable search of the Copyright Office's records. For this reason we do not believe the RIAA's approach to be aligned with the statutory goal.

Moreover, the language in section 205(c) referencing indexing by the Register of Copyrights must be interpreted in light of section 705(a), which provides that the Register ''shall ensure that records of deposits, registrations, recordations, and other actions taken under this title are maintained, and that *indexes of such records are prepared.''* 17 U.S.C. 705(a) (emphasis added).[5] She is also authorized to establish regulations consistent with the statute ''for the administration of [her] functions and duties'' under title 17. 17 U.S.C. 702. Thus, the Register may assign the task of indexing to another and issue implementing regulations; her duty is to *ensure* that indexes of records are prepared. Notably, section 705 was amended in 2000 specifically to empower the Register to delegate tasks related to record maintenance and indexing to others outside the Copyright Office.[6] Especially in light of this amendment, allowing remitters to prepare electronic title lists that will serve as the basis for the recordation index is fully consistent with congressional intent.[7]

We appreciate the RIAA's concern that remitters are perhaps bearing some additional responsibility and risk by choosing to submit electronic title lists. RIAA Comments at 5. We note that remitters can mitigate their risk by establishing appropriate internal procedures to review and confirm electronic lists before they are submitted to the Office. (Indeed, remitters should already be employing such measures for title lists that are submitted in paper form.) Still, the Office acknowledges that some remitters may not wish to take on the added burden of preparing a careful list in electronic form. In such a case, the remitter may continue to rely

[5] *See Wachovia Bank NA* v. *Schmidt*, 546 U.S. 303, 315–16 (2006) (''[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read 'as if they were one law.' '' (quoting *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972))).

[6] H.R. Rep. No. 106–861, at 5–6 (2000); *see* Work Made for Hire and Copyright Corrections Act of 2000, Public Law 106–379, 114 Stat. 144, 1445. Prior to this amendment, section 705(a) stated that the Register ''shall . . . prepare indexes of all . . . records.'' 17 U.S.C. 705(a) (1999).

[7] The RIAA also relies on provisions of the Federal Rules of Evidence relating to the introduction of documentary evidence at trial. RIAA Comments at 3–5 (citing Fed. R. Evid. 1001(d); 1002; 1003). While those provisions could be relevant in litigation involving a particular document, they do not govern the interpretation of the Copyright Act by the Copyright Office. *See* Fed. R. Evid. 101 (''These rules apply to proceedings in United States courts.'').

on a wholly paper process and manual transcription by the Office. The Office continues to believe, however, that for many remitters, the benefits of faster processing times are likely to outweigh the concerns identified by the RIAA.

Notwithstanding its disagreement with the RIAA's basic position, the Office concurs with the RIAA's views to the extent that the RIAA suggests that it is unnecessary for the rule itself specifically to note potential scenarios where discrepancies in the electronic list may give rise to concerns about notice or priority. Accordingly, the final rule omits the last two sentences of proposed § 201.4(c)(4)(iii), which referenced such scenarios, and revises the preceding sentence to be more general in approach.

2. Quality Control Checks

The RIAA also suggests that the Office ''implement a process of quality control checks, particularly during the first year or so after a final rule is promulgated, so that the Office can determine the extent of errors in the submissions of electronic lists.'' RIAA Comments at 2. The RIAA notes that ''[i]f the rate of such errors is not insignificant, the Office may need to consider modifying the rule in order to minimize such errors.'' *Id.*

The Office intends to ''spot check'' electronic title lists that are submitted, at least for some initial period of time after promulgation of the rule, and plans to communicate with remitters if inaccuracies are found. If the Office discovers an unacceptably high error rate in electronic title lists through these spot checks or otherwise, it will consider appropriate revisions to the rule. Notwithstanding such quality control checks, the Office reiterates that remitters bear full responsibility for ensuring the accuracy of the electronic title lists they submit.

3. Correction of Errors

The RIAA also urges the Office to ''provide for a mechanism or procedure by which a remitter can easily correct any errors to the electronic list that the remitter has supplied voluntarily.'' RIAA Comments at 5. Specifically, the RIAA urges that ''the remitter should be able to correct those errors in a simple, cost-free or low-cost manner,'' and that ''there should be no time limitation during which a remitter can correct an error.'' *Id.*

In light of the potential consequences of errors, and to ensure the most accurate public record possible, the Office agrees with the RIAA that the rule should provide a mechanism for correcting errors in the online Public Catalog that stem from a remitter's submission of an erroneous title list. The Office is therefore adding a provision to the rule to permit such corrections. This provision, to be codified at § 201.4(c)(4)(v), would apply after the document has already been processed and catalogued by the Office. Under the rule, if a remitter discovers an error in the cataloging of a recorded document that is a result of an inaccuracy in the earlier submitted electronic title list, the remitter may submit a corrected title list to the Copyright Office.

To correct the Public Catalog, the original remitter of the recorded document must submit the full electronic list of titles, in the same format as prescribed for the originally submitted list, with each corrected row identified with color highlighting in the table. The table header should contain the phrase ''CORRECTED TITLE LIST.'' The table header, file name, and label on the storage medium should include the volume and document number of the recorded document to which the corrected list pertains so it can be easily matched to the proper record. A cover letter should also be included that clearly references the volume and document number of the recorded document, the name of the remitting party, the name of the first party listed in the paper document, and the first title listed in the paper document. Once received by the Office, staff will process the necessary corrections so they are reflected in the Office's Public Catalog. In addition, a note will be placed in the record indicating that corrections were made to the catalog, and the date those corrections were made.

This service will require the establishment of a separate fee.[8] *See* 17 U.S.C. 708(a) (authorizing the Register to ''fix fees for other services . . . based on the cost of providing the service''). But rather than delay the adoption of this final rule in its entirety to allow public comment on such a fee, the Office has decided to issue the rule now and delay imposition of the fee.[9] Until the applicable fee is finalized through the separate rulemaking proceeding, the fee for submission of corrected title lists will be zero.

[8] The Office will reexamine the overall fees for recordation, including the impact, if any, of implementation of this rule, during its next fee study. *See generally* 79 FR 15910 (Mar. 24, 2014) (prior fee study).

[9] In a separate Notice of Proposed Rulemaking, the Office proposes a fee of seven dollars for every title that is being corrected.

4. Technical Changes

Lastly, the final rule includes a few technical changes with respect to the processing of electronic title lists. The rule now specifies that the Office will add a note into the record indicating that it has used an electronic title list submitted by the remitter for purposes of indexing the document. In addition, the final rule includes two clarifications regarding the manner in which registration numbers are to be listed in electronic title lists. First, it specifies that when multiple registration numbers are associated with a title, the registration numbers should be separated by commas. Second, it requires the use of all capital letters for the alphabetic prefixes of registration numbers (*e.g.,* ''VAU'' not ''VAu'').

List of Subjects in 37 CFR Part 201

Copyright.

Final Regulations

For the reasons set forth in the preamble, the Copyright Office amends 37 CFR part 201 as follows:

PART 201—GENERAL PROVISIONS

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

■ 2. Amend § 201.4 by revising paragraph (b) and the paragraph (c) heading and by adding paragraphs (c)(4) and (f) to read as follows:

§ 201.4 Recordation of transfers and certain other documents.

* * * * *

(b) *Forms.* Persons recording documents are encouraged, but not required, to complete and include a Recordation Document Cover Sheet (Form DCS), available on the Copyright Office Web site, with their submissions; provided, however, that if the remitter seeks a return receipt as provided in paragraph (f) of this section, then Form DCS is required. Form DCS may also be used to satisfy the sworn certification requirement of 17 U.S.C. 205(a), as provided in paragraph (a)(3)(i) of this section. If Form DCS is used, two copies of the completed form should accompany each document submitted for recordation, one of which will become part of the public record.

(c) *Document submission contents and process.* * * *

(4) *Submission of electronic title lists.* If a document submitted for recordation pertains to 100 or more titles of copyrighted works (including where the total number of titles across multiple title lists associated with the document

is 100 or more), in addition to identifying the titles in the paper submission, the remitting party may also submit an electronic list (or lists) setting forth each such title, as provided herein. The electronic list(s) shall not be considered a part of the recorded document and shall function only as a means to index titles and other information associated with the recorded document. When the Office uses an electronic title list submitted by a remitter for indexing purposes, it will make a note of this fact in the record.

(i) *Method of submitting electronic title lists.* Absent a special arrangement with the Office, the electronic list must be included in the same package as the paper document to be recorded. The list must be prepared in a format consistent with the requirements in paragraph (c)(4)(ii) of this section, and stored on a compact disc, flash drive, or other digital storage medium approved by the Copyright Office that is clearly labeled with the following information: The name of the remitting party, the name of the first party listed in the paper document, the first title listed in the paper document, the number of titles included in the paper document, and the date the remitting party mailed or delivered the paper document.

(ii) *Format requirements for electronic title lists.* Any electronic list of titles submitted pursuant to this paragraph (c)(4) shall conform to the requirements of this subparagraph. The electronic list of titles shall:

(A) Consist of a table contained in an electronic file in Excel (.xls) format or an equivalent electronic format approved by the Office;

(B) Include only letters, numbers, and printable characters that appear in the ASCII 128-character set;

(C) Include four columns respectively entitled, from left to right, Article, Title, Authorship Information, and Registration Number(s);

(D) List each title on a separate row of the electronic table, and include the following information for each title in the appropriate column, as applicable:

(*1*) First column: *Article.* If the title of the work begins with one of the articles specified in the following list, the article should be separated from the title and placed in this column. If the title does not begin with one of the specified articles, the column must still be included, but this field should be left blank. The list of leading articles is as follows:

(*i*) English: A, An, The

(*ii*) Spanish: Un, Una, El, La, Lo, Las, Los

(*iii*) French: L', Le, La, Les, Un, Une

(*iv*) German: Der, Die, Das, Einer, Eine, Ein;

(*2*) Second column: *Title.* The title of the work, not including any leading article;

(*3*) Third column: *Authorship Information.* The word ''By'' followed by the author or authors of the work. Where applicable, include designations such as ''performer known as'' or ''also known as,'' or the abbreviated form of such designations. Abbreviated designations must omit any punctuation between letters, for example ''pka'' (not ''p/k/a''); and

(*4*) Fourth column: *Registration Number(s).* The copyright registration number or numbers, separated by commas. This field is optional; if registration numbers are not being supplied for any title in the submission, this column should still be included, but left blank. Regardless of how they appear in the paper document, registration numbers included in the electronic list must be twelve characters long, must include a two- or three-letter prefix in all capital letters, and must not include spaces or hyphens. If a given registration number consists of fewer than twelve characters in the original, the remitting party should add leading zeroes to the numeric portion of the registration number before adding it to the list. For example, a published work with the registration number ''SR–320–918'' should be transcribed into the electronic list as ''SR0000320918,'' and an unpublished work with the registration number ''VAu–598–764'' should be transcribed into the electronic list as ''VAU000598764.''

(iii) *Remitters to bear consequences of inaccurate electronic title lists.* The Office will rely on the electronic list of titles for purposes of indexing recorded documents in the Public Catalog and the remitter will bear the consequences, if any, of any inaccuracies in the electronic list in relation to the recorded document, including with respect to the application of 17 U.S.C. 205(c) and 205(d).

(iv) *Treatment of improperly prepared electronic title lists.* The Office reserves the right to reject an electronic title list from any party that is shown to have submitted an improperly prepared file.

(v) *Correction of erroneous title lists.* If a remitter of a recorded document finds that an error or omission in an electronic title list has led to the inaccurate indexing of the document in the Public Catalog, the remitter may request that the record be corrected by submitting a corrected version of the electronic title list. The remitter must submit the complete, corrected list of electronic titles in accordance with the method and format requirements set forth in paragraphs (c)(4)(i) and (ii) of this section, with each corrected row in the table identified by color highlighting. The table header should contain the phrase ''CORRECTED TITLE LIST.'' The volume and document number of the associated recorded document should also be included in the header, as well as in the title of the computer file containing the electronic title list. In submitting the list the remitter should include a cover letter that clearly references the volume and document number of the recorded document, the name of the remitting party, the name of the first party listed in the paper document, and the first title listed in the paper document. Upon receipt of a corrected electronic list in proper form, the Office will proceed to correct the data in the Public Catalog, and will make a note in the record indicating that the corrections were made and the date they were made.

* * * * *

(f) *Return receipt.* If, with a document submitted for recordation, a remitter includes two copies of a properly completed Recordation Document Cover Sheet (Form DCS) indicating that a return receipt is requested, as well as a self-addressed, postage-paid envelope, the remitter will receive a date-stamped return receipt acknowledging the Copyright Office's receipt of the enclosed submission. The completed copies of Form DCS and the self-addressed, postage-paid envelope must be included in the same package as the submitted document. A return receipt confirms the Office's receipt of the submission as of the date indicated, but does not establish eligibility for, or the date of, recordation.

Dated: September 2, 2014.

Maria A. Pallante,

Register of Copyrights.

Approved by:

James H. Billington,

Librarian of Congress.

[FR Doc. 2014–22233 Filed 9–16–14; 8:45 am]

BILLING CODE 1410–30–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2011–0881; FRL–9916–06-Region 9]

Approval and Promulgation of Implementation Plans, State of California, San Joaquin Valley Unified Air Pollution Control District, New Source Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action under the Clean Air Act to approve revisions to the San Joaquin Valley Unified Air Pollution Control District portion of the California State Implementation Plan submitted by the California Air Resources Board. These revisions concern pre-construction review of new and modified stationary sources located within the District. The revisions are intended to remedy deficiencies the EPA identified when granting limited approval and limited disapproval to the rules in 2010, and to add requirements for pre-construction review of new and modified sources of fine particulate matter ($PM_{2.5}$).

DATES: This rule is effective on October 17, 2014.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2011–0881 for this action. The index to the docket is available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), 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: Laura Yannayon, Permits Office (AIR–3), U.S. Environmental Protection Agency, Region IX, (415) 972–3534, *yannayon.laura@epa.gov.*

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

Table of Contents

I. Background and Proposed Action
II. Public Comments and EPA's Responses
III. Final Action
IV. Statutory and Executive Order Reviews

I. Background and Proposed Action

On December 6, 2011 (76 FR 76112), under section 110(k) of the Clean Air Act (CAA or ''Act''), we proposed to approve two amended rules adopted by the San Joaquin Valley Unified Air Pollution Control District (District or SJVUAPCD) and submitted to EPA by the California Air Resources Board (CARB) as a revision to the California state implementation plan (SIP). The two amended rules include District Rule 2020 (''Exemptions'') [1] and District Rule 2201 (''New and Modified Stationary Source Review Rule'').[2] These rules concern pre-construction review of new and modified stationary sources (''new source review'' or NSR) within the District. Collectively, we refer to District Rules 2020 and 2201 herein as the ''District NSR rules.'' Table 1 below shows the relevant amendment and submittal dates for this SIP revision.

TABLE 1—AMENDED SAN JOAQUIN VALLEY NSR RULES

Local agency	Rule No.	Rule title	Amended	Submitted
SJVUAPCD	2020	Exemptions	8/18/11	9/28/11
SJVUAPCD	2201	New and Modified Stationary Source Review Rule	4/21/11	05/19/11

In our December 6, 2011 proposed rule, we indicated that, in May 2010, 75 FR 26102 (May 11, 2010), we took a limited approval and limited disapproval action on previous versions of District Rules 2020 and 2201 because, although we found that the rules strengthened the SIP, they contained deficiencies in enforceability that prevented full approval. Specifically, in our May 2010 final rule, we indicated that both rules contained references to California Health and Safety Code (CH&SC) that were unacceptably ambiguous because the State law cited therein had not been submitted to EPA for approval into the SIP.

In the year following our May 2010 limited approval and limited disapproval action, the District amended the NSR rules to address the deficiencies that EPA had identified in the previous version of the District NSR rules. In addition to addressing the deficiencies, the District amended the NSR rules in 2011 to address the 1997 $PM_{2.5}$ standards to ensure that new major sources of $PM_{2.5}$, and major modifications at existing major $PM_{2.5}$ sources, will undergo pre-construction review that requires permit applicants to apply Lowest Achievable Emission Rate (LAER) and provide emission offsets. The District NSR rules, as amended in 2011, are the subject of our December 6, 2011 proposed rule.

In our December 6, 2011 proposed rule, we proposed approval of District Rule 2020 (''Exemptions'') because the rule, as amended, replaced a cross-reference to CH&SC section 42301.16, which is not approved in the SIP, with a clear description of the agricultural sources covered by the exemption based on the language from the corresponding CH&SC section. We also proposed to approve a new permitting exemption in District Rule 2020 for wind machines because wind machines are not subject to any prohibitory District rule, because no controls would approach any reasonable threshold of cost-effectiveness given the very limited use of the machines and the low emissions per unit, and because neither the EPA-approved San Joaquin Valley PM_{10} maintenance plan nor the EPA-approved $PM_{2.5}$ attainment plan relies on emissions reductions from this particular episodic source of emissions.

With respect to District Rule 2201 (''New and Modified Stationary Source Review Rule''), we proposed approval because the rule, as amended, replaced references to CH&SC sections not approved into the SIP with a clear

[1] The purpose of District Rule 2020 (''Exemptions'') is to specify emission units that are not required to obtain an Authority to Construct or Permit to Operate. Rule 2020 also specifies the recordkeeping requirements to verify such exemptions and outlines the compliance schedule for emission units that lose the exemption.

[2] The purpose of District Rule 2201 (''New and Modified Stationary Source Review Rule'') is to provide for the review of new and modified stationary sources of air pollution and to provide mechanisms including emission trade-offs by which Authorities to Construct such sources may be granted, without interfering with the attainment or maintenance of ambient air quality standards. District Rule 2201 is also intended to provide for no net increase in emissions above specified thresholds from new and modified stationary sources of all nonattainment pollutants and their precursors.

description of the applicability of the offset requirement to agricultural sources based on the language from the corresponding CH&SC sections. We also proposed approval of the revisions to District Rule 2201 that added requirements to address the 1997 $PM_{2.5}$ standard, including permitting thresholds, Best Available Control Technology (which in California is the same as Federal LAER), and emission offset requirements, because we found that they satisfy the CAA requirements for NSR for new and modified major stationary sources of $PM_{2.5}$.[3]

Lastly, in our December 6, 2011 proposed rule, we found that approval of amended Rules 2020 and 2201 would not interfere with attainment and reasonable further progress for any of the national ambient air quality standards (NAAQS or standards), and would not interfere with any other applicable requirement of the Act, and thus was acceptable under section 110(l) of the CAA. We based this finding on the following considerations:

- Amended Rule 2201 does not relax the SIP in any aspect; rather, the amended rule strengthens the SIP by applying NSR requirements to new major stationary sources and major modifications of $PM_{2.5}$.[4]
- While amended Rule 2020 contains a new exemption for wind machines, this exemption would not lead to an increase in emissions because, as explained above, wind machines would not be subject to any particular controls under the NSR rule even if no such exemption were in effect because no control device would be considered cost-effective.
- Neither the EPA-approved San Joaquin Valley PM_{10} maintenance plan nor the EPA-approved $PM_{2.5}$ attainment plan relies on emissions reductions from this particular episodic source of emissions (i.e., wind machines).

Please see our December 6, 2011 proposed rule and related technical support document (TSD) for a more detailed discussion of the background for this action and our rationale for proposing approval of the amended District NSR rules.[5]

II. Public Comments and EPA's Responses

Our December 6, 2011 proposed rule provided for a 30-day comment period. During that period, we received one comment letter from Earthjustice (dated January 5, 2012), containing four comments. In the following paragraphs, we summarize the comments and provide our responses.

Earthjustice Comment #1: Earthjustice asserts that District Rule 2201 is not fully approvable under 40 CFR 51.165 until it is revised to include condensable emissions in the definition of $PM_{2.5}$. Earthjustice argues that EPA is simply assuming this defect away, because it has pointed to no District permitting decision or any statement by the District providing evidence to support EPA's belief that the District is appropriately accounting for condensable emissions.

Response to Earthjustice Comment #1: To appropriately account for condensable particulate matter in regulating $PM_{2.5}$ from stationary sources, we agree that District rules should be amended to be explicit regarding the inclusion of the condensable portion of particulate matter in the definition of $PM_{2.5}$, and indicated as much in our proposed rule at 76 FR 76112, at 76114, footnote 3. The commenter is correct that we did not refer to any specific District permitting decision or District statement in support of our stated belief that, notwithstanding the absence of explicit rule language, the District is appropriately accounting for condensable particulate matter in regulating $PM_{2.5}$.

Thus, in response to this comment, we have requested, and the District has responded with, a letter clarifying how the District treats the condensable portion of particulate matter for NSR purposes. In a letter dated June 26, 2014, from David Warner, Deputy Air Pollution Control Officer, San Joaquin Valley Unified Air Pollution Control District, to Gerardo C. Rios, EPA Region IX, the District explains that it interprets its current regulations to require consideration of condensable particulate matter for $PM_{2.5}$ NSR purposes based on the definitions for ''$PM_{2.5}$'' and ''particulate matter'' in District Rules 2201 and 1020, respectively. The former term is defined in terms of ''particulate matter,'' and the latter term is defined in terms of ''any material except uncombined water, which exists in a finely divided form as a liquid or solid at standard conditions.'' As such, the condensable portion of particulate matter is treated as a part of total $PM_{2.5}$ emissions under existing District NSR rules.

Nonetheless, in its letter, the District indicates that it will amend its rules to eliminate any confusion about the inclusion of condensable particulate matter as part of $PM_{2.5}$ when it considers further $PM_{2.5}$-related amendments to District NSR rules. CARB must submit to EPA, no later than December 31, 2014, any revisions to District NSR rules that are necessary to address subpart 4. See 79 FR 31566 (June 2, 2014).

Earthjustice Comment #2: Earthjustice asserts that District Rule 2201 does not ensure $PM_{2.5}$ offsets will be surplus at time of use and must do so in order to be approved as meeting NSR requirements. Earthjustice notes that, unlike the District's NSR requirements for ozone and PM_{10}, $PM_{2.5}$ offsets are not required of minor sources or at more stringent ratios, and thus no demonstration can be made to show that the District's NSR program, in the aggregate, achieves $PM_{2.5}$ offsets equivalent to those that would be required if all major sources were required to provide offsets that are surplus at the time of use.

Response to Earthjustice Comment #2: As the commenter notes, EPA has previously approved versions of District Rule 2201 that allow the District to demonstrate that an equal number of ''surplus'' emission reductions are provided by District Rule 2201 as would be required if all major sources, including $PM_{2.5}$ major sources, were

[3] On January 4, 2013, in *Natural Resources Defense Council (NRDC)* v. *EPA,* 706 F.3d 428 (D.C. Cir. 2013), the D.C. Circuit Court remanded to EPA the implementation rules, including the NSR implementation rule, promulgated by EPA at 73 FR 28321 (May 16, 2008) to implement the 1997 $PM_{2.5}$ standards. The Court found that the EPA erred in implementing the 1997 $PM_{2.5}$ standards pursuant solely to the general implementation provisions of subpart 1 of Part D of Title I of the CAA, without also considering the particulate matter-specific provisions of subpart 4 of Part D. In the wake of the decision in *NRDC* v. *EPA,* EPA has classified a number of areas, including the San Joaquin Valley, under subpart 4 as ''moderate'' nonattainment areas for the 1997 and 2006 $PM_{2.5}$ standards and has established a deadline of December 31, 2014 for submittal of SIP revisions necessary to meet subpart 4 requirements for the $PM_{2.5}$ standards, including any necessary revisions to the District NSR rules. 79 FR 31566 (June 2, 2014). In today's final rule, we are taking final action to approve the District NSR rules, as amended in 2011 to meet the NSR requirements for $PM_{2.5}$ under subpart 1, because they address previously-identified deficiencies and strengthen the existing SIP by meeting subpart 1 NSR requirements for $PM_{2.5}$, but we also recognize that further amendments may be necessary to the $PM_{2.5}$-related portions of the District NSR rules to meet the applicable NSR requirements under subpart 4.

[4] Consistent with EPA's 2008 NSR implementation rule for $PM_{2.5}$ as developed consistent with subpart 1 of the CAA, District NSR rules currently regulate direct $PM_{2.5}$ but only NO_X and SO_x as $PM_{2.5}$ precursors. To meet the requirements of subpart 4, the District's NSR rules may need to be revised to include VOCs or ammonia or both as additional $PM_{2.5}$ precursors. As noted in the previous footnote, any changes to District NSR rules necessary to meet the requirements of subpart 4 with respect to $PM_{2.5}$ must be submitted to EPA by December 31, 2014.

[5] Our proposed approval of the 2011 amended versions of District Rules 2020 and 2201 provided us with the basis to issue an interim final rule (76 FR 76046, December 6, 2011) deferring imposition of sanctions under CAA section 179 resulting from the limited disapproval of the rules on May 11, 2010 at 75 FR 26102.

required to provide offsets that are surplus at the time of use. The offset equivalency provisions provided in section 7 (''Annual Offset Equivalency Demonstration and Pre-baseline ERC Cap Tracking System'') of District Rule 2201 require the District to submit an annual report demonstrating that the amount of ''surplus'' emission reductions required by the CAA are provided by the sources that surrendered the emission reduction credits or by additional or ''extra'' emission reductions (in the form of offsets) not otherwise required by the CAA.

EPA recognizes that District Rule 2201 does not require new or modified minor $PM_{2.5}$ sources to offset their emissions with surplus emission reductions nor does District Rule 2201 impose a more stringent $PM_{2.5}$ ratio to compensate for the absence of a requirement that all offsets must be surplus at the time of use. However, the District can still provide an equivalency demonstration for $PM_{2.5}$ under the provisions of section 7 of District Rule 2201 because the District holds a large quantity of PM_{10} offsets that can be speciated to determine the portion of the offset that is made up of $PM_{2.5}$ emissions. Thus, if an applicant surrenders $PM_{2.5}$ offsets that are not considered surplus at the time of use, then the provisions of section 7 would apply, and the District could supply the necessary $PM_{2.5}$ offsets by speciating existing PM_{10} offsets that it holds. Thus, EPA finds that District Rule 2201 does provide an appropriate mechanism to ensure that either (1) all $PM_{2.5}$ credits surrendered are surplus at time of use or (2) the District provides the necessary quantity of surplus $PM_{2.5}$ offsets by speciating PM_{10} offsets into their $PM_{2.5}$ fraction. Lastly, we note that the District has yet to issue a permit for a new major $PM_{2.5}$ source or a major modification of an existing major $PM_{2.5}$ source, and thus, while the mechanism exists for showing equivalency, it has yet to be relied upon by the District in practice.[6]

Earthjustice Comment #3: Earthjustice requests that EPA clarify that no sources will ever qualify for the offset exemption in section 4.6.9 in District Rule 2201 because any source that emits criteria pollutants is capable of generating real, permanent, quantifiable and enforceable emission reductions. Earthjustice states that it is not a question of ''if'' emissions reductions from agricultural sources would meet the criteria in section 4.6.9 but how the emission reductions are demonstrated and enshrined. Earthjustice further requests that EPA reiterate that the ability of a source to generate creditable emissions reductions does not depend on whether an agency chooses to adopt protocols allowing such credits.

Response to Earthjustice Comment #3: The District adopted the offset exemption in section 4.6.9 of District Rule 2201 to explicitly align District NSR rules with State law regarding District regulation of agricultural sources. We first approved the offset exemption in section 4.6.9 of Rule 2201 as part of the California SIP in our limited approval and limited disapproval action published in May 2010. See 75 FR 26102 (May 11, 2010).

As approved in May 2010, section 4.6.9 provides that emissions offsets shall not be required for: ''Agricultural sources, to the extent provided by California Health and Safety Code, section 42301.18(c), except that nothing in this section shall circumvent the requirements of section 42301.16(a).'' California Health & Safety Code (CH&SC) section 42301.18(c) provides that: ''A district may not require an agricultural source to obtain emissions offsets for criteria pollutants for that source if emissions reductions from that source would not meet the criteria for real, permanent, quantifiable, and enforceable emissions reductions.'' CH&SC section 42301.16(a) in turn provides that: ''In addition to complying with the requirements of this chapter, a permit system established by a district pursuant to Section 42300 shall ensure that any agricultural source that is required to obtain a permit pursuant to Title I . . . or Title V . . . of the federal Clean Air Act is required by district regulation to obtain a permit in manner that is consistent with the federal requirements.'' Our action in May 2010 was a limited approval and limited disapproval action because, while strengthening the SIP and meeting most applicable requirements, District Rule 2201 contained unacceptably ambiguous provisions in section 4.6.9 because the statutory provisions cited therein are not approved as part of the California SIP. In our May 2010 final rule, we understood the offset exemption to apply to all new minor agricultural sources and minor modifications to agricultural sources and determined that the exemption was consistent with Federal NSR requirements and would not interfere with attainment or maintenance of the NAAQS in San Joaquin Valley. 75 FR at 26105 (May 11, 2010).

In response to our limited approval and limited disapproval action in May 2010, the District amended section 4.6.9 of Rule 2201 to provide that emissions offsets shall not be required for: ''Agricultural Sources, for criteria pollutants for that source if emissions reductions from that source would not meet the criteria for real, permanent, quantifiable and enforceable emissions reductions.'' The District also added a new subsection 4.6.9.1 that reads: ''In no case shall the offset exemption in section 4.6.9 apply to an agricultural source that is also a major stationary source for the pollutant for which the offset exemption is sought.'' As such, the District merely replaced the statutory reference to CH&SC section 42301.18(c) with text mirroring the language from the code section itself and added language limiting the exemption to give effect to CH&SC section 42301.16(a). EPA's proposed approval of District Rule 2201, as amended in 2011, recognizes that the District amended the rule in such a way as to eliminate the deficiency that we had identified in May 2010. In today's action, we are taking final action to approve the amended version of District Rule 2201, including the amendment to section 4.6.9 as a revision to the California SIP.

The commenter does not object to the District's amendment to section 4.6.9 to address the deficiency identified by EPA in our May 2010 final action, nor does it object to our determination that the amendment has resolved the identified deficiency. Rather, the comment seeks EPA agreement on a factual statement that derives logically from the commenter's interpretation of the language of the underlying state law provision. As noted above, in our May 2010 final action, in contrast to the commenter's interpretation, we understood the offset exemption to apply to all new minor agricultural sources and to all minor modifications to agricultural sources. Notwithstanding the breadth of application of the exemption to minor agricultural sources, we determined in our May 2010 final action that the exemption was consistent with Federal NSR requirements and would not interfere with attainment or maintenance of the NAAQS. If, as commenter contends, the exemption applies to no minor agricultural sources or modifications to minor agricultural sources, our determination as to whether the exemption is acceptable would remain the same.

Nonetheless, we note that the commenter's opinion that section 4.6.9 of District Rule 2201 does not in fact exempt any new or modified agricultural source from the offset

[6] See email from Arnaud Marjollet, Director of Permit Services, SJVUAPCD, to Laura Yannayon, EPA Region IX, July 24, 2014.

exemption is not shared by EPA or the State of California. In a detailed response to a comment in a separate final rule, we explain that, while we agree that the criteria in CH&SC section 42301.18(c) allowing districts to require emissions offsets for new or modified agricultural sources does not depend upon the district's adoption of a specific protocol or rule allowing offsets from such sources to be generated, some determination is necessary. See at 78 FR 46504, at 46509 (August 1, 2013). More specifically, in our August 2013 final rule, at 46509, we explain:

> However, whether emissions reductions from a given agricultural source meet the relevant criteria is not self-evident or self-implementing. Some determination is necessary. For instance, the District is the agency responsible for allowing the emissions reductions from a given agricultural source to be banked or used for the purpose of offsetting emissions increases from new or modified stationary sources that are subject to the offset requirement under an approved NSR program. If the District allowed emission reductions to be banked or used for offsetting emission increases, then the District would thereby be determining that the emissions reductions are ''real, permanent, quantifiable, and enforceable'' since those are the basic criteria for judging the creditability of emission reductions for use as NSR offsets. The District's authority to impose the offset requirement on new or modified minor agricultural sources would vest as to those agricultural sources for which it has allowed banking or use of emission reductions for NSR offset purposes. Thus, while no protocol or District rule specifically directed at agricultural sources need be adopted for the offset authority to vest, some determination is necessary.

Moreover, by letter dated March 18, 2013, the California Attorney General's office states, in connection with CH&SC section 42301.18(c): ''It is our understanding that currently emissions reductions from minor agricultural sources do not meet the criteria for real, permanent, quantifiable and enforceable emission reductions. On these facts, the plain language of subdivision (c) of the statute serves to suspend the duty of a minor agricultural source to offset emissions from that source.'' [7] As such, given the direct connection between CH&SC section 42301.18(c) and section 4.6.9 in District Rule 2201, it is clear that new minor agricultural sources and minor modifications to existing agricultural sources have qualified for the offset exemption in section 4.6.9 of District Rule 2201.

Earthjustice Comment #4: Earthjustice asserts that EPA should finalize a limited approval/limited disapproval and maintain sanctions until the defects in District Rule 2201, including the condensable emissions issue and the offsets issue, discussed in comments #1 and #2, above, are adequately addressed.

Response to Earthjustice Comment #4: For the reasons given in the proposed rule, and in responses to comments, we conclude that amended District Rules 2020 and 2201, as submitted on September 28, 2011 and May 19, 2011, respectively, adequately address deficiencies in the previous version of the District NSR rules and provide for review of new and modified sources of $PM_{2.5}$, including the requirements for LAER and emissions offsets for new major $PM_{2.5}$ sources and major modifications to existing major $PM_{2.5}$ sources, consistent with the requirements under subpart 1 of part D. In addition, under an EPA rule published in June 2014 (79 FR 31566, June 2, 2014), CARB must submit a SIP revision containing further amendments to District NSR rules no later than the end of 2014 as necessary to address $PM_{2.5}$-related requirements under subpart 4 of part D. Thus, while the District NSR rules, amended in 2011, may not yet meet all of the requirements for $PM_{2.5}$ (i.e., those under subpart 4), we believe that full approval, rather than limited approval, of the 2011 amended District NSR rules is the appropriate action to take at this time given the SIP strengthening aspects of the amended rules. EPA will consider whether District NSR rules meet all applicable $PM_{2.5}$ requirements under subpart 4 in a separate rulemaking after submittal by CARB of any necessary SIP revisions.

III. Final Action

After due consideration of the comments submitted on our proposed action, and for the reasons provided in our proposed rule and summarized above, we are taking final action under CAA section 110(k)(3) to approve District Rule 2020 (''Exemptions''), as amended by the San Joaquin Valley Unified Air Pollution Control District on August 18, 2011 and submitted by CARB on September 28, 2011; and District Rule 2201 (''New and Modified Stationary Source Review Rule''), as amended by the District on April 21, 2011 and submitted by CARB on May 19, 2011, as revisions to the California SIP.[8] In so doing, we conclude that the District has remedied deficiencies that EPA had identified in previous versions of the rules and that other changes made by the District to the rules strengthen the SIP. Further $PM_{2.5}$-related amendments in the District's NSR rules as necessary to address subpart 4 of part D are due for submittal to EPA by the end of 2014.

Upon the effective date of today's final approval, all sanctions and sanctions clocks that were triggered upon our final limited disapproval at 75 FR 26102 (May 11, 2010) of previous versions of District Rules 2020 and 2201, and deferred upon our interim final rule at 76 FR 76046 (December 6, 2011), are permanently terminated.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement

[7] Letter and attachment from Robert W. Byrne, Senior Assistant Attorney General, to Jared Blumenfeld, Regional Administrator, EPA Region IX, March 18, 2013.

[8] Upon the effective date of this final rule, District Rules 2020 and 2201, as approved herein, will supersede District Rules 2020 and 2201 as approved on May 11, 2010 (75 FR 26102) in the applicable California SIP.

Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 17, 2014. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: August 11, 2014.

Alexis Strauss,

Acting Regional Administrator, Region IX.

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

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs(c)(400)(i) and (c)(400)(ii)(C), and (c)(440), to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(400) * * *

(i) Incorporation by reference.

(A) San Joaquin Valley Unified Air Pollution Control District.

(*1*) Rule 2201, ''New and Modified Stationary Source Review Rule,'' amended on April 21, 2011.

(ii) * * *

(C) San Joaquin Valley Unified Air Pollution Control District.

(*1*) Letter from David Warner, Deputy Air Pollution Control Officer, San Joaquin Valley Unified Air Pollution Control District, to Gerardo C. Rios, Chief, Air Permits Office, EPA Region IX, dated June 26, 2014.

* * * * *

(440) Amended regulations were submitted by the Governor's designee on September 28, 2011.

(i) Incorporation by reference.

(A) San Joaquin Valley Unified Air Pollution Control District.

(*1*) Rule 2020, ''Exemptions,'' amended on August 18, 2011.

[FR Doc. 2014–22019 Filed 9–16–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2011–0968; FRL–9916–47–Region 5]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Open Burning Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a November 14, 2011, request by Indiana to revise the state implementation plan (SIP) to incorporate the open burning provisions in Title 326 of the Indiana Administrative Code (IAC), Article 4, Rule 1 (326 IAC 4–1), Open Burning Rule. EPA is approving this rule for attainment counties and is taking no action on the rule for Clark, Floyd, Lake and Porter counties which are nonattainment or maintenance areas for ozone (O_3) or particulate matter (PM).

DATES: This direct final rule will be effective November 17, 2014, unless EPA receives adverse comments by October 17, 2014. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2011–0968, 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–2011–0968. 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.

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 Charles Hatten, Environmental Engineer, (312) 886–6031 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Charles Hatten, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6031, *hatten.charles@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 is the background for this action?
II. Discussion of State Submittal
III. What action is EPA taking today?
IV. Statutory and Executive Order Reviews

I. What is the background for this action?

Open burning is generally prohibited in the state of Indiana. Indiana state law exempts certain open burning activities under conditions that minimize the impact on the air quality and public health. Open burning activities allowed include: maintenance burning, recreational or ceremonial fires, farm burning, waste oil burning, prescribed used to facilitate the growth of desired vegetation, and residential burning.

Indiana's open burning rule at 326 IAC 4–1 [formerly Air Pollution Code–2, (APC–2)] applies state-wide and was first approved on June 22, 1978 (43 FR 26722), and re-codified on July 16, 1982 (47 FR 30972). On February 1, 1996 (61 FR 3581), EPA approved a ban on residential open burning for Clark, Floyd, Lake and Porter counties to reduce VOC emissions as part of Indiana's fifteen (15) percent rate of progress plan for the 1-hour O_3 standard. This ban on residential open burning remains a permanent and enforceable control measure in the state's O_3 SIP.

On November 14, 2011, the Indiana Department of Environmental Management (IDEM) submitted a request to EPA to revise 326 IAC 4–1. IDEM published several newspaper notices (March 31, 2011, June 25, 2011) informing the public of the revisions to 326 IAC 4–1–3 and 326 IAC 4–1–4. IDEM held a public hearing on these revisions on August 3, 2011. There were no comments received. IDEM's November 14, 2011, submittal also included certification that adoption of the revisions at 326 IAC 4–1–0.5, 326 IAC 4–1–1, 326 IAC 4–1–2, 326 IAC 4–1–3, 326 IAC 4–1–4, 326 IAC 4–1–4.1, 326 IAC 4–1–4.2, and 326 IAC 4–1–4.3, had been preceded by adequate notice and public hearing.

II. Discussion of State Submittal

Below is a discussion of Indiana's rule, including an identification of any significant changes from the previously approved SIP.

• *4–1–0.5 Definitions*

This section defines several terms, including a revised definition of ''open burn.'' IDEM consolidated the definition of the terms from 326 IAC 4–1, ''open burning'' and ''open'' into one definition at 326 IAC 4–1–0.5(6), ''open burn.'' The term ''open burn'' means, the burning of any materials wherein air contaminants resulting from combustion are emitted directly into the air, without passing through a stack or chimney from an enclosed chamber. This revision provides clarity to the definition of ''open burn'' and is approvable into the Indiana SIP.

• *4–1–1 Scope*

This section describes the rule's applicability. The applicability remains consistent with the existing SIP and continues to apply to all open burning state-wide.

Because the revisions to this section are administrative and non-substantive, EPA finds 326 IAC 4–1–1 remains consistent with the approved SIP, and therefore, are approvable into Indiana's SIP.

• *4–1–2 Prohibition Against Open Burning*

This section prohibits open burning of any material not exempt, or authorized, unless approval has been granted by the Commissioner or the Commissioner's designated agent. There were no substantive changes to this section of the rule. The revision reflects a wording change. The language in the SIP reads, ''No person shall open burn any material except as provided in section 3 or 4.'' Indiana's revised the language now reads, ''Open burning is prohibited except as allowed in this rule.''

The revision to this section requires a person or entity subject this rule to comply with the entire rule and not just certain sections. Thus, EPA finds the revision to the rule to be consistent with the approved SIP and is approvable into Indiana's SIP.

• *4–1–3 Exemptions*

In the approved SIP, section 3 of 326 IAC 4–1 identifies those exemptions for certain open burning activities under conditions that minimize the impact on air quality and public health.

In section (3)(a)(1) Indiana identifies exemptions in the rule for open burning for maintenance purposes. This exemption allows open burning of the following: (1) Vegetation from farms, cemeteries, drainage ditches and agricultural land, if the burn occurs in an unincorporated area; (2) wood products from pruning or clearing a roadside by a county highway department and the initial clearing of a public utility right-of-way if in an unincorporated area; (3) undesirable wood structures or remnants; and (4) clean petroleum products for maintaining or for repairing railroad tracks, but not including railroad ties. Section (3)(a)(2) applies certain restrictions to open burning, for maintenance purposes, that is allowed by this rule. These include: Extinguishing the fire if it creates a nuisance or a fire hazard; all fires must be attended at all times during burning until completely extinguished; no burning during unfavorable meteorological conditions; removal of all asbestos-containing material before burning of a structure. The language in

this section (3)(a) remains consistent with the existing SIP.

Section (3)(b) specifies certain conditions that apply to any fires allowed by this rule in section (3)(c). The language in this section (3)(b) remains consistent with the existing SIP.

Section (3)(c) allows the following types of fires: Recreational and ceremonial fires; private residential burning; and waste oil burning. IDEM added criteria that would allow the burning of two single family, non-demolished dwellings per calendar year by municipal fire departments for the purposes of live fire training subject to certain conditions, including written notification to IDEM and the removal of material that would otherwise result in toxic air emissions; and the ceremonial burning of United States flags. These additional exemptions are subject to both the conditions in section (3)(b) and more specific conditions associated with each exemption to limit open burning emissions.

The revisions to section 3 of 326 IAC are not anticipated to increase the amount or frequency of open burning occurring in Indiana, and therefore, are approvable into the Indiana SIP.

• *4–1–4 Emergency Burning*

IDEM revised section 4 renaming it ''Emergency burning''. The SIP approved language in section 4 of 326 IAC 4–1 identified certain types of open burning not exempt by the rule that would require a person(s) to obtain prior approval before open burning by the Air Pollution Control Board (APCB) or its designated agent. Among the list of open burnings that IDEM would consider granting approval included emergency burnings. The revisions address the administrative function associated with open burning approvals in the event of an emergency. IDEM revised the rule for emergency burning to require written approval by the Commissioner. Emergency burnings may be authorized for spilled petroleum products and clean wood waste, vegetation or deceased animals under certain conditions.

This revision serves to help clarify language in the rule regarding the approval process for emergency burning. Thus, EPA finds the revision to the rule to be consistent with the approved SIP when open burning for emergency purposes, and is approvable into the Indiana SIP.

• *4–1–4.1 to 4–1–4.3 Open Burning Approval Process*

The open burning ''approval process'' is contained in sections 4–1–4.1 thru 4–1–4.3. The approval process is designed to simplify the relevant steps for a person(s) or an entity to submit a request to open burn or obtain a variance from the Commissioner or the Commissioner's designated agent, similar to requests for approvals for emergency burning, as noted above in section 4.

Below is a discussion of the various parts of Indiana's open burning approval process.

4–1–4.1 Open Burning Approval; Criteria and Conditions

Section 4.1(a)—Burning not exempted by Section 3 or 4 of this rule may be authorized by the issuance of an approval by the Commissioner or the Commissioner's designated agent, after consideration of an approval application, for fire training, burning of natural growth derived from a clearing operation and burning of highly explosive or dangerous materials for which no alternative disposal method exists, burning of clean wood products and natural growth.

Section 4.1(b) specifies the criteria that may be considered for approval for open burning, including: A demonstration that alternative methods of disposal are impractical; there are not more than five residences within 500 feet of the proposed burning site; there have been no open burning violations at the site of the proposed burning or the applicant; the burning site is located in a county not designated as a nonattainment area for PM_{10} (particles that are 10 micrometers in diameter or smaller) or O_3 and is not located in Clark or Floyd County.

Section 4.1(c) prohibits approval of residential burning in Clark, Floyd, Lake or Porter County.

Section 4.1(d) provides the conditions that any approval for open burning may be subject to, including: Only clean wood products shall be burned; no asbestos-containing material shall be burned; no burning shall be conducted during unfavorable meteorological conditions; and burning shall be conducted during daylight hours only.

Section 4.1(e) specifies that an approval letter for open burning shall be valid for no longer than one year from the date of issuance. However, an approval letter for open burning may be valid for as long as five years, if the approval application is accompanied by an open burning plan which must contain a description of the open burning proposed.

Section 4.1(f) states that the Commissioner may add conditions to an approval letter, as necessary, to prevent a public nuisance or to protect public health. Such conditions may be based on local air quality conditions, including whether the area is a nonattainment county as defined in 326 IAC 1–4–1 or has been redesignated from nonattainment to attainment status.

4–1–4.2 Open Burning; Approval Revocation

As a part of the approval process, this section allows the Commissioner to revoke an approval letter for open burning if the applicant violates any requirement of Section 4.1(d) or 4.1(f) or falsifies any information on an application for an approval.

4–1–4.3 Open Burning Approval; Delegation of Authority

This section of the rule states that the Commissioner may delegate the authority to issue approval letters for open burning to another agency that has the necessary legal authority to implement an approval program.

EPA finds the ''approval process'' outlined in 326 IAC 4–1–4.1 to 326 IAC 4–1–4.3 to be consistent with the approved SIP. The revisions to the rule does not relax IDEM's review process, provides clarity, as well as simplifies the administrative procedures necessary to obtain approval or a variance to open burn.

EPA finds Indiana's open burning rule provides a state-wide prohibition of open burning with reasonable exceptions. Open burning not specifically exempt may be authorized by the Commissioner for specific purposes, e.g., fire training or burning of highly explosive materials, and based upon specified criteria, e.g. alternative methods of disposal are not feasible and there are not more than five residences within 500 feet of the proposed burning site. EPA will recognize approvals for burning not specifically exempted by these regulations authorized by the Commissioner or the Commissioner's designated agent provided that a copy of the approval letter and application be kept on file and made available to EPA upon request.

The revisions to 326 IAC 4–1 range from wording changes and additions, improve and expand the applicability of the rule and its impact on air quality statewide. EPA is approving this rule for attainment counties and is taking no action on the rule for Clark, Floyd, Lake and Porter counties which are nonattainment or maintenance areas for O_3 or PM. On balance, EPA finds that the rule strengthens the existing SIP in Indiana and as such, deems the submittal approvable.

III. What action is EPA taking today?

EPA is approving a November 14, 2011, request by Indiana to revise the SIP to update 326 IAC 4–1, Open Burning Rule, because reducing open burning will reduce PM, volatile organic compounds, and other pollutants. EPA is approving this rule for attainment counties and is taking no action on the rule for Clark, Floyd, Lake and Porter counties which are nonattainment or maintenance areas for O_3 or PM. We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written comments are filed. This rule will be effective November 17, 2014 without further notice unless we receive relevant adverse written comments by October 17, 2014. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. The EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. If we do not receive any comments, this action will be effective November 17, 2014.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Clean Air Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 17, 2014. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of this **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Emissions Reporting, Incorporation by reference, Ozone, Volatile organic compounds.

Dated: September 2, 2014.

Susan Hedman,

Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

■ 2. In § 52.770, the table in paragraph (c) is amended by revising the entries under the subheading entitled ''Article 4. Burning Regulations'' and by adding footnote 1 to the end of the table to read as follows:

§ 52.770 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED INDIANA REGULATIONS

Indiana citation	Subject	Indiana effective date	EPA approval date	Notes
*	*	*	*	*
Article 4. Burning Regulations				
Rule 1. Open Burning [1]				
4–1–0.5	Definitions	02/10/2001	09/17/2014, [insert **Federal Register** citation].	
4–1–1	Scope	02/10/2001	09/17/2014, [insert **Federal Register** citation].	
4–1–2	Prohibition against open burning.	02/10/2001	09/17/2014, [insert **Federal Register** citation].	
4–1–3	Exemptions	10/28/2011	09/17/2014, [insert **Federal Register** citation].	
4–1–4	Emergency burning	10/28/2011	09/17/2014, [insert **Federal Register** citation].	
4–1–4.1	Open burning approval; criteria and conditions.	12/15/2002	09/17/2014, [insert **Federal Register** citation].	
4–1–4.2	Open burning; approval revocation.	02/10/2001	09/17/2014, [insert **Federal Register** citation].	
4–1–4.3	Open burning approval; delegation of authority.	02/10/2001	09/17/2014, [insert **Federal Register** citation].	
Rule 2. Incinerators				
4–2–1	Applicability	12/15/2002	11/30/2004, 69 FR 69531.	
4–2–2	Incinerators	12/15/2002	11/30/2004, 69 FR 69531.	
4–2–3	Portable incinerators (Repealed).	12/15/2002	11/30/2004, 69 FR 69531.	
*	*	*	*	*

[1] EPA is approving Rule 1 for the counties of Adams, Allen, Bartholomew, Benton, Blackford, Boone, Brown, Carroll, Cass, Clay, Clinton, Crawford, Daviess Dearborn, Decatur, De Kalb, Delaware, Dubois, Elkhart, Fayette, Fountain, Franklin, Fulton, Gibson, Grant, Greene, Hamilton, Hancock, Harrison, Hendricks, Henry, Howard, Huntington, Jackson, Jasper, Jay, Jefferson, Jennings, Johnson, Knox, Kosciusko, La Porte, Lagrange, Lawrence, Madison, Marion, Marshall, Martin, Miami, Monroe, Montgomery, Morgan, Newton, Noble, Ohio, Orange, Owen, Parke, Perry, Pike, Posey, Pulaski, Putnam, Randolph, Ripley, Rush, St. Joseph, Scott, Shelby, Spencer, Starke, Steuben, Sullivan, Switzerland, Tippecanoe, Tipton, Union, Vanderburgh, Vermillion, Vigo, Wabash, Warren, Warrick, Washington, Wayne, Wells, White, and Whitley.

* * * * *

[FR Doc. 2014–22049 Filed 9–16–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R09–OAR–2013–0686; FRL 9916–12–Region 9]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; State of Arizona; Redesignation of Phoenix-Mesa Area to Attainment for the 1997 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving, as a revision to the Arizona state implementation plan, a request from the Arizona Department of Environmental Quality to redesignate the Phoenix-Mesa ozone nonattainment area to attainment of the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS or ''standard'') because the request meets the statutory requirements for redesignation under the Clean Air Act. EPA is also approving the State's plan for maintaining the 1997 ozone standard in the Phoenix-Mesa area for 10 years beyond redesignation, and the inventories and related motor vehicle emissions budgets within the plan, because they meet the applicable requirements for such plans and budgets.

DATES: This final rule is effective on October 17, 2014.

ADDRESSES: EPA has established a docket for this action: Docket ID No. EPA–R09–OAR–2013–0686. 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. 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., Confidential Business Information). 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: Ginger Vagenas, Air Planning Office (AIR–2), U.S. Environmental Protection Agency, Region IX, (415) 972–3964, *vagenas.ginger@epa.gov.*

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

Table of Contents

I. Summary of Proposed Action
A. Determination That the Area Has Attained the Applicable NAAQS

B. Determination That the Area Has a Fully Approved SIP Meeting Requirements Applicable for Purposes of Redesignation Under Section 110 and Part D
C. Determination That the Improvement in Air Quality in the Area Is Due to Permanent and Enforceable Emissions Reductions
D. Approval of the Maintenance Plan for the Area Under CAA Section 175A
II. Responses to Comments on the Proposed Rule
III. Final Action
IV. Statutory and Executive Order Reviews

I. Summary of Proposed Action

On March 26, 2014 (79 FR 16734), we proposed to take several related actions. First, under Clean Air Act (CAA or ''Act'') section 110(k)(3), EPA proposed to approve a March 23, 2009 submittal from the Arizona Department of Environmental Quality (ADEQ) of the Maricopa Association of Governments' (MAG's) plan titled ''*MAG Eight-Hour Ozone Redesignation Request and Maintenance Plan for the Maricopa Nonattainment Area,''* (February 2009) (''Eight-Hour Ozone Maintenance Plan'') as a revision to the Arizona state implementation plan (SIP).[1]

In connection with the Eight-Hour Ozone Maintenance Plan, EPA proposed to find that the maintenance demonstration showing that the area will continue to attain the 1997 8-hour ozone NAAQS[2] for 10 years beyond redesignation (i.e., through 2025) and the contingency provisions meet all applicable requirements for maintenance plans and related contingency provisions in CAA section 175A. EPA also proposed to find adequate and approve the motor vehicle emissions budgets (MVEBs) in the Eight-Hour Ozone Maintenance Plan because we found that they meet the applicable transportation conformity requirements under 40 CFR 93.118(e).

Second, under CAA section 107(d)(3)(D), EPA proposed to approve ADEQ's request that accompanied the submittal of the maintenance plan to redesignate the Phoenix-Mesa 8-hour ozone nonattainment area to attainment for the 1997 8-hour ozone NAAQS. We did so based on our proposed approval of the Eight-Hour Ozone Maintenance Plan, and our conclusion that the area has met the criteria for redesignation under CAA section 107(d)(3)(E). Our conclusion was based on our determination that the area has attained the 1997 8-hour ozone NAAQS, that relevant portions of the Arizona SIP are fully approved, that the improvement in air quality is due to permanent and enforceable reductions in emissions, and that Arizona has met all the section 110 and part D requirements of the CAA that are applicable to the Phoenix-Mesa 8-hour ozone nonattainment area for purposes of redesignation.

For the purposes of this final rule, we have summarized the basis for our findings in connection with the proposed approvals of the Eight-Hour Ozone Maintenance Plan and redesignation request. For a more detailed explanation as well as background information concerning the 1997 8-hour ozone NAAQS, the CAA requirements for redesignation, and the ozone planning history of the Phoenix-Mesa area, please see our March 26, 2014, proposed rule.

A. Determination That the Area Has Attained the Applicable NAAQS

Prior to redesignating an area to attainment, CAA section 107(d)(3)(E)(i) requires that we determine that the area has attained the NAAQS. For our proposed rule, consistent with the requirements contained in 40 CFR part 50, EPA reviewed the ozone ambient air monitoring data for the monitoring period from 2010 through 2012, as recorded in the EPA Air Quality System (AQS) database, and determined, based on the complete, quality-assured, and certified data for 2010–2012, that the Phoenix-Mesa 8-hour ozone nonattainment area has attained the 1997 8-hour ozone standard because the design value[3] is less than 0.084 ppm.[4] We also reviewed preliminary data from 2013 and found that it was consistent with continued attainment of the standard in the Phoenix-Mesa area. See pages 16737–16739 of our March 26, 2014 proposed rule.

In the proposed rule, we anticipated that by the time we took final action, data for year 2013 would be certified, and that preliminary data for a portion of year 2014 would be available. In anticipation of the newly certified and available data, we also indicated that, in our final action, we would update our attainment determination for the Phoenix-Mesa area based on complete, certified data for 2011–2013 and would review preliminary data for 2014. As expected, the relevant certifications have been submitted,[5] and based on review of complete, certified data for 2011–2013, we find that the 8-hour ozone design value for 2011–2013 for the Phoenix-Mesa area is 0.081 parts per million (ppm) based on the data from the monitoring site (North Phoenix) recording the highest design value among the various monitoring sites within the nonattainment area. Like the design value for 2010–2012 documented in the proposed rule, the design value for 2011–2013 is below 0.084 ppm, and is, thus, consistent with attainment of the 1997 ozone NAAQS. Preliminary data for 2014 are also consistent with continued attainment.

B. Determination That the Area Has a Fully Approved SIP Meeting Requirements Applicable for Purposes of Redesignation Under Section 110 and Part D

Sections 107(d)(3)(E)(ii) and (v) of the CAA require EPA to determine that the area has a fully approved applicable SIP under section 110(k) that meets all applicable requirements under section 110 and part D for the purposes of redesignation. For the reasons summarized below, we find that the Phoenix-Mesa area has a fully approved applicable SIP under section 110(k) that meets all applicable requirements under section 110 and part D for the purposes of redesignation. See pages 16739–16741 of our March 26, 2014 proposed rule.

With respect to section 110 of the CAA (General SIP Requirements), we conclude that the Phoenix-Mesa portion of the approved SIP, which includes rules pertaining to areas and sources under the jurisdiction of ADEQ, the Maricopa County Air Quality Department (MCAQD), and the Pinal County Air Quality Control District (PCAQCD), meet all SIP requirements for the Phoenix-Mesa area that are applicable for purposes of redesignation. Our conclusion in this regard is based on our review of the Phoenix-Mesa portion of the Arizona SIP.

[1] The Phoenix-Mesa 8-hour ozone nonattainment area is sometimes referred to as the Maricopa nonattainment area. The precise boundaries of the area are found at 40 CFR 81.303.

[2] The 1997 8-hour ozone standard is 0.08 parts per million (ppm) averaged over an 8-hour time frame. Ground-level ozone is an oxidant that is formed from photochemical reactions in the atmosphere between volatile organic compounds (VOC) and oxides of nitrogen (NO_X) in the presence of sunlight.

[3] The design value for the 8-hour standard is the three-year average of the annual fourth-highest daily maximum 8-hour ozone concentration at the worst-case monitoring site in the area. When the design value is less than or equal to 0.084 ppm (based on the rounding convention in 40 CFR part 50, appendix I) at each monitoring site within the area, the area is meeting the 1997 8-hour ozone NAAQS.

[4] Our proposed rule also includes a table (at page 16743, table 2) that shows that design values have been consistent with attainment of the 1997 ozone standard since the 2005–2007 period.

[5] See letters from Michael Sundblom, Air Quality Director, Pinal County Air Quality Control District, dated April 21, 2014; Eric C. Massey, Director, Air Quality Division, ADEQ, dated May 30, 2014; and Dennis Dickerson, Acting Director, Maricopa County Air Quality Department, dated June 3, 2014.

With respect to part D (of title I of the CAA), we reviewed the Phoenix-Mesa portion of the Arizona SIP for compliance with applicable requirements for nonattainment areas under both subparts 1 and 2.[6] First, we note that EPA previously approved the Eight-Hour Attainment Plan for the Phoenix-Mesa area based upon the determination that it met all applicable requirements for such plans under subpart 1 of part D, title 1 of the CAA for the 1997 8-hour ozone NAAQS (77 FR 35285, June 13, 2012), including the requirements for an emissions inventory, for contingency measures, and for demonstrations of implementation of reasonably available control measures, of reasonable further progress, and of attainment by the applicable attainment date. As to the other applicable subpart 1 requirements, we find that:

- Arizona has met the nonattainment applicable New Source Review (NSR) requirements for the Phoenix-Mesa eight-hour ozone nonattainment area because rules meeting the fundamental nonattainment NSR requirements for ozone nonattainment areas are approved in the Arizona SIP; and
- The requirements for transportation conformity SIPs under section 176(c) do not apply for the purposes of a redesignation request under section 107(d)(3) because state conformity rules are still required after redesignation and federal conformity rules apply where state rules have not been approved.[7]

With respect to the requirements associated with subpart 2, we noted that the Phoenix-Mesa 8-hour ozone nonattainment area was initially designated nonattainment under subpart 1 of the CAA, but was classified as marginal nonattainment for the 1997 8-hour ozone standard under subpart 2 of part D of the CAA in May 2012,[8] i.e., after Arizona's submittal of the redesignation request. Under EPA's longstanding policy of evaluating requirements in accordance with the requirements due at the time a redesignation request is submitted, and in consideration of the inequity of applying retroactively any requirements that might in the future be applied, we determined that the additional requirements for marginal nonattainment areas do not apply to the Phoenix-Mesa 8-hour ozone nonattainment area for the purposes of redesignation.

C. Determination that the Improvement in Air Quality in the Area Is Due to Permanent and Enforceable Emissions Reductions

Section 107(d)(3)(E)(iii) precludes redesignation of a nonattainment area to attainment unless EPA 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 pollution control regulations and other permanent and enforceable regulations. Based on our review of the control measures that provided for attainment of the now-revoked one-hour ozone NAAQS in the Phoenix metropolitan area and the additional control measures adopted and approved for attainment of the 1997 8-hour ozone standard, and based on our consideration of other factors such as weather patterns and economic activity,[9] we find that the improvement in air quality in the Phoenix-Mesa area is the result of permanent and enforceable emissions reductions from a combination of numerous EPA-approved State and local stationary source and mobile source control measures, along with federal motor vehicle and nonroad control programs. See pages 16741–16742 of our March 26, 2014 proposed rule.

D. Approval of the Maintenance Plan for the Area Under CAA Section 175A

Section 107(d)(3)(E)(iv) precludes EPA from redesignating an area from nonattainment to attainment unless EPA has fully approved a plan for maintaining compliance with the NAAQS. The required elements of a maintenance plan for areas seeking redesignation from nonattainment to attainment are set forth in CAA section 175A. As explained in the proposed rule, we interpret this section of the Act to require, in general, the following core elements: attainment inventory, maintenance demonstration, monitoring network, verification of continued attainment, and contingency plan.

Based on our review and evaluation of the Eight-Hour Ozone Maintenance Plan, we conclude that it contains the core elements and meets the requirements of CAA section 175A. See pages 16742–16748 of our proposed rule. Our conclusion was based on the following findings:

- The base year emissions inventory for 2005 is comprehensive, the methods and assumptions used by MAG to develop the 2005 emission inventory are reasonable, and the inventory reasonably estimates actual ozone season emissions in an attainment year. Moreover, we found that the 2005 emissions inventories reflect the latest planning assumptions and emissions models available at the time the plan was developed, and provide a comprehensive and reasonably accurate basis upon which to forecast ozone precursor emissions for years 2019 and 2025;
- MAG's photochemical modeling adequately demonstrates maintenance for at least 10 years after redesignation to attainment;
- The Eight-Hour Ozone Maintenance plan indicates that ADEQ and MCAQD will continue to operate an appropriate air quality monitoring network to verify the continued attainment of the 1997 8-hour ozone NAAQS;
- The continued operation of an ozone monitoring network and the requirement that MCAQD, with input from ADEQ, Arizona DOT, and MAG, must inventory emissions sources and report to EPA on a periodic basis[10] are sufficient for the purpose of verifying continued attainment; and
- The contingency provisions of the Ozone Maintenance Plan identify specific contingency measures,[11] contain tracking and triggering mechanisms to determine when contingency measures are needed, contain a sufficient description of the process of recommending and implementing contingency measures, and contain specific timelines for action, and will, therefore, be adequate to ensure prompt correction of a violation and comply with the contingency-related requirements under CAA section 175A(d).

Lastly, we find adequate and are approving the motor vehicle emissions budgets (MVEBs) contained in the Eight-Hour Ozone Maintenance Plan because

[6] Subpart 1 contains general, less prescriptive requirements for all nonattainment areas of any pollutant, including ozone, governed by a NAAQS. Subpart 2 contains additional, more specific requirements for ozone nonattainment areas classified under subpart 2.

[7] See *Wall* v. *EPA,* 265 F.3d 426, 439 (6th Cir. 2001) upholding this interpretation.

[8] 77 FR 28424, May 14, 2012.

[9] Specifically, we reviewed temperature data to determine if unusual meteorological conditions could have played a significant role in attaining the 1997 ozone standard in the Phoenix-Mesa area and determined that unusually favorable meteorology did not play a significant role. We also discussed the economic slowdown affecting the Phoenix-Mesa area starting in 2008 but noted that the downward trend in ozone concentrations had already been established well before that time.

[10] See 40 CFR part 51, subpart A (''Air Emissions Reporting Requirements'').

[11] The Eight-Hour Ozone Maintenance Plan includes both specific contingency measures (such as the Gross Polluter Option for I/M Program Waivers, Increased Waiver Repair Limit Options, and Federal Heavy Duty Diesel Vehicle Emissions Standards, among others) that have already been adopted and are being implemented early, and a mechanism to trigger the adoption of additional measures as needed. See pages 3–21 and 3–22 of the Eight-Hour Ozone Maintenance Plan.

we find that they meet the transportation conformity adequacy requirements under 40 CFR 93.118(e)(4) and (5). Specifically, we find that, among other things, the MVEBs, when considered with emissions from all other sources, would be consistent with maintenance of the 1997 8-hour ozone NAAQS in the Phoenix-Mesa area for ten years beyond redesignation.

II. Responses to Comments on the Proposed Rule

EPA's March 26, 2014 proposed rule provided a 30-day public comment period. During this period, we received two comment letters. One comment letter was from a member of the public who supports EPA's proposed actions. The other letter, from Sierra Club, opposes the proposed actions. A summary of Sierra Club's comments and EPA's responses are provided below.

Comment: The Sierra Club contends that EPA must disapprove the State of Arizona's redesignation request for the Phoenix-Mesa 1997 8-hour ozone nonattainment area because the inclusion of State and Maricopa County rules in the Arizona SIP that provide an affirmative defense potentially applicable to violations due to excess emissions that occur during startup, shutdown, and malfunction (''SSM events'') prevents EPA from determining that all applicable Clean Air Act requirements under section 107(d)(3)(E) for redesignations have been met. Specifically, Sierra Club contends that the affirmative defense provisions in the Arizona SIP prevent EPA from determining:

- That the improvement in air quality is due to enforceable reductions as required under section 107(d)(3)(E)(iii) because the affirmative defense provisions applicable during SSM events make emission reductions unenforceable;
- that the maintenance plan demonstrates maintenance of the NAAQS as required under sections 107(d)(3)(E)(iv) and 175A(a) when emissions can increase above the emission inventory and allowable levels during SSM events; and
- that the State has met all requirements applicable to the area under section 110 and part D as required under sections 107(d)(3)(E)(v) and 110(a)(2)(A) because the emission limits in the SIP, at least during SSM events, are not enforceable because of the affirmative defense provisions.

In support of this claim, the Sierra Club notes that EPA has found in other actions [12] that illegal SSM provisions related to emissions during SSM events constituted grounds for denying redesignation requests. Moreover, the Sierra Club notes that EPA has proposed a SIP call for both the State and Maricopa County affirmative defense provisions applicable during startup and shutdown events based on a finding that such provisions are inconsistent with the CAA. Sierra Club also cites a recent D.C. Circuit Court of Appeals decision (*Natural Resources Defense Council* v. *EPA,* No. 10–1371 (D.C. Cir., Apr. 18, 2014—*''Cement Kiln Decision''*),[13] as standing for the principle that affirmative defense provisions, even those applicable only during malfunctions, are inconsistent with the requirements of the Clean Air Act because such provisions purport to alter or eliminate the jurisdiction of federal courts to assess penalties for violation in contravention of sections 113 and 304. Lastly, Sierra Club includes a recent District Court opinion as an example of a citizen enforcement action undermined by the presence in a SIP of affirmative defense provisions applicable during malfunction events.[14]

Response: EPA does not agree that the affirmative defense provisions in the State and Maricopa County portions of the Arizona SIP provide a basis for disapproving the redesignation request for the Phoenix-Mesa nonattainment area for the 1997 8-hour ozone standard for the reasons set forth below.

The CAA sets forth the general criteria for redesignation of an area from nonattainment to attainment in section 107(d)(3)(E). These criteria include a determination by EPA that the area has attained the relevant standard [section 107(d)(3)(E)(i)] and that EPA has fully approved the applicable implementation plan for the area for purposes of redesignation [section 107(d)(3)(E)(ii) and (v)]. EPA must also determine that the improvement in air quality is due to reductions that are permanent and enforceable [section 107(d)(3)(E)(iii)], and that the EPA has fully approved a maintenance plan for the area under section 175A [section 107(d)(3)(E)(iv)]. EPA addressed all these criteria in the proposal to redesignate the Phoenix-Mesa area to attainment for the 1997 8-hour ozone area. The commenter alleges that EPA's analysis is flawed because inclusion of the affirmative defense in the SIP makes the Agency's determination under redesignation criteria at CAA section 107(d)(3)(E)(iii), (iv), and (v) invalid.

As EPA stated in its proposed rule, CAA SIP requirements that are not linked with a particular nonattainment area's designation and classification, including certain section 110 requirements, are not ''applicable'' for purposes of evaluating compliance with the specific redesignation criteria in CAA sections 107(d)(3)(E)(ii) and (v). 79 FR at 16739, FN 22. EPA maintains this interpretation because these requirements remain applicable after an area is redesignated to attainment. For at least the past 15 years, EPA has applied this interpretation with respect to requirements to which a state will be subject after the area is redesignated. *See, e.g.,* 73 FR 22307, 22312–22313 (April 25, 2008) (proposed redesignation of San Joaquin Valley; EPA concluded that section 110(a)(2)(D) transport requirements are not applicable under section 110(d)(3)(E)(v) because they ''continue to apply to a state regardless of the designation of any one particular area in the state''); 62 FR 24826, 24829–24830 (May 7, 1997) (redesignation of Reading, Pennsylvania, Area; EPA concluded that the additional controls required by section 184 were not ''applicable'' for purposes of section 107(d)(3)(E) because ''they remain in force regardless of the area's redesignation status''). Courts reviewing EPA's interpretation of ''applicable'' in the context of requirements applicable for redesignation have agreed with the Agency. *See Sierra Club* v. *EPA*, 375 F.3d 537 (7th Cir. 2004) and *Wall* v. *EPA,* 265 F.3d 426, 438 (6th Cir. 2001). With respect to the affirmative defense provisions in the Arizona SIP, redesignation of the area to attainment will in no way relieve the State and Maricopa County of their responsibilities to remove the affirmative defense provisions from the SIP, if EPA later takes action to require correction of the Arizona SIP with respect to the affirmative defense provisions.[15] Because we conclude that

[12] The commenter cites two **Federal Register** documents: a proposed disapproval of redesignation requests and maintenance plans for Salt Lake County, Utah County, and Ogden City, Utah PM_{10} nonattainment areas (74 FR 62717, December 1, 2009), and a final rule requiring Utah to revise SSM provisions in its SIP (76 FR 21639, April 18, 2011).

[13] The *Cement Kiln Decision* involved a challenge to EPA's National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 78 FR 10006 (February 12, 2013), in which EPA included an affirmative defense to civil penalties for violations of emissions standards that result from unavoidable malfunctions. In the *Cement Kiln Decision,* the Court vacated the portion of the 2013 rule pertaining to the affirmative defense.

[14] *Sierra Club* v. *Energy Future Holdings Corp.,* No. W–12–cv–108, W.D. Tex., memorandum opinion and order filed March 28, 2014.

[15] EPA has proposed, under CAA section 110(k)(5), to find a number of SIPs, including the

the affirmative defense provisions are not applicable requirements for purposes of this redesignation action, the existence of the affirmative defense provisions in the SIP does not undermine our conclusion that the redesignation criteria under section 107(d)(3)(E)(ii) and (v) have been met.

The affirmative defense provisions at issue provide an affirmative defense to monetary penalties for violations due to excess emissions for certain categories of stationary sources during qualifying SSM events.[16] The Sierra Club maintains that the inclusion of these provisions in the SIP renders the emissions limits in the nonattainment SIP and maintenance plan that are subject to the affirmative defense provision unenforceable, thus undermining the Agency's conclusion that the improvement in air quality is due to permanent and enforceable reductions in emissions as required under section 107(d)(3)(E)(iii), and the conclusion that the maintenance plan will ensure maintenance of the NAAQS prospectively as required under section 107(d)(3)(E)(iv). The Sierra Club did not explain the precise basis for its claim that potential assertion of the affirmative defenses at issue would render the existing EPA approved SIP inconsistent with the criteria under section 107(d)(3)(E)(iii) and (iv), and thus, in effect, invites EPA to determine that the existence in the SIP of affirmative defense provisions, without regard to the types of sources relied upon for attainment and maintenance, per se means that EPA may not make a positive determination with respect to the redesignation criteria under CAA sections 107(d)(3)(E)(iii) and (iv). We do not believe that the redesignation criteria must be interpreted so narrowly, but may be interpreted to account for the larger planning context in a given area.

As noted above, the affirmative defense provisions in the Arizona SIP purport to allow sources to avoid monetary penalties for violations of an applicable emissions limit under certain limited circumstances, but those provisions do not prohibit the state, EPA or citizens from seeking injunctive relief to force a source that is violating the applicable SIP emission limitations to take steps to address the non-compliance. Penalties are not the only means to address exceedances of a SIP emission limitation, even though the possibility or threat of penalties provides deterrence against violations and may cause a source to agree more readily to correct a problem prospectively. The continued availability of injunctive relief supports EPA's contention that the emissions limits in the SIP are sufficiently enforceable for purposes of redesignation, even though EPA now believes that such affirmative defense provisions in SIPs are not consistent with the CAA and must be revised.

Second, attainment of the 1997 ozone standard in the Phoenix-Mesa area and maintenance of the standard through 2025 primarily rely upon emission limits on mobile and area sources to which the affirmative defense provisions in the Arizona SIP do not apply. For example, all of the specific control measures relied upon by the state for numeric credit for attainment and maintenance planning purposes, with very minor exceptions, apply to mobile and area sources. See figures ES–3 and ES–4 on pages ES–4 and ES–5 in the approved *Eight-Hour Ozone Plan for the Maricopa Nonattainment Area* (June 2007); and figures ES–2 and ES–3 on pages ES–5 and ES–6 in the Eight-Hour Ozone Maintenance Plan. These control measures relate to nonroad equipment standards, fuel formulations, and inspection and maintenance (I/M) requirements rather than stationary source controls.

This is not to say that controls on stationary source are not an important part of the overall ozone control strategy in the Phoenix-Mesa area. Rather, the point is that the extent to which individual stationary sources, which might assert an affirmative defense for an SSM event that would likely have occurred even in the absence of an affirmative defense, can affect regional ozone concentrations in the Phoenix-Mesa area is likely limited. For instance, based on the emissions inventory for this area, the highest-emitting individual stationary sources in the Phoenix-Mesa area emit approximately 0.80 metric tons per day (mtpd) of VOC and 2.55 mtpd of NO_X based on the individual facility data for 2005 compiled in appendix A, exhibit 1 of the Eight-Hour Ozone Maintenance Plan. Such emissions constitute approximately 0.12% and 0.94% of the overall regional inventory for VOC and NO_X, respectively.

Moreover, overall point source[17] emissions in the Phoenix-Mesa area constitute only 1.7% and 4.0% of VOC and NO_X emissions, respectively, based on the 2005 inventories presented on pages ES–8 and ES–9 of the Eight-Hour Ozone Maintenance Plan. These values underscore the importance of mobile and area (and biogenic) sources, to which the affirmative defense provisions do not apply, to the regional inventory, and by extension, to regional ozone concentrations. The current design value for the Phoenix-Mesa area, meanwhile, which is equal to the projected design value, is 0.081 ppm, five percent below the applicable NAAQS. Thus, the hypothetical potential for any one individual point source, or even small subset of such sources, to cause a violation of the 1997 ozone standard in the Phoenix-Mesa area due to higher emissions that would likely have occurred in the absence of the affirmative defense provisions, is quite low. For these reasons, we conclude that the affirmative defense provisions in the Arizona SIP do not make the emission limits relied upon for attainment and maintenance unenforceable for the purposes of CAA section 107(d)(3)(E)(iii) and (iv) or otherwise undermine EPA's approval, finalized herein, of the Eight-Hour Ozone Maintenance Plan and related grant of ADEQ's redesignation request for the Phoenix-Mesa area for the 1997 ozone standard.

Sierra Club also contends that EPA has previously found in other actions that illegal SSM provisions constitute grounds for denying redesignation requests and references EPA's December 1, 2009 proposed disapproval of Utah's redesignation requests for Salt Lake County, Utah County, and Ogden City PM_{10} nonattainment areas (74 FR 62717). However, this aspect of the proposed disapproval, which was one of many deficiencies identified by EPA, was based on the state's inclusion in the submittal of new SIP revisions that would provide blanket exemptions from compliance with emission standards during SSM events. In the redesignation at issue here, the state did not seek to create new SIP provisions that are inconsistent with CAA requirements as part of its redesignation request or

Arizona SIP, substantially inadequate to meet CAA requirements because the SIP provides an affirmative defense for excess emissions during certain SSM events. See 78 FR 12460, at 12533–12536 (February 22, 2013).

[16] EPA approved the State's SSM affirmative defense rules prior to designating the Phoenix-Mesa Area non-attainment for the 1997 8-hour ozone standard. See [Arizona Administrative Code (AAC) R18–2–310 (''Affirmative Defenses for Excess Emissions Due to Malfunctions, Startup, and Shutdown'')] at 66 FR 48087 (September 18, 2001) and Maricopa County's SSM affirmative defense rule [Maricopa County Rule 140 (''Excess Emissions'') at 67 FR 54957 (August 27, 2002). At the time EPA approved the affirmative defense provisions as a part of the SIP, the Agency believed them to be consistent with CAA requirements.

[17] The Eight-Hour Ozone Maintenance Plan defines ''point sources'' as stationary sources that emit 25 (English) tons per year or more of carbon monoxide, 10 tons per year or more of ozone precursors, or 5 tons or more of PM_{10} or ammonia compounds. See page 11 of appendix A, exhibit 1 of the Eight-Hour Ozone Maintenance Plan.

maintenance plan, and the already existing affirmative defense provisions do not purport to preclude all potential forms of enforcement, or to provide a blanket exemption from compliance.

A more analogous action by EPA is the Agency's final redesignation of the Ohio portion of the Huntington-Ashland (OH–WV–KY) nonattainment area to attainment for the fine particulate matter standard ($PM_{2.5}$) standard. *See* 77 FR 76883 (December 31, 2012). In response to comments challenging the proposed redesignation due to the presence of certain SSM provisions in the Ohio SIP, EPA concluded that the SSM provisions in the Ohio SIP did not provide a basis for disapproving the redesignation request. *Id.,* at 76891, 76892. In so concluding, EPA noted that the SSM provisions and related SIP limits at issue in that state were approved into the SIP and thus were permanent and enforceable for the purposes of meeting the criteria for redesignation, and that EPA had other statutory mechanisms for addressing any problems associated with the SSM measures. EPA emphasizes that the redesignation of the area to attainment does not relieve Arizona of the responsibility to remove legally deficient SIP provisions either independently or pursuant to a SIP call. To the contrary, EPA maintains that it may determine that the affirmative defense provisions are contrary to CAA requirements and take action to require correction of those provisions even after the area has been redesignated to attainment. This interpretation is consistent with prior redesignation actions. See *Southwestern Pennsylvania Growth Alliance* v. *EPA,* 114 F.3d 984 (6th Cir. 1998) (Redesignation of Cleveland-Akron-Lorain area determined valid even though the Agency subsequently proposed a SIP call to require Ohio and other states to revise their SIPs to mitigate ozone transport to other states).

As of this time, the State's and Maricopa County's affirmative defense provisions are part of the approved SIP, and EPA is not required to re-evaluate the validity of previously approved SIP provisions as part of this redesignation.[18] If approved SIP provisions are separately determined to be deficient, EPA is able to evaluate those concerns in the appropriate context, and can, if necessary, issue a ''SIP call,'' which triggers a requirement for states to submit a corrective SIP revision.

EPA acknowledges that we are currently evaluating a petition that pertains to EPA's SSM Policy that interprets the requirements of the CAA with respect to the proper treatment of excess emissions during SSM events in SIP provisions. As part of that process, EPA is separately evaluating the issue of whether states have authority to create, and EPA has authority to approve, any affirmative defense provisions in SIPs. On June 30, 2011, Sierra Club filed a ''Petition to Find Inadequate and Correct Several State Implementation Plans under Section 110 of the Clean Air Act Due to Startup, Shutdown, Malfunction, and/or Maintenance Provisions.'' The petition includes interrelated requests concerning the treatment of excess emissions in state rules by sources during periods of SSM. On February 22, 2013, EPA proposed to grant in part and deny in part the request in the petition to rescind its policy interpreting the CAA to allow states to have appropriately drawn SIP provisions that provide affirmative defenses to monetary penalties for violations during periods of SSM (78 FR 12460). EPA also proposed either to grant or to deny the petition with respect to the specific existing SIP provisions related to SSM events in each of the 39 states identified by the Sierra Club as inconsistent with the CAA. In this context, EPA has proposed to grant the petition with respect to both the State's and Maricopa County's affirmative defense provisions for startup and shutdown periods, and to deny the petition with respect to the arguments concerning the agencies' affirmative defense provisions for periods of malfunction. Under EPA's February 2013 proposal, a schedule has been proposed for states to submit corrective SIP revisions.

The Sierra Club also argues that the *Cement Kiln Decision,* issued by the D.C. Circuit Court of Appeals on April 18, 2014, prevents EPA from approving any affirmative defense provisions in SIPs because they are inconsistent with CAA provisions relevant to citizen enforcement under sections 113 and 304. In the decision, the D.C. Circuit vacated affirmative defense provisions applicable to violations due to unavoidable malfunctions provided in EPA's standard for emissions from Portland cement plants.[19] The court concluded that sections 113 and 304 preclude EPA from creating such affirmative defense provision in its own regulations because it would purport to alter or eliminate the jurisdiction of federal courts to assess civil penalties for violations of CAA requirements. EPA is currently analyzing this opinion and is evaluating its impact on our interpretation of the CAA regarding the permissibility of affirmative defenses in SIP provisions, including those applicable to malfunctions. In the event that EPA determines that no affirmative defense provisions are permissible in SIPs, the Agency will have the authority and discretion to require the states to remove deficient provisions from the SIPs pursuant to section 110(k)(5). EPA maintains that this concern is better addressed through the exercise of that authority, than through its authority to redesignate areas that otherwise attain the NAAQS and meet the requirements of section 107(d)(3), consistent with EPA's long standing approach to evaluating requests for redesignation to attainment.

In conclusion, with regard to the redesignation of the Phoenix-Mesa area, Arizona has a fully approved SIP. The provisions that the Sierra Club objects to do not preclude EPA's determination that the emissions reductions that have provided for attainment and that will provide for maintenance of the 1997 8-hour ozone standard in the Phoenix-Mesa area are permanent and enforceable, as those terms are meant in section 107(d)(3) of the CAA, or that the state has met all applicable requirements under section 110 and part D for the purposes of redesignation. In addition, the area has attained the 1997 8-hour ozone standard since 2007, and has demonstrated it can maintain compliance with the standard for at least 10 years after redesignation to attainment. EPA notes, moreover, that it is approving contingency provisions under section 175A(d) as part of the area's maintenance plan. The contingency element of the maintenance plan provides assurance that the area can promptly correct a violation that might occur after redesignation. Finally, EPA is addressing the affirmative defense provisions in the Arizona SIP in separate action or actions, and redesignation of the area to attainment will in no way relieve the State and Maricopa County of their responsibilities to remove the affirmative defense provisions from the SIP, if EPA later takes final action to

[18] See September 4, 1992 memorandum entitled ''Procedures for Processing Requests to Redesignate Areas to Attainment,'' from John Calcagni, Director, Air Quality Management Division, EPA Office of Air Quality Planning and Standards, at page 3; *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); 68 FR 25418, 25426, May 12, 2003.

[19] National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 78 FR 10006 (February 12, 2013).

require such revisions to the Arizona SIP.

III. Final Action

Under CAA section 110(k)(3), and for the reasons provided above and in the proposed rule, EPA is approving ADEQ's submittal dated March 23, 2009 of the *MAG Eight-Hour Ozone Redesignation Request and Maintenance Plan for the Maricopa Nonattainment Area* (February 2009) (''Phoenix-Mesa Eight-Hour Ozone Maintenance Plan'') as a revision to the Arizona SIP. In connection with the Phoenix-Mesa Eight-Hour Ozone Maintenance Plan, EPA finds that the maintenance demonstration showing how the area will continue to attain the 1997 8-hour ozone NAAQS for 10 years beyond redesignation (i.e., through 2025) and the contingency provisions meet all applicable requirements for maintenance plans and related contingency provisions in CAA section 175A.

EPA is also finding adequate and approving the motor vehicle emissions budgets (MVEBs) from the Eight-Hour Ozone Maintenance Plan for transportation conformity purposes because we find that they meet the applicable transportation conformity requirements under 40 CFR 93.118(e). The MVEBs are 43.8 metric tons per day (mtpd) of VOC and 101.8 mtpd of NO_X. They include a 10% safety margin, and correspond to the peak episode day (Thursday) in June 2025 that was used to model maintenance of the 1997 8-hour ozone NAAQS in the Phoenix-Mesa area in the Eight-Hour Ozone Maintenance Plan.

These new MVEBs become effective on the date of publication of this final rule in the **Federal Register** (see 40 CFR 93.118(f)(2)) and must be used by U.S. Department of Transportation and the Maricopa Association of Governments for future transportation conformity analyses for the Phoenix-Mesa area with applicable horizon years after 2024. The existing 2008 VOC and NO_X MVEBs established in MAG's approved Eight-Hour Ozone Attainment Plan also remain in effect. On-road motor vehicle emissions in any required analysis years up to and including 2024 cannot exceed levels established by those previously-approved MVEBs.

Second, under CAA section 107(d)(3)(D), we are approving ADEQ's request, which accompanied the submittal of the maintenance plan, to redesignate the Phoenix-Mesa 8-hour ozone nonattainment area to attainment for the 1997 8-hour ozone NAAQS.[20] We are doing so based on our conclusion that the area has met the five criteria for redesignation under CAA section 107(d)(3)(E). Our conclusion in this regard is in turn based on our determination that the area has attained the 1997 ozone NAAQS; that relevant portions of the Arizona SIP are fully approved; that the improvement in air quality is due to permanent and enforceable reductions in emissions; that Arizona has met all requirements applicable to the Phoenix-Mesa area with respect to section 110 and part D of the CAA; and that the area has a fully approved maintenance plan meeting the requirements of CAA section 175A (i.e., the Eight-Hour Ozone Maintenance Plan approved herein).

IV. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment under section 107(d)(3)(E) and the accompanying approval of a maintenance plan as a SIP revision under section 110(k)(3) 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. 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 Clean Air Act. Accordingly, these actions merely approve a State plan and redesignation request as meeting federal requirements and do not impose additional requirements beyond those imposed by state law. For these reasons, these actions:

- Are 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);
- 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 an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not a significant regulatory action 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 disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Nonetheless, in accordance with EPA's 2011 Policy on Consultation and Coordination with Tribes, EPA has discussed the actions with the three Tribes located within the Phoenix-Mesa 8-hour ozone nonattainment area: The Fort McDowell Yavapai Nation, the Salt River-Pima Maricopa Indian Community, and the Tohono O'odham Nation.

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

[20] As noted in our proposed rule at 79 FR 16736, EPA has lowered the 8-hour ozone standard to 0.075 ppm (the 2008 8-hour ozone standard), and has designated the Phoenix-Mesa area as marginal nonattainment for the 2008 8-hour ozone standard. Today's action redesignates the Phoenix-Mesa area as attainment for the 1997 8-hour ozone standard only. The Phoenix-Mesa area remains nonattainment for the more stringent 2008 8-hour ozone standard until redesignated for that standard.

the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 17, 2014. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects

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, National parks, Wilderness areas.

Dated: August 20, 2014.

Jared Blumenfeld,

Regional Administrator, Region IX.

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

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart D—Arizona

■ 2. Section 52.120 is amended by adding paragraph (c)(160) to read as follows:

§ 52.120 Identification of plan.

* * * * *

(c) * * *

(160) The following plan was submitted on March 23, 2009, by the Governor's designee.

(i) [Reserved]

(ii) Additional materials.

(A) Arizona Department of Environmental Quality.

(*1*) *MAG Eight-Hour Ozone Redesignation Request and Maintenance Plan for the Maricopa Nonattainment Area* (February 2009), adopted by the Arizona Department of Environmental Quality on March 23, 2009, excluding the appendices.

* * * * *

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 3. The authority citation for part 81 continues to read as follows:

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

■ 4. Section 81.303 is amended by:

■ a. Removing the table heading ''Arizona—Ozone (Arizona–1997 8-Hour Ozone NAAQS (Primary and Secondary)'' and adding in its place ''Arizona–1997 8-Hour Ozone NAAQS (Primary and Secondary)''; and

■ b. In the newly headed table ''Arizona–1997 8-Hour Ozone NAAQS (Primary and Secondary),'' under ''Phoenix-Mesa, AZ:'' revising the entries for ''Maricopa County (part)'' and ''Pinal County (part)''.

The revision reads as follows:

§ 81.303 Arizona.

* * * * *

ARIZONA–1997 8-HOUR OZONE NAAQS

[Primary and Secondary]

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
Phoenix-Mesa, AZ:				
Maricopa County (part)	10/17/2014	Attainment.		

ARIZONA–1997 8-HOUR OZONE NAAQS—Continued

[Primary and Secondary]

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
T1N, R1E (except that portion in Indian Country); T1N, R2E; T1N, R3E; T1N, R4E; T1N, R5E; T1N, R6E; T1N, R7E; T1N, R1W; T1N, R2W; T1N, R3W; T1N, R4W; T1N, R5W; T1N, R6W; T2N, R1E; T2N, R2E; T2N, R3E; T2N, R4E; T2N, R5E, T2N, R6E; T2N, R7E; T2N, R8E; T2N, R9E; T2N, R10E; T2N, R11E; T2N, R12E (except that portion in Gila County); T2N, R13E (except that portion in Gila County); T2N, R1W; T2N, R2W; T2N, R3W; T2N, R4W; T2N, R5W; T2N, R6W; T2N, R7W; T3N, R1E; T3N, R2E; T3N, R3E; T3N, R4E; T3N, R5E; T3N, R6E; T3N, R7E; T3N, R8E; T3N, R9E; T3N, R10E (except that portion in Gila County); T3N, R11E (except that portion in Gila County); T3N, R12E (except that portion in Gila County); T3N, R1W; T3N, R2W; T3N, R3W; T3N, R4W; T3N, R5W; T3N, R6W; T4N, R1E; T4N, R2E; T4N, R3E; T4N, R4E; T4N, R5E; T4N, R6E; T4N, R7E; T4N, R8E; T4N, R9E; T4N, R10E (except that portion in Gila County); T4N, R11E (except that portion in Gila County); T4N, R12E (except that portion in Gila County); T4N, R1W; T4N, R2W; T4N, R3W; T4N, R4W; T4N, R5W; T4N, R6W; T5N, R1E; T5N, R2E; T5N, R3E; T5N, R4E; T5N, R5E; T5N, R6E; T5N, R7E; T5N, R8E; T5N, R9E (except that portion in Gila County); T5N, R10E (except that portion in Gila County); T5N, R1W; T5N, R2W; T5N, R3W; T5N, R4W; T5N, R5W; T6N, R1E (except that portion in Yavapai County); T6N, R2E; T6N, R3E; T6N, R4E; T6N, R5E; T6N, R6E; T6N, R7E; T6N, R8E; T6N, R9E (except that portion in Gila County); T6N, R10E (except that portion in Gila County); T6N, R1W (except that portion in Yavapai County); T6N, R2W; T6N, R3W; T6N, R4W; T6N, R5W; T7N, R1E (except that portion in Yavapai County); T7N, R2E; (except that portion in Yavapai County); T7N, R3E; T7N, R4E; T7N, R5E; T7N, R6E; T7N, R7E; T7N, R8E; T7N, R9E (except that portion in Gila County); T7N, R1W (except that portion in Yavapai County); T7N, R2W (except that portion in Yavapai County); T8N, R2E (except that portion in Yavapai County); T8N, R3E (except that portion in Yavapai County); T8N, R4E (except that portion in Yavapai County); T8N, R5E (except that portion in Yavapai County); T8N, R6E (except that portion in Yavapai County); T8N, R7E (except that portion in Yavapai County); T8N, R8E (except that portion in Yavapai and Gila Counties); T8N, R9E (except that portion in Yavapai and Gila Counties); T1S, R1E (except that portion in Indian Country); T1S, R2E (except that portion in Pinal County and in Indian Country); T1S, R3E; T1S, R4E; T1S, R5E; T1S, R6E; T1S, R7E; T1S, R1W; T1S, R2W; T1S, R3W; T1S, R4W; T1S, R5W; T1S, R6W; T2S, R1E (except that portion in Indian Country); T2S, R5E; T2S, R6E; T2S, R7E; T2S, R1W; T2S, R2W; T2S, R3W; T2S, R4W; T2S, R5W; T3S, R1E; T3S, R1W; T3S, R2W; T3S, R3W; T3S, R4W; T3S, R5W; T4S, 1E; T4S, R1W; T4S, R2W; T4S, R3W; T4S, R4W; T4S, R5W.				
Pinal County (part)	10/17/2014	Attainment.		
Apache Junction: T1N, R8E; T1S, R8E (Sections 1 through 12)				

* * * * * * *

[a] Includes Indian Country located in each county or area, except as otherwise specified.
[1] This date is June 15, 2004, unless otherwise noted.

* * * * *

[FR Doc. 2014–22029 Filed 9–16–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2014–0324; FRL–9915–81]

Butanedioic Acid, 2-methylene-, Polymer With 2,5-fuandione, Sodium and Ammonium Salts, Hydrogen Peroxide-Initiated; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated when used as an inert ingredient in a pesticide formulation. Technology Sciences Group Inc. on behalf of Specialty Fertilizer Products LLC. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA) requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to

establish a maximum permissible level for residues of butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated on food or feed commodities.

DATES: This regulation is effective September 17, 2014. Objections and requests for hearings must be received on or before November 17, 2014, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2014–0324, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton 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: Lois Rossi, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. Can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2014–0324 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before November 17, 2014. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2014–0324, by one of the following methods.

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

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

II. Background and Statutory Findings

In the **Federal Register** of August 1, 2014 (79 FR 44729) (FRL–9911–67), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the receipt of a pesticide petition (IN–10697) filed by Specialty Fertilizer Products LLC., 11550 Ash, Suite 220, Leawood, KS 66211. The petition requested that 40 CFR 180.960 be amended by establishing an exemption from the requirement of a tolerance for residues of butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium (CAS Reg. No. 556055–76–6) and ammonium (CAS Reg. No. 701908–99–8) salts, hydrogen peroxide-initiated. That document included a summary of the petition prepared by the petitioner and solicited comments on the petitioner's request. The Agency did not receive any comments.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and use in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing an exemption from the requirement of a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue . . .'' and specifies factors EPA is to consider in establishing an exemption.

III. Risk Assessment and Statutory Findings

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be shown that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food,

drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. In the case of certain chemical substances that are defined as polymers, the Agency has established a set of criteria to identify categories of polymers expected to present minimal or no risk. The definition of a polymer is given in 40 CFR 723.250(b) and the exclusion criteria for identifying these low-risk polymers are described in 40 CFR 723.250(d). Butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated conforms to the definition of a polymer given in 40 CFR 723.250(b) and meets the following criteria that are used to identify low-risk polymers.

1. The polymer is not a cationic polymer nor is it reasonably anticipated to become a cationic polymer in a natural aquatic environment.

2. The polymer does contain as an integral part of its composition the atomic elements carbon, hydrogen, and oxygen.

3. The polymer does not contain as an integral part of its composition, except as impurities, any element other than those listed in 40 CFR 723.250(d)(2)(ii).

4. The polymer is neither designed nor can it be reasonably anticipated to substantially degrade, decompose, or depolymerize.

5. The polymer is manufactured or imported from monomers and/or reactants that are already included on the TSCA Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.

6. The polymer is not a water absorbing polymer with a number average molecular weight (MW) greater than or equal to 10,000 daltons.

7. The polymer does not contain certain perfluoroalkyl moieties consisting of a CF3- or longer chain length as specified in 40 CFR 723.250(d)(6).

Additionally, the polymer also meets as required the following exemption criteria specified in 40 CFR 723.250(e).

8. The polymer's number average MW of 2,500 to 3,000 is greater than 1,000 and less than 10,000 daltons. The polymer contains less than 10% oligomeric material below MW 500 and less than 25% oligomeric material below MW 1,000, and the polymer does not contain any reactive functional groups.

Thus, butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated meets the criteria for a polymer to be considered low risk under 40 CFR 723.250. Based on its conformance to the criteria in this unit, no mammalian toxicity is anticipated from dietary, inhalation, or dermal exposure to butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated.

IV. Aggregate Exposures

For the purposes of assessing potential exposure under this exemption, EPA considered that butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated could be present in all raw and processed agricultural commodities and drinking water, and that non-occupational non-dietary exposure was possible. The number average MW of butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated is 2,500 to 3,000 daltons. Generally, a polymer of this size would be poorly absorbed through the intact gastrointestinal tract or through intact human skin. Since butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated conform to the criteria that identify a low-risk polymer, there are no concerns for risks associated with any potential exposure scenarios that are reasonably foreseeable. The Agency has determined that a tolerance is not necessary to protect the public health.

V. Cumulative Effects From Substances With a Common Mechanism of Toxicity

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated to share a common mechanism of toxicity with any other substances, and butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

VI. Additional Safety Factor for the Protection of Infants and Children

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database unless EPA concludes that a different margin of safety will be safe for infants and children. Due to the expected low toxicity of butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated, EPA has not used a safety factor analysis to assess the risk. For the same reasons the additional tenfold safety factor is unnecessary.

VII. Determination of Safety

Based on the conformance to the criteria used to identify a low-risk polymer, EPA concludes that there is a reasonable certainty of no harm to the U.S. population, including infants and children, from aggregate exposure to residues of butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated.

VIII. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption

from the requirement of a tolerance without any numerical limitation.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated.

IX. Conclusion

Accordingly, EPA finds that exempting residues of butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated from the requirement of a tolerance will be safe.

X. Statutory and Executive Order Reviews

This final rule establishes a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these rules from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes, or otherwise have any unique impacts on local governments. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

Although this action does not require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994), EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. As such, to the extent that information is publicly available or was submitted in comments to EPA, the Agency considered whether groups or segments of the population, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide discussed in this document, compared to the general population.

XI. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: September 10, 2014.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. In § 180.960, add alphabetically to the table after ''Butadiene-styrene copolymer'' the following entry to read as follows:

§ 180.960 Polymers; exemptions from the requirement of a tolerance.

* * * * *

Polymer	CAS No.
* * *	* *
Butanedioic acid, 2-methylene-, polymer with 2,5-furandione, sodium and ammonium salts, hydrogen peroxide-initiated, minimum number average molecular weight (in amu), 2,500–3,000	556055–76–6 701908–99–8
* * *	* *

[FR Doc. 2014–22159 Filed 9–16–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1983–0002; FRL–9916–67–Region 8]

National Oil and Hazardous Substances Pollution Contingency Plan: Partial Deletion of the California Gulch Superfund Site National Priorities List; Withdrawal

AGENCY: Environmental Protection Agency.

ACTION: Withdrawal of direct final rule.

SUMMARY: On August 12, 2014, the Environmental Protection Agency (EPA) published a direct final notice of partial deletion and a proposed notice of intent for partial deletion for Operable Unit 4, Upper California Gulch; Operable Unit 5, ASARCO Smelters/Slag/Mill Sites; and Operable Unit 7, Apache Tailing Impoundment, of the California Gulch Superfund Site from the National Priorities List. The EPA is withdrawing the final notice of partial deletion due to adverse comments that were received during the public comment period. After consideration of the comments received, if appropriate, EPA will publish a notice of partial deletion in the **Federal Register** based on the parallel notice of intent for partial deletion and place a copy of the final partial deletion package, including a Responsiveness Summary, if prepared, in the Site repositories.

DATES: The direct final rule published at 79 FR 47007 on August 12, 2014, is withdrawn effective September 17, 2014.

ADDRESSES: *Information Repositories:* Comprehensive information on the Site, as well as the comments that we received during the comment period, are available in docket EPA–HQ–SFUND–1983–0002, accessed through the *http://www.regulations.gov* Web site. Although listed in the docket 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 hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy:

By calling EPA Region 8 at (303) 312–7279 and leaving a message, or at the Lake County Public Library, 1115 Harrison Avenue, Leadville, CO 80461, (719) 486–0569, Monday and Wednesday from 10:00 a.m.–8:00 p.m., Tuesday and Thursday from 10:00 a.m.–5:00 p.m., and Friday and Saturday 1:00 p.m.–5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Linda Kiefer, Remedial Project Manager, Environmental Protection Agency, Region 8, Mail Code 8EPR–SR, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–6689, email: *kiefer.linda@epa.gov.*

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.

SUPPLEMENTARY INFORMATION: On August 12, 2014, the Environmental Protection Agency (EPA) published a direct final notice of partial deletion (79 FR 47007) and a proposed notice of intent for partial deletion (79 FR 47043) for Operable Unit 4, Upper California Gulch; Operable Unit 5, ASARCO Smelters/Slag/Mill Sites; and Operable Unit 7, Apache Tailing Impoundment, of the California Gulch Superfund Site from the National Priorities List.

Due to adverse comments that were received during the public comment period, the direct final rule published at 79 FR 47007 on August 12, 2014, is withdrawn.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p.306; 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: September 5, 2014.

Shaun L. McGrath,

Regional Administrator, Region 8.

[FR Doc. 2014–22045 Filed 9–16–14; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 11

[Docket No. USCG–2004–17914]

RIN 1625–AA16

Implementation of the Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, and Changes to National Endorsements; Corrections

AGENCY: Coast Guard, DHS.

ACTION: Correcting amendments.

SUMMARY: The Coast Guard published in the **Federal Register** of December 24, 2013 (78 FR 77796), a final rule entitled ''Implementation of the Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, and Changes to National Endorsements''. This document corrects two amended CFR sections that are causing inconsistencies in interpretation.

DATES: This correction is effective on September 17, 2014.

FOR FURTHER INFORMATION CONTACT: If you have questions on this final rule, call or email Mr. E.J. Terminella, Project Manager, U.S. Coast Guard; telephone 202–372–1239, email *emanuel.j.terminellajr@uscg.mil.* If you have questions on viewing material on the docket, call Cheryl Collins, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Coast Guard is correcting a final rule that appeared in the **Federal Register** of December 24, 2013 (78 FR 77796), entitled ''Implementation of the Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, and Changes to National Endorsements''. Amendments to 46 CFR 11.705 and 11.711 published in the final rule require correction. The Coast Guard has determined that these changes were a result of an oversight in drafting and are causing inconsistencies in the interpretation of the application of the requirement. This correction will ensure the two sections revert back to the language that was in place before the final rule went into effect.

List of Subjects in 46 CFR Part 11

Incorporation by reference, Penalties, Reporting and recordkeeping requirements, Schools, Seamen, Transportation Worker Identification Card.

Accordingly, 46 CFR part 11 is amended by making the following correcting amendments:

PART 11—REQUIREMENTS FOR OFFICER ENDORSEMENTS

■ 1. The authority citation for part 11 continues to read as follows:

Authority: 14 U.S.C. 633; 31 U.S.C. 9701; 46 U.S.C. 2101, 2103, and 2110; 46 U.S.C. chapter 71; 46 U.S.C. 7502, 7505, 7701, 8906, and 70105; Executive Order 10173; Department of Homeland Security Delegation No. 0170.1. Section 11.107 is also issued under the authority of 44 U.S.C. 3507.

§ 11.705 [Amended]

■ 2. In § 11.705, remove paragraph (f).

■ 3. In § 11.711, revise paragraph (c) to read as follows:

§ 11.711 Tonnage requirements.

* * * * *

(c) If an applicant does not have sufficient experience on vessels of 1,600 GRT/3,000 GT or more, the endorsement will be for a limited tonnage until the applicant completes a number of additional roundtrips, as determined by the OCMI, within the range contained in § 11.705(b) or (c) of this subpart, as appropriate on vessels of 1,600 GRT/3,000 GT or more.

* * * * *

Dated: September 11, 2014.

Katia G. Cervoni,

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

[FR Doc. 2014–22064 Filed 9–16–14; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 120815345–3525–02]

RIN 0648–XD495

Snapper-Grouper Fishery of the South Atlantic; 2014 Recreational Accountability Measure and Closure for the South Atlantic Porgy Complex

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements accountability measures (AMs) for the recreational porgy complex in the exclusive economic zone (EEZ) of the South Atlantic. In the South Atlantic, the porgy complex includes jolthead porgy, knobbed porgy, whitebone porgy, scup, and saucereye porgy. Because recreational landings for the porgy complex in the 2013 fishing year exceeded the recreational annual catch limit (ACL) for the complex NMFS monitored recreational landings in 2014 for a persistence in increased landings. Through this temporary rule NMFS now closes the recreational sector for the porgy complex in the South Atlantic EEZ on September 17, 2014, as the recreational ACL has been projected to have been met for the 2014 fishing year. This closure is necessary to protect the porgy complex resource.

DATES: This rule is effective 12:01 a.m., local time, September 17, 2014, until 12:01 a.m., local time, January 1, 2015.

FOR FURTHER INFORMATION CONTACT: Catherine Hayslip, telephone: 727–824–5305, or email: *Catherine.Hayslip@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic, which includes the porgy complex, is managed under the Fishery Management Plan for Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

The recreational ACL for the porgy complex is 106,914 lb (48,495 kg), round weight. In accordance with regulations at 50 CFR 622.193(w)(2), if the recreational ACL is exceeded, the Assistant Administrator, NMFS (AA) will file a notification with the Office of the Federal Register to reduce the length of the following fishing season by the amount necessary to ensure landings do not exceed the recreational ACL in the following fishing year. In the 2013 fishing year, recreational landings were 117,293 lb (53,203 kg), round weight, and therefore exceeded the recreational ACL by 10,379 lb (4,708 kg), round weight. Initial 2014 landings projections indicated that the recreational ACL would be harvested on September 17, 2014. However, updated landings information received on September 11, 2014, indicates that the ACL has already been harvested. Therefore, this temporary rule implements the post-season AM to reduce the fishing season for the recreational porgy complex within the snapper-grouper fishery in 2014. As a result, the recreational sector for the porgy complex will be closed effective 12:01 a.m., local time, September 17, 2014.

During the closure, the bag and possession limit for the porgy complex in or from the South Atlantic EEZ is zero. The recreational sector for the porgy complex will reopen on January 1, 2015, the beginning of the 2015 recreational fishing season.

Classification

The Regional Administrator, Southeast Region, NMFS, has determined this temporary rule is necessary for the conservation and management of the South Atlantic porgy complex within the South Atlantic snapper-grouper fishery and is consistent with the Magnuson-Stevens Act, the FMP, and other applicable laws.

This action is taken under 50 CFR 622.193(w)(2) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

This action responds to the best available scientific information recently obtained from the fishery. The AA finds that the need to immediately implement this action to close the recreational sector for the porgy complex constitutes good cause to waive the requirements to provide prior notice and opportunity for public comment pursuant to the authority set forth in 5 U.S.C. 553(b)(B), as such procedures would be unnecessary and contrary to the public interest. Such procedures would be unnecessary because the rule itself has been subject to notice and comment, and all that remains is to notify the public of the closure. Such procedures would be contrary to the public interest because there is a need to immediately notify the public of the reduced recreational fishing season for the porgy complex for the 2014 fishing year, to prevent recreational harvest of the porgy complex from further exceeding the ACL, which will help protect the South Atlantic porgy resource.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 12, 2014.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2014–22182 Filed 9–12–14; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 79, No. 180

Wednesday, September 17, 2014

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 JUSTICE

Executive Office for Immigration Review

8 CFR Part 1003

[EOIR Docket No. 181; AG Order No. 3450–2014]

RIN 1125–AA78

Separate Representation for Custody and Bond Proceedings

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Executive Office for Immigration Review (EOIR) regulations relating to the representation of aliens in custody and bond proceedings. Specifically, this rulemaking proposes to allow a representative before EOIR to enter an appearance in custody and bond proceedings without such appearance constituting an entry of appearance for all of the alien's proceedings before the Immigration Court.

DATES: Written comments must be submitted on or before November 17, 2014. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until midnight Eastern Time at the end of that day.

ADDRESSES: Please submit written comments to Jeff Rosenblum, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 20530. To ensure proper handling, please reference RIN No. 1125–AA78 or EOIR docket No. 181 on your correspondence. You may submit comments electronically or view an electronic version of this proposed rule at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jeff Rosenblum, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 20530; telephone (703) 305–0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at *www.regulations.gov.* Such information includes personally identifiable information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personally identifiable information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONALLY IDENTIFIABLE INFORMATION'' in the first paragraph of your comment. You must also locate all the personally identifiable information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot effectively be redacted, all or part of that comment may not be posted on *http://www.regulations.gov.*

Personally identifiable information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

II. Background

The Immigration and Nationality Act (INA) provides that aliens appearing before an immigration judge ''shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings.'' INA sec. 240(b)(4) (8 U.S.C. 1229a(b)(4)); *see also* INA sec. 292 (8 U.S.C. 1362). In order to represent an alien before EOIR, a representative must file a Notice of Entry of Appearance with the Immigration Court or the Board of Immigration Appeals (Board). *See* 8 CFR 1003.17, 1003.3(a)(3). A representative who enters his or her appearance before the Immigration Court is the representative of record for the alien in all of the alien's proceedings, including removal or deportation proceedings and, if the alien is detained, custody and bond proceedings. To the extent a representative wishes to represent an alien solely in custody and bond proceedings, and not in any other proceedings before the Immigration Court, he or she must file a motion to withdraw representation after the alien's custody and bond proceedings conclude. *Cf. Matter of N–K– & V–S–,* 21 I&N Dec. 879, 880, 881 n.2 (BIA 1997). Whether to grant or deny that motion is within the sole discretion of the immigration judge presiding over the particular case. *See* 8 CFR 1003.17(b).

Over the past several years, EOIR has seen a substantial increase in the number of aliens appearing before its Immigration Courts. At the end of fiscal year (FY) 2013, there were 350,330 cases pending at the Immigration Courts, marking an increase of 22,901 cases pending above those at the end of FY 2012. *See* 2013 EOIR Stat. Y.B. W1, *available at http://www.justice.gov/eoir/statspub/fy13syb.pdf.*[1]

Moreover, a significant number of aliens appeared before EOIR without representation. Forty-one percent of the aliens whose immigration proceedings were completed in FY 2013, or 71,653 aliens, were unrepresented. *See* 2013 EOIR Stat. Y.B. F1. Non-detained aliens are much more likely to be represented before the Immigration Courts, as are aliens who have been released from detention. Of the 265,708 initial case

[1] *See also Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. on the Judiciary,* 112th Cong. 2 (May 18, 2011) (statement of Juan P. Osuna, Director, EOIR) (''Director's Testimony'') (discussing the increase in the number of matters received by the Immigration Court), *available at http://www.justice.gov/eoir/press/2011/EOIRtestimony05182011.pdf.*

completions for detained aliens from FY 2011 to FY 2013, 210,633 aliens, or 79 percent, were unrepresented. By contrast, of the 214,506 initial case completions during the same timeframe for aliens who were never detained, only 50,075 aliens, or 23 percent, were unrepresented. Similarly, of the 90,316 initial case completions during the same timeframe for detained aliens who were released, only 25,426 aliens, or 28 percent, were unrepresented.

Immigration proceedings involving unrepresented aliens often require more time than those involving represented aliens. For instance, immigration judges may need to spend additional time to ensure that unrepresented aliens understand the nature and purpose of the removal process, as well as their rights and responsibilities. An unrepresented alien may also ask for a continuance (or continuances) of his or her proceedings to obtain counsel. By contrast, aliens who are represented are likely to have discussed their proceedings, including their rights and responsibilities, with their counsel in advance of a hearing, and thereby avoid additional delays of the kind that may occur with respect to aliens who lack representation.

III. Proposed Amendment To Permit Separate Appearances

In order for a representative to enter an appearance solely for custody and bond proceedings before the Immigration Courts, EOIR is proposing to amend its regulations to specifically allow separate appearances in such proceedings. Permitting such separate appearances is expected to encourage more attorneys and accredited representatives to agree to represent aliens who would otherwise appear pro se at their custody and bond proceedings, which, in turn, will benefit the public by increasing the efficiency of the Immigration Courts.

Providing for separate appearances in custody and bond proceedings has been of significant and longstanding interest to public stakeholders. On September 28, 2012, EOIR published an advance notice of proposed rulemaking (ANPRM), which requested the public's input on potential amendments to the EOIR regulations pursuant to the Department of Justice's Plan for Retrospective Analysis of Existing Rules (Plan).[2] *See* Retrospective Regulatory Review Under E.O. 13563, 77 FR 59567 (Sept. 28, 2012). The ANPRM included notification that EOIR planned to evaluate whether to propose a rule providing for separate appearances in bond proceedings. *See* 77 FR 59569.[3] In response to the ANPRM, EOIR received comments from the public in support of permitting such appearances. Specifically, commenters noted that permitting separate appearances would increase the level of representation of aliens in custody and bond proceedings and improve the efficiency of those proceedings.

These comments echoed statements made previously by public interest groups that have indicated that more attorneys would be willing to represent detained aliens, including as pro bono counsel, if they were able to enter an appearance exclusively for custody and bond proceedings. For example, since 2007, the American Immigration Lawyers Association (AILA), in public meetings with EOIR, has continuously appealed to EOIR to amend its rules to allow representatives to enter a separate appearance on behalf of an alien for custody and bond proceedings, without such appearance also constituting an appearance for removal and deportation proceedings. Specifically, AILA has stated that separate appearances ''encourage pro bono representation and provide greater flexibility for attorneys and clients to agree on the scope of representation based on the client's needs and resources.'' EOIR/AILA Liaison Meeting Agenda Questions and Answers, March 29, 2012, at 10.[4]

In light of the anticipated benefits and public support detailed above, EOIR has decided to promulgate this separate rulemaking proposing to amend its regulations at 8 CFR 1003.17 to explicitly allow for separate appearances in custody and bond proceedings. Under EOIR's regulations, such proceedings are separate and apart from removal and deportation proceedings. *See* 8 CFR 1003.19(d); *Matter of Guerra,* 24 I&N Dec 37, 40 n.2 (BIA 2006); *Matter of R–S–H-,* 23 I&N Dec 629, 630 n.7 (BIA 2003). This proposed rule effectuates that separation by requiring Notices of Entry of Appearance to be filed separately for different types of proceedings. Specifically, an attorney or representative who appears on behalf of an alien in his or her custody and bond proceedings will not be held responsible for appearing, filing documents, receiving notices, or any of the other duties enumerated in 8 CFR 1292.5(a) in the alien's other proceedings, unless and until the attorney or representative files a Notice of Entry of Appearance in such proceedings.

The Board has held in a precedential decision that a representative of record cannot enter a ''limited'' appearance in immigration proceedings. *See Matter of Velasquez,* 19 I&N Dec. 377, 384 (BIA 1986). In *Matter of Velasquez,* the Board cited to the regulations in effect at the time, 8 CFR 292.1, 292.4 and 292.5(a) (1986),[5] which identified who was eligible to appear as a representative, the form a representative needed to file to enter an appearance, and the notice requirements. Those regulations did not include a provision for limited or separate appearances. This proposed rule leaves intact the holding in *Matter of Velasquez,* as a separate appearance in custody and bond proceedings would not be considered a ''limited'' appearance, which is generally understood to refer to a limit in the scope of representation required by a representative.[6] By contrast, this proposed rule would require a representative of record to represent an alien in all aspects of each separate type of proceeding, unless the Immigration Court grants a motion to withdraw or substitute counsel.

Under the current regulations, representatives are already required to file a Notice of Entry of Appearance on Form EOIR–28 in any proceedings before an immigration judge. *See* 8 CFR 1003.17. Under this proposed amendment to EOIR's regulations, representatives will continue to be

[2] Following the issuance of Executive Order 13563, the Department issued the Plan on August 22, 2011, identifying several regulations that it planned to review during the next two years. Pursuant to the Plan, the Department is conducting a retrospective review of portions of the EOIR regulations, including part 1003 of chapter V of title 8 of the Code of Federal Regulations.

[3] The ANPRM also provides notice that the Department intends to standardize citations and terms to ensure consistency within the EOIR regulations and with respect to the DHS regulations. As indicated in the Plan and discussed in the ANPRM, the revisions to this rule include updated references to DHS, by changing the term ''the Service'' to ''DHS.''

[4] EOIR/AILA Liaison Meeting Questions and Answers are available at *http://www.justice.gov/eoir/ailaarchive.htm.* AILA also raised the issue of separate appearances at several other EOIR/AILA Liaison meetings, including those held on October 10, 2007; October 21, 2008; and April 6, 2011.

[5] These regulations remain substantially unchanged, except that former sections 292.1, 292.4 and 292.5(a) of the regulations were redesignated as sections 1292.1, 1292.4, and 1292.5(a) in 2003 in response to the Homeland Security Act of 2002, which transferred the responsibilities of the former Immigration and Naturalization Service to the newly created Department of Homeland Security. *See* 68 Fed. Reg. 10350 (Mar. 5, 2003).

[6] All fifty states and the District of Columbia have rules governing limited appearances, many of which permit an attorney to limit the scope of representation in a particular matter to, for example, the preparation of court submissions without requiring the attorney to appear as counsel of record. *See http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/limited_appearances.html.*

required to file a Form EOIR–28 in custody and bond proceedings as required by 8 CFR 1003.17. However, the Form EOIR–28 will be amended to require a representative to indicate if he or she is entering an appearance for custody and bond proceedings only, any other proceedings only, or for all proceedings.

The Department welcomes public comment on the proposed amendments to EOIR's regulations providing for separate appearances before the Immigration Court for custody and bond proceedings.

IV. Regulatory Requirements

A. Regulatory Flexibility Act

The Department has reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) and has determined that this rule will not have a significant economic impact on a substantial number of small entities. The rule will not regulate ''small entities,'' as that term is defined in 5 U.S.C. 601(6).

B. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

D. Executive Order 12866 and Executive Order 13563 (Regulatory Planning and Review)

The Department has determined that this rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review and, therefore, it has not been reviewed by the Office of Management and Budget. Nevertheless, the Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including consideration of potential economic, environmental, public health, and safety effects, distributive impacts, and equity.

The benefits of this proposed rule include increased representation of detained aliens by permitting a representative to enter an appearance before the Immigration Court for the discrete task of securing a bond or release from detention, without requiring the representative also to represent the alien in all of the alien's immigration proceedings. The public will benefit from this amendment to the regulations, because the amendment will make it easier for aliens who may not be able to afford to hire an attorney for all of their proceedings before the Immigration Court to at least be able to be represented during their custody and bond proceedings. The Department anticipates that this rule will also have a positive economic impact on the Department, because increasing the number of aliens who are represented in their custody and bond proceedings will enable immigration judges to adjudicate proceedings in a more effective and timely manner, adding to the overall efficiency of immigration proceedings. The Department does not foresee any burdens to the public or the Department.

E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, the Department has determined that this rule does not have sufficient federalism implications to warrant preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule has been prepared in accordance with the standards in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

The information collection requirement (Form EOIR–28) contained in this rule has been previously approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act. This proposed rule contains revised recordkeeping and reporting requirements. Specifically, EOIR will collect additional information on the Notice of Entry of Appearance form indicating the type of proceeding(s) for which an attorney or representative is entering his or her appearance. Accordingly, the Department submitted a copy of this rule to the Office of Management and Budget.

List of Subjects

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organization and functions (Government agencies).

Accordingly, for the reasons stated in the preamble, the Attorney General is proposing to amend part 1003 of chapter V of title 8 of the Code of Federal Regulations as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 1. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

■ 2. Amend § 1003.17 by revising paragraph (a), to read as follows:

§ 1003.17 Appearances

(a) In any proceeding before an Immigration Judge in which the alien is represented, the attorney or representative shall file a Notice of Entry of Appearance on Form EOIR–28 with the Immigration Court, and shall serve a copy of the Notice of Entry of Appearance on the DHS as required by § 1003.32(a). The entry of appearance of an attorney or representative in a custody or bond proceeding shall be separate and apart from an entry of appearance in any other proceeding before the Immigration Court. An attorney or representative may file an EOIR–28 indicating whether the entry of appearance is for custody or bond proceedings only, any other proceedings only, or for all proceedings. Such Notice of Entry of Appearance must be filed and served even if a separate Notice of

Entry of Appearance(s) has previously been filed with the DHS for appearance(s) before the DHS.

* * * * *

Dated: July 29, 2014.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2014–21679 Filed 9–16–14; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1240, and 1241

[EOIR Docket No. 164P; AG Order No. 3463–2014]

RIN 1125–AA62

List of Pro Bono Legal Service Providers for Aliens in Immigration Proceedings

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: This rule proposes to amend 8 CFR parts 1003, 1240, and 1241 by changing the name of the ''List of Free Legal Services Providers'' to the ''List of Pro Bono Legal Service Providers.'' The rule also would enhance the eligibility requirements for organizations, private attorneys, and referral services to be included on the List of Pro Bono Legal Service Providers (List).

DATES: Electronic comments must be submitted and written comments must be postmarked on or before November 17, 2014. The electronic Federal Docket Management System at *www.regulations.gov* will accept electronic comments submitted prior to midnight Eastern Time at the end of that day.

ADDRESSES: Please submit written comments to Jeff Rosenblum, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia, 20530. To ensure proper handling, please reference RIN 1125–AA62 or EOIR docket number 164P on your correspondence. You may view an electronic version and provide comments via the Internet by using the *www.regulations.gov* comment form for this regulation. When submitting comments electronically, you must include RIN 1125–AA62 in the subject box. See Section I of the **SUPPLEMENTARY INFORMATION** section for more information.

FOR FURTHER INFORMATION CONTACT: Jeff Rosenblum, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 20530, telephone (703) 305–0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Public Participation—Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at *www.regulations.gov.* Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on *www.regulations.gov.*

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** section.

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. Comments that will provide the most assistance to the Department of Justice will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support the recommended change.

For access to the electronic docket to read background documents or comments received, go to *www.regulations.gov.* Submitted comments may also be inspected at the Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 20530. To make an appointment, please contact EOIR at (703) 305–0470 (not a toll-free call).

II. Explanation of Proposed Changes

Aliens who are placed in removal proceedings pursuant to section 240 of the Immigration and Nationality Act (Act or INA), or who seek asylum under section 208 of the Act (whether or not in removal proceedings), must be provided with a list of persons who have indicated their availability to represent aliens on a pro bono basis. *See* INA 208(d)(4)(B) (relating to asylum proceedings), and INA 239(a)(1)(E), (b)(2) (relating to removal proceedings). In order to meet this statutory obligation, the Executive Office for Immigration Review (EOIR) publishes the Free Legal Services Providers List (List).[1] The regulations governing the List were promulgated on February 28, 1997, at 62 FR 9071, and are found at 8 CFR 1003.61–1003.65. The List is organized by immigration court location;[2] for each location, the List provides the names of private attorneys and non-profit organizations aliens in proceedings may contact for free legal services. At each location, aliens are given the portion of the List with the providers for that location. The complete List is posted on the EOIR Web site.[3] *See www.usdoj.gov/eoir/probono/states.htm.*

The List is central to EOIR's efforts to improve the amount and quality of representation before its adjudicators, and it is an essential tool to inform aliens in proceedings before EOIR of available pro bono legal services. However, as explained further below,

---

[1] EOIR, a component of the Department of Justice, includes the immigration judges and the Board of Immigration Appeals. The immigration judges, who are appointed by the Attorney General, conduct removal proceedings and other immigration proceedings, resolving questions such as whether an alien is inadmissible to or deportable from the United States, and whether he or she qualifies for relief from removal.

[2] The term ''immigration court location,'' as used in this proposed rule, refers both to the immigration courts and to facilities where hearings may be conducted, but where no EOIR personnel have a permanent duty station.

[3] In addition, the Department of Homeland Security (DHS) provides a modified version of EOIR's List to asylum applicants before that agency, and DHS provides EOIR's List to aliens in certain other instances as well. As explained in more detail below, this proposed rule does not limit DHS's ability to provide aliens with EOIR's List or with DHS's modified versions of the List.

concerns have been expressed to EOIR by government sources and the public about problems with the List, and EOIR believes it is important to improve the functioning of the List. Therefore, the Department of Justice (Department) is proposing to amend the regulations governing the List, as described further below.

A. ''Pro Bono Legal Service Providers''

As the List is intended to provide aliens access to pro bono representation, this proposed rule replaces the term ''free legal service providers'' with ''pro bono legal service providers.'' Replacing the word ''free'' with the term ''pro bono'' reflects the relevant statutory language (*see* INA 208(d)(4)(B), 239(a)(1)(E), 239(b)(2)), describes more accurately the nature of the services provided, and will improve the integrity of the List. Further, removing the word ''free'' will clarify that entities and private attorneys on the List are not necessarily available to work free of charge for every alien regardless of the alien's financial means or the type of legal work involved. Rather, use of the term ''pro bono'' indicates that such services are for the public good, *e.g.,* to help ensure qualified representation for those indigent aliens who do not have sufficient means to hire a private attorney.

B. Definition of ''Pro Bono''

This proposed rule also sets forth a definition of the term ''pro bono'' to ensure that entities or private attorneys that want to be included on the List understand the kind of services expected from them if they are included on the List. The proposed rule defines ''pro bono legal services'' at § 1003.61(a)(2) as ''those uncompensated legal services performed for indigent aliens or the public good without any expectation of either direct or indirect remuneration, including referral fees (other than filing fees or photocopying and mailing expenses), although a representative may be regularly compensated by the firm, organization, or pro bono referral service with which he or she is associated.'' This definition not only reflects the spirit of pro bono representation, but is also consistent with the common law understanding of the terms *pro bono* and *pro bono publico. See, e.g.,* Black's Law Dictionary (9th ed. 2009).

Use of the term *pro bono* indicates that work performed should be for the good of the public *from the outset* and a commitment to continue such representation throughout the duration of the administrative proceeding before an immigration judge. It is inappropriate for legal service providers to subsequently count as ''pro bono'' those services provided to paying clients who fall delinquent in paying attorney fees. In addition, EOIR recognizes that some organizations charge reduced or nominal fees in an attempt to provide services to aliens who cannot afford private attorneys but have a modest ability to pay. However, services provided for a reduced or nominal fee do not constitute ''pro bono'' services under the proposed rule. Although services provided for reduced or nominal fees are not ''pro bono'' services, organizations that charge such fees to some of their clients are not prohibited from inclusion on the List. As set forth in § 1003.62(a) and (b), such an organization can be included on the List if it provides a requisite amount of pro bono legal services and meets the other requirements for inclusion, even though it charges fees to some of its other clients.[4]

As the foregoing definition reflects, this proposed rule also adopts reference to ''pro bono referral services'' in place of the current reference to ''bar associations.'' There is no need to specifically list bar associations since any pro bono programs offered by them would either be in the form of a pro bono referral service or an organization that is eligible to be included on the List under proposed § 1003.62(a), (b), or (c). Adopting the term ''pro bono referral services'' also broadens eligibility for inclusion on the List to referral services that are not administered by a bar association.

C. Proposed Changes to Preserve the Integrity of the List

EOIR has strongly supported various local efforts to provide pro bono legal services to aliens appearing before the immigration judges, the Board of Immigration Appeals (Board), and the Office of the Chief Administrative Hearing Officer (which adjudicates certain immigration-related civil penalty actions). In April 2000, EOIR established a national pro bono program to improve the development and coordination of these services and, in March 2008, EOIR issued formal policy guidance to immigration judges and immigration court staff on facilitating pro bono legal services. *See* ''Office of Legal Access Programs,'' *www.usdoj.gov/eoir/probono/probono.htm;* ''Operating Policies and Procedures Memorandum 08–01: Guidelines for Facilitating Pro Bono Legal Services,'' Mar. 10, 2008, *www.usdoj.gov/eoir/efoia/ocij/oppm08/08–01.pdf* (Last visited July 15, 2014]).

EOIR encourages organizations and private attorneys to publicize their willingness to provide pro bono legal services to aliens appearing before immigration judges by being included on the List.[5] The EOIR Committee on Pro Bono, which was formed in response to Directive 22 of Attorney General Alberto R. Gonzales' ''Measures to Improve the Immigration Courts and the Board of Immigration Appeals,'' Aug. 9, 2006, *http://www.justice.gov/ag/readingroom/ag-080906.pdf* (Last visited July 15, 2014), reviewed issues and concerns regarding the need for additional safeguards for the List. In its recommendations to expand and improve EOIR's pro bono programs, the EOIR Committee on Pro Bono (Committee) recommended that EOIR publish new regulations to strengthen the requirements for placing organizations and private attorneys on the List. *See* ''EOIR to Expand and Improve Pro Bono Programs,'' Nov. 15, 2007, *www.usdoj.gov/eoir/press/07/ProBonoEOIRExpandsImprove.pdf* (Last visited July 15, 2014). Specifically, the Committee recommended that private attorneys not be included on the List unless they could demonstrate their inability to provide pro bono legal services through or in association with local pro bono organizations or referral services. The Committee also recommended that the List be monitored periodically to ensure that listed organizations and individuals were indeed providing free legal services.

Since the creation of the List, EOIR has increasingly received complaints from numerous government sources and the public that certain private attorneys may be using the List to advertise or solicit for paying clients, and do not provide legal representation to a significant number of aliens on a pro bono basis or for any particular amount of time. For instance, a private attorney who has declared his or her willingness to represent indigent aliens on a pro bono basis may provide pro bono

[4] Under this proposed rule, an organization or attorney on the List must provide 50 hours of pro bono legal services per year in cases in front of each immigration court location on its application. *See* proposed §§ 1003.62, 1003.63. This requirement is discussed further below.

[5] For aliens before the Board, EOIR helps to provide pro bono representation in appropriate cases through the BIA Pro Bono Project, which is administered by EOIR's Office of Legal Access Programs. Based on criteria determined by partnering organizations, EOIR assists in identifying cases appropriate for pro bono representation. Partnering organizations then work to find pro bono representatives in those cases. Additional information is available at *http://www.justice.gov/eoir/probono/probono.htm#BIAProBono.*

representation to only one alien and otherwise cease to provide pro bono representation. It is, unfortunately, common for aliens who contact private attorneys on the List to be informed that these attorneys are not available to accept any more pro bono cases, and are only available to represent the aliens for a fee. Though there may be different reasons why attorneys may find themselves unable to accept new pro bono cases at a particular time, there is reason for concern that at least some attorneys may not be using the List for its intended purpose and may be misleading EOIR, the public, and aliens as to their true willingness and availability to provide pro bono services.

EOIR has not received similar complaints regarding organizations or pro bono referral services on the List. This may be because, unlike private attorneys, organizations and pro bono referral services are primarily non-profit operations and are formed specifically to assist indigent and low-income individuals. Thus, although there may be similar potential for abuse, there is less incentive for such entities to use the List improperly. Further, attorneys and accredited representatives who provide pro bono services on behalf of organizations or referral services are typically supervised, unlike some private attorneys on the List.

Finally, the regulations do not currently require organizations or private attorneys who are included on the List to represent any minimum number of indigent aliens on a pro bono basis over a given period of time. Requiring ''an attorney to accept a specific number or percentage of cases on a pro bono basis in order to be included on the list of free legal services providers'' was considered in promulgating the 1997 rule. 62 FR 9072 (Feb. 28, 1997). At that time, EOIR determined that it was not necessary to include such a requirement. *Id.* However, the rule also stated that ''this issue is subject to further review if necessary to eliminate any abuses.'' *Id.*

The proposed rule seeks to prevent in five ways the potential for abuse by all organizations and private attorneys on the List, explained in greater detail below. First, the proposed rule requires that private attorneys on the List, and attorneys and accredited representatives providing pro bono legal services before EOIR on behalf of the organization on the List, not be subject to an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2). Second, the proposed rule provides that attorneys must seek to provide pro bono legal services through or in association with an organization or pro bono referral service if possible. Third, it requires every organization or individual on the List to provide a minimum of 50 pro bono hours a year in each immigration court location where the provider intends to be included on the List. Fourth, this proposed rule allows for and encourages public participation in the application process of an organization, referral service, or private attorney seeking to be included on the List. Finally, once a provider's name is included on the List, the provider must declare under penalty of perjury every three years that the provider is qualified to remain on the List.

The following is a description of the five ways the proposed rule seeks to limit the potential for abuse by the organizations and private attorneys on the List.

1. Professional Conduct Standards

The new eligibility requirements aim to ensure that private attorneys on the List, and attorneys and accredited representatives who provide pro bono legal services for organizations on the List, satisfy EOIR's professional conduct standards.[6]

The proposed rule requires that private attorneys on the List, as well as attorneys and accredited representatives who provide pro bono services before EOIR on behalf of an organization on the List, not be subject to an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2). *See* proposed § 1003.62(a)(3) (pertaining to organizations recognized under § 1292.2), (b)(4) (pertaining to organizations not recognized under § 1292.2), (d)(1) (pertaining to attorneys). When applying to be included on the List, an attorney must submit a written declaration that he or she is not the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2). *See* proposed § 1003.63(d)(7). Similarly, an organization, whether or not recognized, must submit a written declaration that no attorney or accredited representative who will provide pro bono legal services on behalf of the organization before EOIR is the subject of such an order of disbarment or suspension.

Each of the declarations to be made by private attorneys under proposed § 1003.63(d), or organizations under proposed § 1003.63(b), must be made ''under penalty of perjury.'' Use of this term is consistent with language used in the declarations on Forms EOIR–28 (Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court) and EOIR–27 (Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals), which must be signed and filed each time an attorney or representative enters his or her appearance in a matter before the immigration judge or the Board. *See* § 1003.17(a) (requiring the filing of Form EOIR–28 with the immigration court); § 1003.2(g)(1) (requiring the filing of Form EOIR–27 with the Board); § 1003.3(a)(3) (same).

The proposed rule contains no requirement pertaining to other disciplinary actions. Such actions include public or private censure under 1003.101(a)(3) and admonition under § 1003.104(c). An attorney can be included on the List even if he or she was recently subject to such a disciplinary action, and an organization can be included on the List even if an attorney or accredited representative providing pro bono legal services on its behalf before EOIR was recently subject to such an action.

2. Ability To Provide Pro Bono Legal Services in Association With Organizations and Referral Services

The new eligibility requirements for private attorneys further aim to ensure that only those attorneys who are genuinely interested in and capable of providing pro bono services are included on the List.

Many immigration court locations are in areas with developed pro bono programs that are sufficiently capable of assessing the legal claims and financial resources (''intake'' and ''screening'') of large numbers of aliens in immigration proceedings and coordinating pro bono representation with local private attorneys. These programs often provide private attorneys with specialized legal training, ongoing mentoring, and other assistance in their pro bono cases as a recruitment incentive. Thus, where sufficient local organizations or pro

[6] The standards described in this footnote relate to compliance with EOIR's professional conduct standards. In addition, to be eligible for inclusion on the List, or to provide pro bono services before EOIR on behalf of an organization on the List, an attorney must comply with state bar association standards. Specifically, EOIR's regulatory definition of ''attorney'' states that an attorney cannot be ''under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him in the practice of law.'' § 1001.1(f). This includes any such order issued by a state bar association. In an application to be included on the List, an attorney must declare, under penalty of perjury, ''[t]hat he or she is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law.'' Proposed § 1003.63(d)(6). An organization must make such a declaration with respect to every attorney providing pro bono legal services before EOIR on the organization's behalf. Proposed § 1003.63(b)(2)(ii).

bono referral programs are available to identify aliens in need of pro bono legal services, as well as recruit and assist private attorneys interested in providing these services, private attorneys are able to provide pro bono services through or in association with such local organizations or referral programs. In such a situation, there is little to no need for private attorneys to be included by name on the List.

However, EOIR recognizes that in some instances, especially for immigration court locations in rural areas or small cities, private attorneys may be the only available and willing sources of pro bono legal services. For instance, some areas may have no pro bono organizations or may have organizations that lack programs to recruit and support pro bono attorneys. In addition, some pro bono organizations offer a limited range of immigration services, and do not offer referral programs for all types of cases before the immigration court.

The Department has designed the proposed rule to allow private attorneys in such circumstances to continue to be included on the List. Accordingly, this rule proposes to amend § 1003.62(d) to state that, to be included on the List, an individual attorney must demonstrate that he or she cannot provide pro bono legal services through or in association with an organization or referral service because: (i) Such an organization or referral service is unavailable; or (ii) the range of services provided by the existing organization(s) or referral service(s) are insufficient to address the needs of the community. Under the ''Applications'' section at § 1003.63(d)(3), an attorney is further required to submit a written declaration that describes the good-faith efforts he or she made to provide pro bono legal services through an organization or pro bono referral service at each immigration court location where the private attorney is willing to provide pro bono legal services.

3. Minimum Requirement of 50 Pro Bono Hours per Year

This rule proposes a new requirement that, once on the List, an attorney or organization perform at least 50 hours of pro bono legal services annually at each immigration court location where the attorney or organization intends to be included on the List. *See* proposed § 1003.62(a)(1), (b)(2), (d)(2). This requirement aims to ensure that only those organizations and private attorneys genuinely interested in providing pro bono services are included on the List. This requirement applies to organizations as well as private attorneys. As noted above, some organizations charge reduced or nominal fees in an attempt to provide services to aliens who cannot afford private attorney rates but have a modest ability to pay. However, services provided for a fee—even a nominal fee—are not pro bono services, and therefore do not count toward the 50-hour requirement. This requirement does not apply to pro bono referral services; there is no minimum annual amount of pro bono legal services that a referral service must provide.

Only pro bono legal services provided in cases before the immigration court location identified in the attorney's or organization's application count toward the 50-hour requirement. *See* proposed § 1003.63(a)(3), (b)(1), (d)(1). If an attorney or organization identifies more than one immigration court location, then the attorney or organization must provide at least 50 hours of pro bono legal services in cases before each location. For instance, a provider who seeks to be listed as providing pro bono services before the Arlington Immigration Court and the Baltimore Immigration Court must provide 50 hours of pro bono services before the Arlington Immigration Court and 50 hours of pro bono services before the Baltimore Immigration Court each year. This is intended to ensure, to the maximum extent possible, that attorneys and organizations listed as available to provide pro bono legal services at a particular immigration court location are actually able to provide pro bono services at that location.[7] However, a provider is not required to provide 50 hours of *in-court* pro bono service per year. Rather, all time spent providing pro bono legal services in cases before a particular immigration court location, including out-of-court preparation time, counts toward the 50-hour requirement.

Due to the new requirement that private attorneys must first seek to provide pro bono services through an organization or referral service, the Department does not believe that this 50-hour requirement will overly burden an individual attorney's ability to provide pro bono services. The individual attorney might commit to provide any number of pro bono hours through an organization or referral service on the List. An individual attorney associated with an organization on the List would not be required to provide 50 hours per year. Rather, the organization as a whole would commit to providing at least 50 hours of pro bono representation per year before each immigration court location identified in the organization's application.

This 50-hour annual minimum is intended to provide a clear measure of the amount of pro bono representation that is acceptable in order for an organization or private attorney to be qualified to be included on the List. A number of state bar associations and private law firms use 50 hours as the recommended annual minimum for pro bono work and this number is also found in the American Bar Association's (ABA) Model Rules of Professional Conduct.[8] The Department believes this prevailing standard strikes the balance between private attorneys whose primary practice is the business of fee-generating clients but who are genuinely interested in providing pro bono services, and organizations that are primarily formed to assist indigent and low-income individuals. The proposed rule also provides that failure to provide the 50-hour annual minimum subjects attorneys and organizations to removal from the List under new § 1003.65.

The Department also recognizes, however, that a particular minimum may be burdensome for some or result in a de facto maximum standard that undermines the purpose of the List. Accordingly, the Department is soliciting comments on whether this 50-hour annual minimum is an acceptable measure of how much pro bono representation an organization or private attorney should provide in order to remain on the List. In particular, the Department welcomes comments on the following questions:

Question 1. Would a 50-hour annual minimum be too demanding for private attorneys who manage a fee-generating practice, but also want to engage in immigration-related pro bono work and cannot provide pro bono service through or in association with an organization or referral service?

Question 2. Conversely, is a 50-hour annual minimum not enough for organizations that seek to be included on the List?

Question 3. Should the standards for organizations and private attorneys differ from one another in any other way? For example, should the rule require that each attorney or accredited representative performing legal services on behalf of an organization perform a certain amount of pro bono work per year, as opposed to requiring that the

[7] Pro bono legal services provided before the Board do not count toward the 50-hour requirement. As noted in footnote 5, EOIR assists in providing pro bono legal services in appropriate instances through the BIA Pro Bono Project.

[8] ABA Rule 6.1 (Voluntary Pro Bono Publico Service) states that ''[a] lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.''

organization as a whole perform a certain amount of work?

Question 4. Are there alternative standards that would be more appropriate measures of the level of pro bono representation that an organization or a private attorney should provide in order to be included on the List, *e.g.,* the number of cases accepted or the types of cases accepted?

4. Continuing Certification

This proposed rule also would require at § 1003.64(b)(2) that, every three years from the date the application to be included on the List is approved, each provider must declare that the provider continues to be qualified to remain on the List under paragraphs (a), (b), (c), or (d) of § 1003.62. As part of the declaration, the provider must include alien registration numbers of clients in whose cases the provider rendered pro bono legal services under EOIR's regulations, representing at least 50 hours of pro bono legal services each year since the provider's most recent such declaration, or since the provider was included on the List, whichever was more recent. This continuing certification puts a reasonable responsibility on providers to keep EOIR informed of their willingness to provide pro bono legal services and their qualifications to be included on the List. The current rule provides no means by which EOIR remains informed that providers continue to provide pro bono legal services once their names are included on the List. Unless EOIR is specifically notified that a provider is no longer providing pro bono legal services, it is difficult for EOIR to ascertain whether a provider should remain on the List. Under the proposed rule, however, EOIR will remove a provider from the List at the next quarterly update if the provider fails to comply with the continuing certification requirement.[9]

For providers whose applications to be included on the List are approved before the date of publication of the final rule, a new application must be filed in compliance with the new qualification and eligibility requirements set forth in this rule as follows: organizations and pro bono referral services, within one year of the date of publication of the final rule; attorneys, within six months of the date of publication of the final rule. *See* proposed § 1003.63(e). These time periods strike a balance between allowing both providers and EOIR sufficient time to phase in these new requirements and addressing the public's need for an updated list of available, local pro bono legal service providers. The time period for attorneys is shorter than for organizations and pro bono referral services because, as noted above, the complaints EOIR has received primarily relate to attorneys. While the List already comprises well over 100 providers, the allotted time periods should be sufficient for these providers to reapply and be subject to the 15-day notice and comment period under § 1003.63(f).

5. Public Participation

Another means by which the proposed rule aims to improve the integrity of the List is by engaging the public in the application process under § 1003.63(f). The proposed rule requires EOIR to publicly post for a 15 day period the names of applicants, whether organizations, pro bono referral services, or individuals, who meet the regulatory requirements to provide pro bono services to aliens in proceedings in order to allow the public an opportunity to send comments to EOIR and the applicant. The names of applicants will be posted on EOIR's Web site, and may also be posted at the immigration court location where the applicant intends to provide pro bono services. Under the proposed rule, any individual or organization may forward its comments or recommendations for approval or disapproval of the publicly available applications to the Director. The rule will require that such comments also be served on the applicant so that the applicant has an opportunity to respond.

D. Improper Use of the List To Solicit or Advertise for Paying Clients

This proposed rule also states, at § 1003.65(d)(1)(iii), that a provider shall be removed from the List for improperly using the List for the primary purpose of soliciting, or advertising to, potential paying clients since doing so is clearly contrary to the List's intended purpose. Current regulations do not explicitly impose a removal requirement for use of the List for these purposes. Unfortunately, EOIR has received numerous complaints that aliens who contact private attorneys on the List are commonly informed that the private attorneys are not available to accept any pro bono cases and are only available to represent the aliens for a fee. As noted above, though there may be different reasons why attorneys are not able to accept additional pro bono cases at a particular time, this gives rise to concerns that at least some private attorneys may be using the List as free, government-supported advertising for fee-generating services. This may be misleading to aliens who would not have otherwise contacted the private attorney and who may also mistakenly believe that private attorneys on the List are in some manner endorsed by the government. These issues are of particular concern as aliens in immigration proceedings are often unfamiliar with the legal system in the United States and may have limited English proficiency.

Such practice not only degrades the integrity of the List, but may also violate § 1003.102(f)(1),[10] state bar rules or the ABA's Model Rules of Professional Conduct.[11] Use of the List by a private attorney to induce aliens into contacting the attorney for pro bono legal services when these are not commonly provided may also raise questions about whether such conduct might amount to impermissible solicitation by the private attorney for fee-generating legal services. Improperly soliciting clients is grounds for discipline under § 1003.102(d) and is prohibited by various state bar rules, and the ABA's Model Rules. In order to safeguard the integrity of the List and promote aliens' interests in obtaining pro bono legal services, § 1003.65(d)(1)(iii) of the proposed rule states that a provider is subject to removal from the List for improperly using it primarily to advertise for or solicit clients for compensated legal services. Additionally, § 1003.65(d)(5) states that removal from the list pursuant to § 1003.65(d)(1)(iii) shall be without prejudice to the authority to discipline an attorney or representative under EOIR's rules and procedures for

[9] As described further in section II–G of this preamble, a provider can be removed from the List in other circumstances as well. Specifically, as provided in § 1003.65, a provider may be removed if subject to automatic removal, if the provider submits a request for removal, if the provider fails to answer an EOIR inquiry in response to complaints, or if, following proceedings initiated by the EOIR Director, the EOIR Director determines that the provider is no longer qualified to remain on the List.

[10] Under § 1003.102(f), a practitioner is subject to disciplinary action by EOIR if he or she ''[k]nowingly or with reckless disregard makes a false or misleading communication about his or her qualifications or services. A communication is false or misleading if it: (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. . . .''

[11] Most, if not all, states have a rule similar to ABA Model Rule 7.1 (Communications Concerning A Lawyer's Services), which states that: ''[A] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.''

professional conduct for practitioners listed in part 1003, subpart G.

E. Requesting Removal From the List

The Department recognizes that circumstances may arise where an individual attorney or organization on the List may legitimately be unable to continue accepting additional pro bono cases for a certain period, such as a full case load or reaching the annual limitation on pro bono hours by an attorney practicing in a law firm. In that instance, the provider can request removal from the List as set forth in § 1003.65(b)(1). Under § 1003.65(b)(2), any provider granted removal from the List may thereafter seek reinstatement upon written notice and submission of a new eligibility declaration, as specified in section 1003.63(b), (c), or (d). However, reinstatement, like initial inclusion, is subject to the discretion of the Director. Also, reinstatement will not affect the continuing qualification requirement set forth in § 1003.64(b)(2), which requires providers to submit a new declaration of eligibility every three years from the date of the original application's approval.

F. Available Services From the Pro Bono Provider

The proposed rule also requires at § 1003.63 that when applying to be included on the List, providers specify whether there are any limitations on the pro bono legal services they provide. Currently, § 1003.63 only requires the application to indicate whether a provider will represent ''indigent aliens in immigration proceedings *pro bono.*'' § 1003.63(d)(1)(ii). Yet, it is common practice for providers on the List to specify not only if they will represent aliens in specific types of proceedings (e.g., asylum, VAWA), but to state other limitations on the services they are willing to provide. For instance, some providers are unwilling to represent detained aliens. However, immigration court locations often use the same List for both detained and non-detained aliens, even though many providers on the List for a particular court are unwilling or unable to provide pro bono legal services to detained aliens. This practice can create confusion and unnecessary frustration for both detained aliens and the local court.

Accordingly, this proposed rule codifies the already existing practice of specifying any limitations that may exist on a provider's willingness to provide pro bono legal services. For example, if a provider only provides pro bono representation for asylum seekers, or does not represent aliens in detention, this must be specified. Sections 1003.65(d)(1)(i) and 1003.66 of the rule also subject a provider to removal from the List for failing to notify EOIR of any changes to these limitations. This rule will assist both EOIR in assembling the List for each immigration court location, as well as aliens in directing their search.

G. Removal of Providers From the List

The proposed rule transfers from the Chief Immigration Judge to the Director of EOIR responsibility for maintaining the List, exercising authority and discretion to approve or deny an application, and removing a provider from the List. The Director may delegate such authority to any office or official within EOIR. *See* proposed § 1003.61(a)(1)(b).

Under the proposed rule, there are four ways a provider can be removed from the List.

First, under § 1003.65(a), an attorney can be automatically removed from the List if the Director determines that the attorney is the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2). Automatic removal applies only to private attorneys, and not to organizations or referral services.

Second, under § 1003.65(b), a provider can voluntarily request to be removed from the List.

Third, under § 1003.65(c), if EOIR receives complaints that a particular provider may no longer be providing pro bono services, EOIR can inquire, in writing, into the provider's pro bono practices. This will allow the provider to become aware of the receipt of complaints, and to provide an appropriate response. In appropriate cases, if in fact the provider is no longer in a position to provide pro bono services, the provider may request voluntary removal from the List. Where the provider fails to respond, EOIR may choose to remove the provider from the List.

Fourth, paragraph (d) of 1003.65 provides formal procedures for removing a provider from the List in circumstances not covered by paragraphs (a), (b), or (c) of that section. Under § 1003.65(d), the Director can initiate procedures to remove a provider from the List if the Director determines that a provider has: Failed to comply with § 1003.66 (change in address or status), filed a false declaration in connection with an application filed pursuant to § 1003.63, improperly used the List primarily to advertise or solicit clients for compensated legal services, or failed to comply with any other requirements under subpart E.

If the Director decides to initiate procedures under § 1003.65(d), the Director must promptly inform the provider in writing of the Director's intention to remove the provider from the List. The provider then has 30 days to submit a written response establishing, by clear and convincing evidence, that the provider continues to meet the qualifications for inclusion on the List. The response must include a declaration under penalty of perjury as to the provider's continued compliance with the eligibility requirements, including individual examples of specific alien registration numbers of clients in whose cases the provider rendered pro bono legal services, representing at least 50 hours of service each year since the provider's most recent declaration under § 1003.64(b)(2), or since the provider was included on the List, whichever was more recent. *See* proposed § 1003.65(d)(3). If the provider submits a response, the Director will consider the response before deciding whether to remove the provider from the List. *See* proposed § 1003.65(d)(4).

H. Additional Revisions

The proposed rule provides additional clarification by rearranging some of the sections and section headings. For instance, the proposed rule renames the heading of § 1003.62 as ''Eligibility'' (presently titled ''Qualifications''), as the new heading better describes the requirements set forth in that section. Proposed new § 1003.61(c) (''Qualification'') sets forth the criteria that make an entity or individual ''qualified'' to be included on the List, including that the entity or individual meet the eligibility requirements under § 1003.62.

Moreover, the proposed rule specifies at § 1003.64(a) that the approval and denial of applications to be included on the List are discretionary determinations by the EOIR Director. The proposed rule also eliminates the right to appeal to the Board, as currently provided in § 1003.64 and § 1003.65(a), the denial of an application to be included on the List, as well as a determination to remove a provider from the List. These changes are made for two reasons. First, the List is designed specifically to benefit aliens and not the providers listed. As application for placement on the List is completely voluntary and does not confer any rights or benefits to providers, there are no due process concerns with denying an application to be included on the List or removing a provider from the List. Second, applicants to be included on the List, as well as providers who are removed from

the List, may reapply through the normal application process, or may seek reinstatement in the limited circumstance where the Director previously granted removal at the request of the person or organization, as set forth in § 1003.65(b)(2).

Finally, with regard to the denial of an application under § 1003.64 or a decision to remove a provider from the List under § 1003.65, the proposed rule states that when serving documents on an applicant, the Director shall comply with the definition of ''service'' in § 1003.13.

I. Proceedings Before the Department of Homeland Security

As noted above, section 208(d)(4)(B) of the Act requires that asylum applicants be provided ''a list of persons . . . who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.'' For aliens in asylum proceedings before the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), USCIS currently complies with this requirement by providing a modified version of EOIR's List. Specifically, USCIS reorganizes EOIR's List around the geographic area served by each of USCIS's eight asylum offices; the providers in the area served by each office are listed under that office. Separately, U.S. Immigration and Customs Enforcement (ICE) with DHS provides EOIR's List to aliens subject to expedited removal as aggravated felons who are not lawful permanent residents, and in certain instances involving detained juveniles. *See* §§ 236.3(g) (detained juveniles), 238.1(b)(2)(iv) (expedited removal).

The new requirements of this proposed rule are focused solely on pro bono providers who wish to be included on EOIR's List because they are providing pro bono legal services before the immigration courts; these requirements and limitations are not intended to account for pro bono representation of aliens before DHS.

Thus, this proposed rule does not limit whether and how pro bono providers may represent aliens before DHS, nor does it limit how DHS notifies aliens of the availability of pro bono legal services. Under this proposed rule, DHS can continue to provide EOIR's List to aliens who are in proceedings before DHS, and can continue to modify the List as DHS deems appropriate. As explained above, under the proposed rule, only pro bono services in cases before EOIR, specifically at the immigration court location or locations identified in a provider's application, will count toward the 50-hour annual requirement. This is to ensure, as much as possible, that pro bono providers listed for a particular immigration court location are actually available to provide pro bono services there. But the 50-hour annual requirement under this proposed rule does not apply with respect to providing pro bono services before DHS. Thus, in modifying EOIR's List, if DHS wishes to add providers EOIR did not include—for example, those who practice exclusively or mostly before DHS—then DHS may do so. EOIR recognizes the importance of its List in assisting DHS to notify aliens of pro bono legal service providers. The Department believes that this proposed rule is appropriate in that it responds to concerns regarding pro bono representation before EOIR, while not limiting DHS's ability to modify EOIR's List as it chooses, or otherwise to inform aliens of pro bono legal service providers in the manner DHS deems best.

III. Regulatory Requirements

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. Some small entities, such as non-profit organizations or small law offices, will be affected by this rule. Organizations or private attorneys may be removed from the List of Pro Bono Legal Service Providers if they are no longer qualified to be on the List under this proposed rule. Likewise, those who wish to have their names included on this List will be affected as they will have to demonstrate their eligibility to have their names listed. However, application for placement on the List is completely voluntary and does not confer any rights or benefits on such organizations or law offices. Placement on the List does not constitute government endorsement of a particular entity or private attorney; nor is the List to be used for advertising or soliciting. Rather, the purpose of the List is to provide aliens notification that these entities or private attorneys are available to provide uncompensated legal services without any direct or indirect remuneration (other than filing fees or photocopying and mailing expenses).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year and also will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1535).

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804). This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Executive Order 12866 and Executive Order 13563 (Regulatory Planning and Review)

The Department has determined that this rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and, therefore, it has not been reviewed by the Office of Management and Budget. Nevertheless, the Department certifies that this regulation has been drafted in accordance with the principles of Executive Order 12866, section 1(b), and Executive Order 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Additionally, it calls on each agency to periodically review its existing regulations and determine whether any should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving its regulatory objectives.

This rule affects the function and purpose of the Pro Bono Service Provider List. The benefits of this proposed rule include addressing long-standing problems of abuse associated with the existing List, updating the term ''free'' with ''pro bono'' legal services to reflect the proper statutory language,

creating a minimum number of annual pro bono hours to ensure proper compliance with the spirit of the regulation, and creating greater agency flexibility to remove List participants who do not meet the minimum regulatory requirements. Further, the rule is intended to provide aliens with better information regarding the availability of pro bono representation before the immigration courts, thus benefitting aliens who appear in proceedings before the courts.

Burdens to the public are applicable only to attorneys and organizations making a voluntary decision to seek to be included on the list; these include requirements to apply for inclusion on the List, maintain updated contact information, perform a minimum of 50 annual pro bono hours of service at each immigration court location where the attorney or organization intends to be included on the List, and file a declaration every three years of continuing eligibility to be on the List. The regulations provide for removal from the List of a provider who can no longer meet the requirements of inclusion on the List. The Department examined these burdens to the public and has determined that the benefits outweigh the burdens. The Department believes that this rule will have a minimal economic impact on List participants because it provides List participants with flexible means of complying with the rule's requirements. Further, it will not have a substantial economic impact on Department functions, as the Department is already maintaining and updating such a List quarterly. The Department believes this rule will have a positive economic impact for aliens in proceedings before EOIR who need legal services, as the rule is intended to preserve the integrity of the List and ensure that providers on the List are actually available to provide pro bono legal services.

Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

The Department of Justice, Executive Office for Immigration Review (EOIR), is submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with review procedures of the Paperwork Reduction Act of 1995, Public Law 104–13, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320. The information collection is published to obtain comments from the public and affected agencies. Written comments and suggestions are encouraged and will be accepted for 60 days. If you have comments on the estimated public burden, associated response time, or suggestions, please contact EOIR as noted above.

Comments that will provide the most assistance will evaluate: (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) whether the proposed collection of information enhances the quality, utility, and clarity of the information to be collected; (3) 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; and (4) whether the burden of the collection of information on those who are to respond can be minimized 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 information.

There is currently no specific form or information collection instrument associated with this request.[12] Rather, this rule implements new eligibility and application requirements in order for an organization, pro bono referral service, or private attorney to be included on the List of Free Legal Services Providers (to be renamed, through this rule, the ''List of Pro Bono Legal Service Providers''). Organizations and private attorneys that file an application (for which no specific form is currently required) with EOIR to be included on the List must demonstrate that they provide, or plan to provide, a minimum of 50 hours per year of pro bono legal services at each immigration court location where they intend to be included on the List. Entities and individuals must indicate ''their availability to represent aliens in asylum proceedings on a pro bono basis'' (*see* INA 208(d)(4)(B)) and ''their availability to represent pro bono aliens in proceedings under section 240'' (*see* INA 239(b)(2)). They must also indicate whether there are any limitations on the services they plan to provide and in which immigration court locations they plan to provide such services. Private attorneys must demonstrate that they cannot otherwise provide such services through an organization or pro bono referral service. Finally, all providers must file a declaration every three years that they remain eligible to be on the List.

As explained in this proposed rule, these additional requirements will enhance the integrity of the List by ensuring that only those who genuinely intend to provide pro bono services are included on the List. These requirements will benefit aliens in need of pro bono legal services and will also prevent the use of the List primarily for improper solicitation and advertisement with respect to potential clients for paid legal services. It is not mandatory for organizations, pro bono referral services, or private attorneys to be included on the List in order to represent aliens on a pro bono basis before EOIR. Placement on the List is completely voluntary and does not confer any rights or benefits on entities or individuals who are included on the List. Placement on the List in no way constitutes government endorsement of a particular entity or private attorney, nor is the List to be used for advertising or soliciting. Rather, the purpose of the List is to provide aliens notification that these entities or private attorneys are available to provide legal services without any direct or indirect remuneration (other than filing fees or photocopying and mailing expenses).

EOIR currently uses appropriate information technology to reduce burden and improve data quality, agency efficiency, and responsiveness to the public. Under this proposed rule, EOIR would continue to do so to the maximum extent practicable. EOIR will collect the information for any person or entity seeking to be included on EOIR's List of Free Legal Services Providers (to be renamed the ''List of Pro Bono Legal Service Providers''). Under the current regulation, it is estimated that it takes a total of 17 hours annually to provide the required information (50 applicants per year at 20 minutes per application).

[12] The Department contemplates implementing an electronic/Internet-based system in the future that may facilitate the collection of information.

Under the proposed rule, it is estimated that 129 applicants will file applications each year for the first two years (phase-in period) and take an average of 30 minutes for each application, resulting in an estimated total of 65 hours each year. After the first two years, it is estimated that there will be 93 applicants per year, expending an average of 30 minutes for each application, resulting in an estimated total of 47 hours each year. This would be an increase from the current estimated annual hours by 48 hours annually for the two-year phase-in period and 30 hours annually for the succeeding years.

List of Subjects

8 CFR Part 1003

Administrative practice and procedure, Aliens, Immigration, Legal services, Organizations and functions (Government agencies).

8 CFR Part 1240

Administrative practice and procedure, Aliens.

8 CFR Part 1241

Administrative practice and procedure, Aliens, Immigration.

Accordingly, for the reasons stated in the preamble, the Attorney General proposes amending parts 1003, 1240, and 1241 of chapter V of title 8 of the Code of Federal Regulations as follows:

PART 1003—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

■ 1. The authority citation for part 1003 continues to read as follows:

Authority: 5 U.S.C. 301; 6 U.S.C. 521; 8 U.S.C. 1101, 1103, 1154, 1155, 1158, 1182, 1226, 1229, 1229a, 1229b, 1229c, 1231, 1254a, 1255, 1324d, 1330, 1361, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

§ 1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

■ 2. Amend § 1003.1 by removing and reserving paragraph (b)(11).

■ 3. Revise the heading for subpart E to read as follows:

Subpart E—List of Pro Bono Legal Service Providers

■ 4. Revise § 1003.61 to read as follows:

§ 1003.61 General provisions.

(a) *Definitions.*

(1) *Director.* Director means the Director of the Executive Office for Immigration Review (EOIR), pursuant to 8 CFR 1001.1(o), and shall also include any office or official within EOIR to whom the Director delegates authority with respect to subpart E of this part.

(2) *Pro bono legal services.* Pro bono legal services are those uncompensated legal services performed for indigent aliens or the public good without any expectation of either direct or indirect remuneration, including referral fees (other than filing fees or photocopying and mailing expenses), although a representative may be regularly compensated by the firm, organization, or pro bono referral service with which he or she is associated.

(3) *Organization.* A non-profit religious, charitable, social service, or similar group established in the United States.

(4) *Pro bono referral service.* A referral service, offered by a non-profit group, association, or similar organization established in the United States that assists persons in locating pro bono representation by making case referrals to attorneys or organizations that are available to provide pro bono representation.

(5) *Provider.* Any organization, pro bono referral service, or attorney whose name is included on the List of Pro Bono Legal Service Providers.

(b) *Authority.* The Director shall maintain a list, known as the List of Pro Bono Legal Service Providers (List), of organizations, pro bono referral services, and attorneys qualified under this subpart to provide pro bono legal services in immigration proceedings. The List, which shall be updated not less than quarterly, shall be provided to aliens in removal and other proceedings before an immigration court.

(c) *Qualification.* An organization, pro bono referral service, or attorney qualifies to be included on the List if the eligibility requirements under § 1003.62 and the application procedures under § 1003.63 are met.

(d) *Organizations.* Approval of an organization's application to be included on the List under this subpart is not equivalent to recognition under § 1292.2 of this chapter. Recognition under § 1292.2 of this chapter does not constitute a successful application for purposes of the List.

■ 5. Revise § 1003.62 to read as follows:

§ 1003.62 Eligibility.

(a) *Organizations recognized under § 1292.2.* An organization that is recognized under § 1292.2 of this chapter is eligible to apply to have its name included on the List if:

(1) The organization will provide a minimum of 50 hours per year of pro bono legal services to aliens at each immigration court location where the organization intends to be included on the List, in cases where an attorney or representative of the organization files a Form EOIR–28 Notice of Entry of Appearance as Attorney or Representative before the Immigration Court (EOIR–28 Notice of Entry of Appearance);

(2) The organization has on its staff at least one attorney, as defined in § 1292.1(a)(1) of this chapter, or at least one accredited representative, as defined in § 1292.1(a)(4) of this chapter; and

(3) No attorney or accredited representative who will provide pro bono legal services on the organization's behalf before EOIR is the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2).

(b) *Organizations not recognized under § 1292.2.* An organization that is not recognized under § 1292.2 of this chapter is eligible to apply to have its name included on the List if:

(1) The organization is established in the United States;

(2) The organization will provide a minimum of 50 hours per year of pro bono legal services to aliens at each immigration court location where the organization intends to be included on the List, in cases where an attorney of the organization files a Form EOIR–28 Notice of Entry of Appearance;

(3) The organization has on its staff at least one attorney, as defined in § 1292.1(a)(1) of this chapter; and

(4) No attorney who will provide pro bono legal services on the organization's behalf before EOIR is the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2).

(c) *Pro bono referral services.* A referral service is eligible to apply to have its name included on the List at each immigration court location where the referral service either refers or plans to refer cases to attorneys or organizations that will provide pro bono legal services to aliens in proceedings before an immigration judge.

(d) *Attorneys.* An attorney, as defined in § 1292.1(a)(1) of this chapter, is eligible to apply to have his or her name included on the List if the attorney:

(1) Is not the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2);

(2) Will provide a minimum of 50 hours per year of pro bono legal services to aliens at each immigration court location where the attorney intends to be included on the List, in cases where he or she files a Form EOIR–28 Notice of Entry of Appearance; and

(3) Cannot provide pro bono legal services through or in association with an organization or pro bono referral service described in paragraph (a), (b), or (c) of this section because:

(i) Such an organization or referral service is unavailable; or

(ii) The range of services provided by an available organization(s) or referral service(s) are insufficient to address the needs of the community.

■ 6. Revise § 1003.63 to read as follows:

§ 1003.63 Applications.

(a) *Generally.* A form is not required in order to apply to be included on the List. To be included on the List, any organization, pro bono referral service, or attorney that is eligible under § 1003.62 to apply to be included on the List must file an application with the Director. Applications must be submitted in writing and received by the Director at least 60 days in advance of the quarterly update in order to be considered. The application must:

(1) Establish by clear and convincing evidence that the applicant qualifies to be on the List pursuant to § 1003.61(c);

(2) Specify how the organization, pro bono referral service, or attorney wants its name to be set forth on the List;

(3) Identify each immigration court location where the organization, pro bono referral service, or attorney provides, or plans to provide, pro bono legal services;

(4) Include on the envelope the notation ''Application for List of Pro Bono Legal Service Providers''; and

(5) Include proof of service, as defined in § 1003.13, on the court administrator for each immigration court location where the organization, pro bono referral service, or attorney will provide pro bono legal services.

(b) *Organizations.* An organization, whether recognized or not under § 1292.2, must submit with its application a declaration signed by an authorized officer of the organization that states under penalty of perjury:

(1) That it will provide annually at least 50 hours of pro bono legal services to aliens in removal or other proceedings before each immigration court location identified in its application;

(2) That every attorney who will provide pro bono legal services before EOIR on behalf of the organization:

(i) Is eligible to practice law in and is a member in good standing of the bar of the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia; and

(ii) is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law;

(3) That no attorney or accredited representative who will provide pro bono legal services before EOIR on behalf of the organization is the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2); and,

(4) Any specific limitations it has in providing pro bono legal services (e.g., not available to assist detained aliens or aliens with criminal convictions, or available for asylum cases only).

(c) *Pro bono referral services.* A pro bono referral service must submit with its application a declaration signed by an authorized officer of the referral service that states under penalty of perjury:

(1) That it will offer its referral services to aliens in removal or other proceedings before each immigration court location identified in its application; and,

(2) Any specific limitations it has in providing its pro bono referral services (e.g., not available to assist detained aliens or aliens with criminal convictions, or available only for asylum cases only).

(d) *Attorneys.* An attorney must submit with his or her application a declaration that states under penalty of perjury:

(1) That he or she will provide annually at least 50 hours of pro bono legal services to aliens in removal or other proceedings before each immigration court location identified in his or her application;

(2) Any specific limitations the attorney has in providing pro bono legal services (e.g., not available to assist detained aliens or aliens with criminal convictions, or available for asylum cases only);

(3) A description of the good-faith efforts he or she made to provide pro bono legal services through an organization or pro bono referral service described in paragraph (a), (b), or (c) of § 1003.62 to aliens appearing before each immigration court location listed in the application;

(4) An explanation that any such organization or referral service is unavailable or that the range of services provided by available organization(s) or referral service(s) are insufficient to address the needs of the community;

(5) The bars of the highest courts of the states, possessions, territories, or commonwealths of the United States, or the District of Columbia, in which he or she is eligible to practice law, and that he or she is a member in good standing of each, including the attorney's bar number, if any;

(6) That he or she is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law; and

(7) That he or she is not the subject of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2).

(e) *Applications approved before [insert effective date of final rule].* Providers whose applications to be included on the List were approved before [effective date of final rule to be inserted] must file an application under this section as follows: Organizations and pro bono referral services, within one year of [effective date of final rule to be inserted]; attorneys, within six months of [effective date of final rule to be inserted]. The names of providers who do not file an application as required by this paragraph shall be removed from the List following expiration of the application time period, the removal of which will be reflected no later than in the next quarterly update.

(f) *Notice and comments.* (1) *Public notice and comment.* The names of the applicants, whether organizations, pro bono referral services, or individuals, meeting the regulatory requirements to be included on the List shall be publicly posted for 15 days after receipt of the applications by the Director, and upon request a date stamped copy of each application shall be made available for review. Any individual may forward to the Director comments or a recommendation for approval or disapproval of an application within 15 days from the last date the name of the applicant is publicly posted. The commenting party shall also include proof of service of a copy of any such comment or recommendation on the subject organization, pro bono referral service, or individual, in accordance with the definition of ''service'' described in § 1003.13.

(2) *Response.* The applicant has 15 days to respond from the date of service of the comment. All responses must be filed with the Director and include proof of service of a copy of such response on the commenting party, in accordance with the definition of ''service'' described in § 1003.13.

■ 7. Revise § 1003.64 to read as follows:

§ 1003.64 Approval and denial of applications.

(a) *Authority.* The Director in his discretion shall have the authority to approve or deny an application to be included on the List of Pro Bono Legal Service Providers. The Director may request additional information from the applicant to determine whether the applicant qualifies to be included on the List.

(b) *Decision.* The applicant shall be notified of the decision in writing. The written notice shall be served in accordance with the definition of ''service'' described in § 1003.13. The written notice shall be served on the applicant at the address provided on the application unless the applicant subsequently provides a change of address pursuant to § 1003.66.

(1) *Denials.* If the application is denied, the applicant shall be given a written explanation of the grounds for such denial, and the decision shall be final. Such denial shall be without prejudice to file another application at any time after the next quarterly publication of the List.

(2) *Approval and continuing qualification.* If the application is approved, the applicant's name will be included on the List at the next quarterly update. Every three years from the date of approval, a provider must file with the Director a declaration, under penalty of perjury, stating that the provider remains qualified to be included on the List under paragraphs (a), (b), (c), or (d) of § 1003.62. The declaration must include alien registration numbers of clients in whose cases the provider rendered pro bono legal services under §§ 1003.62(a)(1), (b)(2), or (d)(2), representing at least 50 hours of pro bono legal services each year since the provider's most recent such declaration, or since the provider was included on the List, whichever was more recent. If a provider fails to timely file the declaration or declares that it is no longer qualified to be included on the List, the provider's name will be removed from the List at the next quarterly update. Failure to file a declaration within the applicable time period does not prohibit the filing of a new application to be included on the List.

■ 8. Revise § 1003.65 to read as follows:

§ 1003.65 Removal of a provider from the List.

(a) *Automatic removal.* If the Director determines that an attorney on the List is the subject of a final order of disbarment under § 1003.101(a)(1), or an order of suspension under § 1003.101(a)(2), then the Director shall:

(1) Remove the name of the attorney from the List no later than at the next quarterly update; and,

(2) Notify the attorney of such removal in writing, at the last known address given by the provider.

(b) *Requests for removal.*

(1) Any provider may, at any time, submit a written request to have the provider's name removed from the List. The written request may include an explanation for the voluntary removal. Upon such written request, the name of the provider shall be removed from the List, and such removal will be reflected no later than in the next quarterly update.

(2) Any provider removed from the List at the provider's request may seek reinstatement to the List upon written notice to the Director. Any request for reinstatement must include a new declaration of eligibility, as set forth under § 1003.63(b), (c) or (d). Reinstatement to the List is at the sole discretion of the Director. Upon the Director's approval of reinstatement, the provider's name shall be included on the List no later than in the next quarterly update. Reinstatement to the List does not affect the requirement under § 1003.64(b)(2) that a provider submit a new declaration of eligibility every three years from the date of the approval of the original application to be included on the List.

(c) *EOIR inquiry in response to complaints.* If EOIR receives complaints that a particular provider on the List may no longer be accepting new pro bono clients, the Director may send a written inquiry to a provider noting that EOIR has received complaints with regard to the provider's acceptance of pro bono clients and allowing an opportunity for the provider to state whether the provider is continuing to comply with the regulations in this subpart or, if appropriate, whether the provider wishes to request voluntary removal from the List as provided in paragraph (b). The Director may remove a provider from the List for failure to respond to a written inquiry issued under this paragraph within 30 days or such additional time period stated by the Director in the written inquiry.

(d) *Procedures for removing providers from the List.* The following provisions apply in cases not covered by paragraphs (a), (b) or (c).

(1) *Grounds.* A provider shall be removed from the List if it, he, or she:

(i) Fails to comply with § 1003.66;

(ii) Has filed a false declaration in connection with an application filed pursuant to § 1003.63;

(iii) Improperly uses the List primarily to advertise or solicit clients for compensated legal services; or,

(iv) Fails to comply with any and all other requirements of this subpart.

(2) *Notice.* If the Director determines that a provider falls within one or more of the enumerated grounds under paragraph (d)(1) of this section, the Director shall promptly notify the provider in writing, at the address last provided to the Director by the provider, of the Director's intention to remove the name of the provider from the List.

(3) *Response.* The provider may submit a written answer within 30 days from the date the notice is served, as described in § 1003.13. The provider must establish by clear and convincing evidence that the provider continues to meet the qualifications for inclusion on the List, by declaration under penalty of perjury as to the provider's continued compliance with eligibility requirements under this subchapter, which must include alien registration numbers of clients in whose cases the provider rendered pro bono legal services under § 1003.62(a)(1), (b)(2), or (d)(2), representing at least 50 hours of pro bono services each year since the provider's most recent declaration under § 1003.64(b)(2), or since the provider was included on the List, whichever was more recent.

(4) *Decision.* If, after consideration of any response submitted by the provider, the Director determines that the provider is no longer qualified to remain on the List, the Director shall:

(i) Remove the name of the provider from the List no later than in the next quarterly update; and

(ii) Notify the provider of such removal in writing, at the address last provided to the Director by the provider.

(5) *Disciplinary Action.* Removal from the List pursuant to § 1003.65(a), (b), (c) or (d) shall be without prejudice to the authority to discipline a practitioner under EOIR's rules and procedures for professional conduct for practitioners listed in 8 CFR part 1003, subpart G.

■ 9. Add § 1003.66, to read as follows:

§ 1003.66 Changes in address or status.

All entities or persons with a pending application under this subpart, and all providers on the List, are under a continuing obligation to notify the Director, in writing or by whatever electronic notification process approved by the Director, within ten business days, of any:

(a) Change of address;

(b) Change of telephone number;

(c) Change in eligibility under § 1003.62;

(d) Change regarding specific limitations to providing pro bono legal services under § 1003.63;

(e) Receipt of an order of disbarment under § 1003.101(a)(1) or suspension under § 1003.101(a)(2) by the provider (if an attorney), or by an attorney or representative providing pro bono services before EOIR on behalf of the provider; or

(f) Change in professional status, including bar membership or any order suspending, enjoining, restraining, disbarring, or otherwise restricting the provider (if an attorney), or an attorney or representative providing pro bono services before EOIR on behalf of the provider, in the practice of law.

PART 1240—PROCEEDINGS TO DETERMINE REMOVABILITY OF ALIENS IN THE UNITED STATES

■ 10. The authority citation for part 1240 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277, (112 Stat. 2681).

■ 11. In § 1240.10, revise paragraphs (a)(2) and (a)(3), to read as follows:

§ 1240.10 Hearing.

(a) * * *

(2) Advise the respondent of the availability of pro bono legal services for the immigration court location at which the hearing will take place, and ascertain that the respondent has received a list of such pro bono legal service providers.

(3) Ascertain that the respondent has received a copy of appeal rights.

* * * * *

§ 1240.32 [Amended]

■ 12. Amend § 1240.32 in paragraph (a) by removing the words ''Government, and of the availability of free legal services programs qualified under 8 CFR part 1003 and organizations recognized pursuant to § 1292.2 of this chapter located in the district where his or her exclusion hearing is to be held; and shall ascertain that the applicant has received a list of such programs'' and adding, in their place, the words ''Government; advise him or her of the availability of pro bono legal services for the immigration court location at which the hearing will take place, and ascertain that he or she has received a list of such pro bono legal service providers''.

§ 1240.48 [Amended]

■ 13. Amend § 1240.48 in paragraph (a) by removing the words ''free legal services programs qualified under 8 CFR part 1003 and organizations recognized pursuant to § 1292.2 of this chapter, located in the district where the deportation hearing is being held; ascertain that the respondent has received a list of such programs'' and adding, in their place, the words ''pro bono legal services for the immigration court location at which the hearing will take place; ascertain that the respondent has received a list of such pro bono legal service providers''.

PART 1241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

■ 14. The authority citation for part 1241 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1223, 1224, 1225, 1226, 1227, 1231, 1251, 1253, 1255, 1330, 1362; 18 U.S.C. 4002, 4013(c)(4).

§ 1241.14 [Amended]

■ 15. Amend § 1241.14 in paragraph (g)(3)(i) by removing the words ''a list of free legal service providers,'' and adding, in their place, the words ''the List of Pro Bono Legal Service Providers for the immigration court at which the hearing is being held''.

Dated: August 4, 2014.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2014–21686 Filed 9–16–14; 8:45 am]

BILLING CODE 4410–30–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–0625; Directorate Identifier 2014–NM–044–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain Bombardier, Inc. Model CL–600–2A12 (CL–601), and CL–600–2B16 (CL–601–3A, CL–601–3R, and CL–604 Variants) airplanes. This proposed AD was prompted by a report of an aft equipment bay fire due to chafing and subsequent arcing of the integrated drive generator (IDG) power cables. Additionally, we have received several reports of broken support brackets of the hydraulic lines. This proposed AD would require a one-time inspection of the IDG power cables for chafing, and for any cracked or broken support bracket of the hydraulic line; and corrective actions if necessary. We are proposing this AD to detect and correct broken support brackets of the hydraulic lines, which could result in inadequate clearance between the IDG power cables and hydraulic lines and chafing of the IDG power cables, and consequent high energy arcing and an uncontrolled fire in the aft equipment bay.

DATES: We must receive comments on this proposed AD by November 3, 2014.

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

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

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514 855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0625; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Assata Dessaline, Aerospace Engineer,

Avionics and Service Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7301; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2014–0625; Directorate Identifier 2014–NM–044–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2014–05, dated January 20, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> There has been one reported case on the CL–600–2B19 aeroplane of an aft equipment bay fire occurring due to arcing of chafed integrated drive generator (IDG) power cables. Additionally, the hydraulic line support brackets located at the fuselage station (FS) 672 and FS 682 on a CL–600–2B19 aeroplane could result in inadequate clearance between the IDG power cables and hydraulic lines, potentially resulting in chafing of the IDG power cables. Chafed IDG power cables can generate high energy arcing, which can result in an uncontrolled fire in the aft equipment bay.
>
> It was found that a similar configuration exists on models CL–600–2A12 and CL–600–2B16 aeroplanes. Therefore, a similar unsafe condition exists.
>
> This [Canadian] AD mandates the detailed visual inspection and, if required, rectification of the IDG power cables and hydraulic line support bracket.

Required corrective actions include repair or replacement of the IDG power cable if any chafing is found, and replacement of any cracked or broken support bracket. You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating it in Docket No. FAA–2014–0625.

Relevant Service Information

Bombardier has issued the following service information:

(1) Bombardier Service Bulletin 605–24–007, Revision 01, dated January 13, 2014 (for Model CL–600–2B16 airplanes);

(2) Bombardier Service Bulletin 604–24–026, Revision 01, dated January 13, 2014 (for Model CL–600–2B16 airplanes); and

(3) Bombardier Service Bulletin 604–0625, Revision 01, dated January 13, 2014 (for Model Cl-600–2A12 and CL–600–2B16 airplanes).

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

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

Costs of Compliance

We estimate that this proposed AD affects 95 airplanes of U.S. registry.

We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this proposed AD on U.S. operators to be $8,075, or $85 per product.

We have received no definitive data that would enable us to provide cost estimates for the on-condition repair of chafed power cables or cracked or broken support brackets, as 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

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

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

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Bombardier, Inc.: Docket No. FAA–2014–0625; Directorate Identifier 2014–NM–044–AD.

(a) Comments Due Date

We must receive comments by November 3, 2014.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. airplanes identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, certificated in any category.

(1) Model CL–600–2A12 (CL–601) airplanes, serial numbers 3001 through 3066 inclusive.

(2) Model CL–600–2B16 (CL–601–3A, CL–601–3R Variants) airplanes, serial numbers 5001 through 5194 inclusive.

(3) Model CL–600–2B16 (CL–604 Variant) airplanes, serial numbers 5301 through 5665 inclusive, and 5701 through 5934 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 24, Electrical Power.

(e) Reason

This AD was prompted by a report of an aft equipment bay fire due to chafing and subsequent arcing of the integrated drive generator (IDG) power cables. Additionally, we have received several reports of broken support brackets of the hydraulic lines. We are issuing this AD to detect and correct broken support brackets of the hydraulic lines, which could result in inadequate clearance between the IDG power cables and hydraulic lines and chafing of the IDG power cables, and consequent high energy arcing and an uncontrolled fire in the aft equipment bay.

(f) Compliance

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

(g) One-Time Inspection and Corrective Actions

Within 400 flight hours or 18 months after the effective date of this AD, whichever occurs first: Perform a one-time detailed inspection of the IDG power cables for chafing between the cables and the adjacent hydraulic and pneumatic lines, and for any cracked or broken support bracket of the hydraulic lines, in accordance with the Accomplishment Instructions of the applicable service information identified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD. If any chafing of the power cables or any cracked or broken support bracket is found, before further flight, repair or replace, as applicable, in accordance with the Accomplishment Instructions of the applicable service information identified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD.

(1) Bombardier Service Bulletin 605–24–007, Revision 01, dated January 13, 2014 (for Model CL–600–2B16 airplanes).

(2) Bombardier Service Bulletin 604–24–026, Revision 01, dated January 13, 2014 (for Model CL–600–2B16 airplanes).

(3) Bombardier Service Bulletin 601–0625, Revision 01, dated January 13, 2014 (for Model Cl-600–2A12 and CL–600–2B16 airplanes).

(h) Credit for Previous Actions

This paragraph provides credit for action required by paragraph (g) of this AD, if the action was performed before the effective date of this AD using Bombardier Service Bulletin 605–24–007, 604–24–026, or 601–0625, all dated September 18, 2012, provided that the action specified in Service Request for Product Support Action (SRPSA) 27512, SRPSA 30806, SRPSA 32727, SRPSA 32864, or SRPSA 33161 has not been done. Bombardier Service Bulletins 605–24–007, 604–24–026, and 601–0625, all dated September 18, 2012, are not incorporated by reference in this AD.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, New York Aircraft Certification Office (ACO), ANE–170, 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 ACO, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) Contacting the Manufacturer: For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or Transport Canada Civil Aviation (TCCA), or Bombardier, Inc.'s TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian Airworthiness Directive CF–2014–05, dated January 20, 2014, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating it in Docket No. FAA–2014–0625.

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may view this service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on September 9, 2014.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014–22151 Filed 9–16–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2014–0627; Directorate Identifier 2013–NM–217–AD]

RIN 2120–AA64

Airworthiness Directives; Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede Airworthiness Directive (AD) 2011–09–03, which applies to all Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Model 382, 382B, 382E, 382F, and 382G airplanes. AD 2011–09–03 currently requires repetitive eddy current inspections to detect cracks in the center wing upper and lower rainbow fittings, and corrective actions if necessary; and repetitive replacement of rainbow fittings, which would extend the repetitive interval for the next inspection. Since we issued AD 2011–09–03, analysis of in-service cracking has shown that a reduction in the inspection intervals is necessary for the upper rainbow fittings. This proposed AD is intended to complete certain mandated programs intended to support the airplane reaching its limit of validity (LOV) of the engineering data that support the established structural maintenance program. This proposed AD would require reduced intervals for inspections of the upper rainbow fittings. We are proposing this AD to detect and correct fatigue cracking of the upper and lower rainbow fittings on the center wings, which could grow large and lead to the failure of the fitting and a catastrophic failure of the center wing.

DATES: We must receive comments on this proposed AD by November 3, 2014.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.

- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Lockheed Martin Corporation/Lockheed Martin Aeronautics Company, Airworthiness Office, Dept. 6A0M, Zone 0252, Column P–58, 86 S. Cobb Drive, Marietta, GA 30063; telephone 770–494–5444; fax 770–494–5445; email *ams.portal@lmco.com;* Internet *http://www.lockheedmartin.com/ams/tools/TechPubs.html.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton Washington 98057. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2014–0627; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (phone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Carl Gray, Aerospace Engineer, Airframe Branch, ACE–117A, FAA, Atlanta Aircraft Certification Office (ACO), 1701 Columbia Avenue, College Park, Georgia 30337; phone: 404–474–5554; fax: 404–474–5606; email: *carl.w.gray@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2014–0627; Directorate Identifier 2013–NM–217–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On April 12, 2011, we issued AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011), for all Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Model 382, 382B, 382E, 382F, and 382G airplanes. AD 2011–09–03 requires repetitive eddy current inspections to detect cracks in the center wing upper and lower rainbow fittings, and corrective actions if necessary; and repetitive replacements of rainbow fittings, which would extend the repetitive interval for the next inspection. AD 2011–09–03 resulted from reports of fatigue cracking of the wing upper and lower rainbow fittings during durability testing and on in-service airplanes. Analysis of in-service cracking has shown that these rainbow fittings are susceptible to multiple site fatigue damage. We issued AD 2011–09–03 to detect and correct such fatigue cracks, which could grow large and lead to the failure of the fitting and a catastrophic failure of the center wing.

Actions Since AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011), Was Issued

Since we issued AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011), analysis of in-service cracking has shown that the initial and repetitive inspection schedules for the upper rainbow fitting need to be revised to reduce the probability of failure until the rainbow fitting is replaced.

We have also revised paragraphs (i) and (k) of AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011) to clarify the rainbow fitting is replaced with a new rainbow fitting, as specified in Lockheed Service Bulletin 382–57–82, Revision 4, including Appendixes A and B, dated May 20, 2009; and Lockheed Service Bulletin 382–57–82, including Appendices A and B, Revision 6, dated July 11, 2013.

Relevant Service Information

We reviewed Lockheed Service Bulletin 382–57–82, including Appendices A, B, and C, Revision 6, dated July 11, 2013. The compliance times are reduced, but the procedures are unchanged from those described in Lockheed Service Bulletin 382–57–82, including Appendices A, B, and C, dated April 25, 2008.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would retain all of the requirements of AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011). This proposed AD would reduce compliance times for initial and repetitive inspections of the upper rainbow fitting.

We have clarified the replacement process to more closely match the intent of the service information to replace affected fittings with new replacement fittings.

Differences Between This Proposed AD and the Service Information

Where Lockheed Service Bulletin 382–57–82, including Appendices A, B, and C, Revision 6, dated July 11, 2013, does not specify a corrective action or states ''taking appropriate corrective action,'' this NPRM proposes to require repairing those conditions using a method approved by the Manager, Atlanta Aircraft Certification Office, FAA.

Costs of Compliance

We estimate that this proposed AD affects 14 airplanes of U.S. registry.

We estimate the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection of upper and lower fitting [retained actions from AD 2011-09-03, Amendment 39-16665 (76 FR 22311, April 21, 2011)].	20 work-hours × $85 per hour = $1,700 per inspection cycle.	(1)	$1,700, per inspection cycle.	$23,800, per inspection cycle.
Fitting replacement [retained actions from AD 2011-09-03, Amendment 39-16665 (76 FR 22311, April 21, 2011)].	2,438 work-hours × $85 per hour = $207,230 per replacement.	$40,000	$247,230, per replacement.	$3,461,220, per replacement.

(1) None.

This proposed AD reduces the compliance times for the upper rainbow fitting inspections and adds no additional economic burden.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Amend § 39.13 by removing Airworthiness Directive (AD) 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011), and adding the following new AD:

Lockheed Martin Corporation/Lockheed Martin Aeronautics Company: Docket No. FAA–2014–0627; Directorate Identifier 2013–NM–217–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by November 3, 2014.

(b) Affected ADs

This AD replaces AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011.

(c) Applicability

This AD applies to all Lockheed Martin Corporation/Lockheed Martin Aeronautics Company Model 382, 382B, 382E, 382F, and 382G airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by an analysis of in-service cracking that has shown that the rainbow fittings are susceptible to multiple site fatigue damage. We are issuing this AD to detect and correct fatigue cracking of the upper and lower rainbow fittings on the center wings, which could grow large and lead to the failure of the fitting and a catastrophic failure of the center wing.

(f) Compliance

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

(g) Retained Initial Inspections

This paragraph restates the requirements of paragraph (g) of AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011), with revised service information. Except as required by paragraph (m) of this AD, at the later of the times specified in paragraphs (g)(1) and (g)(2) of this AD: Do eddy current inspections to detect cracking of the center wing upper and lower rainbow fittings on the left and right side of the airplane. Do the actions in accordance with the Accomplishment Instructions of Lockheed Service Bulletin 382–57–82, Revision 4, including Appendixes A and B, dated May 20, 2009; or Lockheed Service Bulletin 382–57–82, including Appendices A and B, Revision 6, dated July 11, 2013. If any crack is found during the inspections required by this paragraph, before further flight, do the actions required by paragraph (k) of this AD. Doing the requirements of paragraph (m) of this AD terminates the requirements of this paragraph for the affected upper rainbow fitting only. As of the effective date of this AD, only use Lockheed Service Bulletin 382–57–82, including Appendices A and B, Revision 6, dated July 11, 2013, for accomplishing the actions specified in this paragraph.

(1) Before the accumulation of 15,000 total flight hours on the rainbow fitting.

(2) Within 365 days or 600 flight hours on the rainbow fitting after May 26, 2011, (the effective date of AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011)), whichever occurs first.

(h) Retained Repetitive Inspection Schedule

This paragraph restates the requirements of paragraph (h) of AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011), with a new exception. Except as required by paragraph (n) of this AD, repeat the inspection required by paragraph (g) of this AD at intervals not to exceed 3,600 flight hours on the center wing, until the rainbow fitting has accumulated 30,000 total flight hours. If any crack is found during the inspections required by paragraph (h) of this AD, before further flight, do the actions required by paragraph (k) of this AD. Doing

the requirements of paragraph (n) of this AD terminates the requirements of this paragraph for the affected upper rainbow fitting only.

(i) Retained Rainbow Fitting Replacements

This paragraph restates the requirements of paragraph (i) of AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011), with revised service information. Before the accumulation of 30,000 flight hours on the rainbow fitting, or within 600 flight hours after May 26, 2011, (the effective date of AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011)), whichever occurs later: Replace the rainbow fitting with a new rainbow fitting, do all related investigative actions, and do all applicable corrective actions, in accordance with paragraph 2.C. of the Accomplishment Instructions of Lockheed Service Bulletin 382–57–82, Revision 4, including Appendix C, dated May 20, 2009, except as required by paragraph (l) of this AD; or Lockheed Service Bulletin 382–57–82, including Appendix C, Revision 6, dated July 11, 2013, except as required by paragraph (l) of this AD. Replace the rainbow fitting thereafter at intervals not to exceed 30,000 flight hours. As of the effective date of this AD, only use Lockheed Service Bulletin 382–57–82, including Appendix C, Revision 6, dated July 11, 2013, for accomplishing the actions specified in this paragraph.

(j) Retained Post-Replacement Repetitive Inspections

This paragraph restates the requirements of paragraph (j) of AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011), with a new exception. For upper and lower rainbow fittings replaced in accordance with paragraph (i) or (k) of this AD: Except as required by paragraph (o) of this AD, do the eddy current inspections specified in paragraph (g) of this AD within 15,000 flight hours after doing the replacement and repeat the eddy current inspections specified in paragraph (h) of this AD thereafter at intervals not to exceed 3,600 flight hours until the rainbow fittings are replaced in accordance with paragraph (i) or (k) of this AD. Doing the requirements of paragraph (o) of this AD terminates the requirements of this paragraph for the affected upper rainbow fitting only.

(k) Retained Replacement, Related Investigative Actions, and Corrective Actions

This paragraph restates the requirements of paragraph (k) of AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011), with revised service information and revised references to inspection paragraphs. If, during any inspection required by paragraph (g), (h), (m), or (n) of this AD, any crack is detected in the rainbow fitting, before further flight, replace the rainbow fitting with a new rainbow fitting, do all related investigative actions, and do all applicable corrective actions, in accordance with Paragraph 2.C. of the Accomplishment Instructions of Lockheed Service Bulletin 382–57–82, Revision 4, including Appendix C, dated May 20, 2009, except as provided by paragraph (l) of this AD; or Lockheed Service Bulletin 382–57–82, including Appendix C, Revision 6, dated July 11, 2013, except as required by paragraph (l) of this AD. As of the effective date of this AD, only use Lockheed Service Bulletin 382–57–82, including Appendix C, Revision 6, dated July 11, 2013, for accomplishing the actions specified in this paragraph.

(l) Retained Exceptions to Service Bulletin

This paragraph restates the requirements of paragraph (l) of AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011), with revised service information. Where Lockheed Service Bulletin 382–57–82, Revision 4, including Appendixes A, B, and C, dated May 20, 2009; or Lockheed Service Bulletin 382–57–82, including Appendices A, B, and C, Revision 6, dated July 11, 2013; specifies to contact the manufacturer for disposition of certain repair conditions or does not specify corrective actions if certain conditions are found, this AD requires repairing those conditions using a method approved by the Manager, Atlanta Aircraft Certification Office (ACO), FAA. For a repair method to be approved by the Manager, Atlanta ACO, as required by this paragraph, the Manager's approval letter must specifically refer to this AD.

(m) New Requirement: Reduced Initial Compliance Time for Upper Rainbow Fittings

At the applicable compliance time specified in paragraphs (m)(1) and (m)(2) of this AD, do eddy current inspections to detect cracking of the center wing upper rainbow fittings on the left and right side of the airplane. Do the actions in accordance with the Accomplishment Instructions of Lockheed Service Bulletin 382–57–82, including Appendices A and B, Revision 6, dated July 11, 2013. If any crack is found during the inspections required by this paragraph, before further flight, do the actions required by paragraph (k) of this AD. Doing the requirements of this paragraph terminates the requirements of paragraph (g) of this AD for that upper rainbow fitting only. Repeat the inspection at the interval required by paragraph (n) of this AD.

(1) For upper rainbow fittings that have accumulated less than 10,000 total flight hours as of the effective date of this AD, the compliance time is at the later of the times in paragraphs (m)(1)(i) and (m)(1)(ii) of this AD.

(i) Before the accumulation of 10,000 total flight hours.

(ii) Within 365 days or 600 flight hours after the effective date of this AD, whichever occurs first.

(2) For upper rainbow fittings that have accumulated 10,000 total flight hours or more, but less than 15,000 total flight hours as of the effective date of this AD, the compliance time is the earlier of the times specified in paragraphs (m)(2)(i) and (m)(2)(ii) of this AD.

(i) Within 365 days or 600 flight hours after the effective date of this AD, whichever occurs first.

(ii) Before the accumulation of 15,000 total flight hours on the rainbow fitting.

(n) New Requirement: Reduced Repetitive Inspection Intervals

For upper rainbow fittings on which the requirements of paragraph (g), (h), or (m) of this AD were done, do the next inspection at the earlier of the times required in paragraphs (n)(1) and (n)(2) of this AD. Thereafter, repeat the inspection required by paragraph (m) of this AD at intervals not to exceed 2,500 flight hours until the upper rainbow fitting has accumulated 30,000 total flight hours. If any crack is found during the inspections required by this paragraph, before further flight, do the actions required by paragraph (k) of this AD. Doing an inspection required by this paragraph terminates the requirements of paragraph (h) of this AD for the affected upper rainbow fitting only.

(1) Within 3,600 flight hours since the last inspection done in accordance with paragraph (g), (h), or (m) of this AD, whichever occurs latest.

(2) At the later of the times specified in paragraphs (n)(2)(i) and (n)(2)(ii) of this AD.

(i) Within 2,500 flight hours after the last inspection done in accordance with paragraph (g), (h), or (m) of this AD, whichever occurs latest.

(ii) Within 365 days or 600 flight hours after the effective date of this AD, whichever occurs first.

(o) New Requirement: Reduced Post-Replacement Repetitive Inspections

For upper rainbow fittings replaced in accordance with paragraph (i) or (k) of this AD, do the inspection required by paragraph (m) of this AD at the earlier of the compliance times required in paragraph (o)(1) and (o)(2) of this AD. Repeat the inspection thereafter at intervals not to exceed 2,500 flight hours. Doing the inspections required by this paragraph terminates the requirements of paragraph (j) of this AD for the affected upper rainbow fitting only.

(1) At the later of the times in paragraphs (o)(1)(i) and (o)(1)(ii) of this AD. (i) Within 10,000 total flight hours on the upper rainbow fitting.

(ii) Within 365 days or 600 flight hours after the effective date of this AD, whichever occurs first.

(2) Within 15,000 total flight hours on the upper rainbow fitting.

(p) Credit for Previous Actions

The service information identified in paragraphs (p)(1)(i), (p)(1)(ii), (p)(1)(iii), (p)(2), and (p)(3) is not incorporated by reference in this AD.

(1) This paragraph provides credit for actions required by paragraphs (g), (h), (i), (j), and (k) of this AD, if those actions were performed before the effective date of this AD using the service information identified in paragraphs (p)(1)(i), (p)(1)(ii), and (p)(1)(iii) of this AD.

(i) Lockheed Service Bulletin 382–57–82, including Appendices A and B, dated December 7, 2004.

(ii) Lockheed Service Bulletin 382–57–82, Revision 1, including Appendices A and B, dated February 24, 2005.

(iii) Lockheed Service Bulletin 382–57–82, Revision 2, including Appendices A and B, dated February 15, 2007.

(2) This paragraph restates paragraph (m) of AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011). This paragraph provides credit for actions required by paragraphs (g), (h), (i), (j), and (k) of this AD, if those actions were performed before May 26, 2011 (the effective date of AD 2011–09–03), using Lockheed Service Bulletin 382–57–82, Revision 3, including Appendixes A, B, and C, dated April 25, 2008.

(3) This paragraph provides credit for actions required by paragraphs (g), (h), (i), (j), (k), (m), (n), and (o) of this AD, if those actions were performed before the effective date of this AD using Lockheed Service Bulletin 382–57–82, including Appendices A, B, and C, Revision 5, dated August 12, 2010.

(q) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Atlanta Aircraft Certification Office, 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 paragraph (r)(2) of this AD.

(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.

(3) AMOCs approved for AD 2011–09–03, Amendment 39–16665 (76 FR 22311, April 21, 2011), are approved as AMOCs for the corresponding provisions of this AD.

(r) Related Information

(1) For more information about this AD, contact Carl Gray, Aerospace Engineer, Airframe Branch, ACE–117A, FAA, Atlanta Aircraft Certification Office (ACO), 1701 Columbia Avenue, College Park, Georgia 30337; phone: 404–474–5554; fax: 404–474–5606; email: *carl.w.gray@faa.gov.*

(2) For information about AMOCs, contact Hal Horsbough, Aerospace Engineer, Airframe Branch, ACE–117A, FAA, Atlanta Aircraft Certification Office (ACO), 1701 Columbia Avenue, College Park, Georgia 30337; phone: 404–474–5554; fax: 404–474–5606; email: *hal.horsbough@faa.gov.*

(3) For service information identified in this AD, contact Lockheed Martin Corporation/Lockheed Martin Aeronautics Company, Airworthiness Office, Dept. 6A0M, Zone 0252, Column P–58, 86 S. Cobb Drive, Marietta, GA 30063; telephone 770–494–5444; fax 770–494–5445; email *ams.portal@lmco.com;* Internet *http://www.lockheedmartin.com/ams/tools/TechPubs.html.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on September 9, 2014.

Jeffrey E. Duven,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2014–22149 Filed 9–16–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 238

[Docket ID: DOD–2012–OS–0075]

RIN 0790–AI90

DoD Assistance to Non-Government, Entertainment-Oriented Media Productions

AGENCY: Office of the Assistant to the Secretary of Defense for Public Affairs, DoD.

ACTION: Proposed rule.

SUMMARY: This rule establishes policy, assigns responsibilities, and prescribes procedures for DoD assistance to non-Government entertainment media productions such as feature motion pictures, episodic television programs, documentaries, and computer-based games. This rule provides for oversight of production assistance decisions at centralized and senior levels of DoD to ensure consistency of approach among DoD and Service components with respect to support for entertainment media productions, including documentaries.

DATES: Comments must be received by November 17, 2014.

ADDRESSES: You may submit comments, identified by docket number and or Regulatory Information Number (RIN) 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, 2nd floor, East Tower, Suite 02G09, Alexandria VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number or RIN 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: Philip M. Strub, (703) 695–2936.

SUPPLEMENTARY INFORMATION:

Executive Summary

I. Purpose

This rule is being published to seek comment on DOD's updated policy for support to entertainment-oriented media productions, including documentaries. The increased and higher-level oversight is required to eliminate inconsistencies and ambiguities in guidance for and supervision of DoD activities to ensure common standards are met in providing support, and that production support is appropriate. The rule also includes two DoD Production Assistance Memoranda (PAM) as samples. These memoranda explain the terms under which DoD provides assistance to production companies for projects that have been approved for DoD support.

II. Summary of the Major Provisions of This Regulatory Action

(a) This rule includes documentaries within the category of non-government, entertainment-oriented media productions and requires approval of production assistance for such entertainment-oriented media productions at the DoD level vice the Service level.

(b) This rule includes two sample DoD Production Assistance Memoranda (PAMs), one for documentary productions and one for all other entertainment media productions. This rule also assigns the authority for signing both types of agreements to the Assistant to the Secretary of Defense for Public Affairs (ATSD(PA)), or the ATSD(PA)'s designee.

(c) This rule addresses how military personnel may appear in entertainment media. This rule requires the written permission of the Assistant to the Secretary of Defense for Public Affairs (or his/her designee) in order for active duty military personnel to serve as actors in significant roles and in roles beyond the scope of their normal duties.

III. Costs and Benefits of This Regulatory Action

First, the support and assistance to non-government entertainment media productions will be at no additional cost to the government and taxpayers. Once DoD has agreed with a production company to provide production assistance and the parties have signed a Production Assistance Memorandum, operations, and maintenance, supply and equipment costs incurred by DoD (collectively) as a direct consequence of

providing support will be reimbursed by the non-government entertainment production company. Additionally, the sample production assistance memoranda provide for the production company to indemnify and hold harmless the DoD for claims arising from the production company's possession or use of DoD property or other assistance in connection with the production. Support to non-government entertainment media may be provided based on a number of factors: whether the production presents a reasonably realistic depiction of the Military Services and the DoD, whether the production is informational and considered likely to contribute to public understanding of the Military Services and the DoD, or whether the production may benefit Military Service recruiting and retention programs.

Regulatory Procedures

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

We have consulted with the Office of Management and Budget (OMB) and determined this NPRM meets the criteria for a significant regulatory action under Executive Order 12866, as supplemented by *Executive Order 13563*, and was subject to OMB review.

Sec. 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) requires agencies to 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 2014, that threshold is approximately $141 million. This document will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

We certify this proposed rule will not have a significant economic impact on a substantial number of small entities because the entities who receive production assistance are those who affirmatively request it, and therefore, interact with DoD solely on a voluntary basis. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

This proposed rule does not create any new or affect any existing collections, and therefore, does not require OMB approval under the Paperwork Reduction Act.

Executive Order 13132, ''Federalism''

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. This document will not have a substantial effect on State and local governments.

List of Subjects in 32 CFR Part 238

Entertainment; Media productions; Documentaries.

■ For the reasons set forth in the preamble, DoD proposes to add 32 CFR part 238 to read as follows:

PART 238—DoD ASSISTANCE TO NON-GOVERNMENT, ENTERTAINMENT-ORIENTED MEDIA PRODUCTIONS

Sec.
238.1 Purpose.
238.2 Applicability.
238.3 Policy.
238.4 Responsibilities.
238.5 Procedures.
Appendix A to Part 238—Sample Production Assistance Memorandum
Appendix B to Part 238—Sample Documentary Production Assistance Memorandum

Authority: 31 U.S.C. 9701.

§ 238.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures for DoD assistance to non-Government entertainment media productions such as feature motion pictures, episodic television programs, documentaries, and electronic games.

§ 238.2 Applicability.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the combatant commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (referred to collectively in this part as the ''DoD Components'').

(b) Does not apply to productions that are intended to inform the public of fast-breaking or developing news stories.

§ 238.3 Definitions.

Unless otherwise noted, this term and its definition are for the purposes of this part.

Assistance (as in ''DoD Assistance to Non-Government, Entertainment-Oriented Media Productions''). The variety of support that the DoD can provide. The assistance ranges from supplying technical advice during script development, to allowing access to military installations for production.

§ 238.4 Policy.

It is DoD policy that:

(a) DoD assistance may be provided to an entertainment media production, to include fictional portrayals, when cooperation of the producers with the Department of Defense benefits the Department of Defense, or when such cooperation would be in the best interest of the Nation based on whether the production:

(1) Presents a reasonably realistic depiction of the Military Services and the Department of Defense, including Service members, civilian personnel, events, missions, assets, and policies;

(2) Is informational and considered likely to contribute to public understanding of the Military Services and the Department of Defense; or

(3) May benefit Military Service recruiting and retention programs.

(b) DoD assistance to an entertainment-oriented media production will not deviate from established DoD safety and environmental standards, nor will it impair the operational readiness of the Military Services. Diversion of equipment, personnel, and material resources will be kept to a minimum.

(c) The production company will reimburse the Government for any expenses incurred as a result of DoD assistance rendered in accordance with the procedures in this part.

(d) Official activities of Service personnel in assisting the production; use of official DoD property, facilities, and material; and employment of Service members in an off-duty, non-official status will be in accordance with the procedures in this part.

(e) Footage shot with DoD assistance and official DoD footage released for a specific production will not be reused for or sold to other productions without Department of Defense approval.

§ 238.5 Responsibilities.

(a) The Assistant to the Secretary of Defense for Public Affairs (ATSD (PA))

will serve as the sole authority for approving DoD assistance, including DoD involvement in marketing and publicity, to non-Government entertainment-oriented media. The ATSD (PA) will make DoD commitments, in consultation with the Heads of the Military Components, only after:

(1) The script, treatment, or narrative description is found to qualify in accordance with the general principles in § 238.4(a) of this part.

(2) The support requested is determined to be feasible.

(3) For episodic television, motion pictures, and other nondocumentary entertainment media productions, the producer has an acceptable public exhibition agreement with a recognized exhibition entity (i.e., studio or network), and the capability to complete the production (i.e., completion bond or other industry-recognized guarantor of completion, such as the commitment of a major studio or other source of financial commitment). For documentaries, the producer has indicated a clear capability to complete the production.

(b) The Heads of the Military Components will develop procedures for implementing this part and will ensure that the requirements of this part are met.

§ 238.6 Procedures.

(a) *General.* (1) The producer will be required to sign a written Production Assistance Memorandum (see Appendices A and B for sample memoranda), explaining the terms under which DoD's production assistance is provided, with the designee of the Assistant to the Secretary of Defense for Public Affairs, and may be required to post advance payment or a letter of credit issued by a recognized financial institution to cover the estimated costs before receiving DoD assistance.

(2) Official activities of Service members in assisting the production must be within the scope of normal military activities. On-duty service members and DoD civilians are prohibited from serving as actors, such as by speaking filmmaker-invented, or scripted dialogue, unless approved in writing by the (ATSD(PA)) or his or her designee. With the exception of assigned project officer(s) and technical advisor(s), Service members and DoD civilians will not be assigned to perform functions outside the scope of their normal duties.

(3) Official personnel services and DoD material will not be employed in such a manner as to compete directly with commercial and private enterprises. DoD assets may be provided when similar civilian assets are not reasonably available.

(4) The production company may hire Service members in an off-duty, non-official status to perform as extras or actors in minor roles, etc., provided there is no conflict with any existing Service regulation. In such cases, contractual arrangements are solely between those individuals and the production company; however, payment should be consistent with current industry standards. The producer is responsible for resolving any disputes with unions governing the hiring of non-union actors and extras. Service members accepting such employment will comply with the standards of conduct in DoD Directive 5500.07, ''Standards of Conduct'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/550007p.pdf*). The Heads of the Components may assist the production company in publicizing the opportunity for employment and in identifying appropriate personnel.

(5) The production company will restore all Government property and facilities used in the production to the same or better condition as when they were made available for the company's use. This includes cleaning the site and removing trash.

(6) The DoD project officer, described in paragraph (b)(3) of this section, may make DoD motion and still media archival materials available when a production qualifies for assistance in accordance with the general principles in § 238.4(a) of this part.

(b) *Specific procedures*—(1) *Script development and review.* (i) Before a producer officially submits a project to the Office of the Assistant to the Secretary of Defense for Public Affairs (OATSD(PA)), the Military Components are authorized to assist entertainment-oriented media producers, scriptwriters, etc., in their efforts to develop a script that might ultimately qualify for DoD assistance. Such activities could include guidance, suggestions, answers to research queries for technical research, and interviews with technical experts. However, the Military Departments providing such assistance are required to coordinate with and update OATSD (PA) of the status of such projects. Military Components will refrain from making commitments and rendering official DoD opinions until first coordinating through appropriate channels to obtain OATSD (PA) concurrence in such actions.

(ii) Production company officials requesting DoD assistance will submit a completed script (or a treatment or narrative description for documentaries), along with a list of desired support. If a definitive list is not available when the script is initially submitted, requirements should be stated in general terms at the outset. However, no DoD commitment will be made until the detailed list of support requested has been reviewed and deemed to be feasible.

(iii) OATSD (PA) will coordinate the review of scripts, treatment, or narrative description submitted for production assistance consideration. The coordinated review will include each Military Service depicted in the script. Although no commitment for assisting in the production is implied, OATSD (PA) may provide, or authorize the Military Services to provide, further guidance and suggestions for changes that might resolve problems that would prevent DoD assistance.

(2) *Production assistance notification.* Upon reviewing the recommendations of the Military Components concerned, the ATSD (PA) will determine whether a given production meets the DoD criteria for support and if the support requested is feasible. If both requirements are satisfied, the ATSD (PA) will notify in writing the production company concerned, advising it that the Department of Defense has approved DoD production assistance and identifying the DoD project officer tasked with representing the Department of Defense throughout the production process. On a case-by-case basis, the ATSD (PA) may choose to delegate the responsibility of signing the Production Assistance Memorandum on behalf of DoD to the designated DoD project officer or other DoD official responsible for coordinating production assistance. If so, this decision would be included in the notification letter. If production assistance is approved for only a portion of the proposed project, the written notification shall clearly describe the portion(s) approved. If assistance is not approved, ATSD (PA) or the ATSD (PA)'s designee will send a letter to the production company stating reasons for disapproval.

(3) *Role of the DoD project officer.* (i) When production assistance has been approved, the Military Components will assign a project officer (commissioned, non-commissioned, or civilian) who will be designated by OATSD (PA) as the principal DoD liaison to the production company. The DoD project officer will at a minimum:

(A) Act as liaison between the production company and the Secretaries of the Military Departments and maintain contact with OATSD (PA)

through appropriate channels. In this regard, the project officer will serve as the central coordinator for billing the producer and monitoring payments to the Government. (See paragraph (d) of this section for billing procedures.)

(B) Advise the production company on technical aspects and arrange for information necessary to ensure reasonably accurate and authentic portrayals of the Department of Defense.

(C) Maintain liaison with units and commands providing assistance to ensure timely arrangements consistent with the approved support.

(D) Coordinate with installations or commands that intend to provide support to the production to ensure that no material assistance is provided before a Production Assistance Memorandum is signed by both DoD and the production company.

(E) When DoD assistance to the production requires the production company to reimburse the Government for additional expenses, develop an estimate of expenses based on the assistance requested, and ensure that these are reflected in the Production Assistance Memorandum.

(F) Coordinate with each installation or command providing assets to the production to ensure the production company receives accurate and prompt statements of charges assessed by the Government and that the Government receives sufficient payment for any additional expenses incurred to support the production.

(G) For project officers assigned to a documentary or a non-documentary television series, maintain close liaison with the producer(s) and writers in developing story outlines. All story ideas considered for further development by the production company should be submitted to OATSD (PA) to provide the earliest opportunity for appraisal.

(ii) When considered to be in the best interest of the Department of Defense, the assigned project officer may provide ''on-scene'' assistance to the production company. Military or civilian technical advisor(s) may also be required. In such cases:

(A) Assignment will be at no additional cost to the Government. The production company will assume payment of such items as travel (air, rental car, reimbursement for fuel, etc.) and per diem (lodging, food and incidentals).

(B) Assignment should be for the length of time required to meet preproduction requirements through completion of photography. When feasible, assignment may be extended to cover post-production stages and site clean-up.

(iii) Additional project officer responsibilities, when considered to be in the best interest of the Department of Defense, will include:

(A) Supervising the use of DoD equipment, facilities, and personnel.

(B) Attending pertinent preproduction and production conferences, being available during rehearsals to provide technical advice, and being present during filming of all scenes pertinent to the Department of Defense.

(C) Ensuring proper selection of locations, appropriate uniforms, awards and decorations, height and weight standards, grooming standards, insignia, and set dressing applicable to the military aspects of the production. This applies to active duty members as well as paid civilian actors.

(D) Arranging for appropriate technical advisers to be present when highly specialized military technical expertise is required.

(E) Ensuring that the production adheres to the agreed-upon script and list of support to be provided.

(F) Authorizing minor deviations from the approved script or list of support to be provided, so long as such deviations are feasible, consistent with the safety standards, and in keeping with the approved story line. All other deviations shall be referred for approval to OATSD (PA) through appropriate channels.

(G) In accordance with the Production Assistance Memorandum, providing notice of non-compliance, and when necessary, suspending assistance when action by the production company is contrary to stipulations governing the project and suspension is in the best interest of the Department of Defense until the matter is resolved locally or by referral to OATSD (PA).

(H) Attending the approval screening of the production, unless the Military Department concerned, OATSD (PA), and the production company mutually agree otherwise.

(I) Determining whether the production company will need to obtain the written consent of DoD personnel who may be recorded, photographed, or filmed by the production company, including when the production company uses the personally identifying information (PII) of DoD personnel. The likeness of DoD personnel in any imagery is included in the meaning of PII. If the recording or imagery captures medical treatment being performed on DoD personnel, the project officer shall require the production company to gain written consent from such DoD personnel. In the case of DoD personnel who are deceased or incapacitated, the project officer shall require the production company to gain written consent from the next of kin of the deceased or incapacitated DoD personnel.

(c) *Production company procedures*—(1) *Review of productions.* When DoD assistance has been provided to a non-documentary production, the production company must arrange for an official DoD screening in Washington, DC, or at another location agreeable to OATSD (PA), before the production is publicly exhibited. This review should be early, but at a stage in editing when changes can be accommodated, to allow the Department of Defense to confirm military sequences conform to the agreed upon script. For documentary productions, the production company will provide to the DoD project officer and the DoD designee(s) responsible for coordinating production assistance a digital video (DVD) of military-themed photography and the roughly edited version of the production at a stage in editing when changes can be accommodated. In addition to confirming that the military sequences conform to the agreed upon script, treatment, or narrative, this review will also serve to preclude release or disclosure of sensitive, security-related, or classified information; and to ensure that the privacy of DoD personnel is not violated. Should DoD determine that material in the production compromises any of the preceding concerns, DoD will alert the production company of the material, and the production company will remove the material from the production.

(2) *Credit titles.* The production company will place a credit in the end titles immediately above the ''Special Thanks'' section (if any) that states ''Special Thanks to the United States Department of Defense,'' with no less than one clear line above and one clear line below such credit acknowledging the DoD assistance provided. Such acknowledgment(s) will be in keeping with industry customs and practices, and will be of the same size and font used for other similar credits in the end titles.

(3) *Requests for promotional assistance.* Pursuant to DoD Directive 5122.05, ''Assistant Secretary of Defense for Public Affairs'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/512205p.pdf*), the ATSD(PA) is the final authority for military participation in public events, including participation in promotional events for entertainment media productions. The production company will forward requests for promotional assistance to OATSD(PA)

in sufficient detail to permit a complete evaluation.

(4) *Publicity photos and promotional material.* The production company will provide DoD with copies of all promotional and marketing materials (e.g., electronic press kits, one-sheets, and television advertisements) for internal information and historical purposes in documenting DoD assistance to the production.

(5) *Copies of completed production.* The production company will provide, in a format to be specified in the Production Assistance Memorandum, copies of the completed production to DoD for briefings and for historical purposes.

(d) *Billing procedures.* Pursuant to 31 U.S.C. 9701, production companies will reimburse the Government for additional expenses incurred as a result of DoD assistance.

(1) Each installation or Military Component will provide the production company with individual statements of charges assessed for providing assets to assist in the production. Unless agreed otherwise, statements should be presented to the production company within 45 days from the last day of the month in which filming and/or photography is completed to ensure prompt and complete accounting of charges for DoD assistance.

(2) The production company will be billed for only those expenses that are considered to be additional expenses to the Government. In accordance with paragraph (b)(3)(i)(A) of this section, the assigned project officer will serve as the central coordinator for submitting statements to the producer and monitoring receipt of payment to the Government. Items for which the costs may be reimbursed to the Government include:

(i) Petroleum, oil, and lubricants for equipment used.

(ii) Depot maintenance for equipment used.

(iii) Cost incurred in diverting or moving equipment.

(iv) Lost or damaged equipment.

(v) Expendable supplies.

(vi) Travel and per diem (unless paid directly to the Service member when authorized under 31 U.S.C. 1353).

(vii) Civilian overtime.

(viii) Commercial power or other utilities for facilities kept open beyond normal duty hours or when the production company's consumption of utilities is significant, based on average usage rates.

(ix) Should the production company not comply with requested clean-up required by production, project officer will require production company to hire a cleaning company. Should the production company not provide for the necessary clean-up, it shall reimburse the Government for any additional expenses incurred by the Government in performing such clean-up.

(3) The production company will be required to reimburse the Government for all flying hours related to production assistance, including takeoffs, landings, and ferrying aircraft from military locations to filming sites, except when such missions coincide with and can be considered legitimate operational and training missions. The production company will be required to reimburse the Government for all steaming days related to production assistance, including all costs (tugs, harbor pilots and port costs) required to move ships from military locations to filming sites, except when such missions coincide with and can be considered legitimate operational and training missions. These reimbursements will be calculated at the current DoD User Rates.

(4) In cases where provision of support provides a significant benefit to DoD, the production company will not be required to reimburse the Government for military or civilian manpower (except for civilian overtime) when such personnel are officially assigned to assist in the production. However, this limitation does not apply to Reserve Component personnel assigned in an official capacity, because such members are called to active duty at additional cost to the Government to perform the assigned mission. Reimbursement for Reserve Component personnel in an official capacity will be at composite standard pay and reimbursement rates for military personnel published annually by the Under Secretary of Defense (Comptroller)/DoD Chief Financial Officer.

(5) Normal training and operational missions that would occur regardless of DoD assistance to a particular production are not considered to be chargeable to the production company.

(6) Beyond actual operational expenses, imputed rental charges ordinarily will not be levied for use of structures or equipment.

(7) The production company will provide proof of adequate industry standard liability insurance, naming DoD as an additional insured entity prior to the commencement of production involving DoD. The production company will maintain, at its sole expense, insurance in such amounts and under such terms and conditions as may be required by DoD to protect its interests in the property involved.

Appendix A to Part 238—Sample Production Assistance Memorandum

U.S. DEPARTMENT OF DEFENSE

PRODUCTION ASSISTANCE MEMORANDUM

DoD-[enter number]-[enter year]

The United States Department of Defense (DoD), acting on behalf of the United States of America, hereby expresses its intent, subject to the provisions herein, to provide to [enter name of production entity], hereinafter referred to as the ''production company,'' the assistance itemized in this Production Assistance Memorandum (Memorandum) in conjunction with the production of a [enter type of production; e.g., feature motion picture, television series] known at this time as [enter title of production or episode]. This Memorandum expresses the terms under which DoD intends to provide assistance. This Memorandum does not authorize the obligation of any United States funding, nor should it be construed as a contract, grant, cooperative agreement, other transaction, or any other form of procurement agreement.

LIST OF MILITARY RESOURCES REQUESTED TO BE PROVIDED IN SUPPORT OF PRODUCTION [or ''see Attachment 1''] The DoD will make reasonable efforts to provide the assistance requested in the request for production assistance, to the extent approved by DoD, and subject to the limitations contained herein.

This Memorandum is subject to revocation due to non-compliance with the terms herein, with the possible consequence of a temporary suspension or permanent withdrawal of the use of some or all of the military resources identified to assist this project. In the event of dispute, the production company will be given a written notice of non-compliance by the DoD project officer. The production company will have a 72-hour cure period after receipt of written notice of non-compliance. DoD may temporarily suspend support until the non-compliance has been cured or the 72-hour cure period has expired. After the cure period has expired, DoD may permanently withdraw its support for the production. If such Memorandum is either suspended or terminated, the sole right of the Production Company to appeal such decision is to the DoD designee responsible for coordinating production assistance for entertainment media operations (''DoD Director of Entertainment Media''). The requirements in Department of Defense Instruction 5410.16 shall apply to this Memorandum.

It is understood between DoD and the production company that:

1. The DoD project officer, [enter name of project officer], is the official DoD representative responsible for ensuring that the terms of this Memorandum are met. The DoD project officer or his or her designee will be present each day the U.S. military is being portrayed, photographed, or otherwise involved in any aspect of [enter title of

production]. The DoD project officer is the military technical advisor, and all military coordination must go through him or her. The production company will consult with the DoD project officer in all phases of pre-production, production, and post-production that involves or depicts the U.S. military.

2. The production company will cast actors, extras, doubles, and stunt personnel portraying Service members who conform to individual Military Service regulations governing age, height and weight, uniform, grooming, appearance, and conduct standards. DoD reserves the right to suspend support in the event that disagreement regarding the military aspects of these portrayals cannot be resolved in negotiation between the production company and DoD within the 72-hour cure period. The DoD project officer will provide written guidance specific to each Military Service being portrayed.

3. DoD has approved production assistance as in the best interest of DoD, based on the [enter date] version of the script to the extent agreed upon by DoD [, and as further described by _____]. The production company must obtain, in advance, DoD concurrence for any subsequent changes proposed to the military depictions made to either the picture or the sound portions of the production before these changes are undertaken.

4. The operational capability and readiness of the Military Components will not be impaired. Unforeseen contingencies affecting national security or other emergency circumstances such as disaster relief may temporarily or permanently preclude the use of military resources. In these circumstances, DoD will not be liable, financially or otherwise, for any resulting negative impact or prejudice to the production caused by the premature withdrawal or change in support to the production company.

5. There will be no deviation from established DoD safety and conduct standards. The DoD project officer or his or her designee will coordinate such standards and compliance therewith. DoD will provide the production company advance notice of such safety or conduct standards upon request.

6. All DoD property or facilities damaged, used, or altered by the production company in connection with the production will be restored by the production company to the same or better condition, cleaned and free of trash, normal wear and tear excepted, as when they were made available for the production company's use.

7. The production company will reimburse the U.S. Government for any additional expenses incurred as a result of the assistance rendered for the production of [enter title of production]. The estimated amount will be detailed and included (e.g., ''see Attachment 2,'' etc.). Unless otherwise agreed upon, the production company agrees to post advance payment or a letter of credit in the amount estimated to comprise the total additional DoD expenses or deposit such funds that may be reasonably necessary. The payment or letter of credit will be submitted to the military component(s) designated to provide the assistance, or to another DoD agency, as deemed appropriate by DoD.

a. DoD agrees to provide statements of charges assessed by each installation or DoD component providing assets to assist in the production within 45 days from the last day of the month in which filming is completed.

b. The production company will be charged for only those expenses that are considered to be additional costs to DoD in excess of those that would otherwise have been incurred, including, but not limited to fuel, resultant depot maintenance, expendable supplies, travel and per diem, civilian overtime, and lost or damaged equipment.

c. If the final aggregate of such costs and charges is less than previously anticipated, DoD agrees to remit the exact amount of the difference of any funds posted within 45 days from the last day of the month in which filming is completed.

8. The production company will be charged for the travel, lodging, per diem, and incidental expenses for the DoD project officer, the DoD Director of Entertainment Media or his or her designee, and any other assigned military technical and safety advisor(s) whose presence may be required by DoD. For each of these individuals, the production company will provide:

a. Round-trip air transportation and ground transfers to the production location(s) at which there is a military portrayal or involvement, at times deemed appropriate by the DoD project officer and DoD Director of Entertainment Media.

b. A full-size vehicle (with fuel and with loss, damage, and collision automobile insurance paid for by the production company) for his or her personal use during the filming, including for his or her stay at the production location(s). If parking at the location(s) is not available, transportation to and from the lodging location to the production site will be provided.

c. Hotel accommodations equivalent to those provided to the production company's crew.

d. A dedicated, on-location trailer room or other comparable work space with full Internet access, desk, seating, and en-suite toilet.

9. By approving DoD production assistance for [enter title of production], DoD hereby provides a general release to the production company for the use of any and all photography and sound recordings of any and all Service members, equipment, and real estate, subject to the limitations in this Memorandum (e.g. Paragraphs 12–13).

10. As a condition of DoD assistance, the production company will:

a. Indemnify and hold harmless DoD, its agencies, officers, and employees against any claims (including claims for personal injury and death, damage to property, and attorneys' fees) arising from the production company's possession or use of DoD property or other assistance in connection with this production of [enter title of production], to include pre-production, post-production, and DoD-provided orientation or training. This provision will not in any event require production company to indemnify or hold harmless DoD, its agencies, officers and or employees from or against any claims arising from defects in DoD property or negligence on the part of DoD, its agencies, officers, or employees.

b. Provide proof of adequate industry standard liability insurance, naming DoD as an additional insured entity prior to the commencement of production involving DoD. The production company will maintain, at its sole expense, insurance in such amounts and under such terms and conditions as may be required by DoD to protect its interests in the property involved.

c. Not carry onto DoD property any non-prescription narcotic, hallucinogenic, or other controlled substance; or alcoholic beverage without prior coordination with the DoD project officer or his or her designee.

d. Not carry onto DoD property any real or prop firearms, weapons, explosives, or any special effects devices or equipment that cause or simulate explosions, flashes, flares, fire, loud noises, etc., without the prior approval of the DoD project officer and the supporting installation.

e. Allow DoD public affairs personnel access to the production site(s) to conduct still and motion photography of DoD personnel and assets that are directly supporting the filming, and to allow DoD the use of production company-generated publicity and marketing materials, such as production stills and electronic press kits. These materials may be used to show DoD viewers how DoD is assisting in the production; such materials may be viewed by the general public if posted on an open DoD Web site or released on ''The Pentagon Channel'' or other publicly-accessible media source. Therefore, no DoD personnel will photograph actual filming, talent, or sets without the prior approval of the production company.

11. The production company will provide the DoD project officer with whatever internal communications equipment it is supplying to production company crew members to communicate on the set during production of military-themed sequences. The production company will also supply the DoD project officer with earphones to monitor military-themed dialogue and other sound recording during these periods.

12. The production company will screen for the DoD project officer and the DoD Director of Entertainment Media, or their designees, the roughly edited version of the production at a stage in editing when changes can be accommodated to allow DoD to confirm the military sequences conforms to the agreed script treatment, or narrative description; to preclude release or disclosure of sensitive, security-related, or classified information; and to ensure that the privacy of DoD personnel is not violated. Should DoD determine that material in the production compromises any of the preceding concerns, DoD will alert the production company of the material, and the production company will remove the material from the production. The production company will bear the travel, lodging, per diem, and incidental expenses incurred in transporting the DoD project officer and the DoD Director of Entertainment Media, or their designees, to the location where the screening is held.

13. No photography or sound recordings made with DoD assistance and no DoD

photography and sound recordings released for this production will be reused or sold for use in other productions without DoD approval. The foregoing will not prohibit the production company from exploiting the production in any and all ancillary markets, now known or hereafter devised (including, without limitation, television, web content, home video and theme parks) or from using clips in promotional material relative thereto.

14. The production company will also provide an official DoD screening of the completed production in Washington, D.C., prior to public exhibition. An alternative screening location may be authorized by DoD, in negotiation with the production company. In this case, the production company will pay the travel and lodging expenses incidental to the attendance at the screening of the DoD project officer and the Director of Entertainment Media or their designees.

15. The production company will place a credit in the end titles immediately above the ''Special Thanks'' section (if any), substantially in the form of ''Special Thanks to the United States Department of Defense,'' with no less than one clear line above and one clear line below such credit acknowledging the DoD assistance provided. Such acknowledgment(s) will be in keeping with industry customs and practices, and will be of the same size and font used for other similar credits in the end titles.

16. The production company will provide DoD with five copies of all promotional and marketing materials (e.g., electronic press kits, one-sheets, and television advertisements) for internal information and historical purposes in documenting DoD assistance to the production.

17. The production company will provide a minimum of ten digital video (DVD) copies of the completed production to DoD for internal briefings and for historical purposes, by overnight shipment to arrive the day following the first domestic airing or commercial distribution of the production. DoD will not exhibit these DVDs publicly or copy them; however, DoD is allowed to use short clips from them in official presentations by Service members and DoD civilian personnel who were directly involved in providing DoD assistance, for the sole purpose of illustrating DoD support to the production. However, DoD is prohibited from making these clips available to any other party for any other purpose.

18. Official activities of DoD personnel in assisting the production must be within the scope of normal military activities, with the exception of the DoD project officer and assigned official technical advisor(s), whose activities must be consistent with their authorized additional duties. DoD personnel in an off-duty, non-official status may be hired by the production company to perform as actors, extras, etc., provided there is no conflict with existing Service or Department regulations. In such cases, these conditions apply:

a. Contractual agreements are solely between those individuals and the production company; however, they should be consistent with industry standards.

b. The DoD project officer will ensure that DoD personnel will comply with standards of conduct regulations in accepting employment.

c. The production company is responsible for any disputes with unions governing the hiring of non-union actors or extras.

19. The production company may make donations or gifts in-kind to morale, welfare, and recreation programs of the military unit(s) involved; however, donations of this kind are not at all required, and are not in any manner a consideration in the determination of whether or not a production should receive DoD assistance. These donations must be coordinated through the DoD project officer and must comply with law and DoD policies.

20. The undersigned parties warrant that they have the authority to enter into this Memorandum and that the consent of no other party is necessary to effectuate the full and complete satisfaction of the provisions contained herein.

21. This Memorandum consists of [enter number] pages including [enter number of attachment(s)]. Each page will be initialed by the undersigned DoD and production company representatives.

FOR THE DEPARTMENT OF DEFENSE

_____

Signature and Date

Name of DoD Representative:

_____

Title and Address

FOR [ENTER PRODUCTION COMPANY]

_____

Signature and Date

Name of Production Company Representative:

_____

Title and Address

Appendix B to Part 238—Sample Production Assistance Memorandum

U.S. DEPARTMENT OF DEFENSE

DOCUMENTARY PRODUCTION ASSISTANCE MEMORANDUM

DoD-[enter number]-[enter year]

The United States Department of Defense (DoD), acting on behalf of the United States of America, hereby expresses its intent, subject to the provisions herein, to provide to [enter name of production entity], hereinafter referred to as the ''production company,'' the assistance itemized in this Production Assistance Memorandum (Memorandum) in conjunction with the production of a documentary known at this time as [enter title of the production]. This Memorandum expresses the terms under which DoD intends to provide assistance. This Memorandum does not authorize the obligation of any United States funding, nor should it be construed as a contract, grant, cooperative agreement, other transaction, or any other form of procurement agreement.

LIST OF MILITARY RESOURCES REQUESTED TO BE PROVIDED IN SUPPORT OF PRODUCTION [or ''see Attachment 1''] The DoD will make reasonable efforts to provide the assistance requested in the request for DoD documentary assistance, to the extent approved by DoD, and subject to the limitations contained herein.

This Memorandum is subject to revocation due to non-compliance with the terms herein, with the possible consequence of a temporary suspension or permanent withdrawal of the use of some or all of the military resources identified to assist this project. In the event of dispute, the production company will be given a written notice of non-compliance by the DoD project officer. The production company will have a 72-hour cure period after receipt of written notice of non-compliance. DoD may temporarily suspend support until the non-compliance has been cured or the 72-hour cure period has expired. After the cure period has expired, DoD may permanently withdraw its support for the production. If such Memorandum is either suspended or terminated, the sole right of the Production Company to appeal such decision is to the DoD designee responsible for coordinating assistance for documentary productions. The requirements in Department of Defense Instruction 5410.16 shall apply to this Memorandum.

It is understood between DoD and the production company that:

1. The DoD project officer, [enter name of project officer and contact information], is the official DoD representative responsible for ensuring that the terms of this Memorandum are met. The DoD project officer is the military technical advisor, and all military coordination must go through him or her. The production company will consult with the DoD project officer in all phases of pre-production, production, and post-production that involves or depicts the U.S. military. The local unit/installation public affairs officer, or a designated official, may serve as the official onsite DoD representative for this project and will act as the interface between the film crew and military units providing both filming and logistical support.

2. DoD has approved production assistance as in the best interest of DoD, based on the [enter date] version of the script, treatment, or narrative description to the extent agreed upon by DoD [and as further described by _____]. The production company must obtain, in advance, DoD concurrence for any subsequent changes proposed to the military depictions made to either the picture or the sound portions of the production before these changes are undertaken.

3. The operational capability and readiness of the Military Components will not be impaired. Unforeseen contingencies affecting national security or other emergency circumstances such as disaster relief may temporarily or permanently preclude the use of military resources. In these circumstances, DoD will not be liable, financially or otherwise, for any resulting negative impact or prejudice to the production caused by the premature withdrawal or change in support to the production company.

4. There will be no deviation from established DoD safety and conduct standards. The DoD project officer, or his or her designee, will coordinate such standards and compliance therewith. DoD will provide the production company advance notice of

such safety or conduct standards upon request.

5. All DoD property or facilities damaged, used or altered by the production company in connection with the production will be restored by the production company to the same or better condition, cleaned and free of trash, normal wear and tear excepted, as when they were made available for the production company's use.

6. The production company will reimburse the U.S. Government for any additional expenses incurred as a result of the assistance rendered for the production of [enter title of production]. The estimated amount will be detailed and included in this Memorandum or as an attachment to it.

7. The production company will be charged for only those expenses that are considered to be additional costs to DoD in excess of those that would otherwise have been incurred, including, but not limited to fuel, resultant depot maintenance, expendable supplies, travel and per diem, civilian overtime, and lost or damaged equipment.

8. The production company will be charged for the travel, lodging, per diem, and incidental expenses for the DoD project officer, the DoD documentary officer, or his or her designee, and any other assigned military technical and safety advisor(s) whose presence may be required by DoD. For each of these individuals, the production company will provide:

a. Round-trip air transportation and ground transfers to the production location(s) at which there is a military portrayal or involvement, at times deemed appropriate by the DoD project officer and the DoD documentary officer.

b. Hotel accommodations equivalent to those provided to the production company's crew.

9. By approving DoD production assistance for [enter title of production], DoD hereby provides a general release to the production company for the use of any and all photography and sound recordings of any and all Service members, equipment, and real estate, subject to the limitations in this Memorandum (e.g., including, but not limited to, Paragraphs 11–14).

10. As a condition of DoD assistance, the production company will:

a. Indemnify and hold harmless the DoD, its agencies, officers, and employees against any claims (including claims for personal injury and death, damage to property, and attorneys' fees) arising from the production company's possession or use of DoD property or other assistance in connection with this production of [enter title of production]. This provision will not in any event require production company to indemnify or hold harmless the DoD, its agencies, officers, or employees from or against any claims arising from defects in DoD property or negligence on the part of DoD, its agencies, officers, or employees.

b. Provide proof of adequate industry standard liability insurance, naming DoD as an additional insured entity prior to the commencement of production involving DoD. The production company will maintain, at its sole expense, insurance in such amounts and under such terms and conditions as may be required by DoD to protect its interests in the property involved.

c. Not carry onto DoD property any non-prescription narcotic, hallucinogenic, or other controlled substance or alcoholic beverage without prior coordination with the DoD project officer or his or her designee.

d. Not carry onto DoD property any real or prop firearms, weapons, explosives, or any special effects devices or equipment that cause or simulate explosions, flashes, flares, fire, loud noises, etc., without the prior approval of the DoD project officer and the supporting installation.

e. Allow DoD public affairs personnel access to the production site(s) to conduct still and motion photography of DoD personnel and assets that are directly supporting the filming, and to allow DoD the use of production company-generated publicity and marketing materials. These materials are may be used to show DoD viewers how DoD is assisting in the production; such materials may be viewed by the general public if posted on an open DoD Web site or on ''The Pentagon Channel'' or other publicly-accessible media source. Therefore, no DoD personnel will photograph actual filming without the prior approval of the production company.

11. The production company will screen for the DoD project officer, and the DoD documentary officer, or their designees, the roughly edited version of the production at a stage in editing when changes can be accommodated to allow DoD to confirm the military sequences conforms to the agreed-upon script, treatment, or narrative description; to preclude release or disclosure of sensitive, security-related, or classified information; and to ensure that the privacy of DoD personnel is not violated. Should DoD determine that material in the production compromises any of the preceding concerns, DoD will alert the production company of the material, and the production company will remove the material from the production.

12. If the recording or imagery to be used in the production captures medical treatment being performed on DoD personnel, the project officer shall require the production company to gain written consent from such DoD personnel. In the case of DoD personnel who are deceased or incapacitated, the project officer shall require the production company to gain written consent from the next of kin of the deceased or incapacitated DoD personnel.

13. All Department of Defense uniformed and civilian personnel who are photographed or sound recorded by the documentary production company are considered to be on duty and are precluded from receiving any compensation from the production company or any other party as a result of their appearance in the production or subsequent authorized productions, or as a result of the use of their name, likeness, life story or other rights for any purpose. Military personnel in an off-duty, non-official status may be hired by the production company to perform as actors, extras, etc., provided there is no conflict with existing Service regulations. In such cases, these conditions apply:

a. Contractual agreements are solely between those individuals and the production company; however, they should be consistent with industry standards.

b. The DoD project officer will ensure that DoD personnel will comply with standards of conduct regulations in accepting employment.

c. The production company is responsible for any disputes with unions governing the hiring of non-union actors or extras.

14. No photography or sound recordings made with DoD assistance and no DoD photography and sound recordings released for this production will be reused or sold for use in other productions without DoD approval. The foregoing will not prohibit the production company from exploiting the production in any and all ancillary markets, now known or hereafter devised (including, without limitation, television, web content, home video and theme parks) or from using clips in promotional material relative thereto.

15. The production company will identify any and all re-enactments in the production by placing the word ''RE-ENACTMENT ''on the screen, in a legible format and of a legible size, for either the duration of the re-enactment or at the beginning of the re-enactment for a period of not less than 3 seconds and reappearing every subsequent 10 seconds for a period of 3 seconds until complete. This activity will occur for every instance of a re-enactment in the production.

16. The production company will place a credit in the end titles immediately above the ''Special Thanks'' section (if any) substantially in the form of ''Special Thanks to the United States Department of Defense,'' with no less than one clear line above and one clear line below such credit acknowledging the DoD assistance provided. Such acknowledgment(s) will be in keeping with industry customs and practices, and will be of the same size and font used for other similar credits in the end titles.

17. The production company will provide a minimum of five digital video (DVD) copies of the completed production within seven working days of initial broadcast to DoD, for internal briefings and for historical purposes. DoD will not exhibit these DVDs publicly or copy them; however, DoD is allowed to use short clips from them in official presentations by Service members and DoD civilian personnel who were directly involved in providing DoD assistance, for the sole purpose of illustrating DoD support to the production. However, DoD is prohibited from making these clips available to any other party for any other purpose.

18. The undersigned parties warrant that they have the authority to agree to the terms of this Memorandum and that the consent of no other party is necessary to effectuate the full and complete satisfaction of the provisions contained herein.

19. This Memorandum consists of [enter number] pages including [enter number of attachment(s)]. Each page will be initialed by the undersigned DoD and production company representatives.

FOR THE DEPARTMENT OF DEFENSE

_____

Signature and Date

Name of DoD Representative:

_____

Title and Address

FOR [ENTER PRODUCTION COMPANY]

Signature and Date

Name of Production Company Representative:

Title and Address

Dated: September 11, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–22030 Filed 9–16–14; 8:45 am]

BILLING CODE 5001–06–P

LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 201

[Docket No. 2014–07]

Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of inquiry and request for petitions.

SUMMARY: The United States Copyright Office is initiating the sixth triennial rulemaking proceeding under the Digital Millennium Copyright Act, concerning possible exemptions to the Act's prohibition against circumvention of technological measures that control access to copyrighted works. The Copyright Office invites written petitions for proposed exemptions from interested parties. Unlike in previous rulemakings, the Office is not requesting the submission of complete legal and factual support for such proposals at the outset of the proceeding. Instead, in this first step of the process, parties seeking an exemption may submit a petition setting forth specified elements of the proposed exemption, as explained in this notice. After receiving petitions for proposed exemptions, the Office will consider the petitions, group and/or consolidate related and overlapping proposals, and issue a notice of proposed rulemaking setting forth the list of proposed exemptions for further consideration. The notice of proposed rulemaking will invite full legal and evidentiary submissions and provide further guidance as to the types of evidence that may be expected or useful vis-à-vis particular proposals, with the aim of producing a well-developed administrative record.

The Office believes that the adjustments it is making to its process, as discussed in this notice, will enhance public understanding of the rulemaking process, including its legal and evidentiary requirements, and facilitate more effective participation in the triennial proceeding.

DATES: Written petitions for proposed exemptions must be received no later than November 3, 2014.

ADDRESSES: Each proposal for an exemption should be submitted as a separate petition. The Copyright Office strongly prefers that petitions for proposed exemptions be submitted electronically. See the **SUPPLEMENTARY INFORMATION** section below for information about the content and format requirements for petitions. A petition submission page and a template petition form will be posted on the Copyright Office Web site at *http://www.copyright.gov/1201/*. To meet accessibility standards, all petitions must be uploaded in a single file in either the Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes (MB). The name of the submitter (and organization) should appear on both the form and the face of the comments. Petitions will be posted publicly on the Copyright Office Web site in the form they are received, along with the name of the submitter or organization. If electronic submission is not feasible, please contact the Copyright Office at 202–707–8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at *jcharlesworth@loc.gov* or by telephone at 202–707–8350; Sarang V. Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov* or by telephone at 202–707–8350; or Stephen Ruwe, Attorney-Advisor, by email at *sruwe@loc.gov* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION: As contemplated by 17 U.S.C. 1201(a)(1), the U.S. Copyright Office is initiating a proceeding to determine whether there are any classes of copyrighted works for which noninfringing uses are, or in the next three years are likely to be, adversely affected by the prohibition on circumvention of technological measures that control access to copyrighted works. The Office invites submission of petitions for proposed exemptions, the requirements for which are described in part IV.B.1 below.

I. Background

In 1998, Congress enacted the Digital Millennium Copyright Act (''DMCA'') to implement certain provisions of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. *See generally* Public Law 105–304, 112 Stat. 2860 (1998). The DMCA governs many aspects of the digital marketplace for copyrighted works by establishing ''a wide range of rules . . . for electronic commerce'' and ''defin[ing] whether consumers and businesses may engage in certain conduct, or use certain devices, in the course of transacting electronic commerce.'' *Report of the H. Comm. on Commerce on the Digital Millennium Copyright Act of 1998,* H.R. Rep. No. 105–551, pt. 2, at 22 (1998) (''Commerce Comm. Report'').

Among other things, title I of the DMCA, which added a new chapter 12 to title 17 of the U.S. Code, prohibits circumvention of technological measures employed by or on behalf of copyright owners to protect access to their works (also known as ''access controls''). Specifically, section 1201(a)(1)(A) provides in pertinent part that ''[n]o person shall circumvent a technological measure that effectively controls access to a work protected under [title 17].'' Under the statute, to ''circumvent a technological measure'' means ''to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.'' 17 U.S.C. 1201(a)(3)(A). A technological measure that ''effectively controls access to a work'' is one that ''in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.'' 17 U.S.C. 1201(a)(3)(B). In enacting this prohibition, Congress noted that technological protection measures can ''support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials by individuals.'' Staff of House Comm. on the Judiciary, 105th Cong., *Section-by-Section Analysis of H.R. 2281 as passed by the United States House of Representatives on August 4, 1998,* at 6 (Comm. Print 1998) (''House Manager's Report'').

As originally drafted, the prohibition in section 1201(a)(1)(A) did not provide for an exemption process.[1] The House of

[1] The original version of the bill did provide for certain permanent exemptions, including for library browsing, reverse engineering, and other activities,

Continued

Representatives Commerce Committee was concerned, however, that the lack of such an ability to waive the prohibition might undermine the fair use of copyrighted works. Commerce Comm. Report at 35–36. The Committee acknowledged that the growth and development of the internet had had a significant positive impact on the access of students, researchers, consumers, and the public at large to information, and that a ''plethora of information, most of it embodied in materials subject to copyright protection, is available to individuals, often for free, that just a few years ago could have been located and acquired only through the expenditure of considerable time, resources, and money.'' *Id.* at 35–36. At the same time, the Committee was concerned that ''marketplace realities may someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors.'' *Id.* at 36. The Committee thus concluded that it would be appropriate to ''modify the flat prohibition against the circumvention of effective technological measures that control access to copyrighted materials, in order to ensure that access for lawful purposes is not unjustifiably diminished.'' *Id.*

Accordingly, the Commerce Committee proposed a modification of proposed section 1201 that it characterized as a '' 'fail-safe' mechanism.'' *Id.* The Committee Report noted that ''[t]his mechanism would monitor developments in the marketplace for copyrighted materials, and allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.'' *Id.*

As ultimately enacted, the ''fail-safe'' mechanism in section 1201(a)(1) directs the Librarian of Congress, pursuant to a rulemaking proceeding, to publish any class of copyrighted works for which the Librarian has determined that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected by the prohibition against circumvention in the succeeding three-year period, thereby exempting that class from the prohibition for that period. *See* 17 U.S.C. 1201(a)(1). The Librarian's determination to grant an exemption is based upon the recommendation of the Register of Copyrights. *Id.* at 1201(a)(1)(C). The Register in turn is to consult with the Assistant Secretary for Communications and Information of the Department of Commerce, who oversees the National Telecommunications and Information Administration (the ''Assistant Secretary'').[2] *Id.* As explained by the Commerce Committee, ''[t]he goal of the proceeding is to assess whether the implementation of technological protection measures that effectively control access to copyrighted works is adversely affecting the ability of individual users to make lawful uses of copyrighted works.'' *See* Commerce Comm. Report at 37.

In keeping with that goal, the primary responsibility of the Register and the Librarian in the rulemaking proceeding is to assess whether the implementation of access controls impairs the ability of individuals to make noninfringing use of copyrighted works within the meaning of section 1201(a)(1). To do this, the Register develops a comprehensive administrative record using information submitted by interested parties, and makes recommendations to the Librarian concerning whether exemptions are warranted based on that record.[3]

Under the statutory framework, the Librarian, and thus the Register, must consider ''(i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian considers appropriate.'' 17 U.S.C. 1201(a)(1)(C). As noted above, the Register must also consult with the Assistant Secretary, and report and comment on his views, in providing her recommendation. Upon receipt of the recommendation, the Librarian is responsible for promulgating the final rule setting forth any exempted classes of works.

The Librarian has thus far made five determinations under section 1201(a)(1)[4] based upon the recommendations of the Register.[5] This notice announces the commencement of the sixth triennial rulemaking under the statutory process.

II. The Unlocking Consumer Choice and Wireless Competition Act

Earlier this year, Congress enacted the Unlocking Consumer Choice and Wireless Competition Act (''Unlocking Act''), effective as of August 1, 2014. Public Law 113–144, 128 Stat. 1751 (2014).[6] The Unlocking Act did three things. First, it changed the existing exemption allowing circumvention of technological measures that control access to computer programs that enable wireless telephone handsets to connect to wireless communication networks—a process commonly known as ''cellphone unlocking''—by substituting the version of the exemption adopted by the Librarian in 2010[7] for the narrower

which were included in section 1201 as finally enacted. *See* S. Rep. No. 105–190, at 13–16 (1998).

[2] Exemptions adopted by rule under section 1201(a)(1)(C) apply only to the prohibition on the conduct of circumventing technological measures that control ''access'' to copyrighted works, *e.g.,* decryption or hacking of access controls such as passwords. The Librarian of Congress has no authority to adopt exemptions for the prohibitions contained in subsections (a)(2) or (b) of section 1201, which concern trafficking in circumvention tools. *See* 17 U.S.C. 1201(a)(1)(E) (''Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.''). The statute contains exemptions from the trafficking prohibitions for certain limited uses, such as reverse engineering or encryption research. *See* 17 U.S.C. 1201(f)(2), (g)(4).

[3] *See* H. R. Rep. No. 105–796, at 64 (1998) (''Conference Report'') (''[A]s is typical with other rulemaking under title 17, and in recognition of the expertise of the Copyright Office, the Register of Copyrights will conduct the rulemaking, including providing notice of the rulemaking, seeking comments from the public, consulting with the Assistant Secretary for Communications and Information of the Department of Commerce and any other agencies that are deemed appropriate, and recommending final regulations in the report to the Librarian.'').

[4] 77 FR 65260 (Oct. 26, 2012) (''2012 Final Rule''), *modified by* 79 FR 50552 (Aug. 25, 2014) (codified at 37 CFR 201.40); 75 FR 43825 (July 27, 2010) (''2010 Final Rule''); 71 FR 68472 (Nov. 27, 2006); 68 FR 62011 (Oct. 31, 2003) (''2003 Final Rule''); 65 FR 64555 (Oct. 27, 2000).

[5] Register of Copyrights, Section 1201 Rulemaking: Fifth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights (Oct. 2012) (''2012 Recommendation''); Recommendation of the Register of Copyrights in RM 2008–8, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (June 11, 2010) (''2010 Recommendation''); Recommendation of the Register of Copyrights in RM 2005–11, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Nov. 17, 2006); Recommendation of the Register of Copyrights in RM 2002–4, Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (Oct. 27, 2003); 65 FR 64555 (Oct. 27, 2000) (final rule including the full text of the Register's recommendation). The final rules and the Register's recommendations can be found at *www.copyright.gov/1201/.*

[6] Subsequently, the Librarian adopted regulatory amendments to reflect the new legislation. *See* 79 FR 50552 (Aug. 25, 2014) (codified at 37 CFR 201.40(b)(3), (c)).

[7] Although it commenced in 2008, the fourth triennial rulemaking did not conclude until 2010.

version adopted in 2012. *See* Public Law 113–144, sec. 2(a).[8] The language of the Unlocking Act makes clear, however, that the Register is to consider any proposal for a cellphone unlocking exemption according to the usual process in this triennial rulemaking. *See* Public Law 113–144, sec. 2(c)(2) (referencing the possibility of a new cellphone unlocking exemption adopted ''after the date of enactment'' of the Unlocking Act); *id.* sec. 2(d)(2) (''Nothing in this Act alters, or shall be construed to alter, the authority of the Librarian of Congress under section 1201(a)(1) of title 17, United States Code.'').

Second, the legislation provides that the circumvention permitted under the reinstated 2010 exemption, as well as any future exemptions to permit wireless telephone handsets or other wireless devices to connect to wireless telecommunications networks, may be initiated by the owner of the handset or device, by another person at the direction of the owner, or by a provider of commercial mobile radio or data services to enable such owner or a family member to connect to a wireless network when authorized by the network operator. Public Law 113–144, sec. 2(a), (c). This directive is permanent, and is now reflected in the relevant regulations.[9] Accordingly, circumvention under any future ''unlocking'' exemption for wireless telephone handsets and other wireless devices adopted by the Librarian may be initiated by the persons Congress identified in the Unlocking Act.

Third, the legislation directs the Librarian of Congress to consider as part of this next triennial rulemaking proceeding whether to ''extend'' the reinstated 2010 cellphone unlocking exemption ''to include any other category of wireless devices in addition to wireless telephone handsets'' based upon the recommendation of the Register of Copyrights, who in turn is to consult with the Assistant Secretary. Public Law 113–144, sec. 2(b). This provision does not alter or expand the Librarian's authority to grant exemptions under section 1201(a)(1), but merely directs the Librarian to exercise his existing regulatory authority to consider the adoption of an exemption for other wireless devices. Accordingly, as part of this rulemaking, the Copyright Office is soliciting and will consider proposals for one or more exemptions to allow unlocking of wireless devices other than wireless telephone handsets.

The Office invites petitions regarding other wireless devices with the caveat that the proposals should be made with an appropriate level of specificity. The evaluation of whether an exemption would be appropriate under section 1201(a)(1)(C) is likely to be different for different types of wireless devices, requiring distinct legal and evidentiary showings. Thus, a petition proposing a general exemption for ''all wireless devices'' or ''all tablets'' could be quite difficult to support, in contrast to a petition that focuses on specific categories of devices, such as all-purpose tablet computers, dedicated e-book readers, mobile ''hotspots,'' smart watches with mobile data connections, etc.

III. Rulemaking Standards

In adopting the DMCA, Congress imposed legal and evidentiary requirements for the section 1201 rulemaking proceeding. Participants in the proceeding are encouraged to familiarize themselves with these requirements, which are summarized below, so they can maximize the effectiveness of their submissions.

A. Burden of Proof

Those who seek an exemption from the prohibition on circumvention bear the burden of establishing that the requirements for granting an exemption have been satisfied. In enacting the DMCA, Congress explained that that ''prohibition [of section 1201(a)(1)] is presumed to apply to any and all kinds of works'' until the Librarian determines that the requirements for the adoption of an exemption have been met with respect to a particular class of works. Commerce Comm. Report at 37. In other words, the prohibition against circumvention applies unless and until the Librarian determines that ''persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition . . . in their ability to make noninfringing uses under this title of a particular class of copyrighted works.'' 17 U.S.C. 1201(a)(1)(C). This approach is also consistent with general principles of agency rulemaking under the Administrative Procedure Act (''APA'').[10] *See* 5 U.S.C. 556(d) (''Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.'').

To satisfy this burden, as the Copyright Office has previously explained, the proponent ''must prove by a preponderance of the evidence that the harm alleged is more likely than not.'' 2010 Recommendation at 10. This requirement stems from the statute, which requires a demonstration that users *are,* or *are likely to be* adversely affected by the prohibition on circumvention. 17 U.S.C. 1201(a)(1)(B) (emphases added). The preponderance of the evidence standard conforms to basic principles of administrative law. The APA provides that a rule may not be issued pursuant to formal agency rulemaking ''except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the *reliable, probative, and substantial* evidence.'' *See* 5 U.S.C. 556(d) (emphasis added); *see also Steadman* v. *SEC,* 450 U.S. 91, 102 (1981) (holding that the APA ''was intended to establish a standard of proof and that the standard adopted is the traditional preponderance-of-the-evidence standard'').

B. De Novo Consideration of Exemptions

Congress made clear in enacting the DMCA that the basis for an exemption must be established *de novo* in each triennial proceeding. *See* Commerce Comm. Report at 37 (explaining that for every rulemaking, ''the assessment of adverse impacts on particular categories of works is to be determined de novo.''). As Congress stressed, ''[t]he regulatory prohibition [of section 1201(a)(1)] is presumed to apply to any and all kinds of works, including those as to which a

See 73 FR 79425 (Dec. 29, 2008); 2010 Final Rule at 43827.

[8] The 2010 rule allowed unlocking of cellphones initiated by the owner of the copy of the handset computer program in order to connect to a wireless network in an authorized manner. 2010 Final Rule at 43839. Based on the record in the 2012 rulemaking proceeding, the 2012 rule ended the exemption with respect to new phones acquired after January 26, 2013 (90 days after the rule went into effect), but permitted the unlocking of older, or ''legacy,'' phones. 2012 Final Rule at 65263–66. Congress enacted the Unlocking Act after public calls for a broader exemption than provided in the 2012 rule. *See* We the People, Making Unlocking Cell Phones Legal, *https://petitions.whitehouse.gov/petition/make-unlocking-cell-phones-legal/1g9KhZG7* (last updated July 25, 2014).

[9] *See* 79 FR at 50554; *see also* 37 CFR 201.40(c) (''To the extent authorized under paragraph (b) of this section, the circumvention of a technological measure that restricts wireless telephone handsets or other wireless devices from connecting to a wireless telecommunications network may be initiated by the owner of any such handset or other device, by another person at the direction of the owner, or by a provider of a commercial mobile radio service or a commercial mobile data service at the direction of such owner or other person, solely in order to enable such owner or a family member of such owner to connect to a wireless telecommunications network, when such connection is authorized by the operator of such network.'').

[10] Congress indicated that the rulemaking under section 1201(a)(1) should be conducted ''as is typical with other rulemaking under title 17.'' Conference Report at 64. Thus, it is appropriate to look to the APA, which governs rulemaking under title 17. *See* 17 U.S.C. 701(e).

waiver of applicability was previously in effect, *unless, and until,* the [Librarian] makes a *new* determination that the adverse impact criteria have been met with respect to a particular class and therefore issues a *new* waiver.'' *Id.* (emphases added). Accordingly, the fact that an exemption has been previously adopted creates no presumption that readoption is appropriate. This means that a proponent may not simply rely on the fact that the Register has recommended an exemption in the past, but must instead produce relevant evidence in each rulemaking to justify the continuation of the exemption.

That said, however, where a proponent is seeking the readoption of an existing exemption, it may attempt to satisfy its burden by demonstrating that the conditions that led to the adoption of the prior exemption continue to exist today (or that new conditions exist to justify the exemption). This could include, for instance, a showing that the cessation of an exemption will adversely impact users' ability to make noninfringing uses of the class of works covered by the existing exemption. Assuming the proponent succeeds in making such a demonstration, it is incumbent upon any opponent of that exemption to rebut such evidence by showing that the exemption is no longer justified.

C. Adverse Effects on Noninfringing Uses

Proponents who seek to have the Librarian exempt a particular class of works from section 1201(a)(1)'s prohibition on circumvention must show: (1) That uses affected by the prohibition on circumvention are or are likely to be noninfringing; and (2) that as a result of a technological measure controlling access to a copyrighted work, the prohibition is causing, or in the next three years is likely to cause, an adverse impact on those uses. *See* 17 U.S.C. 1201(a)(1)(B). These requirements are explained below. The Register also considers potential exemptions under the statutory factors set forth in section 1201(a)(1)(C), as discussed below.

Noninfringing Uses. As noted above, Congress believed that it is important to protect noninfringing uses. There are several types of noninfringing uses that could be affected by the prohibition of section 1201(a)(1), including fair use (delineated in section 107), certain educational uses (section 110), certain uses of computer programs (section 117), and others.

The Register will look to the Copyright Act and relevant judicial precedents when analyzing whether a proposed use is likely to be noninfringing. A proponent must show more than that a particular use could be noninfringing. Instead, the proponent must establish that the proposed use is likely to qualify as noninfringing under relevant law. As the Register has stated previously, there is no ''rule of doubt'' favoring an exemption when it is unclear that a particular use is a fair use. *See* 2012 Recommendation at 7. Rather, the statutory language requires that the use *is* or *is likely* to be noninfringing, not merely that the use might plausibly be considered noninfringing. *See* 17 U.S.C. 1201(a)(1)(C). And, as noted above, the burden of proving that a particular use is or is likely to be noninfringing belongs to the proponent.

Adverse effects. The second requirement is a showing that users of the class of copyrighted works currently are, or are likely in the ensuing three-year period to be adversely affected by the prohibition against circumvention. 17 U.S.C. 1201(a)(1)(C). In weighing adverse effects, the Register must assess, in particular, ''whether the prevalence of . . . technological protections, with respect to particular categories of copyrighted materials, is diminishing the ability of individuals to use these works in ways that are otherwise lawful.'' Commerce Comm. Report at 37.

Congress stressed that the ''main focus of the rulemaking proceeding'' should be on whether a ''substantial diminution'' of the availability of works for noninfringing uses is ''actually occurring'' in the marketplace. House Manager's Report at 6. To prove the existence of such existing adverse effects, it is necessary to demonstrate ''distinct, verifiable and measurable impacts'' occurring in the marketplace, as exemptions ''should not be based upon *de minimis* impacts.'' Committee Report at 37. Thus, ''mere inconveniences'' or ''individual cases'' do not satisfy the rulemaking standard. House Manager's Report at 6.

To the extent that a proponent is relying on claimed future impacts rather than existing impacts, the statute requires the proponent to establish that such future adverse impacts are ''*likely.*'' 17 U.S.C. 1201(a)(1)(B) (emphasis added). An exemption may be based upon anticipated, rather than actual, adverse impacts ''only in extraordinary circumstances in which the evidence of likelihood of future adverse impact during that time period is highly specific, strong and persuasive.'' House Manager's Report at 6.

The proponent must also demonstrate that the technological protection measure is the *cause* of the claimed adverse impact. ''Adverse impacts that flow from other sources, or that are not clearly attributable to implementation of a technological protection measure, are outside the scope of the rulemaking.'' Commerce Comm. Report at 37. For instance, adverse effects stemming from ''marketplace trends, other technological developments, or changes in the roles of libraries, distributors or other intermediaries'' are not cognizable harms under the statute. House Manager's Report at 6.

D. Statutory Factors

In conducting the rulemaking, the Librarian must also examine the statutory factors listed in section 1201(a)(1)(C). Those factors are: ''(i) The availability for use of copyrighted works; (ii) The availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian considers appropriate.'' 17 U.S.C. 1201(a)(1)(C). In some cases, weighing these factors requires the consideration of the benefits that the technological measure brings with respect to the overall creation and dissemination of works in the marketplace. As Congress explained, ''the rulemaking proceedings should consider the positive as well as the adverse effects of these technologies on the availability of copyrighted materials.'' House Manager's Report at 6.

E. Defining a Class

Section 1201(a)(1) specifies that the exemption adopted as part of this rulemaking must be defined based on ''a particular *class* of works.'' *See* 17 U.S.C. 1201(a)(1)(B) (emphasis added). Thus, a major focus of the rulemaking proceeding is how to define the ''class'' of works for purposes of the exemption. The starting point for any definition of a ''particular class'' under section 1201(a)(1) is the list of categories appearing in section 102 of title 17, such as literary works, musical works, and sound recordings. House Manager's Report at 7. But, as Congress made clear, ''the 'particular class of copyrighted works' [is intended to] be a *narrow and focused subset* of the broad categories of works . . . identified in section 102 of the Copyright Act.'' Commerce Comm. Report at 38 (emphasis added). For

example, while the category of ''literary works'' under section 102(a)(1) ''embraces both prose creations such as journals, periodicals or books, and computer programs of all kinds,'' Congress explained that ''[i]t is exceedingly unlikely that the impact of the prohibition on circumvention of access control technologies will be the same for scientific journals as it is for computer operating systems.'' House Manager's Report at 7. Thus, ''these two categories of works, while both 'literary works,' do not constitute a single 'particular class' for purposes of'' section 1201(a)(1). *Id.*

At the same time, Congress emphasized that the Librarian ''should not draw the boundaries of 'particular classes' too narrowly.'' *Id.* Thus, while the category of ''motion pictures and other audiovisual works'' in section 102 ''may appropriately be subdivided, for purposes of the rulemaking, into classes such as 'motion pictures,' 'television programs,' and other rubrics of similar breadth,'' Congress made clear that it would be inappropriate ''to subdivide overly narrowly into particular genres of motion pictures, such as Westerns, comedies, or live action dramas.'' *Id.*

The determination of the appropriate scope of a ''class of works'' recommended for exemption may also take into account the adverse effects an exemption may have on the market for or value of copyrighted works. For example, the class might be defined in part by reference to the medium on which the works are distributed, or even to the access control measures applied to them. But classifying a work *solely* by reference to the medium on which the work appears, or the access control measures applied to the work, would be inconsistent with Congress' intent in directing the Register and Librarian to define a ''particular class'' of works.[11]

Ultimately, ''[d]eciding the scope or boundaries of a 'particular class' of copyrighted works as to which the prohibition contained in section 1201(a)(1) has been shown to have had an adverse impact is an important issue to be determined during the rulemaking proceedings.'' House Manager's Report at 7. Accordingly, the Register will look to the specific record before her to assess the proper scope of the class for a recommended exemption.

IV. Rulemaking Process

A. Prior Rulemakings

The administrative process employed in the fifth triennial rulemaking largely paralleled that of prior earlier rulemakings. *See generally* 79 FR 60398 (Sept. 29, 2011). First, the Copyright Office initiated the rulemaking process by calling for the public to submit proposals for exemptions. *Id.* Notably, the Office required proponents to provide complete legal and evidentiary support for their proposals at the outset of the rulemaking process, in the proponents' initial submissions. *See id.* at 60403 (stressing that ''[p]roponents should present their *entire* case in their initial comments'' and explaining that ''the best evidence in support of an exemption would consist of concrete examples or specific instances'' of adverse effects on noninfringing uses).[12] After receiving the initial submissions containing the proposed exemptions and posting them on its Web site, the Office published a notice of proposed rulemaking describing the proposals and inviting interested parties to submit comments both in support of and in opposition to those proposals. 76 FR 78866, 78868 (Dec. 20, 2011) (asking for ''additional factual information that would assist the Office in assessing whether a Proposed Class is warranted for exemption and, if it is, how such a class already proposed should be properly tailored''). The Office then invited reply comments in support of and in opposition to the proposed classes, limited to addressing the points made earlier in the proceeding. *Id.* at 78868.

After the close of the comment period, the Office held a series of public hearings to further explore the proposed exemptions. 77 FR 15327 (Mar. 15, 2012). The first hearing was a ''technology hearing'' conducted in Washington, DC in May 2012, and was limited to demonstrations of the ''technologies pertinent to the merits of the proposals.'' *Id.* at 15328.[13] The Office requested that ''[w]itnesses wishing to present demonstrations . . . do so at this hearing rather than at the other hearings, in order to permit the other hearings to proceed on schedule.'' *Id.* Following the technology hearing, the Office held additional hearings in Los Angeles, California, and Washington, DC to hear testimony regarding the exemptions. *Id.* Those hearings ''consist[ed] of presentations of facts and legal argument, followed by questions from Copyright Office staff.'' *Id.*

After the hearing, the Office directed specific follow-up questions to a number of hearing participants in an effort to address unresolved questions regarding the proposed exemptions.[14] Then, based on the resulting record before the Office, and following consideration of the Assistant Secretary's views,[15] the Register provided a recommendation to the Librarian as to the classes of works that should be entitled to an exemption from section 1201(a)'s prohibition on circumvention.[16] The Librarian, after consideration of that recommendation, adopted a final rule announcing the exemptions. 77 FR 65260 (Oct. 26, 2012).

B. Sixth Triennial Rulemaking

The Copyright Office is modifying its administrative process for the sixth triennial rulemaking. As in prior rulemakings, the overall aim of the process is to create a comprehensive record on which the Register can base her recommendation and the Librarian, in turn, can adopt final exemptions. The Office believes that the procedural changes it is making will further that objective by, among other things, making the process more accessible and understandable to the public, allowing greater opportunity for participants to coordinate their efforts, encouraging

[11] In the earliest rulemakings, consistent with the records in those proceedings, the Register rejected proposals to classify works by reference to the type of user or use (*e.g.,* libraries, or scholarly research). In the 2006 proceeding, however, the Register concluded, based on the record before her, that in appropriate circumstances a ''class of works'' that is defined initially by reference to a section 102 category of works or subcategory thereof may additionally be refined not only by reference to the medium on which the works are distributed or particular access controls at issue, but also by reference to the particular type of use and/or user to which the exemption shall be applicable. The Register determined that there was no basis in the statute or in the legislative history that required her to delineate the contours of a ''class of works'' in a factual vacuum. At the same time, tailoring a class solely by reference to the use and/or user would be beyond the scope of what a ''particular class of works'' is intended to be. *See* 2006 Recommendation at 9–10, 15–20.

[12] In the fifth triennial rulemaking, the Copyright Office provided a mechanism allowing for the submission of untimely proposed exemptions based on exceptional or unforeseen circumstances. 76 FR 60398 at 60404. However, the revised process described herein will make it substantially easier for a party to submit a proposal, as it does not require submission of a full-fledged case at the outset. Thus, the Office is not providing for a specific process for untimely petitions. The Office nevertheless reserves its ability to exercise discretion to address unanticipated concerns as appropriate.

[13] This was the first time in a triennial rulemaking that the Office had held a hearing specifically focused on the technologies involved.

[14] The post-hearing questions and responses can be found on the Copyright Office's Web site at *http://copyright.gov/1201/2012/responses/.*

[15] See Letter from Lawrence E. Strickling, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Maria Pallante, Register of Copyrights, Sept. 21, 2012, *available at http://copyright.gov/1201/2012/2012_NTIA_Letter.pdf.*

[16] The Register's 2012 recommendation can be found at *http://www.copyright.gov/1201/2012/Section_1201_Rulemaking_2012_Recommendation.pdf.*

participants to submit effective factual and legal in support for their positions, and reducing administrative burdens on both the participants and the Office.

We describe below the administrative process that will be employed for this rulemaking.

1. Petition Phase

With this notice of inquiry, the Copyright Office is calling for the public to submit petitions for proposed exemptions. In a departure from prior rulemakings, the Office is not requiring the proponent of an exemption to deliver the complete legal and evidentiary basis for its proposal with its initial submission. Instead, the purpose of the petition is to provide the Office with basic information regarding the essential elements of the proposed exemption, both to confirm that the threshold requirements of section 1201(a) can be met, and to aid the Office in describing the proposal for the next, more substantive, phase of the rulemaking proceeding. The petitions should comply with the below requirements. To assist participants, the Office has posted a recommended template form on its Web site, at *http://www.copyright.gov/1201.* If there are extenuating circumstances such that a participant cannot meet one or more of the requirements, the participant should contact the Copyright Office using the above contact information.

a. Petitions requesting a proposed exemption should be limited to five pages in length (which may be single-spaced but should be in at least 12-point type).

b. Petitions should address a single proposed exemption. That is, a separate petition must be filed for *each* proposal. Although a single petition may not encompass more than one proposed exemption, the same party may submit multiple petitions. The Office will be requiring participants in later rounds also to make separate submissions with respect to each proposed exemption (or group of related exemptions). The Office anticipates that it will receive a significant number of submissions, and requiring separate submissions for each proposed exemption will help both participants and the Office keep better track of the record for each proposed exemption. In the past, submitters sometimes combined their views on multiple proposals in a single filing, making it difficult and time-consuming for other participants and the Office to sort out which arguments and evidence pertained to which. Separating the submissions by proposal will allow for more focused responses and replies and a clearer record overall.

The Office also urges submitters to consider the appropriate level of specificity for their petitions, including the particular type of copyrighted work, and the specific medium or device at issue. For instance, as noted above, with respect to petitions to unlock wireless devices, the Office encourages participants to submit petitions that clearly identify a particular category of device.

c. The petition should concisely address each of the following elements of the proposed exemption, in separate sections as identified below, and in the below order, bearing in mind that more complete information—including legal and evidentiary support—will be permitted in later rounds of submissions.

Petition Requirements

1. Submitter and Contact Information

The petition should clearly identify the submitter and, if desired, a means for others to contact the submitter or an authorized representative of the submitter by either email or telephone. Petitions will be published on the Copyright Office's Web site, and providing such contact information in the petition will allow parties with aligned interests to more easily coordinate their efforts during later stages of the rulemaking should they wish to do so.[17] The Office believes that the opportunity for those with substantially similar proposals to combine their efforts with respect to their legal and evidentiary submissions may yield a more complete record in some cases.[18] In addition, law clinics and other organizations that may be in a position to offer assistance to others will be aware of the proposals before full submissions are due.[19]

2. Brief Overview of Proposed Exemption

The submitter should provide a brief statement describing the overall proposed exemption (ideally in one to three sentences), explaining the type of copyrighted work involved, the technological protection measure (''TPM'') (or access control) sought to be circumvented, and any limitations or conditions that would apply (*e.g.,* a limitation to certain types of users or a requirement that the circumvention be for a certain purpose). While the petition may seek to propose precise regulatory language for the exemption, it need not do so. The petition should focus instead on providing a clear description of the specific elements of the proposed exemption. The Office notes that the specific language for the regulation that the Office ultimately recommends to the Librarian will necessarily be tied to the full record at the end of the proceeding. Thus, at the petition phase, particularized regulatory language matters less than the substance of the proposal.

3. Copyrighted Works Sought to be Accessed

The petition must identify the specific class, or category, of copyrighted works that the proponent wishes to access through circumvention. The works identified should reference a category of works referred to in section 102 of title 17 (the Copyright Act) (*e.g.,* literary works, audiovisual works, etc.). Unless the submitter seeks an exemption for an entire category in section 102, the description of works should be further refined to identify the particular subset of work to be subject to the exemption (*e.g.,* e-books, computer programs, or motion pictures) and, if applicable, by reference to the medium or device on which the works reside (*e.g.,* motion pictures distributed on DVDs).

4. Technological Protection Measure(s)

The petition should describe the TPM that controls access to the work. The submitter does not need to describe the specific technical details of the access control measure, but should offer sufficient information to allow the Office to understand the basic nature of the technological measure and why it prevents open access to the work (*e.g.,* the encryption of motion pictures on DVD using the Content Scramble System or the cryptographic authentication protocol on a garage door opener).

5. Noninfringing Uses

The petition must also identify the specific noninfringing uses of copyrighted works sought to be facilitated by circumvention (*e.g.,* enabling accessibility for disabled users, or copying a lawfully owned computer program for archival purposes), and the statutory or doctrinal basis or bases that

[17] Note that apart from any contact information set forth in the petition itself, the Office requires the provision of certain contact information, including name, address, phone number, and email address, as part of the electronic submission process so that the Office may contact submitters (for example, to confirm receipt of the submission). Apart from the name of the submitter, the information requested as part of the electronic submitting process (as opposed to information contained in the petition) is not posted online.

[18] Those who oppose exemptions, too, are encouraged to coordinate their efforts at the opposition stage if they wish.

[19] Parties should keep in mind, however, that any private, confidential, or personally identifiable information appearing in their petition will be accessible to the public.

support the view that the uses are or are likely noninfringing (*e.g.,* because it is a fair use under section 107, or a permissible use under section 117). The description should include a brief explanation of how, and by whom, the works will be used. But while the petition must clearly articulate the proposed use and the legal basis for the claim that it is noninfringing under current law, it need not provide fully developed legal or factual arguments in support of the claim. Such arguments and additional legal support can and should be fleshed out in the proponents' later submissions.

6. Adverse Effects

Finally, the petition needs to describe how the inability to circumvent the TPM has or is likely to have adverse effects on the proposed noninfringing uses (*e.g.,* the TPM prevents connection to an alternative wireless communications network or prevents an electronic book from being accessed by screen reading software for the blind). The description should include a brief explanation of the negative impact on uses of copyrighted works. The adverse effects can be current, or may be adverse effects that are likely to occur during the next three years, or both. Again, while the petition must specifically describe the adverse effects of the TPM, it need not provide a full evidentiary basis for that claim. Such evidence should be presented during the public comment phase of the rulemaking.

While the Office intends to err on the side of inclusiveness in interpreting petitions for proposed exemptions, it reserves the right to decline to proceed with further consideration of a proposed exemption if the proponent fails to identify the essential elements required for an exemption. In addition, if it is apparent from the face of the petition that the proposed exemption cannot be granted as a matter of law, the Office may decline to further consider the proposal. *See, e.g.,* 77 FR 65260 at 65271–72 (concluding that a proposed exemption ''to access public domain works'' was beyond the scope of the rulemaking proceeding since section 1201's prohibition on circumvention applies only to works protected under title 17). Any such determinations will be noted in the **Federal Register** notice announcing the proposed exemptions to be considered.

2. Public Comment Phase

The Copyright Office will study the petitions and publish a notice of proposed rulemaking identifying the proposed exemptions and initiating three rounds of public comment. The Office plans to consolidate or group related and/or overlapping proposed exemptions where possible to streamline the rulemaking process and encourage joint participation among parties with common interests (though such collaboration is not required). As in previous rulemakings, the exemptions as described in the notice of proposed rulemaking will represent only a starting point for further consideration in the rulemaking proceeding, and will be subject to further refinement based on the record. *See* 76 FR 78866, 78868 (Dec. 20, 2011). The notice of proposed rulemaking will also provide guidance regarding specific areas of legal and factual interest for the Office with respect to each proposed exemption, and suggest particular types of evidence that participants may wish to submit for the record. In the past, some submissions have been lacking in evidentiary support, which is critical to the process. The Office hopes that additional guidance as to the types of evidence that might be expected or useful vis-à-vis particular proposals will yield a more robust record.

To ensure a clear and definite record for each of the proposals, as noted above, both proponents and opponents are required to provide separate submissions for each proposed exemption (or group of related exemptions) during each stage of the public comment period. Although participants may submit or comment on more than one proposal, a single submission may not address more than one exemption. The Office acknowledges that this format may require some parties to repeat certain general information (*e.g.,* about their organization) across multiple submissions, but the Office believes that the administrative benefits for both participants and the Office of creating self-contained, separate records for each proposal will be worth the modest amount of added effort involved.

In an additional departure from past rulemakings, the first round of public comment will be limited to submissions from the proponents (*i.e.,* those parties that proposed exemptions during the petition phase) and other members of the public that *support* the adoption of a proposed exemption, as well as any parties that neither support nor oppose an exemption but seek only to share pertinent information about a specific proposal. These submissions may suggest refinements to the proposed exemptions described in the notice of proposed rulemaking, but may not propose entirely new exemptions. The proponents should present their *entire* case for the exemption during this round of public comment (other than responding to any opponents), including the complete legal and evidentiary basis for the proposal. In the notice of proposed rulemaking, the Office will offer additional guidance as to the format and content of these submissions, including instructions for providing documentary evidence.

In addition to their primary written submissions, where it may be helpful to establishing their case, proponents will have the option of submitting multimedia presentations of the proposed noninfringing use, adverse effects, and/or other pertinent material. More specific guidance with respect to the kinds of demonstrations the Office would find useful and the format and method for submitting, as well as the means to access such demonstrations, will be provided in the notice of proposed rulemaking.[20]

The second round of public comment will be limited to submissions from opponents of the proposed exemptions. These, too, may include documentary evidence and/or multimedia presentations submitted in accordance with Office guidelines. The third round of public comment will be limited to supporters of particular proposals, or parties that neither support nor oppose a proposal, in either case who seek to reply to points made in the earlier rounds of comments. Reply comments shall not raise new issues, but should be limited to addressing arguments and evidence presented by others.

3. Public Hearings

The Copyright Office intends to hold public hearings following the last round of public comments. The hearings are expected to be conducted in Washington DC and California, although the specific dates and locations have not yet been determined. A separate notice providing details about the hearings and how to participate will be published in the **Federal Register**. The Office expects to identify specific items of inquiry to be addressed during the hearings, and may offer particular participants the opportunity to demonstrate technologies that are unknown or are unclear to the Office.

4. Post-Hearing Questions

Following the hearings, the Copyright Office may request additional information with respect to particular proposals from parties who have been involved in the rulemaking process. While this has been done in the past,

[20] The notice of proposed rulemaking will also provide instructions for parties who seek to present demonstrations, but lack the means to record them.

the Office may rely on this process somewhat more in this proceeding to the extent it believes it would be useful to provide a final opportunity for proponents, opponents or others to supply missing information for the record or otherwise resolve issues that the Office believes are material to particular exemptions. Such requests for responses to questions will take the form of a letter from the Copyright Office and will be addressed to individual parties involved in the proposal as to which more information is sought. While responding to such a request will be voluntary, any response will be need to be supplied by a specified deadline. After the receipt of all responses, the Office will post the questions and responses on the Office's Web site as part of the public record.

5. Recommendation and Final Rule

Finally, in accordance with the statutory framework, the Register will review the record, consult with the Assistant Secretary, and prepare a recommendation with proposed regulations for the Librarian. *See* Conference Report at 64. Thereafter, the Librarian will make a final determination and publish the exemptions in the **Federal Register** for later codification in title 37 of the CFR 17 U.S.C. 1201(a)(1)(D).

6. Schedule of Proceedings

As noted above, petitions for proposed rulemaking are due on November 3, 2014. After the Office publishes the notice of proposed rulemaking, it intends to give proponents at least 45 days to prepare and file their evidentiary submissions. The opponents will then have at least 45 days to respond, followed by a reply period of at least 30 days. The Office will provide at least 30 days' notice before the public hearings begin. Parties who receive post-hearing questions will be given at least 14 days to respond. The precise dates for these future aspects of the proceeding will be provided in subsequent **Federal Register** notices.

Dated: September 11, 2014.

Jacqueline C. Charlesworth,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2014–22082 Filed 9–16–14; 8:45 am]

BILLING CODE 1410–30–P

LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 201

[Docket No. 2014–08]

Fees for Submitting Corrected Electronic Title Appendices

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Copyright Office published elsewhere in this issue of the **Federal Register** a final rule amending its regulations to allow remitters to submit title lists in electronic format when recording a document pertaining to 100 or more copyrighted works. As the rule explains, when a remitter submits an electronic title list along with a document for recordation, the Office will use the information in the electronic list to populate its online Public Catalog. In response to comments received during the electronic title list rulemaking, the Office also established a process to allow a remitter to correct inaccuracies in the Office's online Public Catalog resulting from errors in an electronic list submitted by the remitter. In this separate notice of proposed rulemaking, the Office seeks to establish a new fee for this correction service at the rate of seven dollars per corrected title.

DATES: Written comments are due on or before October 17, 2014.

ADDRESSES: All comments shall be submitted electronically. A comment submission page is posted on the Copyright Office Web site at *http://copyright.gov/rulemaking/etitle-fees/.* The Web site interface requires commenting parties to complete a form specifying their name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: A Portable Document File (PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The maximum file size is 6 megabytes. The form and face of the comments must include both the name of the submitter and organization. The Office will post the comments publicly on the Office's Web site in the form that they are received, along with associated names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202–707–8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Sarang V. Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov* or by telephone at 202–707–8350, or Abi Oyewole, Attorney-Advisor, by email at *aoye@loc.gov* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

Over the past several years, the Copyright Office has sought public input on technological upgrades to the recordation function. *See* 78 FR 17722 (Mar. 22, 2013); 79 FR 2696 (Jan. 15, 2014). In addition to seeking written comments, the Office has held focused discussions with copyright owners, users of copyright records, technical experts, public interest organizations, lawyers, and professional and industry associations regarding the same. *See* 79 FR 6636 (Feb. 4, 2014). Participants in these processes have expressed a number of concerns about the current recordation system, including frustration with the submission process, the amount of time the Office requires to record remitted documents, and the searchability of the public record. These problems are related in part to the fact that recordation remains a paper-driven process (in contrast to most registration transactions, which occur electronically).[1]

To date, recordation specialists have had to review paper documents and manually transcribe selected information from the documents into an electronic format in order to permit indexing in the Office's online Public Catalog. Among the information that must be transcribed are the titles of copyrighted works associated with a document submitted for recordation, which are typically presented in a list appended to the document, referred to informally as a ''title appendix.'' A title appendix associated with a document can include hundreds, or even thousands, of titles. The Office attributes the long processing times associated with document recordation in considerable part to the manual entry of these titles. In an effort to reduce processing time for recorded document submissions, on July 16, 2014, the

[1] For further information, see the comments obtained during the Copyright Office's two-year Special Projects process, particularly the Special Project on Technical Upgrades to Registration and Recordation Functions. Comments pertaining to the Special Project on Technological Upgrades to Registration and Recordation Functions are available on the Copyright Office Web site at *http://www.copyright.gov/_upgrades/comments/.*

Office proposed a new rule that would, among other things, allow remitters to submit electronic title appendices containing 100 or more titles in electronic format. *See* 79 FR 41470 (July 16, 2014).

The Recording Industry Association of America, Inc., (''RIAA'') commented on the proposed rule, stating, among other things, that the Office should ''provide for a mechanism or procedure by which a remitter can easily correct any errors to the electronic title list that the remitter has supplied.'' [2] The Office agreed, and has adopted such a procedure as part of the final electronic title list rule, to be codified at 37 CFR 201.4(c)(4)(v). *See* the final rule entitled ''Changes to Recordation Practices'' published elsewhere in this issue of the **Federal Register**. Under the new § 201.4(c)(4)(v), if a remitter discovers that an error in an electronic title list has led to the inaccurate cataloging of a recorded document, it may submit a corrected title list to the Copyright Office in accordance with the procedures set forth in the rule. However, to avoid delay in implementing the electronic title list option, the Office decided to issue that final rule without imposition of a fee for corrections until such time as a fee is set in accordance with this separate notice.[3]

II. Discussion

Section 708(a) of title 17 authorizes the Register to fix fees for services other than those enumerated in paragraphs (1)–(9) of section 708(a) based on cost and without prior submission to Congress.[4] *See* 17 U.S.C. 708(a). Fees for Office services that the Register has the discretion to establish based on cost and without Congressional review include fees for copying Office records, fees for mail and delivery services, and fees for special handling. *See* 79 FR 15910, 15916–17 (Mar. 24, 2014). With the rule proposed herein, the Office seeks to adopt a new fee to recover costs associated with the correction of errors in the online Public Catalog following recordation of a document where the errors stem from a remitter's inaccurate electronic title list.

Based on a cost analysis, the Office believes that the initial fee for this service should be established at seven dollars per corrected title. The Office arrived at the seven dollar amount by considering the various personnel and systems costs associated with providing the new service. To process a corrected title list, senior recordation staff must first review the nature and extent of corrections, and the Office's accounting staff must process the payment associated with the submission. Then, the corrections must be individually transcribed into the Office's online Public Catalog; this is a labor-intensive process that involves searching for the original entry by volume and document number, finding the title or titles that require correction, and amending and/or adding new titles to the database. Once entered into the online Public Catalog, the resulting changes must be checked to ensure the correction process was successful.

After evaluating the anticipated personnel and overhead expenses that will be incurred to accomplish the above tasks, the Office estimates the average cost to be seven dollars per corrected title. The Office therefore proposes to establish the new fee at that amount.

List of Subjects in 37 CFR Part 201

Copyright.

Proposed Regulations

For the reasons set forth in the preamble, the Copyright Office proposes amending 37 CFR part 201 as follows:

PART 201—GENERAL PROVISIONS

■ 1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

■ 2. In § 201.3, revise paragraph (c)(16) to read as follows:

§ 201.3 Fees for registration, recordation, and related services, special services, and services performed by the Licensing Division.

* * * * *

Registration, recordation and related services	Fees ($)
* * * * * * *	
(16) Recordation of document, including a notice of intention to enforce (single title)	105
Additional titles (per group of 1 to 10 titles)	35
Correction of online Public Catalog data due to erroneous electronic title submission (per title)	7
* * * * * * *	

* * * * *

■ 3. In § 201.4, as added elsewhere in this issue of the **Federal Register**, effective October 17, 2014, revise the last sentence of paragraph (c)(4)(v) to read as follows:

§ 201.4 Recordation of transfers and certain other documents.

* * * * *

(c) * * *

(4) * * *

(v) * * * Upon receipt of a corrected electronic list in proper form and the appropriate fee, the Office will proceed to correct the data in the online Public Catalog, and will make a note in the record indicating that the corrections were made and the date they were made.

* * * * *

Dated: September 11, 2014.

Jacqueline C. Charlesworth,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2014–22232 Filed 9–16–14; 8:45 am]

BILLING CODE 1410–30–P

[2] Recording Industry Ass'n of Am., Inc., Comments Submitted in Response to U.S. Copyright Office's July 16, 2014 Notice of Proposed Rulemaking (Aug. 15, 2014) (''RIAA Comments''), *available at http://copyright.gov/rulemaking/recordation-practices/docket2014-4/comments/RIAA.pdf.*

[3] There are already fees in effect for the recordation of the document and processing of associated titles. *See* 37 CFR 201.3(c)(16).

[4] Fees for core Office services such as registration of a claim, recording a transfer of copyright ownership or other document, issuance of a certificate of registration, and certain other services are to be submitted by the Register to Congress before they take effect. *See* 17 U.S.C. 708(a)–(b).

LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 201

[Docket No. 2012–5]

Verification of Statements of Account Submitted by Cable Operators and Satellite Carriers

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: On May 9, 2013 the U.S. Copyright Office issued a notice of proposed rulemaking and request for comments concerning a new regulation that will allow copyright owners to audit the statements of account and royalty fees that cable operators and satellite carriers deposit with the Office for secondary transmissions of broadcast programming made pursuant to statutory licenses. The Office has revised the proposed regulation to address certain logistical concerns and based on further input that it has received from copyright owners, cable operators, satellite carriers, and accounting professionals. The Office seeks comments on the revised proposal before it is adopted as a final rule.

DATES: Comments must be made in writing and must be received in the U.S. Copyright Office no later than October 17, 2014.

ADDRESSES: The U.S. Copyright Office strongly prefers that comments be submitted electronically. A comment page containing a comment submission form is posted on the Office's Web site at *http://copyright.gov/docs/soaaudit/soa_audit.html.* The Web site interface requires submitters to complete a form specifying a name and organization, as applicable, and to upload comments as an attachment. To meet accessibility standards, all comments must be uploaded in a single file in either Portable Document Format (PDF) that contains searchable, accessible text (not an image); Word format (DOC or DOCX); WordPerfect format (WPD); Rich Text Format (RTF); or ASCII text file (not a scanned document). The maximum file size for comments is six megabytes (MB). The name of the commenter and organization should appear on both the form and on the comment itself. All comments will be posted publicly on the Office's Web site exactly as they are received, along with names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202–707–8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at *jcharlesworth@loc.gov,* or by telephone at 202–707–8350; Erik Bertin, Assistant General Counsel, by email at *ebertin@loc.gov,* or by telephone at 202–707–8350; or Sy Damle, Special Advisor to the General Counsel, by email at *sdam@loc.gov,* or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

Sections 111 and 119 of the Copyright Act (the ''Act''), Title 17 of the United States Code, allow cable operators and satellite carriers to retransmit programming that broadcast stations transmit on over-the-air broadcast signals. To use these statutory licenses, cable operators and satellite carriers are required to file statements of account (''SOAs'') and deposit royalty fees with the U.S. Copyright Office (''Office'') on a semi-annual basis. The Office invests these royalties in United States Treasury securities pending distribution of the funds to copyright owners that are entitled to receive a share of the royalties.

The Satellite Television Extension and Localism Act of 2010 (''STELA''), Public Law 111–175, amended the Act by directing the Register of Copyrights to issue regulations to allow copyright owners to audit the SOAs and royalty fees that cable operators and satellite carriers file with the Office. Section 119(b)(2) of the Act directs the Register to ''issue regulations to permit interested parties to verify and audit the statements of account and royalty fees submitted by satellite carriers under this subsection.'' 17 U.S.C. 119(b)(2). Similarly, section 111(d)(6) directs the Register to ''issue regulations to provide for the confidential verification by copyright owners whose works were embodied in the secondary transmissions of primary transmissions pursuant to [section 111] of the information reported on the semiannual statements of account filed under this subsection for accounting periods beginning on or after January 1, 2010, in order that the auditor designated under subparagraph [111(d)(6)(A)] is able to confirm the correctness of the calculations and royalty payments reported therein.'' 17 U.S.C. 111(d)(6).

The Office began working on its initial draft for this procedure in 2011. The initial draft was based on similar audit regulations that the Office developed for parties that make ephemeral recordings or transmit digital sound recordings under 17 U.S.C. sections 112(e) and 114(f), respectively, or manufacture, import, and distribute digital audio recording devices under 17 U.S.C. chapter 10.

On January 31, 2012 the Office received a Petition for Rulemaking, which was filed by a group of copyright owners.[1] The copyright owners urged the Office to adopt regulations that would allow them to audit the SOAs filed by cable operators and satellite carriers, and they provided the Office with proposed language for each regulation. *See* Petition at 1–4.

On June 14, 2012, the Office issued a Notice of Proposed Rulemaking that set forth its initial proposal for the audit procedure (the ''First Proposed Rule''). *See* 77 FR 35643 (June 14, 2012). The Office received extensive comments from groups representing copyright owners,[2] cable operators,[3] and individual companies that retransmit broadcast programming under sections 111 or 119 of the Act, namely, AT&T, Inc., DIRECTV, LLC, and DISH Network L.L.C.[4]

In lieu of reply comments, DIRECTV, the NCTA, and a group representing certain copyright owners[5] submitted a joint proposal for revising the First Proposed Rule. This group referred to themselves collectively as the ''Joint Stakeholders,'' and they urged the Office to incorporate their suggestions

[1] This group included the Program Suppliers (commercial entertainment programming), Joint Sports Claimants (professional and college sports programming), National Association of Broadcasters (''NAB'') (commercial television programming), Commercial Television Claimants (local commercial television programming), Broadcaster Claimants Group (U.S. commercial television stations), American Society of Composers, Authors and Publishers (''ASCAP'') (musical works included in television programming), Broadcast Music, Inc. (''BMI'') (same), Public Television Claimants (noncommercial television programming), Public Broadcasting Service (''PBS'') (same), National Public Radio (''NPR'') (noncommercial radio programming), Canadian Claimants (Canadian television programming), and Devotional Claimants (religious television programming).

[2] This group included the Program Suppliers, Joint Sports Claimants, Commercial Television Claimants, Broadcaster Claimants Group, ASCAP, BMI, SESAC, Inc., Public Television Claimants, Canadian Claimants, NPR, and Devotional Claimants. The NAB and PBS did not submit comments in response to the First Proposed Rule.

[3] The National Cable & Telecommunications Association (''NCTA'') and the American Cable Association (''ACA'') filed comments on the First Proposed Rule on behalf of cable operators.

[4] Citations to the comments and reply comments submitted in response to the First Proposed Rule are abbreviated ''[Name of Party] First Comment'' and ''[Name of Party] First Reply.''

[5] The copyright owners that joined the NCTA and DIRECTV in submitting the Joint Stakeholders' First Submission include the Program Suppliers, Joint Sports Claimants, ASCAP, BMI, SESAC, Public Television Claimants, Canadian Claimants Group, Devotional Claimants, and NPR. The Commercial Television Claimants, the Broadcaster Claimants Group, the NAB, and PBS did not join their fellow copyright owners in submitting this proposal.

''as promptly as possible after receiving any further public comment.'' JS First Submission at 1.[6] The Office also received reply comments from AT&T. AT&T explained that it was aware of the Joint Stakeholders' negotiations and the ''potential areas of agreement'' among the parties, but stated that it did not have a sufficient amount of time for ''meaningful engagement'' with the group. AT&T First Reply at 1. Therefore, AT&T urged the Office to publish the Joint Stakeholders' proposal ''for further comment by other interested parties who were not parties to the agreement.'' *Id.*

The Office carefully studied the Joint Stakeholders' proposal and the other comments and reply comments submitted in response to the First Proposed Rule. The Joint Stakeholders' proposal addressed many of the concerns that the parties raised in their initial comments. The Office therefore incorporated most of the Joint Stakeholders' suggestions into a revised proposed regulation (the ''Second Proposed Rule'').

On May 9, 2013, the Office published the Second Proposed Rule in the **Federal Register** and invited AT&T, DISH, the ACA, the Broadcaster Claimants Group, the Commercial Television Claimants, and other interested parties to comment on the proposed regulation. The Office also invited reply comments from the Joint Stakeholders and other interested parties. *See* 78 FR 27137, 27138 (May 9, 2013). The Office received comments from AT&T and the ACA, and it received reply comments from the ACA, the NCTA, and a group representing the copyright owners (''Copyright Owners'') that negotiated the Joint Stakeholders' Proposal with the NCTA and DIRECTV.[7] The parties raised a number of complex issues, including issues of first impression that were not addressed in the comments or reply comments submitted in response to the First Proposed Rule.

On December 26, 2013, the Office issued an interim rule that addresses a procedural issue that was not contested by the parties (the ''Interim Rule''). Specifically, the Interim Rule allows copyright owners to identify any SOAs from accounting periods beginning on or after January 1, 2010 that they intend to audit. At the same time, it provides licensees with advance notice of the SOAs that will be subject to audit when the final rule goes into effect. *See* 78 FR 28257 (Dec. 26, 2013).

After analyzing the latest round of comments, the Office identified a number of issues that were not addressed in the First or Second Proposed Rules or in the comments submitted in response to those proposals. Because the Office believed these issues might be narrowed through group discussion, it decided to convene a public roundtable before issuing another notice of proposed rulemaking. *See* 79 FR 31992 (June 3, 2014). During the roundtable the Office received valuable input from parties that previously submitted comments in this proceeding, including the Motion Picture Association of America (''MPAA''), the Commissioner of Baseball, the NCTA, the ACA, and DIRECTV. The Office also received guidance from Crunch Digital, a company that conducts audits on behalf of content owners and licensees in the music industry.

The issues discussed at the roundtable are summarized in the Office's **Federal Register** notice dated June 3, 2014 (the ''Roundtable Notice''). The most significant concern was the potential for backlogs to develop as a result of the limit on the number of SOAs that could be audited at any one time under the existing proposal.[8] The Office also expressed concern about the accounting standards that should be applied during the audit, the limitation on *ex parte* communications between the auditor and the copyright owners, the amount of time allocated for consultations between the auditor and the licensee, and the procedure for allocating the costs of the audit between the copyright owners and the licensee. *See* 79 FR at 31994–95.

Following the roundtable, the Joint Stakeholders consulted with each other regarding three of these issues, namely: (i) Requiring an initial consultation between the auditor and a representative of the licensee and the participating copyright owners prior to the commencement of an audit; (ii) the accounting standard that should govern the audit; and (iii) the procedure for allocating the cost of an audit between the participating copyright owners and the licensee. On July 31, 2014, the Joint Stakeholders informed the Office that they had reached a consensus on two of these issues and they offered specific recommendations for modifying certain aspects of the proposed rule.[9] JS Second Submission at 1–2.

After reviewing the comments and reply comments submitted in response to the Second Proposed Rule, the input provided during the roundtable, and the Joint Stakeholders' Second Submission, the Office made several changes to the proposed rule (the ''Third Proposed Rule'').[10] The Office invites public comment from copyright owners, cable operators, satellite carriers, accounting professionals, and other interested parties concerning the proposed modifications that are discussed below in sections II, III.A, III.B, VI.A, VI.B, VII.A, VII.B, and VIII.C.[11]

II. Audit Notice, Timetable, and Transitional Provisions

A. Initial Audits

Under the Second Proposed Rule, a copyright owner could initiate an audit by filing a written notice with the Office that identified the statutory licensee, the SOAs, and the accounting periods that would be subject to the audit. The Office would publish a notice in the **Federal Register** announcing the receipt of the notice of intent to audit, and within thirty days thereafter, any other copyright owner that wished to participate in the audit would be required to notify both the copyright owner that filed the notice and the licensee that would be subject to the audit. Copyright owners that failed to comply with this requirement would not be permitted to participate in the audit process and would not be

[6] Citations to the proposals submitted by the Joint Stakeholders ae abbreviated ''JS First Submission'' and ''JS Second Submission.''

[7] Citations to the comments and reply comments submitted in response to the Second Proposed Rule are abbreviated ''[Name of Party] Second Comment'' and ''[Name of Party] Second Reply.'' For example, citations to the Copyright Owners' reply comments are abbreviated ''CO Second Reply.'' This group includes all the copyright owners listed in footnote five, but as mentioned in that footnote, the Commercial Television Claimants, the Broadcaster Claimants Group, the NAB, and PBS did not join their fellow copyright owners in submitting the Joint Stakeholders' First Submission.

[8] Under the Second Proposed Rule a satellite carrier or a particular cable system would be subject to no more than one audit per calendar year and each audit would involve no more than two SOAs filed by that licensee. For multiple system operators (''MSOs''), the audit would be limited to a sample of no more than ten percent of the MSO's systems, and the audit of each system would involve no more than two SOAs filed by each system. The Second Proposed Rule also provided that if a single audit required multiple years to complete, the licensee would not be subject to any other audits during those years. *See* 78 FR at 27143; 79 FR at 31993.

[9] The parties that submitted these recommendations are identified in footnote five.

[10] For the convenience of the parties, the Office created a document that illustrates the differences between the Second Proposed Rule (as it was modified by the Interim Rule) and the Third Proposed Rule. This document is available on the Office's Web site at *http://copyright.gov/docs/soaaudit/soa_audit.html*.

[11] The Office has reached a final decision concerning the topics discussed in sections III.C, III.D, IV, V, VII.C, VIII.A, VIII.B, or IX. Therefore, the Office does not invite further comment on these topics.

permitted to audit the same SOAs in a subsequent proceeding.

The Third Proposed Rule modifies this portion of the audit procedure in several respects. It provides that the notice should include the copyright owner's name, address, telephone number, and email address (but need not include a fax number). To facilitate the submission of notices, the Third Proposed Rule provides that notices should be addressed to the ''U.S. Copyright Office, Office of the General Counsel,'' and specifies the mailing address for time-sensitive materials where notices should be sent. It also establishes similar—but separate—procedures for submitting a notice of intent to conduct an initial audit and a notice of intent to conduct an expanded audit.[12]

Under the Third Proposed Rule a notice of intent to conduct an initial audit must be received in the Office between December 1st and December 31st. The Office will publish a notice in the **Federal Register** announcing the receipt of that notice between January 1st and January 31st of the next calendar year. By contrast, a notice of intent to conduct an expanded audit may be filed at any point during the calendar year, provided that the notice is received within three years after the last day of the year in which any statement to be reviewed was filed with the Office. When the Office receives a notice of intent to conduct an expanded audit, it will publish a notice in the **Federal Register** within thirty days thereafter announcing the receipt of the notice. As the Office noted in its **Federal Register** document dated May 9, 2013, this step is intended to give copyright owners that did not join the initial audit an opportunity to participate in the expanded audit. *See* 78 FR at 27143.

The Office decided to modify the timing of the receipt and publication of the initial notice to prevent the development of backlogs in pending audits. This concern stemmed from the fact that—under the Second Proposed Rule—a licensee could be subject to only one audit during a calendar year, but there was no assurance that any given audit would be started and finished within a single calendar year. *See* 79 FR at 31993. Indeed, the Second Proposed Rule made clear that if a single audit spanned multiple years, the licensee would not be subject to any other audits during those years. *See* 78 FR at 27153.

At the roundtable, several participants suggested that the Office's concerns were unwarranted, because they expected audits to be completed within relatively short periods of time. The MPAA explained that it has audited SOAs on an informal basis for many years. According to the MPAA, before an audit begins, copyright owners often have a sense of what the problems may be based on the information already provided in the licensee's SOAs, and thus will be able to give the auditor a sense of what he or she should focus on from the outset. The MPAA stated that the most difficult part of the audit process is identifying the stations and signals carried by the provider. Under the proposed rule, the licensee would be required to provide this information at the outset. Therefore, the MPAA is of the view that the audit as a whole would be expected to proceed smoothly. The MPAA predicted that an audit involving a small cable system could be completed within a few weeks, while an audit of a large cable system might require three months. In response to the Office's concerns that some licensees may not be diligent in responding to the auditor's requests for information, the MPAA indicated that in its experience this was not a problem. According to the MPAA, copyright owners and licensees traditionally have been cooperative during the audit process, with disputes typically resolved through settlement and voluntary adoption of corrective practices.

While the Office appreciates the MPAA's experience, it is concerned that the level of cooperation experienced by the MPAA during these voluntary informal audits might not be universal. Indeed, as the NCTA observed in its written comments, ''no one can predict at this point how smoothly the audit process will be for the cable and satellite industries.'' NCTA Second Reply at 6.

As discussed in section IV.C, the Third Proposed Rule will allow licensees to suspend the audit for several months during each year. The Office is concerned that the audit process may be delayed even further if the licensee fails to respond to the auditor's requests in a timely manner. The Office believes that this is a real possibility given that—under the Joint Stakeholders' first proposal and the Second Proposed Rule—prolonging an audit into the next calendar year would preclude the copyright owners from commencing another audit involving that same licensee, thus creating an incentive for delay. *See* JS First Submission at 9–10; 78 FR at 27143; 79 FR at 31993. The roundtable revealed that, apart from the MPAA, none of the cable or satellite industry representatives in attendance has had any meaningful experience with audits involving SOAs. At the same time, the Office is aware that royalty audits of other types of content licensees may well take longer than a year to complete.

The Third Proposed Rule addresses this concern by establishing a schedule that is intended to ensure that the initial audit will be completed within a single calendar year. Specifically, it will require the copyright owners to file a notice of intent to conduct an initial audit during the month of December in the year before the audit is to begin, will require the Office to publish a notice in the **Federal Register** during January of the following year, and will require the auditor to deliver his or her final report to the participating copyright owners by November 1st of that same year.[13]

This approach provides advantages over the Second Proposed Rule, which would have allowed the copyright owners to commence an initial audit at any time during the year. For instance, the Third Proposed Rule will substantially alleviate administrative burdens on the Office related to initial audits since notices will arrive in the Office within a set period of time, which in turn will allow the Office to publish them in the **Federal Register** as a group instead of publishing them on a piecemeal basis. In addition, this approach will improve certainty for both the copyright owners and statutory licensees. Copyright owners will be able to better coordinate their collective auditing activities, since notices of intent to conduct an initial audit will be submitted to the Office and published in the **Federal Register** at the same time each year. Likewise, a routine schedule for the submission and publication of notices will allow licensees to organize their affairs, because each December they will know whether they will be subject to an initial audit in the following calendar year.

In order to comply with the time limits set forth in section 111(d)(6)(E) of the Act, the copyright owners must file a notice of intent to audit a particular SOA within three years after the last day

[12] As discussed in sections II.B and VII, the Third Proposed Rule limits the number of SOAs and the number of cable systems that may be included in an initial audit, but if the auditor discovers an underpayment that exceeds a certain threshold, the copyright owners may expand the scope of the initial audit to include other SOAs and other cable systems that have not been audited before.

[13] Under the Third Proposed Rule, a statutory licensee will be subject to no more than one initial audit per calendar year, and an initial audit involving a particular satellite carrier or a particular cable system will be limited to no more than two of the SOAs filed by that licensee. But, as discussed in section VII.B, these limits will not apply to an expanded audit, which could be conducted concurrently with an initial audit involving the same licensee.

of the year in which the SOA was filed with the Office (regardless of whether they intend to conduct an initial audit or an expanded audit). The Third Proposed Rule recognizes that in any given year the copyright owners may file a notice of intent to conduct an initial audit involving any two of the SOAs that the licensee filed with the Office during that year or the three previous [14] calendar years. Once the Office receives a notice of intent to conduct an initial audit involving two SOAs filed by a particular satellite carrier or a particular cable system, the Office will not accept a notice of intent to conduct an initial audit involving that same carrier or that same system until the following calendar year.

B. Expanded Audits

Under the Third Proposed Rule, if the auditor discovers a net aggregate underpayment [15] of five percent or more during an initial audit of a satellite carrier or a single cable system, the copyright owners may expand the scope of the audit to include previous [16] SOAs filed by that licensee. If the auditor makes such a finding during an initial audit involving a sample of cable systems that are owned by a multiple system operator (''MSO''), the copyright owners may expand the scope of that audit to include previous SOAs filed by those cable systems, and in the following calendar year, the copyright owners may conduct an initial audit involving a larger sample of the cable systems owned by that MSO.

During an expanded audit the copyright owners would be able to audit any of the previous statements filed by the licensee, as long as they file a notice of intent to audit those statements within three years after the last day of the year in which those statements were filed with the Office. 17 U.S.C. 111(d)(6)(E). Although a notice of intent to conduct an initial audit must be filed in December and although the initial audit must be completed by November 1st of the following year, these requirements will not apply to expanded audits. Under the Third Proposed Rule a notice of intent to conduct an expanded audit may be filed during any month, and the auditor does not need to deliver his or her final report by November 1st of any given year.

C. Notices Filed Under the Interim Rule

Assuming the Third Proposed Rule is adopted as a final rule, it will supersede the Interim Rule in its entirety. Until then, copyright owners may use the Interim Rule to preserve their right to audit any SOA that was filed with the Office for accounting periods 2010–2 through 2014–1,[17] so long as the notice is received in a timely manner.[18]

If a copyright owner does file a notice of intent to audit before the Third Proposed Rule goes into effect, then, as stated in the Interim Rule, the Office will publish that notice in the **Federal Register** within thirty days after it is received in the Office. *See* 37 CFR 201.16(c)(1). In such cases, the Third Proposed Rule provides that the audit shall be conducted using the procedures set forth in the proposed rule, except that regardless of the timing of the notice and its publication pursuant to the Interim Rule, the copyright owners must provide the licensee with a list of proposed auditors by March 16, 2015, and the auditor must deliver his or her final report to the copyright owners and the licensee by November 1, 2015.

III. Commencement of the Audit

A. Designation of the Auditor

The Second Proposed Rule provided that the copyright owners must deliver a list of three independent and qualified auditors to the licensee, along with information that is reasonably sufficient for the licensee to evaluate the independence and qualifications of each individual. Within five business days thereafter, the licensee would be required to select one of these individuals to conduct the audit. *See* 78 FR at 27139–40. None of the parties objected to this aspect of the Second Proposed Rule.

The Interim Rule allows a copyright owner to preserve the right to audit a particular SOA so long as it files a notice of intent within three years after the last day of the year in which that statement was filed. 37 CFR 201.16(c)(1). However, the Interim Rule does not specify a precise deadline by which a copyright owner must commence the actual audit. As the Office observed in the Roundtable Notice, copyright owners may feel obligated to file notices of intent to audit on a routine basis in order to preserve the option of auditing a particular statement, even if they do not expect to proceed with the audit in the foreseeable future. 79 FR 31993. In such cases, the licensee might be required to maintain records related to SOAs for many years before an audit got underway, which would create administrative burdens and increase the risk that records would be lost or damaged in the interim.

The Third Proposed Rule addresses this concern by establishing a deadline for commencing the audit. Specifically, it provides that the participating copyright owners must deliver the list of prospective auditors to the licensee within forty-five days after the date that the Office publishes a notice in the **Federal Register** announcing the receipt of the notice of intent to audit. Once the licensee has made its selection, the Third Proposed Rule provides that the licensee must notify the participating copyright owners and the participating copyright owners must retain the auditor that the licensee selected. It also provides that if the copyright owners fail to deliver a list of prospective auditors to the licensee within the time allowed or fail to retain the auditor that the licensee selected, the SOAs identified in the notice of intent to audit shall not be subject to audit.

B. Initial Consultation With the Auditor

At the roundtable, the audit firm Crunch Digital explained that it typically schedules a ''kick-off call'' at the start of each of its audits. During this call, the auditor and the party that is subject to the audit identify the types of books and records that the auditor intends to examine and the parties set a mutually agreeable schedule for the production of those items. In addition, each party designates a contact person who will be responsible for receiving and responding to communications regarding the audit. Crunch Digital explained that this improves the efficiency of the examination process, thus reducing the overall cost of the audit. The Joint Stakeholders made a similar recommendation in their Second Submission and the Office has incorporated that suggestion into the proposed rule. JS Second Submission at 1. Specifically, the Third Proposed Rule provides that the auditor shall meet with designated representatives of the licensee and the participating copyright

[14] In this context, the word ''previous'' means an SOA filed prior to the date that the copyright owners filed a notice of intent to audit with the Office.

[15] The Second Proposed Rule defined ''net aggregate underpayment'' as the aggregate amount of underpayments found by the auditor less the aggregate amount of any overpayments found by the auditor, as measured against the total amount of royalties reflected on the Statements of Account examined by the auditor. *See* 78 FR at 27150. The same definition also appears in the Third Proposed Rule.

[16] In this context, the word ''previous'' means SOAs filed before the SOAs that were reviewed during the initial audit. *See* 78 FR at 27143.

[17] The deadline for filing a notice of intent to audit a statement for the 2010–1 accounting period expired on December 31, 2013, and as discussed in the **Federal Register** document dated June 14, 2012, statements covering accounting periods that began before January 1, 2010 are not subject to audit under this procedure. *See* 77 FR at 35645.

[18] To date, the Office has not received any notices filed pursuant to the Interim Rule.

owners (either in person or by telephone) within ten days after he or she has been selected. During the consultation, the parties are to review the scope of the audit, the methodology that the auditor will use during his or her review, and the schedule for conducting and completing the audit. The objective of this consultation is to establish the schedule and procedures for the production and review of information so that the audit will be completed in a timely fashion.

C. Limitation on Ex Parte Communications

The Second Proposed Rule contained a provision that banned *ex parte* communications between the auditor and the participating copyright owners, except in certain narrow circumstances. For example, the auditor may communicate directly with the copyright owners if he or she has a reasonable basis to suspect fraud, and if the auditor reasonably believes that involving the licensee in the communication would prejudice the investigation of that fraud. In the Roundtable Notice the Office questioned whether this restriction is necessary and whether it might create inefficiencies. *See* 79 FR at 31994. At the roundtable the NCTA explained that this provision will promote transparency in the audit process. Specifically, the NCTA opined that it will ensure that copyright owners do not exercise undue influence over the auditor's deliberations, and that licensees are made aware of potential issues at the same time as the copyright owners, thus helping to eliminate the possibility of unfair surprise when the auditor delivers the initial draft of his or her report. Crunch Digital noted that this could be accomplished in most cases simply by copying the licensee on email communications between the auditor and the copyright owners or their representatives. The Office found the foregoing observations persuasive. Therefore, the Office has retained the prohibition against *ex parte* communications in the Third Proposed Rule.

D. Certified List of Broadcast Signals

1. Comments

The Second Proposed Rule provided that the licensee must deliver a document to the auditor and the copyright owners containing a certified list of the broadcast signals retransmitted during each accounting period that is subject to the audit, including the call sign for each broadcast signal and each multicast signal. In addition, cable operators must identify the classification of each signal on a community-by-community basis pursuant to sections 201.17(e)(9)(iv)–(v) and 201.17(h) of the regulations. *See* 78 FR at 27141.

The Office added this requirement to the Second Proposed Rule at the request of the Joint Stakeholders. As the Office noted in the **Federal Register** document dated May 9, 2013, licensees are supposed to report this information in their SOAs and the person signing each SOA must certify that this information is true, correct, and complete. The Office sought comment on whether there is any benefit in requiring licensees to provide information that should be apparent from the face of an SOA. *See* 78 FR at 27141.

AT&T stated that ''there is no need to include this 'make-work' step in the audit process,'' because ''it does not provide the auditor or the copyright owners with any information that is not readily available from the SOA.'' AT&T Second Comment at 3. The ACA stated that ''whatever benefit is derived, it is far outweighed by the administrative and financial burdens of compiling and submitting this information, especially for smaller cable operators.'' ACA Second Comment at 3.

The Copyright Owners responded that this provision ''provides tangible benefits that will promote the efficiency and effectiveness'' of the audit procedure. CO Second Reply at 10. They noted that licensees that use Form SA 1–2, or the previous version of Form SA–3, are not required to identify ''different channel line-ups linked to different subscriber groups.'' *Id.* at 7. Therefore, ''it is impossible to link communities with reported local stations'' when reviewing these types of SOAs. *Id.* at 8.

Licensees that use the current version of Form SA–3 are supposed to identify the communities they serve, along with the relevant channel line-ups and subscriber groups. The Copyright Owners acknowledged that this information ''might be sufficient to match communities and stations for systems having one or two subscriber groups and one or two separate channel line-ups.'' *Id.* at 8. But identifying the signals that are retransmitted in each community can be ''difficult, if not impossible'' for larger cable systems ''that cover large geographic areas'' with ''multiple channel line-ups and numerous subscriber groups.'' *Id.* at 7, 10. For example, the Copyright Owners noted that Comcast of Southeast PA LLC recently reported 589 communities, 30 channel line-ups with 7 to 49 stations each, and 46 subscriber groups, while Time Warner Northeast LLC recently reported 257 communities, 17 channel line-ups with 9 to 21 stations each, and 51 subscriber groups. *Id.* at 8. The Copyright Owners contended that it would be ''cumbersome and costly'' for the auditor to identify the distant and local signals that are retransmitted in each community, given the complexity of information reported in these types of SOAs. *Id.* at 10. By contrast, they contended that it would be easy for the licensee to compile this information, because ''the cable system is more likely to know what stations that it carries in each community.'' *Id.* at 10.

Requiring the licensee to provide this information at the beginning of the audit was ''an important component of the Joint [Stakeholders'] Proposal'' from the Copyright Owners' point of view.[19] *Id.* at 7. The Joint Stakeholders agreed that the auditor should verify the information reported on the SOAs in order to confirm the correctness of the calculations and royalty payments reported therein, but the auditor should not determine whether a cable operator properly classified the broadcast signals reported on its SOAs, or whether a satellite carrier properly determined if any subscriber or group of subscribers is eligible to receive any broadcast signals under the Act.[20] *See* 78 FR at 27151.

In their reply comments, the Copyright Owners explained that they agreed to narrow the scope of the auditor's inquiry on the condition that the licensee produces a certified list of broadcast signals that were retransmitted during the accounting period that is subject to the audit. CO Reply at 7–8. They contended that the auditor needs this information to confirm the correctness of the calculations and royalty payments reported in the licensee's SOAs. *Id.* at 7, 9. They also contended that the certified list will avoid the need for ''costly, time-consuming litigation'' over signal classification issues. *Id.* at 9–10. The Copyright Owners explained that the list will help them determine whether the licensee correctly classified the carriage of each signal. If they disagree with the licensee's classification, the Copyright Owners will be able to raise their concerns during the audit, which in turn will give the licensee an opportunity to amend its SOAs if it agrees that a mistake has been made. *Id.* at 9.

[19] As noted in section I, the Joint Stakeholders' proposal was submitted by the NCTA, DIRECTV, and the Copyright Owners identified in footnote five.

[20] The Office included this suggested revision in both the Second Proposed Rule and the Third Proposed Rule. *See* 78 FR at 27151.

2. Discussion

The Office has noted AT&T's and the ACA's concerns, but has concluded that the Copyright Owners have the better argument. Requiring the licensee to identify the broadcast signals that the licensee retransmitted and the communities that the licensee served provides the auditor with information he or she needs to interpret an SOA and to verify the calculations and royalty payments reported therein. It is also a fair trade-off for excluding the classification of signals as local/distant or permitted/non-permitted from the scope of the auditor's inquiry.

The Copyright Owners correctly noted that the previous version of Form SA–3 did not require licensees to report specific channel line-ups for each subscriber group. The current version of Form SA–3 instructs the licensee to identify each community served by the cable system and each television station carried by the cable system during the accounting period.[21] In the Office's experience, this information is clearly stated in the SOA in some cases, but in other cases it is not. When the information is deficient, the Office may write the licensee to request a clarification.[22]

Requiring the licensee to provide this information at the outset of the audit should not impose an undue burden on the licensee. The licensee should be familiar with the stations that it carries and the communities that it serves and thus should be able to prepare a list of stations and communities without difficulty. Moreover, the Third Proposed Rule provides that the licensee must retain any records needed to confirm the correctness of the calculations and royalty payments reported in its SOAs for at least three and a half years after the last day of the year that the SOA is filed with the Office, and if an SOA has been audited under this procedure, must continue to maintain those records until three years after the auditor delivers his or her final report. By definition, this would include records that identify the stations that the licensee carries and the communities it serves. Thus, even if the required information is not apparent from the face of the SOA, the licensee should be able to compile a list of stations and communities from its own records.

The Office made one minor change to the Third Proposed Rule to make it consistent with the rules governing statements of account. Rather than employing the somewhat vague term ''certified list,'' the Third Proposed Rule clarifies that the list of broadcast signals must be signed by a duly authorized agent of the licensee, and that person must confirm that the facts contained in the document are true, complete, and correct to the best of his or her knowledge, information, and belief. *See* 37 CFR 201.11(e)(9)(iii)(E), 201.17(e)(14)(iii)(E).

IV. Scope of the Audit

A. Accounting Standard

The Second Proposed Rule provided that audits must be conducted ''according to generally accepted auditing standards.'' 78 FR at 27151. In the Roundtable Notice, the Office questioned whether this is the appropriate standard, noting that guidance from the American Institute of Certified Public Accountants (''AICPA'') indicates that ''generally accepted auditing standards'' are those used by accountants to audit corporate financial statements. *See* 79 FR at 31994. At the roundtable and in their Second Submission, the Joint Stakeholders were unable to reach agreement on what standard, if any, should be specified in lieu of ''generally accepted auditing standards.'' For its part, Crunch Digital confirmed at the roundtable that ''generally accepted auditing standards'' are not directly relevant to the type of audit contemplated by this rule. It also suggested that it is generally unnecessary to specify in advance the standard that will be applied during the audit, and that the auditor's approach can be considered by the parties during the initial consultation.

Given the lack of consensus on this issue, and that none of the parties could explain why any particular auditing standard should apply to these proceedings, the Office believes it is unnecessary to specify the professional standard to be employed under the rule. Instead, the Office believes that it is appropriate to rely on the auditors themselves to adopt an appropriate audit methodology based on their professional judgment, and to review that methodology with the participating copyright owners and the licensee during the initial consultation described in section III.B.

B. Subscriber Information

1. Comments

Under the Second Proposed Rule the statutory licensee would be required to provide reasonable access to its books, records, or any other information that the auditor needs to conduct the audit. It also provided that the licensee should produce any other information that the auditor reasonably requests. *See* 78 FR at 27141–42.

AT&T asserted that a cable operator should not be required to produce information regarding individual subscribers, because this would impose an undue burden on the licensee. AT&T Second Comment at 4. Instead, AT&T argued that the licensee should be allowed to provide ''reports that include the number of subscribers, the amount of revenue and the numbers of subscribers and revenues applicable to specific service offerings at the system level.'' *Id.*

The Copyright Owners contended that AT&T is seeking ''a special set of accounting standards'' for cable operators. CO Second Reply at 6. In their view, ''[a]uditors should be free to request whatever information they need to fulfill their responsibility,'' and they stated that ''ill-defined subscriber and revenue 'information in the form of reports' '' would not provide the participating copyright owners with the level of certainty that an audit should provide. *Id.* at 6–7.

2. Discussion

The Office believes that it would be inappropriate to place categorical limits on the type of information that the auditor may request during an audit procedure. On the contrary, the auditor should be allowed to request any information he or she reasonably needs to conduct an audit. The Office is in no position to determine whether the auditor does or does not need individual subscriber information to satisfy applicable professional standards, and the Copyright Owners correctly note that the Office lacks the expertise that would be required to craft particularized exceptions to the information that reasonably could be called for in an audit.

The Office has considered AT&T's comments, but has concluded that the proposed rule adequately addresses AT&T's concerns. The Third Proposed Rule limits the number of SOAs and the number of cable systems that may be included in an initial audit or an expanded audit, which in turn limits the amount of information that the auditor may request. It provides that the auditor should be given ''*reasonable*

[21] The Office issued the current version of Form SA–3 in April 2011. It may be used to prepare SOAs for accounting periods beginning on or after January 1, 2011.

[22] The fact that the Office does not communicate with the licensee does not necessarily mean that an SOA is clear or correct. The Office generally accepts the licensee's representations unless they are contradicted by information provided elsewhere in the SOA or in the Office's records or by information that is known to the Licensing Division.

access'' to the licensee's books, records, and any other information that the auditor needs to conduct an audit (emphasis added). It provides that the licensee is only required to produce information that the auditor ''*reasonably* requests'' (emphasis added). It also provides that the audit must be conducted during regular business hours at a location designated by the licensee, that consideration should be ''given to minimizing the costs and burdens associated with the audit,'' and, if the parties agree, that the audit may be conducted in whole or in part by means of electronic communication.

As the Office stated in the **Federal Register** document dated May 9, 2013, cable operators receive a substantial benefit from the statutory licensing system, insofar as it provides a mechanism for licensing broadcast content without having to negotiate with the individual owners of that content. During the legislative process that led to the enactment of STELA, the Congressional Budget Office estimated that the cost of responding to an audit would be minimal, because the auditor would verify information that the licensee already collected and maintained as a condition for using the statutory license. *See* H.R. Rep. No. 111–319, at 20 (2009). While the cost of producing information needed to verify the calculations and royalty payments reported in an SOA may be a new obligation, it is a reasonable cost of doing business under the statutory licensing system. *See* 78 FR at 27148.

C. Suspension of the Audit

1. Comments

The Second Proposed Rule provided that statutory licensees could suspend an audit for up to thirty days before the semi-annual deadlines for filing an SOA, although licensees could not exercise this option after the auditor issues the initial draft of his or her report. *See* 78 FR at 27141. The NCTA strongly disagreed with this aspect of the Second Proposed Rule. NCTA Second Reply at 6. It contended that a licensee should be allowed to suspend an audit for up to sixty days before the filing deadlines, because ''the same individuals that will be involved in responding to an audit . . . typically will be responsible for preparing new statements of account for that licensee.'' *Id.* at 5. AT&T expressed similar concerns in its comments on the First Proposed Rule, explaining that the staff members who would be responsible for responding to an audit would be the same individuals who are responsible for preparing AT&T's SOAs. AT&T First Comment at 1. AT&T explained that preparing these SOAs ''essentially occupies the full time of the staff from two weeks before the close of each semi-annual period through the due date for the [SOA], two months after the close of the period.'' *Id.*

2. Discussion

The Office believes it would be unduly restrictive to prevent the auditor from working for up to four months out of the year, given the limit on the number of audits that may be conducted each year. However, the Office recognizes that the same individuals may be responsible for preparing the licensee's SOAs, responding to the auditor's requests for information, and reviewing the conclusions set forth in the auditor's report, and that it is difficult to predict how much time or effort this may require.

The Third Proposed Rule balances these interests by allowing the licensee to suspend its participation in the audit for up to sixty days before the semi-annual deadlines for filing an SOA (regardless of whether the licensee is subject to an initial audit or an expanded audit, and regardless of whether the auditor has issued the initial draft of his or her report). However, there are two exceptions to this rule. If the participating copyright owners provide the licensee with a list of prospective auditors, then, as discussed in section III.A, the licensee will be required to select one of those individuals within five business days thereafter, even if the licensee has suspended its participation in the audit. Likewise, the licensee will be required to provide the participating copyright owners with the list of broadcast signals discussed in section III.D, and a representative of the licensee will be required to participate in the initial consultation discussed in section III.B. These pre-examination activities should not impose an undue burden on the licensee. Moreover, under the proposed schedule for conducting an initial audit involving a cable operator, these preliminary activities may need to take place at the same time that the licensee is preparing its statement of account for the second accounting period of the previous year.[23] If the licensee could postpone these initial activities until after the filing of its SOA, it could prevent the auditor from completing his or her review in a timely manner.

While the Third Proposed rule allows the licensee to suspend its participation in the audit, it does not prevent the auditor from continuing to work on the audit during the suspension. For example, the auditor could review information he or she has received from the licensee and formulate requests for additional information, but the licensee would not be required to respond to those follow-up requests until the suspension ended. Since the SOA deadlines are known in advance, the parties are strongly encouraged to discuss these issues during the initial consultation that is contemplated under the Third Proposed Rule. If the licensee intends to suspend its obligations under this provision, the auditor should schedule the delivery of critical information that might otherwise threaten the audit deadline well in advance of the suspension period.

V. Draft Audit Report and Final Audit Reports

A. Thirty Day Consultation Period

The Second Proposed Rule provided that the auditor should prepare a written report setting forth his or her initial conclusions and should deliver the initial findings to the licensee (but not the copyright owners). It provided that the auditor should then consult with the licensee for a period of thirty days, and if the auditor agreed that there were errors in the report, the auditor should correct those errors before delivering a final report to the participating copyright owners. If the auditor and the licensee were unable to resolve their differences, then under the Second Proposed Rule, the licensee could prepare a written rebuttal within fourteen days after the thirty-day consultation period, which would be attached as an exhibit to the final report.

In the Roundtable Notice, the Office asked the parties to consider whether the auditor and the licensee should be given more flexibility with respect to the consultation phase of the audit. In particular, the Office wanted to know whether the licensee should be given an opportunity to review the auditor's initial findings before the consultation period begins, whether a thirty-day consultation period would be a sufficient amount of time to resolve potential differences between the auditor and the licensee, whether the auditor should provide the licensee with a revised version of the report at the end of the consultation period (*i.e.,* before the licensee submits its written rebuttal), whether the licensee should be given more than fourteen days to prepare a rebuttal, or whether the

[23] Cable companies must file SOAs covering the second half of the preceding calendar year by March 1st. 37 CFR 201.17(c)(1). Satellite companies must file SOAs for this period by January 30th. 37 CFR 201.11(c)(1)).

auditor should be given more than five days to prepare the final report after receiving the licensee's rebuttal. *See* 79 FR at 31994.

At the roundtable, the NCTA stated that thirty days is a sufficient amount of time for the consultation period and that licensees do not need to receive an initial draft of the auditor's report in advance of the consultation period or an updated draft at the conclusion of that period. In the NCTA's view, adding any additional time to the calendar would merely delay the audit process. The NCTA stated that the written rebuttal will focus solely on the issues that the auditor and the licensee were unable to resolve during the consultation period (if any), and that fourteen days is a sufficient amount of time to prepare that response. If the licensee cannot convince the auditor to change his or her conclusions during the consultation period, then, in the NCTA's view, it is unlikely that the auditor will be persuaded by anything that the licensee says in its rebuttal and unlikely that the auditor will make any changes or revisions to the final version of that report before it is delivered to the participating copyright owners. The NCTA suggested that the rebuttal essentially would be a ''minority report'' and the act of attaching the rebuttal to the final report would be a ministerial task without any immediate practical significance. Thus, the auditor should not need any additional time to review the rebuttal or prepare the final report for the participating copyright owners.

In adjusting the proposed rule, the Office has largely relied upon the NCTA's understanding of how the consultation process would operate. Under the Third Proposed Rule, the auditor will deliver an initial draft of his or her report to the licensee (but, absent a suspicion of fraud, not to the participating copyright owners). The delivery of the initial draft will mark the beginning of the thirty-day consultation period. If, after consulting with the licensee, the auditor agrees that there are errors in the initial draft, the auditor is required to correct those errors. The auditor will then prepare a written report setting forth his or her ultimate conclusions, and on the last day of the consultation period will deliver the final version of that report to the licensee (but not to the participating copyright owners, again absent a suspicion of fraud).

Although the Office accepted most of the NCTA's suggestions, the Office believes it would be helpful if the auditor provides the licensee with the final version of the audit report at the end of the consultation period. This will create a clear record of any changes that the auditor made based on his or her discussions with the licensee, and if the licensee decides to prepare a written rebuttal, it will make it easier for the licensee to identify and respond to any issues that remain in dispute.

Upon receiving the final version of the report, the licensee may provide a written rebuttal within fourteen days after the conclusion of the thirty-day consultation period, but is not required to do so. Consistent with the NCTA's recommendation, the auditor will simply attach any rebuttal received from the licensee to the final version of his or her report, which together will constitute the final report. The auditor will not otherwise address the issues raised in the rebuttal; the rebuttal will serve merely to capture the ultimate areas of disagreement between the auditor and the licensee for the benefit of the participating copyright owners—since they may not be privy to the issues discussed during the consultation period—and to memorialize the licensee's position in the event that the licensee and the participating copyright owners revisit these issues in follow-on negotiations or litigation.

Within five business days after the written rebuttal has been delivered to the auditor or, if no rebuttal is provided, after the fourteen-day deadline for providing a rebuttal has passed, the auditor will deliver a complete copy of the final report to the participating copyright owners, with a copy to the licensee. As discussed in section II, the Third Proposed Rule further provides that the final report must be delivered by November 1st of the year in which the notice of intent to audit was published in the **Federal Register** (except that, as noted above, this requirement would not apply in the case of an expanded audit).

B. Suspicion of Fraud

1. Comments

As discussed in section V.A, the Second Proposed Rule provided that the auditor must deliver the initial draft of his or her report to the licensee (but not the participating copyright owners) at the beginning of the consultation period. However, the Second Proposed Rule provided that the auditor could also send the initial draft to the participating copyright owners if the auditor reasonably suspected that the licensee had committed fraud. In such a case, the Second Proposed Rule provided that the auditor could send the licensee an abridged version of the initial draft containing all of the auditor's initial findings except for the auditor's suspicion of fraud. Consistent with certain other regulatory audit provisions,[24] the Office wanted to address the possibility that if an auditor discloses his or her suspicions to a licensee, the licensee may be tempted to conceal or destroy incriminating evidence before copyright owners are able to take action. *See* 78 FR at 27145.

The NCTA objected to this approach. It contended (incorrectly) that there is ''no precedent in the Office's other audit rules'' for withholding a suspicion of fraud from the licensee. NCTA Second Reply at 3. The NCTA predicted that the auditor ''likely will lack formal legal training'' and contended that ''the Office's rules or precedent'' do not provide ''any guidance as to what types of actions might be considered 'fraud' in this context.'' *Id.* at 3. Instead, the NCTA stated that the auditor should be allowed to discuss his or her suspicions with the copyright owners ''while still giving licensees an opportunity to respond to those allegations prior to the issuance of a final report.'' *Id.* at 3.

2. Discussion

As referenced above, the fraud exception set forth in the Second Proposed Rule was based, in part, on similar regulations that the Office has adopted in the past. *See* 37 CFR 261.6(f), 261.7(f), 262.6(f), 262.7(f). However, the NCTA is correct that the statutory provisions governing cable audits expressly state that the Register ''shall issue regulations'' that ''shall . . . require'' the ''auditor to review [his or her] conclusions'' with the licensee and ''shall . . . provide an opportunity to remedy any disputed facts or conclusions.'' 17 U.S.C. 111(d)(6)(C)(i), (iii).

After weighing the NCTA's concerns, the Office has concluded that the licensee should be given an opportunity to review and respond to the auditor's entire report, even in cases where the auditor suspects fraud. As noted in Section IX, licensees will be required to retain any records needed to confirm the correctness of the calculations and royalty payments reported in their SOAs for three and a half years after the last day of the year in which the SOA is filed with the Office, and if an SOA is audited under this procedure, to continue to maintain those records until three years after the auditor delivers his or her final report to the copyright owners. The risk that the licensee may conceal or destroy incriminating evidence should be minimized if the

[24] *See* 37 CFR 261.6(f), 261.7(f), 262.6(f), 262.7(f) (SOAs for ephemeral recordings and digital performance of sound recordings).

auditor preserves copies of that evidence before disclosing his or her suspicions to the licensee. If the auditor has a reasonable basis for suspecting fraud during the initial phase of the audit (*i.e.,* before the auditor prepares the initial draft of his or her report and before the consultation period begins), then, as discussed in section III.C, the auditor may communicate privately with the participating copyright owners, provided that the auditor reasonably believes that involving the licensee in the communication could prejudice further investigation of the fraud. As an additional protective measure, the Third Proposed Rule provides that the auditor may share the initial draft of his or her report with both the participating copyright owners and the licensee during the consultation period in cases where the auditor suspects fraud.

VI. Corrections, Supplemental Royalty Payments, and Refunds

Congress directed the Office to ''establish a mechanism for the [licensee] to remedy any errors identified in the auditor's report and to cure any underpayment identified.'' 17 U.S.C. 111(d)(6)C)(ii). If the information in an SOA is incorrect or incomplete, if the calculation of the royalty fee is incorrect, or if the licensee has failed to deposit the correct amount of royalties, the Second Proposed Rule provided that the licensee may correct those errors by following the procedures set forth in 37 CFR 201.11(h)(1) or 201.17(m)(3). *See* 78 FR at 27145.

The Third Proposed Rule modifies this aspect of the audit procedure in three respects. First, it clarifies that the licensee may cure an underpayment by depositing additional royalties with the Office, but may not deliver those payments directly to the participating copyright owners or their representatives. Second, it provides that the licensee may cure deficiencies identified in the auditor's report only if the licensee represents that it has reimbursed the participating copyright owners for its share of the audit costs if reimbursement is owed. Third, it allows the licensee to request a refund from the Office if the auditor discovers an overpayment on any of the SOAs at issue in the audit.

A. Supplemental Royalty Payments Must Be Deposited With the Office

The statute clearly indicates that copyright owners should be given a single opportunity to audit a particular SOA, and that the auditor should review that statement on behalf of all copyright owners, regardless of whether they participate in the audit or not. *See* 77 FR at 35647. The statute also indicates that any copyright owner should be allowed to claim an appropriate share of additional royalty fees that result from the audit, even if that copyright owner did not join the audit or pay for the auditor's services. *Id.* at 35649.

Consistent with these principles, the Third Proposed Rule provides that a licensee may cure the underpayments identified in the auditor's final report only by depositing the additional royalties due under the statutory license with the Office. Paying additional royalties directly to the participating copyright owners pursuant to a negotiated settlement agreement would not satisfy this requirement, because that would unfairly prevent non-participating copyright owners from claiming an appropriate share of those payments. In the interests of transparency, the Third Proposed Rule provides that a representative of the participating copyright owners is to promptly notify the Office if the auditor discovered an underpayment or overpayment on any of the statements that were reviewed during the audit (although the copyright owners do not need to disclose the specific amounts). This will create a public record for the benefit of copyright owners that did not participate in the audit process, and will inform the Office that supplemental royalty payments, amended statements, and/or refund requests may be forthcoming from the licensee.

B. Reimbursement of Costs

The Office previously determined that it has the authority to include a cost-shifting provision in the regulation, and the Second Proposed Rule expressly provided that the licensee ''shall pay'' for a portion of the audit costs if the auditor discovers a net aggregate underpayment that exceeds certain thresholds. *See* 78 FR at 27152. But as the ACA noted at the roundtable, some licensees may refuse to reimburse the participating copyright owners if they believe that the auditor's conclusions are unjustified. And as discussed in section VIII.C.2, Congress did not create a specific cause of action for licensees that fail to reimburse the copyright owners for their share of the audit costs.

The Third Proposed Rule addresses this issue by providing that a licensee may exercise its right to address deficiencies identified in an auditor's report only if the licensee confirms that it has reimbursed the participating copyright owners for any audit costs that the licensee is required to pay. In other words, the Office will not accept an amended SOA seeking to cure deficiencies discovered in an audit unless the licensee confirms in writing that it has reimbursed the participating copyright owners for its share of the audit costs or that it has no obligation to do so under the cost-shifting or cost-splitting rule.

The Second Proposed Rule provided that an amended SOA and/or additional royalty payments must be received within sixty days after the delivery of the final report to the participating copyright owners and the licensee, or within ninety days in the case of an audit involving an MSO.[25] In their Second Submission, the Joint Stakeholders stated that the licensee should reimburse the participating copyright owners for its share of the audit costs (if any) within thirty days after these deadlines. The Office agrees that the licensee should be given a precise deadline for reimbursing the participating copyright owners, but because a licensee's ability to cure its SOAs may be contingent upon paying its share of the audit costs, the Third Proposed Rule provides that the deadline for reimbursing the participating copyright owners and the deadline for filing an amended SOA and/or depositing additional royalties will be the same.

C. Refunds

If the auditor discovers an overpayment on a particular SOA, the statutory licensee may request a refund by following the procedures set forth in sections 201.17(m) or 201.11(h) of the Office's existing regulations. The Second Proposed Rule provided that the refund request must be received in the Office within thirty days after the auditor delivers his or her final report to the licensee. The NCTA suggested that a licensee should be given sixty days to submit a refund request. NCTA Second Reply at 5. The Office has accepted the NCTA's suggestion, because it would be consistent with the sixty-day deadline for submitting supplementary royalty payments under the Third Proposed Rule, and consistent with the sixty-day deadline for requesting refunds under section 201.17(m) of the Office's existing regulations. In addition, the Third Proposed Rule corrects certain numbering errors in section 201.17(m) that were inadvertently created when the Office added a new paragraph to that section of the regulations. *See* 78 FR 1755 (Jan. 11, 2013).

VII. Expanded Audits

Under the Second Proposed Rule, copyright owners would be allowed to

[25] None of the parties objected to these deadlines.

conduct an initial audit of no more than two SOAs in a proceeding involving a satellite carrier or a single cable system. In a proceeding involving an MSO, copyright owners would be allowed to audit no more than ten percent of the Form 2 and Form 3 systems owned by that MSO. *See* 78 FR at 27143. To protect the interests of copyright owners, the Second Proposed Rule also created an exception to these rules. If the auditor discovered a net aggregate underpayment in his or her review of a satellite carrier or a single cable system, the copyright owners would be allowed to audit previous SOAs filed by that cable system or satellite carrier, so long as they filed a notice of intent to audit those statements in a timely manner. Likewise, if the auditor discovered a net aggregate underpayment in his or her review of an MSO, the copyright owners would be allowed to audit previous statements filed by each of the systems subject to the initial audit, and in the following calendar year they would also be allowed to audit a larger sample of the cable systems owned by that MSO. *See id.* The Third Proposed Rule modifies this portion of the audit procedure in several respects.

A. Procedure for Conducting an Expanded Audit

As discussed in section II, the Third Proposed Rule provides that the copyright owners must file a notice of intent to conduct an expanded audit, the notice must specify the statements that will be included in the expanded audit, and the notice must be received within three years after the last day of the year in which those statements were filed. It further provides that the expanded audit should be conducted using the same procedures that applied to the initial audit, although there are two exceptions to this rule. First, a notice of intent to conduct an expanded audit may be filed during any month of the year, as long as the copyright owners comply with the time limits set forth in section 111(d)(6)(E) of the Act; and second, the auditor does not need to deliver his or her final report by November 1st of the year in which the notice was published in the **Federal Register**.

B. An Expanded Audit May Be Conducted Concurrently With an Initial Audit

Under the Third Proposed Rule, an expanded audit of a single cable system, multiple cable systems owned by the same MSO, or a satellite carrier may be conducted concurrently with another audit involving that same licensee. Since the initial audit may not be completed until late in the year and since the expanded audit may involve multiple SOAs and/or multiple cable systems, it seems unlikely—if not impossible—that the auditor would be able to complete the initial audit and the expanded audit within the same calendar year.

If the auditor discovers an underpayment of five percent or more during an initial audit, the Office believes that the copyright owners should be allowed to review previous statements filed by that licensee and to promptly initiate a new audit of the licensee's more recent statements. Likewise, if the auditor discovers an underpayment in the case of an MSO, then, as contemplated by the Second Proposed Rule, the copyright owners should be allowed to audit a larger sample of the MSO's cable systems in the following calendar year, even if an expanded audit remains pending. Copyright owners are entitled to know if the same problems appear in the licensee's earlier or later filings, or more broadly throughout an MSO's systems. If the expanded audit displaced the copyright owners' ability to initiate a new audit, it could impede the copyright owners' ability to audit the licensee's more recent filings, particularly because an expanded audit may be noticed at any time and has no deadline for completion. It would seem unwarranted to constrain the copyright owners' ongoing audit right vis-à-vis a particular licensee where that licensee has been found to have underpaid royalty fees in the past.

C. The Initial Audit and the Expanded Audit May Be Conducted by the Same Auditor

The Third Proposed Rule provides that the expanded audit may be conducted by the same auditor that conducted the initial audit of that licensee. The NCTA contended that the Second Proposed Rule created a procedure for selecting an auditor for an expanded audit involving a satellite carrier or a single cable system, but ''[t]here is no provision made for the selection of an auditor for an expanded MSO audit.'' NCTA Second Reply at 7. That is incorrect. The Second Proposed Rule provided that if the auditor discovered a net aggregate underpayment on the statements at issue in an audit involving an MSO, ''[t]he number of Statements of Account of a particular cable system subject to audit in a calendar year may be expanded *in accordance with paragraph (k)(3) of this section''* (emphasis added). 78 FR at 27153. In other words, the procedure for selecting an auditor for an expanded audit involving a cable operator that owns multiple cable systems would be the same as the procedure for an expanded audit involving a cable operator that owns a single cable system.

To eliminate further confusion, the Third Proposed Rule clarifies that if the auditor discovers a net aggregate underpayment on the statements at issue in an initial audit involving an MSO, the cable systems that were included within that initial audit may be subject to an expanded audit. It also clarifies that the MSO may be subject to an initial audit involving a larger sample of its cable systems in the following calendar year, provided that the copyright owners file a notice of intent to audit those systems in a timely manner (*i.e.,* in the month of December of the year in which the auditor delivered the final report that triggered the option of auditing a larger sample).

The NCTA also contended that copyright owners should not be allowed to unilaterally use the same auditor in two consecutive expanded audits involving an MSO.[26] NCTA Second Reply at 8. Instead, the MSO should select the auditor ''from a slate of names supplied by the [copyright] owners that could include the same auditor that conducted the initial audit.'' *Id.* at 7.

As noted in section III.A, the Second Proposed Rule provided that the licensee could select the auditor from a list of names provided by the copyright owners. Because an expanded audit is simply an extension of the initial audit, it is appropriate and efficient for the same individual to conduct the audit from start to finish. Under the Second Proposed Rule, the same auditor who conducted the initial audit could conduct the expanded audit, provided that the copyright owners supply the licensee with information sufficient to show that there has been no material change in the auditor's independence and qualifications. If the auditor is no longer qualified or independent, or if the copyright owners prefer to use a different individual, a new auditor could be selected using the procedure discussed in section III.A.

In its comments, the NCTA recognized that there are benefits to using the same auditor to conduct an initial audit and an expanded audit. The auditor will be familiar with the licensee's accounting systems and

[26] The Joint Stakeholders made a similar suggestion in their First Submission. The NCTA correctly notes that the Office did not include this suggestion in the Second Proposed Rule because it ''fail[ed] to see the justification for this limitation.'' *See* 78 FR 27143 n.19; NCTA Second Reply at 7–8.

methodologies, which should improve the efficiency of the expanded audit and reduce the potential burden on the licensee. The NCTA contended that these benefits should be balanced against the ''benefits of giving the [MSO] a new opportunity to have a say in the selection of the auditor.'' *Id.* at 8. However, the NCTA failed to explain what these purported benefits might be, why they should be bestowed upon MSOs (but denied to satellite carriers or cable operators that own a single cable system), or why they outweigh the benefits of using the same individual to conduct the initial audit and the expanded audit.

VIII. Cost of the Audit Procedure

A. Allocation of Costs

1. Comments

Building off a proposal made by the Joint Stakeholders, the Second Proposed Rule provided that the participating copyright owners would be required to pay the auditor for his or her services if the auditor discovered an overpayment on the SOAs at issue in the audit, or if the auditor discovered a net aggregate underpayment of ten percent or less of the amount reported on those statements. If the auditor discovered a net aggregate underpayment of more than ten percent on the SOAs at issue in the audit, the statutory licensee would be required to reimburse the copyright owners for those costs.

In addition, the Second Proposed Rule included a provision for splitting these fees in certain circumstances. If the auditor concluded in his or her final report that there was a net aggregate underpayment of more than ten percent, the cost of the audit would be split evenly between the copyright owners and the licensee if the licensee prepared a written rebuttal explaining the basis for its good faith belief that the net aggregate underpayment was between five percent and ten percent of the amount reported on the SOAs.[27] *See* 78 FR at 27152.

In all cases, there would be an overall limit on the costs that the licensee would be expected to pay. Specifically, the licensee would not be required to pay for any costs that exceeded the amount of the net aggregate underpayment that the auditor identified in his or her final report. *See* 78 FR at 27148.

In comments received in response to the Second Proposed Rule, the ACA asked the Office to go a step further by making it clear that if the auditor discovers a net aggregate underpayment of ten percent or more the licensee should not have to pay for any portion of the audit costs if the licensee prepares a written rebuttal stating that the underpayment was five percent or less and explaining the basis for its belief. ACA Second Comment at 4.

In the Roundtable Notice, the Office questioned whether the costs should be split between the parties based merely on the views expressed in the licensee's rebuttal. As the NCTA indicated during the roundtable, it is unlikely that the auditor will change his or her mind based on anything said in the rebuttal. If that is the case, it is unclear why a licensee's objections should gain renewed significance for the purpose of allocating costs, when those objections presumably were considered and rejected by the auditor during the consultation period. *See* 79 FR at 31995.

Following the roundtable, the Joint Stakeholders provided a substitute recommendation in their Second Submission. Under that proposal, the copyright owners would bear the costs of the audit if the auditor concluded in the final report that there was an overpayment or a net aggregate underpayment of five percent or less, and that the licensee would bear the costs if the auditor concluded that there was a net aggregate underpayment of ten percent or more. In cases falling in between, where the auditor found a net aggregate payment of more than five percent but less than ten percent, the audit costs would be split evenly between the licensee on the one hand and the participating copyright owners on the other.

2. Discussion

The Office concurs with the cost-shifting and cost-splitting proposals set forth in the Joint Stakeholders' Second Submission. The Office does not accept the ACA's proposal, which would allow a licensee to avoid paying any portion of the audit costs simply by offering its views as to why an underpayment was five percent or less (even if the auditor determined that the underpayment was ten percent or more). ACA Second Comment at 4. As the Office noted in its Roundtable Notice, it is unclear why the licensee's rebuttal should be given greater weight than the auditor's conclusions, particularly given the NCTA's observation that the auditor would not be expected to make any changes to the final report based on the views expressed in the rebuttal.

The ACA contended that the proposed rule ''may impose an unfair burden on small cable operators'' by requiring them to pay for the cost of the audit ''if the auditor finds a net aggregate underpayment of less than five percent.'' *Id.* at 3. But as discussed above, the licensee would not be required to pay for any portion of the audit costs in this situation. The ACA does not contend that it would be unfairly burdensome for small cable operators to pay for the cost of an audit when the underpayment exceeds ten percent. Indeed, the ACA acknowledged that small cable operators will largely be protected by the provision stating that licensees will not be required to pay for any costs that exceed the amount of the underpayment that the auditor identifies in his or her final report. *Id.* at 2. The Office's existing regulations provide additional limitations for small cable operators that use Form SA 1–2. There is an upper limit on the gross receipts that may be reported on this form, which limits the amount of any underpayment that could be discovered during the course of an audit, which in turn limits the amount of any cost-shifting or cost-splitting that could be required. *See* 37 CFR 201.17(d)(2)(i). As the MPAA observed at the roundtable, it seems unlikely that copyright owners will be inclined to audit small cable operators, because even if the auditor discovers an underpayment, the cost of conducting the audit may exceed any amount that could conceivably be recovered from the licensee.

B. Monthly Invoices

1. Comments

The Second Proposed Rule provided that the copyright owners should deliver an itemized statement to the licensee at the conclusion of the audit specifying the total cost of the audit procedure. *See* 78 FR at 27149. The Joint Stakeholders disagreed with this aspect of the Second Proposed Rule. In both their first and second proposals, they suggested that the auditor should be required to provide the licensee with itemized invoices during the course of the audit and that these invoices should be delivered by the fifteenth of each month. 78 FR at 27149; JS Second Submission at 2. The NCTA explained that this would minimize surprises for the licensee, and noted that monthly statements are a common feature of audits involving private sector program carriage agreements. NCTA Second Reply at 6–7.

[27] If the licensee failed to provide a written rebuttal in this situation, then as discussed in the preceding paragraph, the licensee would be required to reimburse the copyright owners for the cost of the audit procedure.

2. Discussion

After further analysis, the Office has included the Joint Stakeholders' suggestion in the Third Proposed Rule. The House Committee stated that the Office ''may consider . . . audit provisions in private agreements to which cable operators or content owners may be parties.'' H.R. Rep. No. 111–319 at 9 (2009). A monthly reporting requirement would promote transparency by requiring the auditor to disclose the ongoing cost of the audit procedure. And this would provide copyright owners and licensees with advance notice in the event that the auditor discovers an underpayment that triggers the cost-shifting or cost-splitting mechanisms discussed in section VIII.A above.

C. Enforcement of Cost-Shifting Provision

1. Comments

Under the Second Proposed Rule, if the auditor discovered a net aggregate underpayment that triggered the licensee's obligation to pay all or part of the cost of the audit, the licensee would be required to make such a reimbursement within a specified period of time. If the licensee disagreed with the auditor's conclusions, however, the rule provided the licensee with a mechanism for recouping those costs from the participating copyright owners, so long as a court issued a final judgment finding that the net aggregate underpayment was ten percent or less. *See* 78 FR at 27149. In proposing that provision, the Office assumed that the licensee might seek a declaratory judgment of non-infringement, and as part of that proceeding, obtain a judgment from a court evaluating the correctness of the conclusions set forth in the audit report. *Id.*

In response to the Second Proposed Rule, AT&T objected to any provision that would affirmatively obligate licensees to pay the costs of the audit.[28] It stated that ''the enforcement mechanism built into the statutory license'' allows copyright owners to seek ''recourse through the courts if they believe that the licensee has failed to fulfill its obligations under the statute and the rules.'' AT&T Second Comment at 2. AT&T contended that the Second Proposed Rule stands this ''fundamental premise'' on its head, because it ''shifts the enforcement obligation from the copyright owners to the licensee'' to seek reimbursement of costs. *Id.* at 2. It also contended that this would be ''an unwieldy and potentially costly process,'' because ''the licensee would be forced to seek reimbursement from numerous sources'' if the copyright owners divide the payment among themselves. *Id.* at 2.

The ACA expressed the same view in its reply comments. It contended that it would be ''burdensome and unfair'' to expect small cable operators to pay for the audit and then take legal action to recover those costs from the copyright owners. The ACA explained that small cable operators have fewer financial and legal resources than the copyright owners, and stated that the cost of bringing a declaratory judgment action may exceed the amount that the licensee could expect to recover. ACA Second Reply at 2–4.

The Copyright Owners noted that AT&T made a similar argument during an earlier phase of this rulemaking,[29] and that AT&T's latest argument is simply a variation on the same theme. CO Second Reply at 2–3. They also stated that the licensee ''will have no trouble'' identifying the relevant copyright owners if there is a dispute between the parties. *Id.* at 5. They noted that the copyright owners will be required to identify themselves at the beginning of the audit by filing a notice with the Office. In the event that the court rules in the licensee's favor, they stated that the copyright owners will ''likely'' be subject to an order directing them to reimburse the licensee. *Id.* at 5.

The Office expressed several concerns about this provision in the Roundtable Notice and during the roundtable discussion. *See* 79 FR at 31995. In particular, the Office questioned whether the parties expect to engage in the sort of litigation contemplated by the Second Proposed Rule, the gravamen of which would seemingly be an infringement action or a declaratory judgment action for non-infringement; whether the court would review the auditor's report to determine the exact amount of underpayment in any such litigation; and whether the issue of audit costs might be better understood as a potential element of actual damages in such an infringement suit. The Office expressed reservations about its authority to essentially dictate the issues that a federal district court would be required to address in a suit initiated after the completion of the audit. In addition, the Office questioned whether the rule should affirmatively require the licensee to pay for the audit costs.

In their Second Submission, the Joint Stakeholders reiterated their belief that the proposed rule should provide a method for licensees to recover the costs of the audit from the participating copyright owners in a judicial proceeding. Specifically, they urged the Office to include the following provision in the proposed rule:

> In the event the statutory licensee disputes the amount of the net aggregate underpayment identified by the auditor, and an action is brought in a court of competent jurisdiction to determine the royalties due for the period(s) covered by the auditor's final report, there shall be a final true-up of the amount of the auditor's costs borne by either party based on the final outcome of that action relative to the cost responsibilities set forth herein.

JS Second Submission at 2.

2. Discussion

As AT&T and the ACA correctly observed, under the Second Proposed Rule, the licensee would have had an absolute obligation to reimburse the copyright owners for the cost of the audit, even if the licensee disagreed with the auditors' conclusions and declined to submit any additional royalty payments to the Office. AT&T Second Comment at 2; ACA Second Reply at 2–3. The Third Proposed Rule modifies the Second Proposed Rule so that licensees are required to pay the costs of the audit if they wish to cure a deficiency, as explained in section VI.B above. This revised approach has several advantages. Although the Second Proposed Rule directed the licensee to pay for the audit costs, it provided no obvious mechanism for the Office or any other party to enforce that mandate. Tying the payment of audit costs to the cure provisions, by contrast, will give the licensee an incentive to make these payments. If the licensee disagrees with the auditor's conclusion regarding the royalty underpayment, the licensee may choose not to deposit additional royalties with the Office or pay the attendant audit costs. In the case where a licensee opts not to cure, the licensee will run the risk of being subject to an infringement action, or in the alternative, could bring its own action against one or more of the copyright owners seeking a declaratory judgment of non-infringement.

The Office believes it is unnecessary for the rule to require a ''true-up'' of the auditor's costs after the close of any follow-on litigation, as the Joint Commenters urged in their Second

[28] AT&T also contended that the Office does not have the authority to include a cost-shifting provision in this audit regulation. AT&T Second Comment at 1–2. AT&T made the same argument in the initial phase of this rulemaking. AT&T First Comment at 5–8. The Office addressed that argument in its **Federal Register** document dated May 9, 2013, concluding that it does have such authority. *See* 78 FR at 27146–48.

[29] The Office addressed this argument in its **Federal Register** document dated May 9, 2013. *See* 78 FR at 27149.

Submission. To begin with, it is unclear what the term ''true-up'' is intended to mean or how the Joint Stakeholders propose to enforce this regulatory obligation. Moreover, the Joint Stakeholders' proposal raises issues that can and should be resolved by a court in the exercise of its remedial discretion as part of the contemplated judicial proceeding. In this regard, the Office notes that the audit costs might be characterized as an element of actual damages incurred by the copyright owners, or as an element of the relief to be awarded in a declaratory judgment action. *See* 28 U.S.C. 2202 (authorizing courts to grant ''[f]urther necessary or proper relief based on a declaratory judgment or decree . . . against any adverse party whose rights have been determined by such judgment'').

IX. Retention of Records

A. Comments

The Second Proposed Rule provided that a statutory licensee should retain any records needed to confirm the correctness of the calculations and royalty payments reported in an SOA or amended SOA for three and a half years after the last day of the year that the SOA or amendment was filed with the Office, or in the event that an SOA or amended SOA was the subject of an audit, for three years after the auditor delivered his or her final report to the parties. As the Office explained in its earlier **Federal Register** document dated June 14, 2012, it is important to ensure that licensees ''retain their records until the deadline for auditing [an SOA] has passed.'' 77 FR at 35647. The Office is also concerned that copyright owners have the benefit of the three-year statute of limitations provided in the Act when an audit takes place. *See* 17 U.S.C. 507(b).

The NCTA contended that the Second Proposed Rule contemplates ''a very lengthy, and burdensome, record retention period'' following the completion of the audit and that it ''imposes a significant burden'' on small cable operators as well as MSOs that file multiple SOAs in each accounting period. NCTA Second Reply at 4. The NCTA instead suggested that a licensee be required to retain the required records for no more than one year after the auditor issues his or her final report.

B. Discussion

The Office has considered the NCTA's concerns but has concluded that a licensee should be required to retain relevant records during the pendency of an audit and for three years after the auditor issues his or her final report, as provided in the Third Proposed Rule. This will ensure that the licensee does not discard its records before the three-year statute of limitations may expire. Moreover, the burden of retaining such records should be minimal. Many licensees collect, report, and maintain their records in electronic form, which should limit the cost of complying with the proposed rule. The Third Proposed Rule limits the number of SOAs that may be included in each audit, which in turn limits the number of records that must be retained when the auditor issues his or her final report. Furthermore, the licensee is only required to keep records that are ''*necessary* to confirm the correctness of the calculations and royalty payments reported'' in those SOAs.

List of Subjects in 37 CFR Part 201

Copyright, General Provisions.

Proposed Regulations

In consideration of the foregoing, the U.S. Copyright Office proposes to amend part 201 of 37 CFR, Chapter II, as follows:

PART 201—GENERAL PROVISIONS

■ 1. Amend the authority citation for part 201 to read as follows:

Authority: 17 U.S.C. 702.

Section 201.10 also issued under 17 U.S.C. 304.

Section 201.16 also issued under 17 U.S.C. 111(d)(6) and 17 U.S.C. 119(b)(2).

■ 2. Revise § 201.16 to read as follows:

§ 201.16 Verification of a Statement of Account and royalty fee payments for secondary transmissions made by cable systems and satellite carriers.

(a) *General.* This section prescribes procedures pertaining to the verification of a Statement of Account and royalty fees filed with the Copyright Office pursuant to sections 111(d)(1) or 119(b)(1) of title 17 of the United States Code.

(b) *Definitions.* As used in this section:

(1) The term *cable system* has the meaning set forth in § 201.17(b)(2).

(2) *Copyright owner* means any person or entity that owns the copyright in a work embodied in a secondary transmission made by a statutory licensee that filed a Statement of Account with the Copyright Office for an accounting period beginning on or after January 1, 2010, or a designated agent or representative of such person or entity.

(3) *Multiple system operator* or *MSO* means an entity that owns, controls, or operates more than one cable system.

(4) *Net aggregate underpayment* means the aggregate amount of underpayments found by the auditor less the aggregate amount of any overpayments found by the auditor, as measured against the total amount of royalties reflected on the Statements of Account examined by the auditor.

(5) *Participating copyright owner* means a copyright owner that filed a notice of intent to audit a Statement of Account pursuant to paragraph (c)(1) or (2) of this section and any other copyright owner that has given notice of its intent to participate in such audit pursuant to paragraph (c)(3) of this section.

(6) The term *satellite carrier* has the meaning set forth in 17 U.S.C. 119(d)(6).

(7) The term *secondary transmission* has the meaning set forth in 17 U.S.C. 111(f)(2).

(8) *Statement of Account* or *Statement* means a semiannual Statement of Account filed with the Copyright Office under 17 U.S.C. 111(d)(1) or 119(b)(1) or an amended Statement of Account filed with the Office pursuant to §§ 201.11(h) or 201.17(m).

(9) *Statutory licensee* or *licensee* means a cable system or satellite carrier that filed a Statement of Account with the Office under 17 U.S.C. 111(d)(1) or 119(b)(1).

(c) *Notice of intent to audit.* (1) Any copyright owner that intends to audit a Statement of Account for an accounting period beginning on or after January 1, 2010 must provide written notice to the Register of Copyrights no later than three years after the last day of the year in which the Statement was filed with the Office. The notice must be received in the Office between December 1st and December 31st, and a copy of the notice must be provided to the statutory licensee on the same day that it is filed with the Office. Between January 1st and January 31st of the next calendar year the Office will publish a notice in the **Federal Register** announcing the receipt of the notice of intent to audit. A notice of intent to audit may be filed by an individual copyright owner or a designated agent that represents a group or multiple groups of copyright owners. The notice shall include a statement indicating that it is a ''notice of intent to audit'' and it shall contain the following information:

(i) It shall identify the licensee that filed the Statement(s) with the Office, and the Statement(s) and accounting period(s) that will be subject to the audit.

(ii) It shall identify the party that filed the notice, including its name, address, telephone number, and email address, and it shall include a statement that the

party owns, or represents one or more copyright owners that own, a work that was embodied in a secondary transmission made by the statutory licensee during one or more of the accounting period(s) specified in the statement(s) that will be subject to the audit.

(2) Notwithstanding the schedule set forth in paragraph (c)(1) of this section, any copyright owner that intends to audit a Statement of Account pursuant to an expanded audit under paragraph (n) of this section may provide written notice to the Register of Copyrights during any month, but no later than three years after the last day of the year in which the Statement was filed with the Office. A copy of the notice must be provided to the licensee on the same day that the notice is filed with the Office. Within thirty days after the notice has been received, the Office will publish a notice in the **Federal Register** announcing the receipt of the notice of intent to conduct an expanded audit. A notice given pursuant to this paragraph may be provided by an individual copyright owner or a designated agent that represents a group or multiple groups of copyright owners. The notice shall include a statement indicating that it is a ''notice of intent to conduct an expanded audit'' and it shall contain the information specified in paragraphs (c)(1)(i) and (ii) of this section.

(3) Within thirty days after a notice is published in the **Federal Register** pursuant to paragraphs (c)(1) or (2) of this section, any other copyright owner that owns a work that was embodied in a secondary transmission made by that statutory licensee during an accounting period covered by the Statement(s) of Account referenced in the **Federal Register** notice and that wishes to participate in the audit of such Statement(s) must provide written notice of such participation to the licensee and to the party that filed the notice of intent to audit. A notice given pursuant to this paragraph may be provided by an individual copyright owner or a designated agent that represents a group or multiple groups of copyright owners, and shall include the information specified in paragraphs (c)(1)(i) and (ii) of this section.

(4) Notices submitted under paragraphs (c)(1) through (3) of this section should be addressed to the ''U.S. Copyright Office, Office of the General Counsel'' and should be sent to the address for time-sensitive requests set forth in § 201.1(c)(1).

(5) Once the Office has received a notice of intent to audit a Statement of Account under paragraphs (c)(1) or (2) of this section, a notice of intent to audit that same Statement will not be accepted for publication in the **Federal Register**.

(6) Once the Office has received a notice of intent to audit two Statements of Account filed by a particular satellite carrier or a particular cable system, a notice of intent to audit that same carrier or that same system under paragraph (c)(1) of this section will not be accepted for publication in the **Federal Register** until the following calendar year.

(7) If the Office has received or receives a notice of intent to audit prior to the effective date of this section, the Office will publish a notice in the **Federal Register** within thirty days thereafter announcing the receipt of the notice of intent to audit. In such a case, the audit shall be conducted using the procedures set forth in paragraphs (d) through (l) of this section, with the following exceptions:

(i) The participating copyright owners shall provide the statutory licensee with a list of three independent and qualified auditors pursuant to paragraph (d)(1) by March 16, 2015.

(ii) The auditor shall deliver his or her final report to the participating copyright owners and the licensee pursuant to paragraph (i)(3) of this section by November 1, 2015.

(d) *Selection of the auditor.* (1) Within forty-five days after a notice is published in the **Federal Register** pursuant to paragraph (c)(1) of this section, the participating copyright owners shall provide the statutory licensee with a list of three independent and qualified auditors, along with information reasonably sufficient for the licensee to evaluate the proposed auditors' independence and qualifications, including:

(i) The auditor's *curriculum vitae* and a list of audits that the auditor has conducted pursuant to 17 U.S.C. 111(d)(6) or 119(b)(2);

(ii) A list and, subject to any confidentiality or other legal restrictions, a brief description of any other work the auditor has performed for any of the participating copyright owners during the prior two calendar years;

(iii) A list identifying the participating copyright owners for whom the auditor's firm has been engaged during the prior two calendar years; and,

(iv) A copy of the engagement letter that would govern the auditor's performance of the audit and that provides for the auditor to be compensated on a non-contingent flat fee or hourly basis that does not take into account the results of the audit.

(2) Within five business days after receiving the list of auditors from the participating copyright owners, the licensee shall select one of the proposed auditors and shall notify the participating copyright owners of its selection. That auditor shall be retained by the participating copyright owners and shall conduct the audit on behalf of all copyright owners who own a work that was embodied in a secondary transmission made by the licensee during the accounting period(s) specified in the Statement(s) of Account identified in the notice of intent to audit.

(3) The auditor shall be independent and qualified as defined in this section. An auditor shall be considered independent and qualified if:

(i) He or she is a certified public accountant and a member in good standing with the American Institute of Certified Public Accountants (''AICPA'') and the licensing authority for the jurisdiction(s) where the auditor is licensed to practice;

(ii) He or she is not, for any purpose other than the audit, an officer, employee, or agent of any participating copyright owner;

(iii) He or she is independent as that term is used in the Code of Professional Conduct of the AICPA, including the Principles, Rules, and Interpretations of such Code; and

(iv) He or she is independent as that term is used in the Statements on Auditing Standards promulgated by the Auditing Standards Board of the AICPA and Interpretations thereof issued by the Auditing Standards Division of the AICPA.

(e) *Commencement of the audit.* (1) Within ten days after the selection of the auditor, the auditor shall meet by telephone or in person with designated representatives of the participating copyright owners and the statutory licensee to review the scope of the audit, audit methodology, and schedule for conducting and completing the audit.

(2) Within thirty days after the selection of the auditor, the licensee shall provide the auditor and a representative of the participating copyright owners with a list of all broadcast signals retransmitted pursuant to the statutory license in each community covered by each of the Statements of Account subject to the audit, including the call sign for each broadcast signal and each multicast signal. In the case of an audit involving a cable system or MSO, the list must include the classification of each signal on a community-by-community basis pursuant to §§ 201.17(e)(9)(iv) through

(v) and 201.17(h). The list shall be signed by a duly authorized agent of the licensee and the signature shall be accompanied by the following statement: I, the undersigned agent of the statutory licensee, hereby declare under penalty of law that all statements of fact contained herein are true, complete, and correct to the best of my knowledge, information, and belief, and are made in good faith.

(f) *Failure to proceed with a noticed audit.* If the participating copyright owners fail to provide the statutory licensee with a list of auditors or fail to retain the auditor selected by the licensee pursuant to paragraph (d)(2) of this section, the Statement(s) of Account identified in the notice of intent to audit shall not be subject to audit under this section.

(g) *Ex parte communications.* Following the initial consultation pursuant to paragraph (e)(1) of this section and until the distribution of the auditor's final report to the participating copyright owners pursuant to paragraph (i)(3) of this section, there shall be no *ex parte* communications regarding the audit between the auditor and the participating copyright owners or their representatives; provided, however, that the auditor may engage in such *ex parte* communications where either:

(1) Subject to paragraph (i)(4) of this section, the auditor has a reasonable basis to suspect fraud and that participation by the licensee in communications regarding the suspected fraud would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud; or

(2) The auditor provides the licensee with a reasonable opportunity to participate in communications with the participating copyright owners or their representatives and the licensee declines to do so.

(h) *Auditor's authority and access.* (1) The auditor shall have exclusive authority to verify all of the information reported on the Statement(s) of Account subject to the audit in order to confirm the correctness of the calculations and royalty payments reported therein; provided, however, that the auditor shall not determine whether any cable system properly classified any broadcast signal as required by §§ 201.17(e)(9)(iv) through (v) and 201.17(h) or whether a satellite carrier properly determined that any subscriber or group of subscribers is eligible to receive any broadcast signals under 17 U.S.C. 119(a).

(2) The statutory licensee shall provide the auditor with reasonable access to the licensee's books and records and any other information that the auditor needs in order to conduct the audit. The licensee shall provide the auditor with any information the auditor reasonably requests promptly after receiving such a request.

(3) The audit shall be conducted during regular business hours at a location designated by the licensee with consideration given to minimizing the costs and burdens associated with the audit. If the auditor and the licensee agree, the audit may be conducted in whole or in part by means of electronic communication.

(4) With the exception of its obligations under paragraphs (d) and (e) of this section, a licensee may suspend its participation in an audit for no more than sixty days before the semi-annual due dates for filing Statements of Account by providing advance written notice to the auditor and a representative of the participating copyright owners, provided however, that if the participating copyright owners notify the licensee within ten days of receiving such notice of their good faith belief that the suspension could prevent the auditor from delivering his or her final report to the participating copyright owners before the statute of limitations may expire on any claims under the Copyright Act related to a Statement of Account covered by that audit, the licensee may not suspend its participation in the audit unless it first executes a tolling agreement to extend the statute of limitations by a period of time equal to the period of the suspension.

(i) *Audit report.* (1) After reviewing the books, records, and any other information received from the statutory licensee, the auditor shall prepare a draft written report setting forth his or her initial conclusions and shall deliver a copy of that draft report to the licensee. The auditor shall then consult with a representative of the licensee regarding the conclusions set forth in the draft report for no more than thirty days. If, upon consulting with the licensee, the auditor concludes that there are errors in the facts or conclusions set forth in the draft report, the auditor shall correct those errors.

(2) Within thirty days after the date that the auditor delivered the draft report to the licensee pursuant to paragraph (i)(1) of this section, the auditor shall prepare a final version of the written report setting forth his or her ultimate conclusions and shall deliver a copy of that final version to the licensee. Within fourteen days thereafter, the licensee may provide the auditor with a written rebuttal setting forth its good faith objections to the facts or conclusions set forth in the final version of the report.

(3) Subject to the confidentiality provisions set forth in paragraph (l) of this section, the auditor shall attach a copy of any written rebuttal timely received from the licensee to the final version of the report and shall deliver a copy of the complete final report to the participating copyright owners and the licensee. The final report must be delivered by November 1st of the year in which the notice was published in the **Federal Register** pursuant to paragraph (c)(1) of this section and within five business days after the last day on which the licensee may provide the auditor with a written rebuttal pursuant to paragraph (i)(2) of this section. A representative of the participating copyright owners shall promptly notify the Office that the audit has been completed and shall state whether the auditor discovered an underpayment or overpayment on any Statement(s) examined in the audit, as applicable. The notice should be addressed to the ''U.S. Copyright Office, Office of the General Counsel'' and should be sent to the address for time-sensitive requests specified in § 201.1(c)(1).

(4) Prior to the delivery of the final report pursuant to paragraph (i)(3) of this section the auditor shall not provide any draft of his or her report to the participating copyright owners or their representatives; provided, however, that the auditor may deliver a draft report simultaneously to the licensee and the participating copyright owners if the auditor has a reasonable basis to suspect fraud.

(j) *Corrections, supplemental payments, and refunds.* (1) If the auditor concludes in his or her final report that any of the information reported on a Statement of Account is incorrect or incomplete, that the calculation of the royalty fee payable for a particular accounting period was incorrect, or that the amount deposited in the Office for that period was too low, a statutory licensee may cure such incorrect or incomplete information or underpayment by filing an amendment to the Statement and, in case of a deficiency in payment, by depositing supplemental royalty fee payments with the Office using the procedures set forth in §§ 201.11(h) or 201.17(m), provided that the amendment and/or payments are received within sixty days after the delivery of the final report to the participating copyright owners and the licensee or within ninety days after the delivery of such report in the case of an audit of an MSO, and further provided that the licensee reimburses the

participating copyright owners for the licensee's share of the audit costs, if any, determined to be owing pursuant to paragraph (k)(3) of this section. Supplemental royalty fee payments made pursuant to this paragraph shall be delivered to the Office and not to participating copyright owners or their representatives.

(2) Notwithstanding §§ 201.11(h)(3)(i) and 201.17(m)(4)(i), if the auditor concludes in his or her final report that there was an overpayment on a particular Statement, the licensee may request a refund from the Office using the procedures set forth in §§ 201.11(h)(3) or 201.17(m)(4), provided that the request is received within sixty days after the delivery of the final report to the participating copyright owners and the licensee or within ninety days after the delivery of the final report in the case of an audit of an MSO.

(k) *Costs of the audit.* (1) No later than the fifteenth day of each month during the course of the audit, the auditor shall provide the participating copyright owners with an itemized statement of the costs incurred by the auditor during the previous month, and shall provide a copy to the licensee that is the subject of the audit.

(2) If the auditor concludes in his or her final report that there was no net aggregate underpayment or a net aggregate underpayment of five percent or less, the participating copyright owners shall pay for the full costs of the auditor. If the auditor concludes in his or her final report that there was a net aggregate underpayment of more than five percent but less than ten percent, the costs of the auditor are to be split evenly between the participating copyright owners and the licensee that is the subject of the audit. If the auditor concludes in his or her final report that there was a net aggregate underpayment of ten percent or more, the licensee will be responsible for the full costs of the auditor.

(3) If a licensee is responsible for any portion of the costs of the auditor, a representative of the participating copyright owners shall provide the licensee with an itemized accounting of the auditor's total costs, the appropriate share of which should be paid by the licensee to such representative no later than sixty days after the delivery of the final report to the participating copyright owners and licensee or within ninety days after the delivery of such report in the case of an audit of an MSO.

(4) Notwithstanding anything to the contrary in paragraph (k) of this section, no portion of the auditor's costs that exceed the amount of the net aggregate underpayment may be recovered from the licensee.

(l) *Confidentiality.* (1) For purposes of this section, confidential information shall include any non-public financial or business information pertaining to a Statement of Account that has been subjected to an audit under 17 U.S.C. 111(d)(6) or 119(b)(2).

(2) Access to confidential information under this section shall be limited to:

(i) The auditor; and

(ii) Subject to the execution of a reasonable confidentiality agreement, outside counsel for the participating copyright owners and any third party consultants retained by outside counsel, and any employees, agents, consultants, or independent contractors of the auditor who are not employees, officers, or agents of a participating copyright owner for any purpose other than the audit, who are engaged in the audit of a Statement or activities directly related hereto, and who require access to the confidential information for the purpose of performing such duties during the ordinary course of their employment.

(3) The auditor and any person identified in paragraph (l)(2)(ii) of this section shall implement procedures to safeguard all confidential information received from any third party in connection with an audit, using a reasonable standard of care, but no less than the same degree of security used to protect confidential financial and business information or similarly sensitive information belonging to the auditor or such person.

(m) *Frequency and scope of the audit.* (1) Except as provided in paragraph (n)(2) of this section with respect to expanded audits, a cable system, MSO, or satellite carrier shall be subject to no more than one audit per calendar year.

(2) Except as provided in paragraph (n)(1) of this section, the audit of a particular cable system or satellite carrier shall include no more than two of the Statements of Account from the previous eight accounting periods submitted by that cable system or satellite carrier.

(3) Except as provided in paragraph (n)(3)(ii), an audit of an MSO shall be limited to a sample of no more than ten percent of the MSO's Form 3 cable systems and no more than ten percent of the MSO's Form 2 systems.

(n) *Expanded audits.* (1) If the auditor concludes in his or her final report that there was a net aggregate underpayment of five percent or more on the Statements of Account examined in an initial audit involving a cable system or satellite carrier, a copyright owner may expand the audit to include all previous Statements filed by that cable system or satellite carrier that may be timely noticed for audit under paragraph (c)(2) of this section. The expanded audit shall be conducted using the procedures set forth in paragraphs (d) through (l) of this section, with the following exceptions:

(i) The expanded audit may be conducted by the same auditor that performed the initial audit, provided that the participating copyright owners provide the licensee with updated information reasonably sufficient to allow the licensee to determine that there has been no material change in the auditor's independence and qualifications. In the alternative, the expanded audit may be conducted by an auditor selected by the licensee using the procedure set forth in paragraph (d) of this section.

(ii) The auditor shall deliver his or her final report to the participating copyright owners and the licensee within five business days following the last day on which the licensee may provide the auditor with a written rebuttal pursuant to paragraph (i)(2) of this section, but shall not be required to deliver the report by November 1st of the year in which the notice was published in the **Federal Register** pursuant to paragraph (c) of this section.

(2) An expanded audit of a cable system or a satellite carrier that is conducted pursuant to paragraph (n)(1) of this section may be conducted concurrently with another audit involving that same licensee.

(3) If the auditor concludes in his or her final report that there was a net aggregate underpayment of five percent or more on the Statements of Account examined in an initial audit involving an MSO:

(i) The cable systems included in the initial audit of that MSO shall be subject to an expanded audit in accordance with paragraph (n)(1) of this section; and

(ii) The MSO shall be subject to an initial audit involving a sample of no more than thirty percent of its Form 3 cable systems and no more than thirty percent of its Form 2 cable systems, provided that the notice of intent to conduct that audit is filed in the same calendar year as the delivery of such final report.

(o) *Retention of records.* For each Statement of Account or amended Statement that a statutory licensee files with the Office for accounting periods beginning on or after January 1, 2010, the licensee shall maintain all records necessary to confirm the correctness of the calculations and royalty payments reported in each Statement or amended Statement for at least three and one-half

years after the last day of the year in which that Statement or amended Statement was filed with the Office and, in the event that such Statement or amended Statement is the subject of an audit conducted pursuant to this section, shall continue to maintain those records until three years after the auditor delivers the final report to the participating copyright owners and the licensee pursuant to paragraph (i)(3) of this section.

§ 201.17 [Amended]

■ 3. Amend § 201.17 as follows:

■ a. In paragraphs (m)(2) and (m)(4)(i) by removing ''(m)(3)'' and adding in its place ''(m)(4)''.

■ b. In paragraphs (m)(2)(ii), (m)(4)(iii)(C), and (m)(4)(iv)(A) by removing ''(m)(1)(iii)'' and adding in its place ''(m)(2)(iii)''.

■ c. In paragraph (m)(4) by removing ''(m)(1)'' and adding in its place ''(m)(2)''.

■ d. In paragraph (m)(4)(iii)(A) by removing ''(m)(1)(i)'' and adding in its place ''(m)(2)(i)''.

■ e. In paragraph (m)(4)(iii)(B) by removing ''(m)(1)(ii)'' and adding in its place ''(m)(2)(ii)''.

■ f. In paragraph (m)(4)(vi) by removing ''(m)(3)(i)'' and adding in its place ''(m)(4)(i)''.

Dated: September 10, 2014.

Jacqueline C. Charlesworth,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2014–21944 Filed 9–16–14; 8:45 am]

BILLING CODE 1410–30–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2011–0968; FRL–9916–46–Region 5]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Open Burning Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a November 14, 2011, request by Indiana to revise the state implementation plan open burning provisions in Title 326 of the Indiana Administrative Code (IAC), Article 4, Rule 1 (326 IAC 4–1), Open Burning Rule. EPA is proposing to approve this rule for attainment counties and take no action on the rule for Clark, Floyd, Lake and Porter counties which are nonattainment or maintenance areas for ozone or particulate matter.

DATES: Comments must be received on or before October 17, 2014.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2011–0968 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 (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Pamela Blakley, Chief, Control Strategies Section (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.

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

FOR FURTHER INFORMATION CONTACT: Charles Hatten, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6031, *hatten.charles@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule, and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: September 2, 2014.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2014–22047 Filed 9–16–14; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–1

RIN 1250–AA06

Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions

AGENCY: Office of Federal Contract Compliance Programs (OFCCP), Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) proposes amending the regulations implementing Executive Order 11246 that set forth the basic equal employment opportunity requirements that apply to Federal contractors and subcontractors. This Notice of Proposed Rulemaking (NPRM) proposes including definitions for key words or terms used in Executive Order 13665. The NPRM also proposes amending the mandatory equal opportunity clauses that are included in Federal contracts and subcontracts and federally assisted construction contracts. The NPRM would delete the outdated reference to the ''Deputy Assistant Secretary'' and replace it with the ''Director of OFCCP.'' The NPRM also proposes to change the title of a section regarding the inclusion of the equal opportunity clause by reference and making conforming changes in the text. In addition, the NPRM would establish contractor defenses to allegations of violations of the nondiscrimination provision. The proposed rule also adds a section requiring Federal contractors to notify employees and job applicants of the nondiscrimination protection created by Executive Order 13665 using existing methods of communicating to applicants and employees.

DATES: To be assured of consideration, comments must be received on or before December 16, 2014.

ADDRESSES: You may submit comments, identified by RIN number 1250–AA06, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Fax: (202) 693–1304 (for comments of six pages or less).
- Mail: Debra A. Carr, Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room C–3325, 200 Constitution Avenue NW., Washington, DC 20210.

Please submit your comments by only one method. Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission was received by telephoning OFCCP at (202) 693–0103 (voice) or (202) 693–1337 (TTY) (these are not toll-free numbers).

All comments received, including any personal information provided, will be available for public inspection during normal business hours at Room C–3325, 200 Constitution Avenue NW., Washington, DC 20210, or via the Internet at *www.regulations.gov.* Upon request, individuals who require assistance viewing comments are provided appropriate aids such as readers or print magnifiers. Copies of this NPRM are made available in the following formats: large print, electronic file on computer disk, and audiotape. To schedule an appointment to review the comments and/or to obtain this NPRM in an alternate format, please contact OFCCP at the telephone numbers or address listed above.

FOR FURTHER INFORMATION CONTACT: Debra A. Carr, Director, Division of Policy, Planning and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW., Room C–3325, Washington, DC 20210. Telephone: (202) 693–0103 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION:

Executive Summary

The Office of Federal Contract Compliance Programs (OFCCP) is a civil rights and worker protection agency. OFCCP enforces an Executive Order and two laws that prohibit employment discrimination and require affirmative action by companies doing business with the Federal Government.[1] Specifically, Federal contractors must not discriminate because of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran.[2] They must also engage in affirmative action and provide equal employment opportunity without regard to race, color, religion, sex, national origin, disability, or status as a protected veteran.

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended, prohibits employment discrimination against certain protected veterans. Section 503 of the Rehabilitation Act of 1973 (section 503), as amended, prohibits employment discrimination against individuals with disabilities. Executive Order 11246, as amended, prohibits employment discrimination because of race, color, religion, sex, sexual orientation, gender identity, or national origin.[3] Compensation discrimination is one form of discrimination prohibited by the Executive Order.

On April 8, 2014, President Obama issued Executive Order 13665 entitled ''Non-Retaliation for Disclosure of Compensation Information.'' This Executive Order amends section 202 of Executive Order 11246 to prohibit Federal contractors from discharging or discriminating in any other way against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. This NPRM proposes new regulations implementing Executive Order 13665, which would apply to covered contracts and federally assisted construction contracts. The provisions of this proposed rule and the Executive Order apply to covered contracts entered into or modified on or after the effective date of the Final Rule. Modified contracts are contracts with any alteration in the terms and conditions of a contract, including supplemental agreements, amendments and extensions. See 41 CFR 60–1.3 (definition of ''Government contractor'').

Despite the existence of laws protecting workers from gender-based compensation discrimination for more than five decades, a pay gap between men and women persists today. A comparison of average annual wage data reveals that women make 77 cents for every dollar that men make.[4] Recent data on average weekly wages from the Bureau of Labor Statistics (BLS) show a similar gap, with women making 82 cents for every dollar that men make.[5] The gap in wages is even greater for some women of color. BLS data show that African American women earn 68 cents and Latina women earn 59 cents for every dollar earned by a non-Hispanic white man.[6] Census data show similar disparities, with African American women making 64 cents, Latina women making 56 cents, and Asian women making 86 cents per dollar earned by a non-Hispanic white man.[7] While research has found that many factors contribute to the wage gap, such as occupational preferences, pay discrimination remains a significant problem, especially for the working poor and the middle class.

For example, according to a 2011 report, a typical 25 year-old woman working full-time, year-round will have already earned $5,000 less than a typical 25 year-old man.[8] If this woman faced the same wage gaps at each age that existed in 2011, then by age 35, she would have earned $33,600 less than a typical 35 year-old man.[9] Moreover, by

[1] Executive Order 11246, Sept. 24, 1965, 30 FR 12319, 12935, 3 CFR, 1964–1965, as amended; Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793, (Section 503); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA).

[2] On July 21, 2014, the President signed Executive Order 13672 amending Executive Order 11246 to include nondiscrimination based on sexual orientation and gender identity. Executive Order 13672 requires the Secretary of DOL to prepare regulations within 90 days of the date of the Order. Though Executive Order 13672 is effective immediately, its protections apply to contracts entered into on or after the effective date of the new DOL regulations.

[3] *Id.*

[4] U.S. Bureau of the Census, Income, Poverty and Health Insurance Coverage in the United States, Current Population Reports 2011 (Sept. 2012), *available at http://www.census.gov/prod/2012pubs/p60–243.pdf.* Calculation of the pay gap using average weekly wages has the advantage of accounting for differences in hours worked, which is not captured in calculations using annual wage data. However, calculations using weekly wage data do not account for forms of compensation other than those paid as weekly wages, unlike annual wage calculations. While neither method is perfect, analyses that account for factors like occupation and qualifications further support the existence of a significant gender-based pay disparity.

[5] Bureau of Labor Statistics, U.S. Department of Labor, Current Population Survey, Labor Force Statistics from Current Population Survey, Median Weekly Earnings of Full-Time Wage and Salary Workers by Selected Characteristics, *available at http://www.bls.gov/cps/cpsaat37.htm*; Updated quarterly CPS earnings figures by demographics by quarter for sex through the end of 2013, *available at http://www.bls.gov/news.release/wkyeng.t01.htm.*

[6] Bureau of Labor Statistics, U.S. Department of Labor, Current Population Survey, Labor Force Statistics from Current Population Survey, *available at http://www.bls.gov/cps/earnings.htm#demographics.*

[7] 2012 Person Income Table PINC–10. Wage and Salary Workers—People 15 Years Old and Over, by Total Wage and Salary Income in 2012, Work Experience in 2012, Race, Hispanic Origin, and Sex, *available at https://www.census.gov/hhes/www/cpstables/032013/perinc/pinc10_000.htm* (comparison of median wage for workers working 50 or more weeks).

[8] White House Council on Women and Girls, The Key to an Economy Built to Last (April 2012), *available at http://www.whitehouse.gov/sites/default/files/email-files/womens_report_final_for_print.pdf.*

[9] *Id.* at 4.

age 65, this earnings gap would have ballooned to $389,300.[10] At the current rate of progress, researchers estimate it will take until 2057 to close the gender pay gap.[11]

Research also reveals a wage gap amongst various racial groups. At the end of 2013, median weekly earnings for African American men working at full-time jobs were $646 per week, only 72.1 percent of the median for white men ($896).[12] The median weekly earnings for African American women was $621 per week, or 69.3% of the median for white men.[13] Further, a study based on the hiring pattern of male and female workers in the state of New Jersey found that African Americans, when re-entering the job market after periods of unemployment, are offered lower wages when compared to their white counterparts.[14] The study showed that the pay gap between these groups is typically 30 percent.[15] Controlling for various factors such as skills and previous earnings, the study found that up to a third of this pay gap could be attributed to racial discrimination in the labor market.[16] Similarly, a study based on National Longitudinal Survey data, found that the pay gap between African Americans and whites continues to exist, even after controlling for abilities and schooling choices.[17]

Many of the studies analyzing pay disparities for the Hispanic populations focus on differences in education and age as compared to white workers.[18] However, even after analyzing the effect of these factors, these studies showed that these factors do not account for the entire pay gap for Hispanics.[19]

Research conducted by The Institute for Women's Policy Research (IWPR) finds that the poverty rate for working women would be cut in half if women were paid the same as men who were similar in terms of their education and hours of work. The poverty rate for all working women would be cut in half, falling to 3.9 percent from 8.1 percent.[20] The high poverty rate for working single mothers would fall by nearly half, from 28.7 percent to 15 percent.[21] For the 14.3 million single women living on their own, equal pay would mean a significant drop in poverty from 11.0 percent to 4.6 percent.[22] Nearly 60 percent (59.3 percent) of women would earn more if working women were paid the same as men of the same age with similar education and hours of work.[23] This would go a long way toward closing the pay gap and reducing the poverty rate for working women. These statistics are intended to provide general information about the potential impacts of eliminating pay differentials among men and women, including pay differentials that may not be attributed to discrimination. In addition, these statistics include all employers and all employees in the U.S., whereas this proposed rule would apply to federal contractors and their employees. Therefore, the potential impact of this rule in reducing the pay gap would be much smaller than the impact of eliminating the pay gap among all working men and women.

Potentially nondiscriminatory factors can explain some of the gender wage differences, but accounting for them does not eliminate the pay gap.[24] Additionally, women earn less even within occupations. In a recent study of newly trained doctors, after considering the effects of specialty, practice setting, work hours and other factors, the gender pay gap was nearly $17,000 in 2008.[25] Catalyst, a nonprofit research organization, reviewed 2011 government data showing a gender pay gap for women lawyers,[26] and that data confirms that the gap exists for a range of professional and technical occupations.[27] In fact, according to a study by IWPR that used information from BLS, women frequently earn less than men within the same occupations.[28] Despite differences in the types of jobs women and men typically perform, women earn less than men in male dominated occupations such as managers, software developers and CEO's and even in those jobs commonly filled by women such as teachers, nurses and receptionists.

Among the possible contributing factors to the enduring pay gap is the prevalence of workplace prohibitions against discussing compensation. Whether communicated through a written employment policy or through more informal means, strictures against revealing compensation can conceal compensation disparities among employees. This makes it impossible for an employee to know he or she is being underpaid compared to his or her peers. If compensation remains hidden, employees who are being unfairly paid less because of their gender or race will remain unaware of the problem and will be unable to exercise their rights by filing a complaint pursuant to the Executive Order.

Although very little research has been conducted about pay secrecy policies and their effects, a recent survey by IWPR provides some insight into the prevalence of workplace rules against discussing compensation. The survey found that 51 percent of female

[10] *Id.*

[11] Institute for Women's Policy Research, At Current Pace of Progress, Wage Gap for Women Expected to Close in 2057 (April 2013), *available at http://www.iwpr.org/publications/pubs/at-current-pace-of-progress-wage-gap-for-women-expected-to-close-in-2057.*

[12] Bureau of Labor Statistics, *Usual Weekly Earnings of Wage and Salary Workers,* Fourth Quarter 2013, *available at http://www.bls.gov/news.release/archives/wkyeng_01222014.pdf,* January 22, 2014 (last accessed March 28, 2014).

[13] *Id. at Table 2: Median usual weekly earnings of full-time wage and salary workers by selected characteristics, quarterly averages, not seasonally adjusted.*

[14] Roland G. Fryer Jr. et al., *Racial Disparities in Job Finding and Offered Wages* (2013), at 27, *available at, http://scholar.harvard.edu/files/fryer/files/racial_disparities_in_job_finding_and_offered_wages.*pdf (last accessed April 29, 2014).

[15] *Id.* at 29.

[16] *Id.*

[17] Sergio Urzua, Racial Labor Market Gaps: The Role of Abilities and Schooling Choices, 43.4 J. Hum. Resources, 919, 919–971.

[18] Richard Fry & B. Lindsay Lowell, The *Wage Structure of Latino-Origin Groups across Generations,* 45 Indus. Relations 2 (2006); Abelardo Rodriguez & Stephen Devadoss, *Wage Gap between White Non-Latinos and Latinos by Nativity and Gender in the Pacific Northwest, U.S.A.,* 4 Journal of Management and Sustainability 1 (2014) .

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Hartman, Heidi, Ph.D., Hayes, Jeffrey, Ph.D., and Clark, Jennifer, ''How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy,'' Briefing Paper IWPR #C411, Institute for Women's Policy Research, January 2014.

[24] A March 2011 White House report entitled Women in America: Indicators of Social and Economic Well-Being, found that while earnings for women and men typically increase with higher levels of education, male-female pay gap persists at all levels of education for full-time workers (35 or more hours per week), according to 2009 BLS wage data. See, e.g., June Elliot O'Neill, The Gender Gap in Wages, Circa 2000, American Economic Review (May 2003). Even so, after controlling for differences in skills and job characteristics, women still earn less than men. Explaining Trends in the Gender Wage Gap, A Report by the Council of Economic Advisers (June 1998). Ultimately, the research literature still finds an unexplained gap exists even after accounting for potential explanations, and finds that the narrowing of the pay gap for women has slowed since the 1980's. Joyce P. Jacobsen, *The Economics of Gender* 44 (2007); Francine D. Blau & Lawrence M. Kahn, The U.S. gender pay gap in the 1990s: Slowing convergence, 60 Industrial and Labor Relations Review 45 (2006).

[25] Anthony T. LoSasso, et al, *The $16,819 Pay Gap For Newly Trained Physicians: The Unexplained Trend of Men Earning More Than Women,* 30 Health Affairs 193 (2011) *available at* (*http://content.healthaffairs.org/content/30/2/193.abstract*).

[26] *http://www.catalyst.org/knowledge/women-law-us.*

[27] Bureau of Labor Statistics, Median weekly earnings of full-time wage and salary workers by detailed occupation and sex (2013), *available at http://www.bls.gov/cps/cpsaat39.pdf.*

[28] Ariane Hegewisch, Claudia Williams, Vanessa Harbin, The Gender Wage Gap by Occupation (2012), *available at http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-1/.*

respondents and 47 percent of male respondents reported that the discussion of wage and salary information is either discouraged or prohibited and/or could lead to punishment.[29] Further, the study found that these institutional barriers to discussing compensation were much more common among private employers than among public employers.[30] Sixty-two percent (62 percent) of women and 60 percent of men working for private employers reported that discussion of wage and salary information is discouraged or prohibited, compared to only 18 percent of women and 11 percent of men working in the public sector.[31]

OFCCP enforces the prohibition against compensation discrimination by investigating class complaints of compensation discrimination and conducting compliance evaluations under Executive Order 11246.[32] If a contractor's employees are unaware of how their compensation compares to that of employees with similar jobs because the risk of punitive action inhibits discussions about compensation, employees will not have the information they need to assert their rights under Executive Order 11246.[33] An unwarranted difference in compensation or other forms of compensation that is based on a protected status like sex or race will likely continue and potentially grow more severe over time. Simply allowing employees to discuss compensation may help bring illegal compensation practices to light and allow employees to obtain appropriate legal redress.

Policies prohibiting employee conversations about compensation can also serve as a significant barrier to Federal enforcement of the laws against compensation discrimination. OFCCP primarily enforces prohibitions in Executive Order 11246 against pay and other forms of compensation discrimination by conducting neutrally scheduled compliance evaluations of Federal contractors.[34] While OFCCP typically develops statistical analyses to establish systemic compensation discrimination, interviewing managers, human resources professionals, and employees potentially impacted by discriminatory compensation is also an invaluable way for the agency to determine whether compensation discrimination in violation of Executive Order 11246 has occurred and to support its statistical findings. Therefore, the accuracy of OFCCP's investigative findings depends in part on the willingness of a contractor's employees to speak openly with OFCCP investigators about a contractor's compensation practices. If a contractor has a policy or practice of punishing employees for discussing their pay, the employees may be fearful and less forthcoming during interviews with OFCCP staff. Prohibiting discrimination against workers who discuss, inquire about or disclose compensation will help dispel an atmosphere of secrecy around the topic of compensation and promote the agency's ability to uncover illegal compensation discrimination.

The experience of Lilly Ledbetter demonstrates how pay secrecy enables illegal compensation discrimination. For Lilly Ledbetter, her employer's insistence on pay secrecy likely cost her the ability to seek justice for the compensation discrimination she suffered throughout her career. Lilly Ledbetter was employed at the Gadsden, Alabama plant of Goodyear Tire and Rubber Company. While there, she filed a charge with the EEOC alleging that she was paid a discriminatorily low salary as an area manager because of her sex in violation of Title VII of the Civil Rights Act of 1964.[35] Ledbetter only discovered how much her male co-workers were earning when she found an anonymous note in her mailbox disclosing her pay and the pay of three males who were doing the same job. In an interview, she said that her employer told her, ''You do not discuss wages with anyone in this factory.'' [36] The Supreme Court, in 2007, issued its ruling in *Ledbetter* v. *Goodyear Tire & Rubber Co.* holding that Ledbetter's claim was untimely.[37]

Pay secrecy policies interfere with the Federal Government's interest in efficiency in procurement. Economy and efficiency in federal procurement require that contractors compensate employees under merit-based practices, without any barriers to success. This rule would eliminate the barrier of pay secrecy policies and ensure that Federal contractor employees are compensated based on merit.

Pay secrecy policies may decrease worker productivity. Workers, due to a lack of compensation information, may experience a reduction in performance motivation and are likely to perceive their employer as unfair or untrustworthy. Both reduce work productivity.[38] For example, one study has shown that workers without access to compensation information are less satisfied and less productive.[39] The precise reasons for this drop in productivity have not been investigated; however, a number of theories can be drawn from the empirical evidence gathered in this field. Because of pay secrecy policies, some workers do not know whether their own wages are reflective of job performance. This information gap makes it more difficult for workers to make informed choices about their own compensation and creates unnecessary barriers to enforcing laws against compensation discrimination. Information asymmetries provide an advantage and market power to the party with more information. This takes a unique form in labor markets where those involved in the transaction are people, who unlike machines, are likely to be affected by the information in terms of motivation and effort. When workers have access to more information about colleagues' compensation, salaries may be likely to be more closely linked to productivity on the job and compensation may be much less likely to be influenced by factors unrelated to job performance such as sex and race. As a result, workers with the ability to inquire about, discuss, and disclose

[29] Institute for Women's Policy Research, Quick Figures: Pay Secrecy and Wage Discrimination (January 2014).

[30] *Id. See also* Rafael Gely & Leonard Bierman, ''Love, Sex and Politics? Sure. Salary? No Way': Workplace Social Norms and the Law,'' 25 BERKELEY J. EMP. & LAB. L. 167, 171 (2004) (arguing that pay-secrecy policies are the prevalent workplace norm); Matthew A. Edwards, ''The Law and Social Norms of Pay Secrecy,'' 26 Berkeley J. Emp. & Lab. L. 41 (2005) (*rebutting* Gely & Bierman's conclusions about the prevalence and causes of pay secrecy).

[31] Institute for Women's Policy Research, Quick Figures: Pay Secrecy and Wage Discrimination (January 2014).

[32] Pursuant to a Memorandum of Understanding between OFCCP and the Equal Employment Opportunity Commission (EEOC), OFCCP refers individual discrimination complaints subject to both Executive Order 11246 and Title VII of the Civil Rights Act of 1964 to the EEOC for investigation, but keeps systemic discrimination complaints. 64 FR 17664–02 (April 12, 1999).

[33] References to ''contractors'' throughout the NPRM are intended to include both contractors and subcontractors unless stated to the contrary.

[34] OFCCP reviews approximately 4,000 federal contractors annually.

[35] White House National Pay Task Force, ''Fifty Years After the Equal Pay Act: Assessing the Past, Taking Stock of the Future,'' June 2013, *http://www.whitehouse.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf,* citing TAP Talks with Lilly Ledbetter. The American Prospect, April 23, 2008, *http://www.prospect.org/cs/articles?article=tap_talks_with_lilly_ledbetter* (last accessed May 15, 2014).

[36] *Id.* at 22.

[37] *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618 (2007).

[38] Adrienne Colella, Ramona L. Paetzold, Asghar Zardkoohi & Michael J. Wesson, *Exposing Pay Secrecy,* 32 ACAD. of MANAGEMENT REV. 55, 58 (2007).

[39] Peter Bamberger & Elena Belogolovsky, *The Impact of Pay Secrecy on Individual Task Performance,* 63 PERSONNEL PSYCHOL. 965, 967 (2010).

compensation information may make more informed decisions about their careers. These workers may become aware of their current value to the organization, but also of their potential value, based on information they receive about the salaries of longer tenured employees or employees in higher wage positions. In companies with pay secrecy policies, negative influences on productivity may stem from workers overestimating the lower limits of pay for others in similar positions leading to an inaccurate compression of the pay range, and causing a perception that increased work will not result in a corresponding reward.[40] Workers with knowledge of compensation information are given accurate aspirational goals because they are aware of the salaries of the best compensated employees, and can make rational decisions about the cost of increased effort at work in relation to the benefit of increased compensation resulting from success in the job.[41]

Worker distrust of corporate management is another potential cause of the lag in productivity for workers subject to pay secrecy policies. The restrictions on sharing compensation information may create a sense that the company has something to hide with respect to compensating employees. Younger employees value openness in general, and are more suspicious of companies instituting pay secrecy rules.[42] Workers who believe that they have been discriminated against may be empowered by the knowledge of their compensation relative to similarly situated employees. These workers may seek assistance from Federal civil rights enforcement agencies to rectify the discriminatory treatment, benefitting themselves and future employees. Further, feelings of institutional unfairness may have an additional negative impact on workers' productivity.[43]

Federal contractors, as a result of Executive Order 13665 and the proposed implementing regulations, may also see a decrease in employee turnover and a related decrease in their training and onboarding cost. Some employees with knowledge of the benefits of increased production and advancement through the corporate hierarchy will work harder to achieve goals and secure advancement. The contractor benefits directly from these goal-oriented employees through better quality and more efficient work product. When these employees receive meritorious awards for their efforts, they may be more satisfied and more likely to remain with the company. Better retention of productive employees leads to less time lost to training new workers.[44] Less employee turnover may also allow Federal contractors to hold onto their highest performing employees and continue to benefit from the quality of their work product, job experience, and organizational knowledge.

Under the NPRM proposals, contractors could also be less burdened by investigation of baseless claims of compensation discrimination. As shown above, workers with knowledge of compensation relative to other employees can make more accurate determinations about the presence or absence of discriminatory practices.[45] When workers' suspicions of discriminatory practices are discredited by information about other employees' compensation, the company avoids the costs and time associated with defending against discrimination lawsuits filed by employees.

Transparency about compensation allows companies and their employees to identify and resolve unwarranted disparities in compensation prior to the employee filing a formal complaint or pursuing litigation. This additional openness about compensation could decrease discrimination complaints and investigations, saving both the contractor and the government time and money. Moreover, the employees may receive a faster remedy through internal resolution than would be possible through a complaint process or subsequent litigation.

The preceding paragraphs present several reasons why the proposed rule could yield productivity benefits or cost savings for covered federal contractors. However, OFCCP notes that, in addition to these benefits, and in order to achieve its goal of ensuring employees receive fair wages, this NPRM is expected to result in increased wage payments to employees. This may be the result of employees using the information that they receive about the compensation paid to others to pursue increased wage payments. Employers may either voluntarily increase wages or be required to do so through actions taken by employees. These higher wage payments may, in some instances, result in net costs to covered contractors.

To help ensure that fear of discrimination does not inhibit the employees of Federal contractors from sharing information with one another about their compensation, and to promote economy and efficiency in Federal Government procurement, this NPRM proposes new regulations. This new rule would apply to all Federal contractors with contracts entered into or modified on or after the effective date of the rules that exceed $10,000 in value.[46] The proposals would require Federal contracting agencies to add a specific nondiscrimination provision regarding compensation disclosure to the mandatory equal opportunity clauses. Contracting agencies may either incorporate the equal opportunity clauses by reference or expressly include it in government contracts, and modifications thereof if not included in the original contract.[47] This provision would prohibit contractors from terminating or otherwise discriminating against employees and applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. This prohibition in no way compels employees to share compensation information with others; it simply protects those who choose to do so from discrimination by their employer. The proposed amendment to the equal opportunity clauses would generally protect employees who reveal compensation information but would

[40] *Id.* at 969.

[41] Weber, Lauren and Rachel Emma Silverman, ''Workers Share Their Salary Secrets,'' *Wall St. J.* (April 16, 2013), *available at http://online.wsj.com/news/articles/SB10001424127887324345804578426744168583824?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001424127887324345804578426744168583824.html* (last accessed Sept. 10, 2014).

[42] *Id.*

[43] See Bamberger & Belogolovsky *supra* note 29.

[44] Heather Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees,* CENTER FOR AMERICAN PROGRESS, Nov. 16, 2012, *http://www.americanprogress.org/issues/labor/report/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/.*

[45] See Weber & Silverman *supra* note 31.

[46] The Federal Acquisition Regulation Council (FARC), pursuant to an inflation-adjustment statute, 41 U.S.C. 1908, enacted a final rule that raises the dollar threshold amount in the Federal Acquisition Regulation (FAR) sections related to Section 503 of the Rehabilitation Act (Section 503) from in excess of $10,000 to $15,000. These inflationary adjustments also apply to VEVRAA's $100,000 statutory minimum threshold but they do not apply to Executive Order 11246 and its dollar threshold of more than $10,000. The procurement adjustments are made every five years.

[47] The FARC, in a separate process, is responsible for amending the FAR provisions to incorporate the change in the Equal Opportunity Clause text. OFCCP will engage the FARC representatives as early as possible to coordinate FAR changes as the Executive Order applies to ''contracts entered into on or after the effective date of rules promulgated by the Department of Labor . . .'' The FAR at 1.108(d), FAR Conventions, provides that FAR changes apply to contracts issued on or after the date of the FAR change but that contracting agencies are allowed to include a FAR change in solicitations issued before the effective date, provided award of the resulting contract occurs on or after the effective date. Contracting agencies, at their discretion, may include a FAR change in any existing contract with appropriate consideration.

not protect employees who disclose compensation information that they had access to as part of their essential job functions. This exception allows contractors to take adverse action against employees who have access to compensation information pursuant to their work duties (e.g., human resources professionals) and disclose that information to other individuals who do not otherwise have access to such information, unless the disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

In addition to the proposal amending the existing equal opportunity clauses in § 60–1.4 to include the nondiscrimination provision in Executive Order 13665, the NPRM also proposes to define key terms used in Executive Order 13665 that are incorporated into the proposed rule. Finally, in § 60–1.35, contractors would be provided defenses to allegations of violations of the nondiscrimination provision. The proposed defenses provisions allow contractors to pursue a defense as long as that defense is not based on a rule, policy, practice, agreement or other instrument that prohibits employees or applicants from discussing or disclosing their compensation or that of other employees consistent with the provisions in the equal opportunity clauses in § 60–1.4. Section 1.35 of the NPRM also proposes requiring the dissemination of the nondiscrimination provision in handbooks and manuals, and through electronic or physical postings. For those contractors that provide manager training or meetings, OFCCP is considering making it a requirement that they include nondiscrimination based on pay in their existing manager training programs or meetings. As for other contractors, OFCCP would encourage them to adopt this as a best practice for minimizing the likelihood of workplace discrimination. Consequently, OFCCP seeks comment on the feasibility of requiring contractors with manager training programs or meetings to include a regular review of the nondiscrimination provision. The language of the provision will be prescribed by the Director of OFCCP to ensure consistency of message and clarity of purpose. We are particularly interested in the cost associated with including a review of the provision in existing manager training programs or meetings.

I. Statement of Legal Authority

Issued in 1965, and amended several times in the intervening years, Executive Order 11246 has two purposes. First, it prohibits covered Federal contractors and subcontractors from discriminating against employees and applicants because of race, color, religion, sex, sexual orientation, gender identity, or national origin.[48] Second, it requires covered Federal contractors and subcontractors to take affirmative action to ensure that equal opportunity is provided in all aspects of employment. The nondiscrimination and affirmative action obligations of Federal contractors and subcontractors cover all aspects of employment, including rates of pay and other compensation.

The requirements in Executive Order 11246 generally apply to any business or organization that (1) holds a single Federal contract, subcontract, or federally assisted construction contract in excess of $10,000; (2) has Federal contracts or subcontracts that combined total in excess of $10,000 in any 12-month period; or (3) holds Government bills of lading, serves as a depository of Federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount.

Pursuant to Executive Order 11246, receiving a Federal contract comes with a number of responsibilities. Section 202 of this Executive Order requires every contractor to agree to comply with all provisions of the Executive Order and the rules, regulations, and relevant orders of the Secretary of Labor. A contractor in violation of the Executive Order 11246 may have its contracts canceled, terminated, or suspended or may be subject to debarment after the opportunity for a hearing.[49]

II. Major Proposed Revisions in the NPRM

The current regulations at § 60–1.4 enumerate the basic equal employment obligations of Federal contractors in a clause required to be included in all Federal contracts. The current § 60–1.3 includes relevant definitions. The NPRM proposes the following changes to the regulations:

- Amending § 60–1.3, Definitions, to insert definitions for each of these words or terms: Compensation, compensation information, and essential job functions.
- Amending § 60–1.4(a), Equal opportunity clause, *Government contracts,* to include the requirement that Federal contractors refrain from discharging or otherwise discriminating against employees or applicants who inquire about, discuss, or disclose their compensation or the compensation of other employees or applicants, except where the disclosure was carried out by an employee who obtained the information in the course of performing his or her essential job functions. This new requirement would be inserted as § 60–1.4(a)(3).
- Amending § 60–1.4(b), Equal opportunity clause, *federally assisted construction contracts,* to include the requirement that construction contractors must refrain from discharging or otherwise discriminating against employees or applicants who inquire about, discuss, or disclose their compensation or the compensation of other employees or applicants, except where the disclosure was carried out by an employee who obtained the information in the course of performing his or her essential job functions. This new requirement would be inserted as § 60–1.4(b)(3).
- The NPRM would delete the outdated reference to the ''Deputy Assistant Secretary'' in § 60–1.4(d), Equal opportunity clause, *Incorporation by reference,* and replace it with the ''Director of OFCCP.'' The proposal also includes changing the title of § 60–1.4(d) to *Inclusion of the equal opportunity clause by reference* and making a conforming change in the text.
- Creating a new provision at § 60–1.35 entitled Contractor Obligations and Defenses to Violation of the Nondiscrimination Requirement for Compensation Disclosures. Proposed § 60–1.35(a) and (b), respectively, would establish a general defenses provision and an essential job functions defense provision. Both provide contractor defenses to alleged violations of the nondiscrimination obligation for employees who inquired about, disclosed or discussed compensation. Proposed § 60–1.35(c) would also require Federal contractors to incorporate the nondiscrimination provision, as prescribed by the Director of OFCCP and made available on the OFCCP Web site, into their existing employee manuals or handbooks, and disseminate the nondiscrimination provision to employees and to job applicants. The prescribed

[48] On July 21, 2014, the President signed Executive Order 13672 amending Executive Order 11246 to include nondiscrimination based on sexual orientation and gender identity. Executive Order 13672 requires that the Secretary of DOL prepare regulations within 90 days of the date of the Order. Though Executive Order 13672 is effective immediately, its protections apply to contracts entered into on or after the effective date of the new DOL regulation.

[49] Executive Order 11246, Section 209(5); 41 CFR 60–1.27.

nondiscrimination provision is based on the language in section 2(b) of Executive Order 13665. This dissemination can be executed electronically or by posting the prescribed provision in conspicuous places available to employees and job applicants.

Section-by-Section Analysis

Part 60–1—Obligations of Contractors and Subcontractors SUBPART A—Preliminary Matters; Equal Opportunity Clause; Compliance Reports

Section 60–1.3 Definitions

The NPRM proposes definitions for three words or terms used in Executive Order 13665 and incorporated into the NPRM. The term ''compensation'' would be included and defined in § 60–1.3. The definition would include payments made to an employee, or on behalf of an employee, or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and contributions to retirement. This definition aligns with the definition OFCCP uses in the context of compensation discrimination investigations.[50]

Next, the proposed rule adds the term ''compensation information'' to the definitions section at § 60–1.3. We propose to define ''compensation information'' by adopting the definition used by OFCP in existing guidance. As such the definition would cover any information related to all aspects of compensation, including but not limited to information about the amount and type of compensation as well as decisions, statements, or actions related to setting or altering employees' compensation. This proposed definition is meant to be broad enough to cover any information directly related to employee compensation, as well as the process or steps that led to a decision to award a particular amount or type of compensation.

Lastly, the proposed rule adds the term ''essential job functions'' to the definitions section. The proposed definition of ''essential job functions'' would include the fundamental job duties of the employment position held by an individual. The term does not include the marginal functions of the position. A job function may be considered essential for any of several reasons, including but not limited to the following:

- The function may be essential because the reason the position exists is to perform that function;
- The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
- The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

In the Americans with Disabilities Act Amendments Act (ADAAA) and OFCCP's regulations implementing section 503 of the Rehabilitation Act, the ''essential job function'' analysis and evidence relate to issues of reasonable accommodation and qualification.[51] The goal in the disability context is to provide equal opportunity to individuals with disabilities, and to provide reasonable accommodation that is sufficient to allow an employee to perform the essential functions of the job and a job applicant to participate in the application process. However, in the context of Executive Order 13665, the goal is to determine whether an employee, by virtue of the job or position held, had access to employee and applicant compensation information as an essential job function and improperly disclosed that information. Such an employee could properly be subject to adverse action by the employer for making that disclosure under Executive Order 13665 and its implementing regulations as proposed in this NPRM.

OFCCP is proposing to adopt the section 503 and ADAAA definition and the broad factors that determine whether a job function may be considered essential, because contractors are familiar with them and they also apply in this context. We are not certain of the applicability of the existing list of types of evidence contractors could look to when determining if a particular function is essential. Not all of these section 503 factors, as listed below, may be particularly applicable in this context.

- The contractor's judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing applicants for the job;
- The amount of time spent on the job performing the function;
- The consequences of not requiring the incumbent to perform the function;
- The terms of a collective bargaining agreement;
- The work experience of past incumbents in the job; and/or
- The current work experience of incumbents in similar jobs.

The NPRM utilizes definitions and concepts from analysis of claims under the ADAAA and Title VII of the Civil Rights Act of 1964 (Title VII). However, any application or interpretation of the definitions and concepts under this proposed regulation is limited to pay disclosure discrimination claims governed by Executive Order 13665. As such, this NPRM is not intended to influence the analyses by the Equal Employment Opportunity Commission (EEOC) or the courts with respect to adjudication of claims under the ADA, as amended, and Title VII.

Therefore, OFCCP is specifically seeking public comment on the applicability of these factors, and possibly other factors, when making the determination of ''essential job function'' under Executive Order 13665, section 2(b). The factors would be considered when determining whether a disclosure by an employee of another employee's or job applicant's compensation was protected under section 2(b) of the Executive Order 13665 and the proposed amendments to § 60–1.4 implementing this section of Executive Order 13665. If the disclosure is not protected by the nondiscrimination provisions because the employee had access to the compensation information by virtue of the employee's essential job functions, the employee making the disclosure could be subjected to disciplinary or other adverse action by the employer without the employer violating Executive Order 13665 or its implementing regulations, unless that disclosure meets the exceptions provided for in section 2(b).

Section 60–1.4 Equal Opportunity Clause

The proposed rule adds a clause to § 60–1.4(a), *Governments contracts,* and to § 60–1.4 (b), *Federally assisted construction contracts.* In the existing regulations, § 60–1.4(a) requires contracting agencies to include the equal opportunity clause in section 202 of Executive Order 11246 in governments contracts and modifications thereof if the clause was

[50] *See* Notice of Final Rescission, ''Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination'' (February 28, 2013); OFCCP Directive (DIR) 2013–03 (formerly DIR 307): Procedures for Reviewing Contractor Compensation Systems and Practices (February 28, 2013).

[51] 41 CFR 60–741.2(i).

not included in the original contract. By accepting the Federal contracts, contractors accept the nondiscrimination and affirmative action requirements contained in the equal opportunity clause and agree to include the requirements in existing paragraph 1 through 7 of the clause in their subcontracts and purchase orders unless exempted by law, regulations or order of the Secretary of the U.S. Department of Labor.

Executive Order 13665, issued on April 8, 2014, amends section 202 of Executive Order 11246 so that it includes a new provision prohibiting discrimination against employees who have disclosed their compensation or the compensation of others, with limited exceptions. Contracting agencies must incorporate the new provision into the existing equal opportunity clause in their contracts, and contractors are held to comply with the revised clause and to include it in their subcontracts and purchase orders for new and modified contracts after the effective date of this Rule.

The proposed rule would revise § 60–1.4 (a) by inserting a new paragraph 3 into the equal opportunity clause, and renumbering the subsequent paragraphs in the clause. The text of the new paragraph is identical to the text in section 2(b) of Executive Order 13665. Under the terms of the provision, contractors will not be allowed to discharge or discriminate in any other manner against any employee or job applicant because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision in EO 13665 does not apply when an employee with access to the compensation information of other employees or job applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in support of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

In the existing regulations, § 60–1.4(b), Equal opportunity clause, *federally assisted construction contracts,* a similar change is proposed. Section 60–1.4(b)(1) requires that administering agencies involved in federally assisted construction through grants, loans, insurance, or guarantee include in their contracts for construction work text informing the funding applicant that the equal opportunity clause must be incorporated into the contracts and contract modifications if they are funded in whole or in part by Federal money. The section further provides the exact language for the equal opportunity clause that lists the contractor's obligations. As with § 60–1.4(a), by accepting the funding the contractor is agreeing to assume the nondiscrimination and affirmative action obligations of Executive Order 11246, including incorporating existing paragraph 1 through 7 of the equal opportunity clause into their subcontracts and purchase orders unless exempted by law, regulations, or order of the Secretary of the U.S. Department of Labor.

The proposed rule revises § 60–1.4(b)(1) by inserting a new paragraph 3 into the equal opportunity clause, and renumbering the subsequent paragraphs in the clause. The text of the new paragraph is identical to the text in section 2(b) of Executive Order 13665 as reprinted above.

These proposed changes to § 60–1.4 are intended to eliminate the secrecy and fear surrounding a discussion or disclosure of compensation information. When employees lack access to compensation information it is more difficult for them to make informed choices about their own compensation, and creates unnecessary barriers to filing complaints with civil rights agencies such as OFCCP. Secrecy may also have a detrimental impact on business productivity, employee morale and retention, and could drive increased cost related to human resources management as discussed earlier in the preamble to the NPRM.[52] Studies have shown that these pay secrecy policies are common among contractors and foster negative consequences for some employees and applicants for employment.[53] The proposed rule does not require employees to share information about compensation with other employees.

The NPRM proposes deleting the outdated reference to the ''Deputy Assistant Secretary'' in § 60–1.4(d), Equal opportunity clause, *Incorporation by reference,* and replacing it with the ''Director of OFCCP.'' The proposal also includes changing the title of § 60–1.4(d) to *Inclusion of the equal opportunity clause by reference* and changing the first sentence of § 60–1.4(d) by deleting ''incorporated by reference'' and inserting to ''included by reference.''

SUBPART B—General Enforcement; Compliance Review and Complaint Procedure Section 60–1.35 Contractor Obligations and Defenses to Violation of the Nondiscrimination Requirement for Compensation Disclosures

Proposed Section 60–1.35, Contractor Obligations and Defenses to Violation of the Nondiscrimination Requirement for Compensation Disclosures, would add a new section to part 60–1 that would implement the requirements of section 2(b), as well as the contractor defenses set forth in the Executive Order.

Analytical Framework

To provide an analytical framework, OFCCP views Executive Order 13665 as establishing a new prohibition against discrimination against any employee or applicant who inquires about, discusses, or discloses her own or someone else's compensation. The equal opportunity clause paragraph set out in section 2(b) of the Executive Order is framed in terms of discrimination. Thus, OFCCP believes that the burdens and standards of proof applicable to Title VII discrimination cases are appropriately applied to violations of section 2(a). OFCCP notes that the new prohibition here diverges from the traditional retaliation framework in that the adverse action would not flow from filing a complaint; assisting or participating in an investigation, evaluation or hearing; or otherwise opposing an act or practice made unlawful by Executive Order 11246.[54] That traditional retaliation framework is designed to protect the integrity of the administrative and legal processes by which workers assert their rights to be free from discrimination. The prohibition at issue here serves a very different purpose—to protect workers from pay discrimination itself.

As supported by administrative case law, the nondiscrimination standards developed under Title VII of the Civil Rights Act of 1964 apply to cases

[52] Cappelli, Peter, and Kevin Chauvin, ''An Interplant Test of the Efficiency Wage Hypothesis,'' Quarterly Journal of Economics, 106, 769–787, *http://dx.doi.org/10.2307/2937926(1991);* Reich, Michael, Dube, Arindrajit, and Naidu, Suresh, ''Economics of Citywide Minimum Wages,'' Institute for Industrial Relations, University of California, Berkeley Policy Brief (2005); Cowherd, D. M. and Levine, D. I., ''Product Quality and Pay Equity Between Lower-level Employees and Top Management: An Investigation of Distributive Justice Theory,'' Administrative Science Quarterly 37: 302–320 (1992).

[53] See Bamberger & Belogolovsky *supra* note 31, and Adrienne Colella, Ramona L. Paetzold, Asghar Zardkoohi & Michael J. Wesson, *Exposing Pay Secrecy,* 32 ACAD. of MANAGEMENT REV. 55, 58 (2007).

[54] See 41 CFR 60–1.32.

brought under Executive Order 11246.[55] Both the Executive Order and Title VII have as one of their goals the identification and elimination of employment discrimination; therefore, Title VII standards for determining the existence of discrimination may properly be applied to discrimination cases under Executive Order 11246.[56] Thus, OFCCP expects that it will evaluate contractor defenses pursuant to 60–1.35 under a Title VII discrimination framework.[57]

Under Title VII, the applicable analytical framework is found in 42 U.S.C. 2000e–2(m), which provides that ''an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.'' Under this framework, where the contractor has set forth a lawful reason for its action, i.e., the violation of its legitimate workplace rule, OFCCP would have to demonstrate that the improper reason, i.e., disclosure or discussion of compensation by the applicant or employee, was a motivating factor for the adverse action even if the lawful reason also motivated the adverse action. Under Title VII, therefore, the employer cannot defeat liability once the plaintiff proves the existence of an impermissible motivating factor.

The employer can, however, limit the scope of an adverse remedial order under Title VII if it can prove that it would have taken the same employment action in the absence of the impermissible motivating factor, i.e., based on violation of the legitimate workplace rule. The court in that situation may grant declaratory relief, injunctive relief and limited attorney's fees and costs, where appropriate. The employer would not be liable for monetary damages or a reinstatement order.[58]

The Department recognizes that the National Labor Relations Act (NLRA), like the Executive Order, prohibits employers from discriminating against employees and job applicants who discuss or disclose their own compensation or the compensation of other employees or applicants.[59] Therefore, a significant portion of the contractor's workforce may be subject to the protections of both the NLRA and the Executive Order. The Department believes that the prohibitions under Executive Order 13665 are compatible with the existing prohibitions under the NLRA, although the Executive Order affords protection to a broader group of employees than under the NLRA. The Executive Order also covers supervisors, managers, agricultural workers, employees of rail and air carriers and covers activity that may not be ''concerted'' under the NLRA.

It is well settled that the NLRB applies a motivating factor analysis, thus protecting an employee's right to engage in wage discussions with other employees, unless the employer can demonstrate, as an affirmative defense, that the adverse action taken against the employee would have occurred in any event.[60] OFCCP notes that the ''motivating factor'' causation standard applicable under the NLRA is consistent with the standard applicable to Title VII discrimination cases.[61] Accordingly, OFCCP proposes applying the ''motivating factor'' causation standard in assessing liability for violations of the new prohibition established in the Executive Order as a matter of consistency with Title VII and NLRA principles.

The Department is of the opinion that the Supreme Court's recent decision in *University of Texas Southeastern Medical Center* v. *Nassar* does not dictate otherwise.[62] The Court held in *Nassar* that Title VII's anti-retaliation provision requires ''but for'' causation, and that the standards and burdens of proof in the 1991 amendments to the Civil Rights Act at 42 U.S.C. 2000e–2(m) apply only to claims for discrimination based on race, color, religion, sex, or national origin under section 2000e–2, not retaliation discrimination referenced in 42 U.S.C. 2000e–3. Thus, under *Nassar,* the ''motivating factor'' standard applicable in discrimination cases no longer applies in retaliation cases. As noted above, though, OFCCP does not believe that the burdens and standards applicable to retaliation cases are applicable here, but invites comments on this issue. Furthermore, the Department notes that the EEOC has taken the position that *Nassar* does not apply to retaliation claims by Federal sector employees and applicants, due to different controlling statutory language in Section 717 of Title VII.[63] No conflicts exist between the EEOC's position on *Nassar* and the Department's interpretation of *Nassar* as described above.

Finally, the Department is aware of the District of Columbia Circuit Court decision, *Chamber of Commerce* v. *Reich*,[64] holding that Executive Order 12954, which authorized the Secretary of Labor to disqualify from certain Federal contracts employers who hire permanent replacement workers during a lawful strike, was in conflict with the NLRA and ''pre-empted by the NLRA which guarantees the right to hire permanent replacements.''[65] No such conflict exists here, as Executive Order 13665 is compatible with the existing prohibitions under the NLRA.

Contractor Defenses

The text of paragraph 60–1.35(a) incorporates the text in section 5(a) of Executive Order 13665. The text of paragraph § 1.35(a) sets out the general contours of a permissible contractor defense—that any such defense can be based on a legitimate workplace rule that does not violate the prohibition in paragraph (3) of the equal opportunity clause. For example, the contractor may have a rule that prohibits employees from being disruptive in the workplace. An employee may violate that rule by

[55] *OFCCP* v. *Greenwood Mills,* 89–OFC–39, Final Decision and Order (ARB) December 20, 2002, at 5.

[56] *OFCCP* v. *Illinois Institute of Technology,* 80–OFCCP–11, December 23, 1982, Secretary's Final Order at 5.

[57] Any claim of discrimination under the Executive Order and its implementing regulations does not preclude the filing or adjudication of claims arising under Title VII, the ADA, Section 503 of the Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, or the Genetic Information Nondiscrimination Act.

[58] 42 U.S.C. 2000e–5(g)(2).

[59] The National Labor Relations Board (NLRB) recently stated in *Parexel International LLC,* 356 NLRB No. 82, slip op. at 3 (2011):

The Board has long held that Section 7 ''encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment.''[59] In fact, wage discussions among employees are considered to be at the core of Section 7 rights because wages, ''probably the most critical element in employment,'' are ''the grist on which concerted activity feeds.''

[60] *NLRB* v. *Transportation Management Corp.,* 462 U.S. 393 (1983) (''It is fair that [the employer] bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.''); *Flex Frac Logistics, LLC,* 360 NLRB No. 120 (May 30, 2014) (NLRB found that employer lawfully discharged employee for disclosing confidential information, not for violating rule prohibiting wage discussions).

[61] OFCCP recognizes that under the NLRA, unlike under Title VII, an employer can escape liability altogether if it establishes that it would have taken the adverse action against the employee in any event and that in this regard the Executive Order affords greater protection to employees than presently exists under the NLRA. OFFCP invites comments on this issue.

[62] *University of Texas Southeastern Medical Center* v. *Nassar,* 133 S.Ct. 978 (2013). See also *Gross* v. *FBL Financial Services, Inc.,* 557 U.S. 167 (2009).

[63] *See Complainant* v. *Dep't of Interior,* E.E.O.C. Pet. No. 032011050, 2014 WL 3788011, at *10, n.6 (July 16, 2014).

[64] *Chamber of Commerce* v. *Reich,* 74 F.3d 1322 (D.C. Cir. 1996).

[65] *Id.* at 1339.

standing on her desk and repeatedly shouting out her pay. If the contractor terminates her for those actions, the contractor may have a defense to a charge of discrimination if it can demonstrate that she was terminated for being disruptive, not for disclosing her pay. Similarly, an employee may violate that same rule if she constantly asks other employees on working time unwelcome questions about their compensation after they request that she stop asking them. These examples are provided simply to illustrate that paragraph 1.35(a) permits contractors to enforce rules against disruptive behavior in the workplace, even if the applicant or employee is discussing his/her compensation or that of other applicants or employees while being disruptive. As with implementation of any legitimate workplace rule, though, the rule must be uniformly and consistently applied, and all defenses under this section will be evaluated based on the specific facts and circumstances. OFCCP is concerned that contractors' legitimate workplace rules, policies and practices such as those related to maintaining discipline in their workplaces and protecting their businesses be consistently and uniformly applied and narrowly defined to ensure they do not unnecessarily prohibit, or tend to prohibit, employees or applicants from inquiring about, discussing or disclosing their compensation or the compensation of other employees or applicants.[66] Accordingly, OFCCP invites comments on how to harmonize contractors' enforcement of legitimate workplace rules with the rights of applicants and employees to discuss, disclose, or inquire about compensation.

The text of paragraph § 1.35(b) is identical to the text in section 2(b) of Executive Order 13665. This paragraph in effect incorporates a specific, legitimate workplace rule: In general, a contractor will not violate proposed equal opportunity clause paragraph 3 if it takes adverse action against an employee, who is entrusted with confidential compensation information of other employees or applicants as part of his or her essential job functions, for disclosing the compensation of other employees or applicants, unless the disclosure occurs in certain limited circumstances.

This defense acknowledges that an employee who has access to sensitive compensation information of others within an organization as part of his or her essential job functions has a duty to protect such information from disclosure. If, however, such an employee discloses or discusses the compensation of other applicants or employees based on information that the employee received through means other than essential job functions access, e.g., through a conversation with a colleague, the defense would not apply. Similarly, the defense would not apply where such an employee pursues her own possible compensation discrimination claim or raises possible disparities involving the compensation of other employees to a contractor manager. Without this distinction, employees with essential job functions access, who primarily work in human resources departments and who are predominantly women,[67] would receive less protection than other employees who learn of possible compensation disparities in a similar manner.

The Executive Order and OFCCP recognize that disclosure by someone with essential job functions access to compensation information may also be appropriate in other limited circumstances. To the extent that an employee with access to compensation information as part of his or her essential job functions discloses compensation information of others in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, § 60–1.35(b) and § 60–1.32 prohibit the contractor from taking adverse action against that employee. As paragraph § 1.32(a) provides, contractors are not allowed to harass, intimidate, threaten, coerce, or discriminate against individuals who have engaged in protected activities, which include assisting in an investigation, review or hearing. Paragraph § 1.35(b) reinforces that the same protection and remedies apply to employees with access to compensation information, who disclose compensation information pursuant to a formal complaint or charge, investigation, proceeding hearing, or action, including an investigation conducted by the contractor, or consistent with the contractor's legal duty to furnish information. As with any defense, OFCCP will evaluate the availability of a paragraph 1.35(b) defense based on the specific facts and circumstances of each case.

Proposed § 60–1.35(c) would require Federal contractors to incorporate the nondiscrimination provision, as prescribed by the Director of OFCCP and made available on the OFCCP Web site, into their existing employee manuals or handbooks, and disseminate the nondiscrimination provision to employees and job applicants. The prescribed nondiscrimination provision is based on the language in section 2(b) of Executive Order 13665. This dissemination can be executed electronically or by posting a copy of the provision in conspicuous places available to employees and job applicants. In person or face-to-face communication of the provision is not required or recommended, however, contractors may use this method if they typically communicate information to all employees or applicants in this manner.

For contractors that provide manager trainings or meetings, OFCCP is considering making it a requirement that they include a review of the prohibition on discriminating based on an employee or applicant inquiring about, discussing, or disclosing compensation information in their existing manager trainings or meetings. As for other contractors, OFCCP would encourage them to adopt this approach as a best practice for minimizing the likelihood of workplace discrimination. Consequently, OFCCP seeks comment on the feasibility of requiring contractors with manager trainings or meetings to include a regular review of the nondiscrimination provision. The language of the provision will be prescribed by the Director of OFCCP to ensure consistency of message and clarity of purpose. We are particularly interested in the cost associated with including a review of the provision in existing manager training programs or meetings.

Regulatory Procedures

Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the

[66] See *Flex Frac Logistics, LLC,* 360 NLRB No. 120 (May 30, 2014) (NLRB found that employer lawfully discharged employee for disclosing confidential business information, even though disclosure also included wage information).

[67] In 2013, at least 71.9 percent of human resources professionals in three occupational categories were women. According to Bureau of Labor Statistics figures, women made up 72.4 percent of human resource workers in business and financial operations positions, 71.9 percent of those employed in human resource positions in management occupations, and 82 percent of those employed as human resources assistants who do not perform payroll or timekeeping work in office and administrative support occupations. *See* Dep't of Labor, Bureau of Labor Statistics, Household Data, Annual Averages: 11. Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity, *available at http://www.bls.gov/cps/cpsaat11.htm.*

least burden on society, consistent with obtaining the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

This proposed rule has been designated a ''significant regulatory action'' although not economically significant, under section 3(f) of Executive Order 12866. The NPRM is not economically significant because it will not have an annual effect on the economy of $100 million or more. The Office of Management and Budget (OMB) has reviewed the NPRM.

The Need for the Regulation

The proposed regulatory changes are needed to ensure that employees of Federal contractors and subcontractors are able to discuss their compensation without fear of adverse action. It is also needed to enhance the ability of Federal contractors and their employees to detect and remediate unlawful discriminatory practices. The NPRM is designed to contribute to a more efficient market in Federal contracting, and ensure that the most qualified and productive workers receive fair wages. The existence of pay secrecy practices means some workers can be fired for even disclosing their compensation or asking their co-workers how much they earn. Even employers who do not specifically restrict employee communications about compensation take great care to guard individual compensation information. The proposals in this NPRM benefit OFCCP's enforcement by incorporating into the equal opportunity clauses the prohibition against pay secrecy policies, specifically that an employer cannot discriminate against an employee or applicant who has inquired about, discussed, or disclosed compensation information.[68] By including the provision in the equal opportunity clauses OFCCP is clearly defining such actions as discriminatory and enhancing OFCCP's ability to take action when it finds pay secrecy policies or practices during compliance evaluations and complaint investigations. In developing its NPRM, OFCCP worked with several other Federal agencies on the National Equal Pay Task Force to identify the persistent challenges to equal pay enforcement and develop an action plan to implement recommendations to resolve those challenges. OFCCP also consulted a number of sources in order to assess the need for the proposed rulemaking. For instance, OFCCP reviewed national statistics on earnings by gender produced by BLS and the U.S. Census Bureau. Those statistics show persistent pay gaps for female and minority workers.[69] These well-documented earnings differences based on race and sex have not been fully explained by nondiscriminatory factors including differences in worker qualifications such as education and experience, occupational preferences, work schedules or other similar factors.[70] Thus, some of the remaining unexplained portion of the pay gap may be attributable to discrimination.

Currently, OFCCP lacks sufficient, reliable data to assess the gender- or race-based pay gap experienced by employees of Federal contractors or subcontractors, including how much of the potential pay gap is attributable to pay discrimination instead of nondiscriminatory factors, and how many contractors are violating the pay discrimination laws OFCCP enforces. Pay secrecy was among one of the most prevalent employer policies and practices that made discrimination much more difficult to discover and remediate.[71] OFCCP's work led to the determination that there is a substantial need for the proposed regulatory action.

Research conducted by the IWPR concluded that the poverty rate for working women could be reduced by half if women were paid the same as comparable men. The paper determined that nearly 60 percent (59.3 percent) of women could earn more if working women were paid the same as men of the same age with similar education and hours of work.[72] The poverty rate for all working women could be cut in half, falling to 3.9 percent from 8.1 percent.[73] The high poverty rate for working single mothers could fall by nearly half, from 28.7 percent to 15 percent.[74] For the 14.3 million single women living on their own, equal pay could mean a significant drop in poverty from 11.0 percent to 4.6 percent.[75] These statistics are intended to provide general information about the potential impacts of eliminating pay differentials among men and women, including pay differentials not attributed to discrimination. In addition, the IWPR statistics include all employers and all employees in the U.S., whereas this proposed rule would apply to only a subset of such employers and employees. Therefore, the potential impact of this rule would be much smaller than the impact of eliminating pay differentials among all working men and women.

Discrimination, occupational segregation, and other factors contribute to creating and maintaining a gap in earnings and keeping a significant percentage of women in poverty. It is worth noting, however, that some research has established that women earn less than men regardless of the field or occupation.[76] This research also suggests that persistent pay discrimination for women translates into lower wages and family income in families with a working woman. The gender pay gap may also affect the economy as a whole.

[68] The proposed rule includes an exception for employees (e.g., payroll personnel) who have access to the compensation information of other employees or applicants as a part of such employee's essential job functions. In certain instances, employers may take adverse action against these employees for making compensation disclosures.

[69] According to the latest Bureau of Labor Statistics (BLS) data, the weekly median earnings of women are about 82 percent of that for men. Bureau of Labor Statistics, U.S. Department of Labor, Current Population Survey, Labor Force Statistics from Current Population Survey, *available at http://www.bls.gov/cps/earnings.htm#demographics;* Updated quarterly CPS earnings figures by demographics by quarter for sex through the end of 2013 *available at http://www.bls.gov/news.release/wkyeng.t01.htm.* Looking at annual earnings reveals even larger gaps—women working full time earn approximately 77 cents on the dollar compared with men. U.S. Bureau of the Census, Income, Poverty and Health Insurance Coverage in the United States, Current Population Reports 2011 (Sept. 2012), *available at http://www.census.gov/prod/2012pubs/p60-243.pdf.* BLS data reveals that African American women make approximately 68 cents, Latinas make approximately 59 cents, and Asian-American women make approximately 87 cents for every dollar earned by a non-Hispanic white man. OFCCP acknowledges that these statistics do not account for nondiscriminatory factors that may explain some of the differential.

[70] *Women in America: Indicators of Social and Economic Well-Being* (2011) (male-female pay gap persists at all levels of education for those working 35 or more hours per week), according to 2009 BLS wage data.

[71] National Equal Pay Task Force, *Fifty Years After the Equal Pay Act* (June 2013), *available at http://www.whitehouse.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf.*

[72] Heidi Hartman, Ph.D., Jeffrey Hayes, Ph.D., & Jennifer Clark, *How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy, Briefing Paper IWPR #C411,* Institute for Women's Policy Research, January 2014.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] Ariane Hegewisch et al., *Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap, Briefing Paper IWPR #C377,* Institute for Women's Policy Research (2010).

Discussion of Impacts

In this section, OFCCP presents a summary of the costs associated with the proposed requirements in §§ 60–1.3, 60–1.4 and 60–1.35. The estimated labor cost to contractors is based on Bureau of Labor Statistics data in the publication ''Employer Costs for Employee Compensation'' issued in December 2013, which lists total compensation for management, professional, and related occupations as $51.58 per hour and for administrative support as $24.23 per hour. Unless specified otherwise, OFCCP estimates that 25 percent of the time burden for complying with this rule will be spent by persons in management, professional and related occupations and 75 percent will be spent by persons in administrative support occupations.

There are approximately 500,000 contractor firms registered in the General Service Administration's System for Award Management (SAM). Therefore, OFCCP estimates that 500,000 contractor companies or firms may be affected by the proposed new provisions.[77] This may be an overestimate because SAM captures firms that do not meet OFCCP's jurisdictional dollar threshold. OFCCP's jurisdiction covers active contracts with a value in excess of $10,000.[78] Comments are welcome on all aspects of the cost and burden calculations, including the number of affected contractors and the amount of time contractors would spend complying with the proposals in this NPRM.

Cost of Regulatory Familiarization

OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis for new information collection requirements the estimated time it takes for contractors to review and understand the instructions for compliance. In order to minimize the burden, OFCCP will publish compliance assistance materials including, but not limited to, fact sheets and ''Frequently Asked Questions.'' OFCCP will also host webinars for the contractor community that will describe the new requirements and conduct listening sessions to identify any specific challenges contractors believe they face, or may face, when complying with the requirements.

OFCCP believes that human resources or personnel managers at each contractor company or firm will be responsible for understanding or becoming familiar with the new requirements. OFCCP estimates that it will take a minimum of 60 minutes or one hour for a management professional at each contractor company to either read the compliance assistance materials provided by OFCCP or participate in an OFCCP webinar to learn more about the new requirements. The estimated cost of this burden is based on data from the Bureau of Labor Statistics in the publication ''Employer Costs for Employee Compensation'' (December 2013) which lists total compensation for the Management, Professional, and Related Occupations group at $51.58. Consequently, the estimated time burden for rule familiarization is 500,000 hours (500,000 contractor companies × 1 hour = 500,000 hours). The estimated cost is $25,790,000 (500,000 hours × $51.58/hour = $25,790,000).

Cost of New Provisions

The NPRM proposes prohibiting discrimination based on employees and applicants inquiring about, discussing, or disclosing their compensation or the compensation of others unless the employee has access to compensation information of other employees or applicants as a part of such employee's essential job functions. The prohibition against discrimination would apply to all Federal contractors and subcontractors and federally assisted construction contractors and subcontractors with contracts or subcontracts in excess of $10,000. The new requirements are located at §§ 60–1.3, 60–1.4 and 60–1.35.

The NPRM proposes amending § 60–1.3 to include definitions for compensation, compensation information, and essential job functions as it relates to employees who have access to compensation information. There is no additional burden associated with adding these terms to the definitions section.

In § 60–1.4(a)(3), the NPRM proposes to mandate that each contracting agency incorporate the prohibition into the equal opportunity clause of Federal contracts and contract modifications, if the provision was not included in the original contract. More specifically, existing § 60–1.4(a)(3) provisions on notices sent to each labor union or representative of workers would be placed in paragraph § 60–1.4(a)(4); existing § 60–1.4(a)(4) would be placed in paragraph § 60–1.4(a)(5); existing § 60–1.4(a)(5) would be placed in paragraph § 60–1.4(a)(6); existing § 60–1.4(a)(6) would be placed in paragraph § 60–1.4(a)(7); and existing § 60–1.4(a)(7) would be placed in new paragraph § 60–1.4(a)(8). The equal opportunity clause may be incorporated by reference into Federal contracts and subcontracts.

In proposed § 60–1.4(b)(3), the NPRM mandates that each administering agency incorporate the prohibition into the equal opportunity clause of an grant, contract, loan, insurance, or guarantee involving federally assisted construction that is not exempted from the equal opportunity clause. More specifically, existing § 60–1.4(b)(3) provisions on notices sent to each labor union or representative of workers would be placed in paragraph § 60–1.4(b)(4); existing § 60–1.4(b)(4) would be placed in paragraph § 60–1.4(b)(5); existing § 60–1.4(b)(5) would be placed in paragraph § 60–1.4(b)(6); existing § 60–1.4(b)(6) would be placed in paragraph § 60–1.4(b)(7); and existing § 60–1.4(b)(7) would be placed in new paragraph § 60–1.4(b)(8). The equal opportunity clause may be incorporated by reference into federally assisted contracts and subcontracts. OFCCP estimates that contractors will spend approximately 15 minutes modifying existing contract templates to ensure the additional language is included. The estimated time burden for this provision is 125,000 hours (500,000 contractors × 0.25 hours = 125,000 hours). The estimated cost of this provision is $3,883,438 ((125,000 hours × 0.25 × $51.58) + (125,000 × 0.75 × $24.23) = $3,883,438).

The NPRM proposes adding § 60–1.35(a) and (b) discussing contractor defenses to an allegation of violation of proposed § 60–1.4(a)(3) and (b)(3). The text of paragraph (a) incorporates the text in section 5(a) of Executive Order 13665. The text of paragraph (b) is

[77] Legacy CCR Extracts Public (''FOIA'') Data Package, May 2014, *https://www.sam.gov/portal/public/SAM/;* last accessed June 14, 2014. There is at least one reason to believe the SAM data yield an underestimate of the number of entities affected by this rule and other reasons to believe the data yield an overestimate. SAM does not necessarily include all subcontractors, thus potentially leading to an underestimate, but this limitation of the data is offset somewhat because of the overlap among contractors and subcontractors; a firm may be a subcontractor on some activities but have a contract on others and thus be included in the SAM data. The SAM data may produce an overestimate of the entities affected by this rule because the data set includes: inactive contractors, contracts below this proposed rule's $10,000 threshold, and recipients of Federal grants and Federal financial assistance.

[78] The FAR Council (FARC), pursuant to an inflation-adjustment statute, 41 U.S.C. 1908, enacted a final rule that raises the dollar threshold amount in the Federal Acquisition Regulation (FAR) sections related to Section 503 of the Rehabilitation Act (Section 503) from in excess of $10,000 to $15,000. These inflationary adjustments also apply to VEVRAA's $100,000 statutory minimum threshold but they do not apply to Executive Order 11246 and its dollar threshold of more than $10,000. The procurement adjustments are made every five years.

drawn from the text in section 2(b) of the same Executive Order. There is no burden associated with the inclusion of these new paragraphs.

Section 60–1.35 (c) of the NPRM proposes requiring contractors to disseminate the nondiscrimination provision by incorporating it into existing employee manuals or handbooks, and disseminating it to employees and to job applicants. This dissemination can be executed electronically or by posting a copy of the provision in conspicuous places available to employees and applicants for employment. In person or face-to-face communication of the provision is not required or recommended, however, contractors may use this method if they typically communicate information to all employees or applicants in this manner. In order to reduce the burden to contractors associated with disseminating the provision, the NPRM contemplates that contractors would adopt the nondiscrimination language provided by OFCCP into contractors' existing employee manuals or handbooks and otherwise make it available to employees and applicants.

Paragraph 60–1.35(c)(i) proposes to require contractors to include the nondiscrimination provision in existing employee manuals or handbooks. OFCCP assumes that most contractors (99 percent) maintain these documents electronically. For those contractors that maintain the documents electronically, we are not requiring contractors to physically reproduce their manuals to include the provision if they do not maintain hardcopies of manuals and handbooks. Additionally, for those contractors that do not maintain their handbooks electronically, OFCCP believes those contractors (1 percent) will print a single errata sheet to update their hardcopy manual. OFCCP estimates it will take 20 minutes for contractors to locate, review, and reproduce the provision as provided by OFCCP and 15 minutes to incorporate it into existing employee manuals or handbooks; the total time required is 35 minutes (or 0.58 hours) to comply with this provision. Therefore, OFCCP estimates the time burden of this provision is 290,000 hours (500,000 contractor companies × 0.58 hours = 290,000 hours). The estimated cost of this provision is $9,009,575 ((290,000 hours × 0.25 × $51.58) + (290,000 hours × 0.75 × $24.23)).[79]

In § 60–1.35(c)(ii) the NPRM proposes requiring contractors to disseminate the nondiscrimination provision to employees and to job applicants. This dissemination can be executed by electronic posting or by posting a copy of the provision in conspicuous places available to employees and applicants for employment. OFCCP believes that 99 percent of contractors will post the information electronically while 1 percent will post the provision on employee bulletin boards. OFCCP's estimate is that it will take 15 minutes (or 0.25 hours) for contractors posting the provision electronically to prepare and post the provision. Additionally, OFCCP estimates it will take 75 minutes (or 1.25 hours) for contractors posting the provision manually to prepare the provision and post it in conspicuous places available to employees and applicants for employment. Therefore, OFCCP estimates that the time burden of this provision is 130,000 hours ((500,000 contractor companies × 99% × 0.25 hours) + (500,000 contractor companies × 1% × 1.25 hours) = 130,000 hours). The estimated cost of this provision is $4,038,775 (((123,750 hours × 0.25 × $51.58) + (123,750 hours × 0.75 × $24.23)) + ((6,250 hours × 0.25 × $51.58) + (6,250 hours × 0.75 × $24.23))).[80]

Contractors are required to maintain documentation of other notices; the regulations implementing Executive Order 11246, VEVRAA and section 503 currently require recordkeeping related to personnel and employment activity. See 41 CFR 60–1.12; 60–4.3(a)(7) 60–300.80; 60–741.80. Consequently, there is no new time burden or cost for retaining copies of the notices to employees.

OFCCP estimates that the combined time burden for becoming familiar with and complying with the proposed regulations is 1,045,000 hours (500,000 hours + 125,000 hours + 290,000 hours + 130,000 hours = 1,045,000 hours).

Operations and Maintenance Costs

In addition to the time burden calculated above, OFCCP estimates that contractors will incur operations and maintenance costs, mostly in the form of materials.

Paragraph 60–1.35(c)(i)

OFCCP estimates that 1 percent of contractors (5,000 contractors) will incorporate the proposed nondiscrimination provision into their existing hardcopy handbook or manual. OFCCP estimates that these 5,000 contractors will incorporate into an existing handbook or manual a single one-page errata sheet that includes the proposed nondiscrimination provision. OFCCP estimates the one time operations and maintenance cost of this provision is $400 (500,000 contractors × 1% × 1 page × $0.08 = $400).

Paragraph 60–1.35(c)(ii)

OFCCP estimates that 1 percent of contractors will inform employees by posting the provision on existing employee bulletin boards. OFCCP assumes that on average these contractors will post the policy on 10 bulletin boards. Therefore OFCCP estimates the operations and maintenance cost of this provision is $4,000 (500,000 × 1% × 10 pages × $0.08 = $4,000).

The estimated total first year cost of this proposed rule is $42,726,188 or $85 per contractor company. Below, in Table 1, is a summary of the burden hours and costs; Table 2 shows the total cost summary for the first-year and recurring years.

TABLE 1—CONTRACTOR PROPOSED NEW REQUIREMENTS

[Estimated First-Year Burden Hours and Costs]

Section	Burden hours	Costs
Regulatory Familiarization	500,000	$25,790,000
60–1.3 Definitions	0	0
60–1.4(a) and (b) Contracting agencies amend the equal opportunity clause	125,000	3,883,438
60–1.4(d) Change "Deputy Assistant Secretary" to "Director of OFCCP"	0	0
60–1.35(c)(i)—Incorporation into manuals or handbooks	290,000	9,009,575

[79] OFCCP assumes that administrative support will identify the appropriate clause, and insert it into the handbook (75 percent) with management oversight (25 percent).

[80] OFCCP assumes that administrative support will copy and paste the clause into a notice and either post or send it electronically (75 percent) with management oversight (25 percent).

TABLE 1—CONTRACTOR PROPOSED NEW REQUIREMENTS—Continued

[Estimated First-Year Burden Hours and Costs]

Section	Burden hours	Costs
60–1.35(c)(ii)—Making the provision available to employees and applicants via electronic posting or manually posting a copy	130,000	4,038,775
Total First-Year Burden Hours and Costs	1,045,000	42,721,788

TABLE 1—CONTRACTOR PROPOSED NEW REQUIREMENTS

[Estimated Recurring Burden Hours and Costs]

Section	Burden hours	Costs
60–1.35(a) and (b)—Defenses	0	0
Total Annual Recurring Burden Hours and Costs	0	$0
Total Operations and Maintenance Costs	0	4,400
Total Burden Hours and Cost of the Proposed Rule	1,045,000	42,726,188

TABLE 2—TOTAL COST SUMMARY

	Hours	Costs	Per contractor company
First Year Hours/Costs	1,045,000	$42,726,188	$85
Annual Recurring Hours/Cost	0	0	0

Analysis of Rulemaking Alternatives

In addition to the approach proposed in the NPRM, OFCCP considered an alternative approach. OFCCP considered solely inserting the nondiscrimination requirement as to applicants and employees who disclose or discuss compensation into the equal opportunity clause. The primary benefit of this approach would be that it would have negligible burden on contractors. Yet, the impact of inserting the prohibition into the equal opportunity clause without informing employees and managers of the change in practice would be of limited use. In the absence of knowledge about the prohibition on discriminating based on compensation inquiries, discussions, or disclosures this worker protect provision would not change behaviors and would not be an effective or efficient way to enforce Executive Order 11246, as amended by Executive Order 13665. From years of experience, OFCCP realizes that contractors are better able to comply with its requirements when its managers and employees understand the prohibitions and are informed about their rights and obligations. Thus, although this alternative involves negligible change in the burden to contractors, it does not promote efficient enforcement of Executive Order 11246, as amended. OFCCP seeks comments from small contractors on possible alternatives that would minimize the impact of this NPRM while still accomplishing the goals of this rule.

Summary of Benefits and Transfers

Executive Order 13563 recognizes that some rules have benefits that are difficult to quantify or monetize but are nevertheless important, and states that agencies may consider such benefits. This rule has equity and fairness benefits, which are explicitly recognized in Executive Order 13563. Enabling Federal contractor employees to discuss their compensation without fear of adverse action can contribute to reducing pay discrimination and ensuring that qualified and productive employees receive fair compensation. The NPRM is designed to achieve these benefits by:

- Supporting more effective enforcement of the prohibition against compensation discrimination.
- Providing better remedies to workers victimized by compensation discrimination.
- Increasing employees and applicants understanding of the value of their skills in the labor market.
- Enhancing the ability of Federal contractors and their employees to detect and remediate unlawful discriminatory practices.

If the proposed rule decreases pay secrecy-facilitated compensation discrimination, this impact most likely represents a transfer of value to female or minority employees from employers (if additional wages are paid out of profits) or taxpayers (if contractor fees increase due to the need to pay higher wages to employees). There is also some potential that some employees could experience decreases in pay (or slowing of increases) as employers adjust compensation practices.

Social Benefits of Improved Antidiscrimination Enforcement

Social science research suggests antidiscrimination law can have broad social benefits, not only to those workers who are explicitly able to mobilize their rights and obtain redress, but also to the workforce and the economy as a whole. In general, discrimination is incompatible with an efficient labor market. Discrimination interferes with the ability of workers to find jobs that match their skills and abilities and to obtain wages consistent with a well-functioning marketplace.[81] Discrimination may reflect market failure, where collusion or other anti-discriminatory practices allow majority group members to shift the costs of discrimination to minority group members.[82]

[81] Shelley J. Lundberg and Richard Starz, ''Private Discrimination and Social Intervention in Competitive Labor Markets,'' 73 American Economic Review 340 (1983); Dennis J. Aigner and Glen G. Cain, ''Statistical Theories of Discrimination in Labor Markets,'' 30 Industrial and Labor Relations Review, 175 (1977).

[82] Kenneth J. Arrow, ''What Has Economics to Say about Racial Discrimination?'' 12 The Journal of Economic Perspectives 91 (1998).

For this reason, effective anti-discrimination enforcement can promote economic efficiency and growth. For example, a number of scholars have documented the benefits of the civil rights movement and the adoption of Title VII of the Civil Rights Act of 1964 on the economic prospects of workers and the larger economy.[83] One recent study estimated that improved workforce participation by women and minorities, including through adoption of civil rights laws and changing social norms, accounts for 15–20 percent of aggregate wage growth between 1960 and 2008.[84] Positive impacts of this proposed rule, which only applies to Federal contractors and only affects discrimination that is facilitated by pay secrecy practices, would necessarily be smaller than the impacts of major society-wide phenomena such as the civil rights movement.

Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the business organizations and governmental jurisdictions subject to regulation.'' Public Law 96–354. To achieve that principle, the Act requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis (IRFA) and to develop alternatives whenever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The Act requires the consideration for the impact of a proposed regulation on a wide-range of small entities including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposal or final rule would have a significant economic impact on a substantial number of small entities.[85] If the determination is that it would, then the agency must prepare a regulatory flexibility analysis as described in the RFA.[86]

However if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. See 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination and the reasoning should be clear.

OFCCP is publishing this initial regulatory flexibility analysis to aid stakeholders in understanding the small entity impacts of the proposed rule and to obtain additional information on the small entity impacts. OFCCP invites interested persons to submit comments on the following estimates, including the number of small entities affected by the Executive Order's prohibition on Federal contractors from discriminating against employees and job applicants, the compliance cost estimates, and whether alternatives exist that will reduce burden on small entities while still remaining consistent with the objective of Executive Order 13665.

Why OFCCP is Considering Action: OFCCP is publishing this proposed regulation to implement the requirements of Executive Order 13665, ''Non-Retaliation for Disclosure of Compensation Information.'' The Executive Order amends Executive Order 11246 by including a prohibition on discriminating against employees and job applicants for inquiring about, discussing or disclosing the compensation of the employee or job applicant or another employee or job applicant. Executive Order 11246 grants responsibility for enforcement to the Secretary of Labor.

Objectives of and Legal Basis for Rule: This proposed rule will provide guidance on how to comply with the nondiscrimination requirements of Executive Order 13665. Section 2(b) of Executive Order 36651 directs the Secretary to issue regulations to implement the requirements of the Order. Section 5(a) sets out the general contours of permissible contractor defenses, specifically that any such defense can be based on a legitimate workplace rule that does not violate the prohibition of the Executive Order.

Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping: As explained in this proposed rule, Executive Order 13665 amends Executive Order 11246 and its Equal Opportunity Clause by incorporating discriminating against employees and job applicants who inquire about, discuss or disclose the compensation of the employee or applicant or another employee or applicant as a covered prohibition. The requirements in Executive Order 11246 generally apply to any business or organization that (1) holds a single Federal contract, subcontract, or federally assisted construction contract in excess of $10,000; (2) has Federal contracts or subcontracts that combined total in excess of $10,000 in any 12-month period; or (3) holds Government bills of lading, serves as a depository of Federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount.

This NPRM contains several provisions that could be considered to impose compliance requirements on contractors. The general requirements with which contractors must comply are set forth in Subpart B of this part. Contractors are obligated by Executive Order 13665 and this proposed rule to abide by the terms of the Equal Opportunity Clause. Among other requirements set forth in the contract clause, contractors must not discriminate against an employee or applicant because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.

In implementing this prohibition, the proposed rule requires contractors to incorporate the nondiscrimination provision into existing employee manuals and handbooks; and disseminate the provision to employees and job applicants either electronically or by posting a copy of the provision in conspicuous places. Documents (i.e., employee manuals, handbooks, employee notifications and meeting notes) created as a result of the proposed rule would fall under the general recordkeeping provisions of the existing regulations and will not impose any additional obligations to which the contractor is not already subject under Executive Order 11246. The proposed rule does not impose any reporting requirements on contractors.

All small entities subject to Executive Order 11246 would be required to comply with all of the provisions of the NPRM. Such compliance requirements are more fully described above in other portions of this preamble. The following section analyzes the cost of complying with Executive Order 13665.

Calculating Impact of the Proposed Rule on Small Business Firms: OFCCP must determine the compliance cost of this proposed rule on small contractor

[83] J. Hoult Verkerke, ''Free to Search,'' 105 Harvard Law Review 2080 (1992); James J. Heckman and Brook S. Payner, ''Determining the Impact of Federal Anti-Discrimination Policy on the Economic Status of Blacks: A Study of South Carolina,'' 79 American Economic Review 138 (1989).

[84] Hsieh, C., Hurst, E. Jones, C.I., Klenow, P.J. ''The Allocation of Talent and U.S. Economic Growth.'' *NBER Working Paper.* (2013).

[85] See 5 U.S.C. 603.

[86] *Id.*

firms, and whether these costs will be significant for a substantial number of small contractor firms (i.e. small business firms that enter into contracts with the Federal Government), and whether these costs will be significant for a substantial number of small contractor firms. If the estimated compliance costs for affected small contractor firms are less than three percent of small contractor firms' revenues, OFCCP considers it appropriate to conclude that this proposed rule will not have a significant economic impact on the small contractor firms covered by Executive Order 13665. OFCCP has chosen three percent as our significance criteria, however, using this benchmark as an indicator of significant impact may overstate the significance of such an impact, since the costs associated with prohibiting discrimination against employees and job applicants who inquire about or discuss their own compensation or the compensation of other employees or applicants are expected to be mitigated to some degree by the benefits of the proposed rule. The benefits, which may include improved employee productivity and decreased employee turnover, are discussed more fully in the preamble of this NPRM.

The data sources used in the analysis of small business impact are the Small Business Administration's (SBA) Table of Small Business Size Standards,[87] the Current Population Survey (CPS), and the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB).[88] Since Federal contractors are not limited to specific industries, OFCCP assessed the impact of this NPRM across the 19 industrial classifications.[89] Because data limitations do not allow OFCCP to determine which of the small firms within these industries are Federal contractors, OFCCP assumes that these small firms are not significantly different from the small Federal contractors that will be directly affected by the proposed rule.

OFCCP used the following steps to estimate the cost of the proposed rule per small contractor firm as measured by a percentage of the total annual receipts. First, OFCCP used Census SUSB data that disaggregates industry information by firm size in order to perform a robust analysis of the impact on small contractor firms. OFCCP applied the SBA small business size standards to the SUSB data to determine the number of small firms in the affected industries. Then OFCCP used receipts data from the SUSB to calculate the cost per firm as a percent of total receipts by dividing the estimated annual cost per firm by the average annual receipts per firm. This methodology was applied to each of the industries and the results by industry are presented in the summary tables below (*see Tables 3–21).*

In sum, the increase cost of compliance resulting from the proposed rule is de minimis relative to revenue at small contractor firms no matter their size. All of the industries had an annual cost per firm as a percent of receipts of three percent or less. For instance, the manufacturing industry cost is estimated to range from 0.00 percent for firms that have average annual receipts of approximately $985 million to 0.02 percent for firms that have average annual receipts of under $500,000. Management of companies and enterprises is the industry with the highest relative costs, with a range of 0.00 percent for firms that have average annual receipts of approximately $2 million to 0.36 percent for firms that have average annual receipts of under $24,000. Therefore in no instance is the effect of the NPRM greater than three percent of total receipts.

Although OFCCP estimates the compliance costs are less than three percent of the average revenue per small contractor firm for each of the 19 industries, OFCCP seeks data and feedback from small firms on the factors and assumptions used in this analysis, such as the data sources, small business industries, NAICS codes and size standards, and the annual costs per firm as a percent of receipts. OFCCP seeks information about which data sources should be used to estimate the number of Federal small subcontractors. OFCCP also seeks information about the potential compliance cost estimates, such as any differences in compliance costs for small businesses as compared to larger businesses and any compliance costs that may not have been included in this analysis.

Estimating the Number of Small Businesses Affected by the Rulemaking: OFCCP now sets forth its estimate of the number of small contractor firms actually affected by the proposed rule. This information is not readily available. The best source for the number of small contractor firms that are affected by this proposed rule is GSA's System for Award Management (SAM). OFCCP used SAM data to estimate the number of affected small contractor firms since SAM data allow us to directly estimate the number of small contractor firms. Federal contractor status cannot be discerned from the SBA firm size data. It can only be used to estimate the number of small firms, not the number of small contractor firms. OFCCP used the SBA data to estimate the impact of the proposed regulation on a ''typical'' or ''average'' small firm in each of the 19 industries. OFCCP then assumed that a typical small firm is similar to a small contractor firm. OFCCP believes that this NPRM will not have a significant economic effect on a substantial number of small businesses.

Based on the most current SAM data available, if OFCCP defined small as fewer than 500 employees, then there are 328,552 small contractor firms. If the Department defined small as firms with less than $35.5 million in revenues, then there are 315,902 small contractor firms. Thus, OFCCP established the range from 315,902 to 328,552 as the total number of small contractor firms. Of course, not all of these contractor firms will be impacted by the proposed rule; only those contractor firms that have policies that prohibit employees and job applicants from inquiring about, discussing or disclosing their own compensation or the compensation of other employees or job applicants. Thus this range is an overestimate of the number of firms affected by the proposed rule because some of those small contractor firms do not have such a policy or practice. OFCCP does not have more precise estimates of the number of contractor firms with such policies or practices. OFCCP invites the public to provide information related to this data limitation, and any data on small contractors.

As the proposed regulation applies to contractors covered by Executive Order 11246, OFCCP estimates that the range of small firms impacted is from 315,902 to 328,552 or all covered Federal contractor companies.

Relevant Federal Rules Duplicating, Overlapping, or Conflicting with the Rule: As discussed in the preamble above, OFCCP recognizes that the National Labor Relations Act (NLRA),

[87] *http://www.sba.gov/advocacy/849/12162#susb,* last visited June 9, 2014.

[88] *http://www.census.gov/econ/susb/,* last accessed June 9, 2014.

[89] Agriculture, Forestry, Fishing, and Hunting Industry (North American Industry Classification System (NAICS) 11, Mining NAICS 21, Utilities NAICS 22, Construction NAICS 23, Manufacturing, NAICS 31–33, Wholesale Trade NAICS 42, Retail Trade NAICS 44–45, Transportation and Warehousing NAICS 48–49, Information NAICS 51, Finance and Insurance NAICS 52, Real Estate and Rental and Leasing NAICS 53, Professional, Scientific, and Technical Services NAICS 54, Management of Companies and Enterprises NAICS 55, Administrative and Support and Waste Management and Remediation Services NAICS 56, Educational Services NAICS 61, Healthcare and Social Assistance NAICS 62, Arts, Entertainment, and Recreation NAICS 71, Accommodation and Food Services NAICS 72, Other Services NAICS 81.

like the Executive Order, prohibits employers from discriminating against employees and job applicants who discuss or disclose their own compensation or the compensation of other employees or applicants [90] and that therefore a significant portion of the contractor's workforce may be subject to the protections of both the NLRA and the Executive Order. The Department believes that Executive Order 13665 is compatible with the existing prohibitions under the NLRA, although it affords protection to a broader group of employees than under the NLRA. The Executive Order also covers supervisors, managers, agricultural workers, employees of rail and air carriers and covers activity that may not be ''concerted'' under the NLRA.[91]

Alternatives to the Proposed Rule: As described above, OFCCP considered one alternative, solely incorporating the provision into the Equal Opportunity Clause as a prohibition. This alternative would not be an effective or efficient way to enforce Executive Order 11246, as amended by Executive Order 13665.

Differing Compliance and Reporting Requirements for Small Entities: This NPRM provides for no differing compliance requirements for small entities. OFCCP strives to have this proposal implement the requirements of Executive Order 13665 with the least possible burden for small entities. The NPRM provides a number of efficiencies including the incorporation of the provision into existing employee manuals. This inclusion reduces burden associated with developing a policy statement and creating new materials.

Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements for Small Entities: This NPRM was drafted to clearly state the compliance requirements for all contractors subject to Executive Order 11246, as amended by Executive Order 13665. The proposed rule does not contain any reporting requirements. The recordkeeping requirements imposed by this proposed rule are necessary for contractors to determine their compliance with the rule as well as for OFCCP to determine the contractor's compliance with the law. The recordkeeping provisions apply generally to all businesses covered by Executive Order 11246, as amended by Executive Order 13665; no rational basis exists for creating an exemption from compliance and recordkeeping requirements for small businesses. OFCCP makes available a variety of resources to employers for understanding their obligations and achieving compliance.

Use of Performance Rather Than Design Standards: This NPRM was written to provide clear guidelines to ensure compliance with the Executive Order requirements. Under the proposed rule, contractors may achieve compliance through a variety of means. OFCCP makes available a variety of resources to contractors for understanding their obligations and achieving compliance.

Exemption from Coverage of the Rule for Small Entities: Executive Order 11246, as amended by Executive Order 13665 establishes its own coverage and exemption requirements; therefore, OFCCP has no authority to exempt small businesses from the requirements of the Executive Order.

BILLING CODE 4510–45–P

[90] The National Labor Relations Board (NLRB) recently stated in *Parexel International LLC,* 356 NLRB No. 82, slip op. at 3 (2011):

The Board has long held that Section 7 ''encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment.'' [90] In fact, wage discussions among employees are considered to be at the core of Section 7 rights because wages, ''probably the most critical element in employment,'' are ''the grist on which concerted activity feeds.''

[91] As noted above, OFCCP recognizes that under the NLRA, unlike under Title VII, an employer can escape liability altogether if it establishes that it would have taken the adverse action against the employee in any event and that in this regard the Executive Order affords greater protection to employees than presently exists under the NLRA.

Table 3: Cost per small firm in the agriculture, forestry, fishing, and hunting industry, the SBA small business size standard for this industry is $0.75 million-$27.5 million.

Agriculture, Forestry, Fishing, and Hunting Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm[1]	Annual Cost per Firm [2]	Annual Receipts	Average Receipts per Firm [3]	Annual Cost per Firm as Percent of Receipts [4]
Firms with sales/receipts/revenue below $100,000	5,086	N/A	N/A	$85	$247,056,000	$48,576	0.17%
Firms with sales/receipts/revenue of $100,000 to $499,999	8,939	21,523	2.4	$85	$2,231,355,000	$249,620	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	3,670	19,631	5.3	$85	$2,620,344,000	$713,990	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	3,230	30,944	9.6	$85	$4,975,078,000	$1,540,272	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	1,117	20,049	17.9	$85	$3,811,000,000	$3,411,817	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	289	8,997	31.1	$85	$1,730,128,000	$5,986,602	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	165	7,588	46.0	$85	$1,340,763,000	$8,125,836	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	112	6,130	54.7	$85	$1,288,588,000	$11,505,250	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	55	4,042	73.5	$85	$874,841,000	$15,906,200	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	44	5,325	121.0	$85	$858,761,000	$19,517,295	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	26	2,800	107.7	$85	$595,387,000	$22,899,500	0.00%

N/A = not available, not disclosed

[1] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the average number of employees per firm (2.4) was derived by dividing the total number of employees (21,523) by the number of firms (8,939).

[2] The annual cost per firm ($85) accounts for regulatory familiarization, including the policy in existing handbooks, including it in existing manager meetings, and informing employees of the prohibition.

[3] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the average receipts per firm ($249,620) was derived by dividing the total annual receipts ($2,231,355,000) by the number of firms (8,939).

[4] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the annual cost per firm as a percent of receipts (0.03 percent) was derived by dividing the annual cost per firm ($119) by the average receipts per firm ($249,620).

Table 4: Cost per small firm in the mining industry the SBA small business size standard for this industry is 500 employees.

Mining Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm[1]	Annual Cost per Firm [2]	Annual Receipts	Average Receipts per Firm [3]	Annual Cost per Firm as Percent of Receipts [4]
Firms with 0-4 employees	11,223	17,874	1.6	$85	$6,809,517,000	$606,747	0.01%
Firms with 5-9 employees	3,186	21,314	6.7	$85	$6,304,810,000	$1,978,911	0.00%
Firms with 10-19 employees	2,451	33,344	13.6	$85	$9,092,457,000	$3,709,693	0.00%
Firms with 20-99 employees	2,775	107,447	38.7	$85	$32,035,288,000	$11,544,248	0.00%
Firms with 100-499 employees	690	102,299	148.3	$85	$38,463,690,000	$55,744,478	0.00%

[1] In the case of mining firms with 0-4 employees, the average number of employees per firm (1.6) was derived by dividing the total number of employees (17,874) by the number of firms (11,223).

[2] The annual cost per firm ($85) accounts for regulatory familiarization, including the policy in existing handbooks, including it in existing manager meetings, and informing employees of the prohibition.

[3] In the case of mining firms with 0-4 employees, the average receipts per firm ($606,747) was derived by dividing the total annual receipts ($6,809,517,000) by the number of firms (11,223).

[4] In the case of mining firms with 0-4 employees, the annual cost per firm as a percent of receipts (0.01 percent) was derived by dividing the annual cost per firm ($119) by the average receipts per firm ($606,747).

Table 5: Cost per small Firm in the utilities industry the SBA small business size standard for this industry is 250-1,000 employees.

Utilities Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with 0-4 employees	3,212	6,181	1.9	$85	$7,238,519,000	$2,253,586	0.00%
Firms with 5-9 employees	1,020	6,546	6.4	$85	$4,373,888,000	$4,288,125	0.00%
Firms with 10-19 employees	513	6,722	13.1	$85	$5,657,251,000	$11,027,780	0.00%
Firms with 20-99 employees	870	38,602	44.4	$85	$27,513,924,000	$31,625,200	0.00%
Firms with 100-499 employees	309	52,294	169.2	$85	$53,091,123,000	$171,815,932	0.00%
Firms with 500+ employees[1]	199	512,412	2,574.9	$85	$475,894,489,000	$2,391,429,593	0.00%

[1] The small business size standard for several subsectors within the utilities industry is 750 or 1,000 employees; however, data are not disaggregated for firms with more than 500 employees.

Table 6: Cost per small firm in the construction industry the SBA small business size standard for this industry is $15 million-$36.5 million.

Construction Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	151,986	N/A	N/A	$85	$7,636,718,000	$50,246	0.17%
Firms with sales/receipts/revenue of $100,000 to $499,999	316,475	776,806	2.5	$85	$81,110,428,000	$256,293	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	124,214	642,823	5.2	$85	$88,028,843,000	$708,687	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	110,546	1,049,670	9.5	$85	$173,054,634,000	$1,565,454	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	47,962	864,701	18.0	$85	$167,758,626,000	$3,497,740	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	16,992	492,370	29.0	$85	$102,502,053,000	$6,032,371	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	7,801	308,512	39.5	$85	$66,977,650,000	$8,585,777	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	8,259	427,159	51.7	$85	$99,174,146,000	$12,008,009	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	4,354	289,441	66.5	$85	$73,881,089,000	$16,968,555	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	2,611	209,081	80.1	$85	$56,928,754,000	$21,803,429	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	1,621	150,754	93.0	$85	$43,119,720,000	$26,600,691	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	1,171	121,928	104.1	$85	$36,848,837,000	$31,467,837	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	831	94,903	114.2	$85	$30,307,198,000	$36,470,756	0.00%

N/A = not available, not disclosed

Table 7: Cost per small firm in the manufacturing industry the SBA small business size standard for this industry is 500-1,500 employees.

Manufacturing Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with 0-4 employees	114,635	213,123	1.9	$85	$46,236,636,000	$403,338	0.02%
Firms with 5-9 employees	53,500	358,110	6.7	$85	$53,036,608,000	$991,338	0.01%
Firms with 10-19 employees	44,939	612,113	13.6	$85	$97,897,887,000	$2,178,462	0.00%
Firms with 20-99 employees	55,603	2,288,585	41.2	$85	$440,739,564,000	$7,926,543	0.00%
Firms with 100-499 employees	13,945	2,445,779	175.4	$85	$634,737,830,000	$45,517,234	0.00%
Firms with 500+ employees[1]	4,079	7,402,462	1,814.8	$85	$4,019,587,050,000	$985,434,432	0.00%

[1] The small business size standard for many subsectors within the manufacturing industry is 750, 1,000, or 1,500 employees; however, data are not disaggregated for firms with more than 500 employees.

Table 8: Cost per small firm in the wholesale trade industry the SBA small business size standard for this industry is 100 employees.

Wholesale Trade Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with 0-4 employees	190,153	325,412	1.7	$85	$297,267,502,000	$1,563,307	0.01%
Firms with 5-9 employees	57,366	377,841	6.6	$85	$249,842,292,000	$4,355,233	0.00%
Firms with 10-19 employees	39,354	525,216	13.3	$85	$325,243,478,000	$8,264,560	0.00%
Firms with 20-99 employees	36,783	1,365,914	37.1	$85	$899,443,843,000	$24,452,705	0.00%

Table 9: Cost per small firm in the retail trade industry the SBA small business size standard for this industry is $7.5 million-$38.5 million.

Retail Trade Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	98,659	N/A	N/A	$85	$5,008,702,000	$50,768	0.17%
Firms with sales/receipts/revenue of $100,000 to $499,999	251,705	727,585	2.9	$85	$67,380,242,000	$267,695	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	122,575	634,006	5.2	$85	$87,491,736,000	$713,781	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	120,985	1,019,672	8.4	$85	$190,373,341,000	$1,573,528	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	55,634	774,581	13.9	$85	$193,186,239,000	$3,472,449	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	19,594	418,263	21.3	$85	$117,223,823,000	$5,982,639	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	9,582	272,697	28.5	$85	$80,790,141,000	$8,431,449	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	9,824	366,889	37.3	$85	$115,236,313,000	$11,730,081	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	5,310	256,826	48.4	$85	$86,999,536,000	$16,384,093	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	3,498	201,289	57.5	$85	$72,964,681,000	$20,858,971	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	2,438	167,596	68.7	$85	$61,987,531,000	$25,425,566	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	1,835	144,987	79.0	$85	$55,162,317,000	$30,061,208	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	1,491	122,188	82.0	$85	$50,711,404,000	$34,011,673	0.00%
N/A = not available, not disclosed							

Table 10: Cost per small firm in the transportation and warehousing industry the SBA small business size standard for this industry is $7.5 million-$38.5 million.

Transportation and Warehousing Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	40,510	N/A	N/A	$85	$1,939,749,000	$47,883	0.18%
Firms with sales/receipts/revenue of $100,000 to $499,999	67,987	181,924	2.7	$85	$16,284,066,000	$239,517	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	22,377	151,019	6.7	$85	$15,756,895,000	$704,156	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	20,915	271,012	13.0	$85	$32,305,484,000	$1,544,608	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	9,183	223,156	24.3	$85	$31,359,227,000	$3,414,922	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,550	136,436	38.4	$85	$20,463,648,000	$5,764,408	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,800	91,408	50.8	$85	$14,261,554,000	$7,923,086	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,840	123,966	67.4	$85	$19,933,921,000	$10,833,653	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	988	85,367	86.4	$85	$14,057,603,000	$14,228,343	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	621	68,836	110.8	$85	$11,060,118,000	$17,810,174	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	429	51,989	121.2	$85	$8,257,805,000	$19,248,963	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	311	45,274	145.6	$85	$7,184,425,000	$23,101,045	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	235	32,922	140.1	$85	$5,902,588,000	$25,117,396	0.00%
N/A = not available, not disclosed							

Table 11: Cost per small firm in the information industry the SBA small business size standard for this industry is $7.5 million-$38.5 million.

Information Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	15,960	N/A	N/A	$85	$767,642,000	$48,098	0.18%
Firms with sales/receipts/revenue of $100,000 to $499,999	27,678	80,336	2.9	$85	$6,876,130,000	$248,433	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	10,311	67,954	6.6	$85	$7,260,927,000	$704,192	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	9,808	120,499	12.3	$85	$15,248,992,000	$1,554,750	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,508	100,331	22.3	$85	$15,472,313,000	$3,432,190	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,837	65,601	35.7	$85	$10,856,893,000	$5,910,121	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,018	46,846	46.0	$85	$8,447,070,000	$8,297,711	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,092	68,058	62.3	$85	$12,300,328,000	$11,264,037	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	601	49,812	82.9	$85	$9,293,544,000	$15,463,468	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	389	37,522	96.5	$85	$7,616,666,000	$19,580,118	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	270	30,523	113.0	$85	$6,512,265,000	$24,119,500	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	175	25,649	146.6	$85	$4,971,718,000	$28,409,817	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	136	21,553	158.5	$85	$4,082,897,000	$30,021,301	0.00%
N/A = not available, not disclosed.							

Table 12: Cost per small firm in the finance and insurance industry the SBA small business size standard for this industry is $7.5 million-$38.5 million.

Finance and Insurance Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	61,548	N/A	N/A	$85	$2,931,522,000	$47,630	0.18%
Firms with sales/receipts/revenue of $100,000 to $499,999	118,169	308,539	2.6	$85	$29,379,598,000	$248,624	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	33,703	177,822	5.3	$85	$23,302,679,000	$691,413	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	23,023	222,822	9.7	$85	$35,135,972,000	$1,526,125	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	9,728	185,783	19.1	$85	$33,574,070,000	$3,451,282	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,108	118,100	28.7	$85	$24,483,200,000	$5,959,883	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,405	90,442	37.6	$85	$20,088,983,000	$8,353,007	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,820	148,252	52.6	$85	$33,267,079,000	$11,796,837	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,564	106,896	68.3	$85	$25,663,650,000	$16,408,983	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,028	87,611	85.2	$85	$21,843,640,000	$21,248,677	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	685	65,621	95.8	$85	$17,478,694,000	$25,516,342	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	515	58,481	113.6	$85	$15,619,023,000	$30,328,200	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	418	51,263	122.6	$85	$14,150,222,000	$33,852,206	0.00%
N/A = not available, not disclosed.							

Table 13: Cost per small firm in the real estate and rental and leasing industry the SBA small business size standard for this industry is $7.5 million-$38.5 million.

Real Estate and Rental and Leasing Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	86,219	N/A	N/A	$85	$4,165,673,000	$48,315	0.18%
Firms with sales/receipts/revenue of $100,000 to $499,999	124,930	299,041	2.4	$85	$30,501,166,000	$244,146	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	39,747	191,958	4.8	$85	$27,836,936,000	$700,353	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	29,717	269,366	9.1	$85	$45,164,417,000	$1,519,818	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	10,013	181,600	18.1	$85	$33,652,743,000	$3,360,905	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,288	95,418	29.0	$85	$18,788,566,000	$5,714,284	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,553	62,482	40.2	$85	$12,221,244,000	$7,869,442	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,518	81,675	53.8	$85	$16,329,830,000	$10,757,464	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	771	48,442	62.8	$85	$11,037,708,000	$14,316,093	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	464	36,318	78.3	$85	$8,012,159,000	$17,267,584	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	365	32,555	89.2	$85	$7,621,190,000	$20,879,973	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	228	25,638	112.4	$85	$5,610,499,000	$24,607,452	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	161	17,743	110.2	$85	$4,144,542,000	$25,742,497	0.00%
N/A = not available, not disclosed							

Table 14: Cost per small firm in the professional, scientific, and technical services industry the SBA small business size standard for this industry is $7.5 million-$38.5 million.

Professional, Scientific and Technical Services Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	207,967	N/A	N/A	$85	$9,968,674,000	$47,934	0.18%
Firms with sales/receipts/revenue of $100,000 to $499,999	339,834	814,116	2.4	$85	$82,241,004,000	$242,003	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	102,144	584,473	5.7	$85	$71,850,790,000	$703,426	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	78,520	870,369	11.1	$85	$120,442,007,000	$1,533,902	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	28,337	631,182	22.3	$85	$97,339,397,000	$3,435,064	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	9,714	355,210	36.6	$85	$57,721,674,000	$5,942,112	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	4,863	245,206	50.4	$85	$40,592,738,000	$8,347,263	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	4,658	313,530	67.3	$85	$53,578,044,000	$11,502,371	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	2,338	211,940	90.7	$85	$36,728,134,000	$15,709,210	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,381	147,737	107.0	$85	$27,448,191,000	$19,875,591	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	954	122,039	127.9	$85	$22,622,723,000	$23,713,546	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	603	91,258	151.3	$85	$15,961,413,000	$26,470,005	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	511	83,414	163.2	$85	$15,941,272,000	$31,196,227	0.00%
N/A = not available, not disclosed							

Table 15: Cost per small firm in the management of companies and enterprises industry the SBA small business size standard for this industry is $20.5 million.

Management of Companies and Enterprises Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	1,895	11,318	6.0	$85	$44,606,000	$23,539	0.36%
Firms with sales/receipts/revenue of $100,000 to $499,999	1,387	4,529	3.3	$85	$293,971,000	$211,947	0.04%
Firms with sales/receipts/revenue of $500,000 to $999,999	964	5,082	5.3	$85	$373,917,000	$387,881	0.02%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	2,039	18,829	9.2	$85	$1,087,692,000	$533,444	0.02%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	2,242	26,723	11.9	$85	$1,698,014,000	$757,366	0.01%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,717	28,312	16.5	$85	$1,855,703,000	$1,080,782	0.01%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,258	22,469	17.9	$85	$1,711,464,000	$1,360,464	0.01%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,942	41,651	21.4	$85	$3,120,558,000	$1,606,878	0.01%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,423	34,363	24.1	$85	$2,997,064,000	$2,106,159	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,075	30,583	28.4	$85	$2,508,188,000	$2,333,198	0.00%

Table 16: Cost per small firm in the administrative and support and waste management and remediation services industry the SBA small business size standard for this industry is $5.5 million-$38.5 million.

Administrative and Support, Waste Management and Remediation Services Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	99,021	139,832	1.4	$85	$4,500,981,000	$45,455	0.19%
Firms with sales/receipts/revenue of $100,000 to $499,999	129,948	513,457	4.0	$85	$31,661,803,000	$243,650	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	40,405	409,563	10.1	$85	$28,444,220,000	$703,978	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	31,127	725,649	23.3	$85	$47,963,623,000	$1,540,901	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	12,294	678,340	55.2	$85	$42,093,718,000	$3,423,924	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,589	434,622	94.7	$85	$26,428,877,000	$5,759,180	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,411	311,321	129.1	$85	$19,304,673,000	$8,006,915	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,309	424,912	184.0	$85	$24,412,659,000	$10,572,828	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,266	292,501	231.0	$85	$17,408,483,000	$13,750,776	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	724	208,939	288.6	$85	$12,542,375,000	$17,323,722	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	528	174,359	330.2	$85	$10,341,768,000	$19,586,682	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	402	173,953	432.7	$85	$9,015,658,000	$22,427,010	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	267	122,013	457.0	$85	$6,382,657,000	$23,905,082	0.00%

Table 17: Cost per small firm in the educational services industry the SBA small business size standard for this industry is $7.5 million-$38.5 million.

Educational Services Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	21,831	50,906	2.3	$85	$1,003,931,000	$45,986	0.18%
Firms with sales/receipts/revenue of $100,000 to $499,999	27,938	158,913	5.7	$85	$6,788,475,000	$242,984	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	8,504	112,142	13.2	$85	$5,984,604,000	$703,740	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	8,465	213,786	25.3	$85	$13,376,338,000	$1,580,194	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,302	209,778	48.8	$85	$14,792,101,000	$3,438,424	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,588	117,648	74.1	$85	$9,314,307,000	$5,865,433	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	888	83,741	94.3	$85	$7,129,969,000	$8,029,244	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,003	127,781	127.4	$85	$11,306,008,000	$11,272,191	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	461	79,059	171.5	$85	$6,983,007,000	$15,147,521	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	355	73,045	205.8	$85	$6,992,060,000	$19,695,944	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	268	70,191	261.9	$85	$6,343,422,000	$23,669,485	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	172	60,202	350.0	$85	$5,119,182,000	$29,762,686	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	138	55,753	404.0	$85	$4,536,897,000	$32,876,065	0.00%

Table 18: Cost per small firm in the health care and social assistance industry the SBA small business size standard for this industry is $7.5 million-$38.5 million.

Health Care and Social Assistance Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	107,112	162,265	1.5	$85	$5,064,756,000	$47,285	0.18%
Firms with sales/receipts/revenue of $100,000 to $499,999	242,566	1,027,234	4.2	$85	$66,168,531,000	$272,786	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	125,095	1,054,985	8.4	$85	$88,227,442,000	$705,284	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	84,361	1,466,391	17.4	$85	$126,989,626,000	$1,505,312	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	26,466	1,107,445	41.8	$85	$91,034,690,000	$3,439,685	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	9,453	712,840	75.4	$85	$56,541,818,000	$5,981,362	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	4,867	501,258	103.0	$85	$41,063,966,000	$8,437,223	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	5,198	760,603	146.3	$85	$61,116,459,000	$11,757,687	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	2,468	497,184	201.5	$85	$40,851,963,000	$16,552,659	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,374	347,358	252.8	$85	$29,140,498,000	$21,208,514	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	978	284,827	291.2	$85	$25,026,728,000	$25,589,701	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	665	230,360	346.4	$85	$20,167,268,000	$30,326,719	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	485	185,982	383.5	$85	$16,744,181,000	$34,524,085	0.00%

Table 19: Cost per small firm in the arts, entertainment, and recreation industry the SBA small business size standard for this industry is $7.5 million-$38.5 million.

Arts, Entertainment, and Recreation Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	33,186	53,994	1.6	$85	$1,569,733,000	$47,301	0.18%
Firms with sales/receipts/revenue of $100,000 to $499,999	46,210	199,647	4.3	$85	$11,295,277,000	$244,434	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	15,493	162,642	10.5	$85	$10,894,947,000	$703,217	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	12,148	259,480	21.4	$85	$18,531,141,000	$1,525,448	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,674	209,762	44.9	$85	$16,040,448,000	$3,431,846	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,718	120,586	70.2	$85	$9,983,571,000	$5,811,159	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	806	74,628	92.6	$85	$6,466,756,000	$8,023,270	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	660	77,131	116.9	$85	$7,102,423,000	$10,761,247	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	344	49,061	142.6	$85	$4,965,644,000	$14,435,012	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	224	40,309	180.0	$85	$4,136,002,000	$18,464,295	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	155	33,220	214.3	$85	$3,428,904,000	$22,121,961	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	115	28,855	250.9	$85	$2,873,044,000	$24,982,991	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	84	25,163	299.6	$85	$2,569,574,000	$30,590,167	0.00%

Table 20: Cost per small firm in the accommodation and food services industry the SBA small business size standard for this industry is $7.5 million-$38.5 million.

Accommodation and Food Services Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	99,592	207,093	2.1	$85	$4,845,922,000	$48,658	0.17%
Firms with sales/receipts/revenue of $100,000 to $499,999	216,446	1,349,187	6.2	$85	$55,536,558,000	$256,584	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	79,875	1,260,097	15.8	$85	$55,913,962,000	$700,018	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	56,476	1,777,649	31.5	$85	$84,117,236,000	$1,489,433	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	14,095	896,373	63.6	$85	$46,231,300,000	$3,279,979	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,720	403,866	108.6	$85	$21,249,810,000	$5,712,315	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,621	244,772	151.0	$85	$12,835,230,000	$7,918,094	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,628	340,741	209.3	$85	$17,984,834,000	$11,047,195	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	859	252,279	293.7	$85	$13,054,878,000	$15,197,763	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	446	170,201	381.6	$85	$8,420,579,000	$18,880,222	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	363	153,594	423.1	$85	$7,987,110,000	$22,003,058	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	241	115,452	479.1	$85	$6,405,041,000	$26,576,934	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	170	90,301	531.2	$85	$4,832,335,000	$28,425,500	0.00%

Table 21: Cost per small firm in the other services (except public administration) industry the SBA small business size standard for this industry is $5.5 million-$38.5 million.

Other Services Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	195,234	322,002	1.6	$85	$9,308,948,000	$47,681	0.18%
Firms with sales/receipts/revenue of $100,000 to $499,999	307,613	1,225,144	4.0	$85	$75,113,021,000	$244,180	0.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	87,833	756,186	8.6	$85	$61,131,552,000	$695,998	0.01%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	55,883	926,035	16.6	$85	$84,065,314,000	$1,504,309	0.01%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	16,522	531,104	32.1	$85	$55,620,907,000	$3,366,475	0.00%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,967	252,838	50.9	$85	$28,838,406,000	$5,806,001	0.00%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,326	151,376	65.1	$85	$18,502,407,000	$7,954,603	0.00%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,114	173,393	82.0	$85	$23,140,184,000	$10,946,161	0.00%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,005	104,997	104.5	$85	$14,696,909,000	$14,623,790	0.00%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	620	73,209	118.1	$85	$11,076,548,000	$17,865,400	0.00%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	405	50,974	125.9	$85	$8,159,095,000	$20,145,914	0.00%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	274	42,041	153.4	$85	$6,643,223,000	$24,245,339	0.00%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	227	37,259	164.1	$85	$5,392,740,000	$23,756,564	0.00%

BILLING CODE 4510–45–C

Paperwork Reduction Act

Compliance Date: Affected parties do not have to comply with the new information collection requirements under § 60–1.35 until the Department publishes a Notice in the **Federal Register** stating that OMB has approved the information collections under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* or until this rules otherwise takes effect, whichever is later.

As part of its continuing effort to reduce paperwork burdens, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3506(c)(2)(A). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. Persons are not required to respond to a collection of information until they are approved by OMB under the PRA.

Purpose and use: Executive Order 13665 amends the equal opportunity clause provided in Executive Order 11246 by adding the prohibition that Federal contractors may not discriminate against employees and job applicants who inquire about, discuss or disclose their own compensation or the compensation of other employees or applicants. Federal contractors are required to amend the equal opportunity clauses incorporated into their subcontracts, and notify job applicants and employees of the requirement. The order became effective with the signing of Executive Order 13655 and shall apply to contracts entered into on or after the effective date of the proposed rules.

This NPRM which implements the provisions of Executive Order 13665 contains several provisions that could be considered a ''collections of information'' as defined by the PRA: The amendment to the equal opportunity clause incorporated into contracts and subcontracts, and the notification given to employees and job applicants.

Proposed §§ 60–1.35(c)(i) and (ii) require the incorporation of the new provision verbatim into existing handbooks and manuals, and notification given to applications and employees. The disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure is not included within the PRA's definition of ''collection of information.'' *See* 5 CFR 1320.3(c)(2). OFCCP has determined that proposed §§ 60–1.35(c)(i) and (ii) do not meet the PRA's definition of ''collection of information'' and therefore these provisions are not subject to the PRA's requirements. However, OFCCP has determined that the proposed changes to §§ 60–1.4 could be considered information collections, thus an information collection request (ICR), has been submitted to the OMB for approval.

Public Comments

OFCCP seeks comments on this NPRM's proposed information collection requirements. Commenters may send their views to OFCCP in the same way as all other comments (e.g., through the *www.regulations.gov* Web site). While much of the information provided to OMB in support of the ICR appears in the preamble, a copy of the

ICR, with applicable supporting documentation—including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=* [INSERT ICR REFERENCE NUMBER] (this link will only become active on the day following publication of this document) or by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble. In addition to having an opportunity to file comments with the OFCCP, comments about the proposed rule's information collection requirements may be addressed to the OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Office of Federal Contract Compliance, Office of Management and Budget, Room 10235, Washington, DC 20503; Telephone: 202–395–7316 (these are not toll-free numbers). You can submit comments to OMB by email at *OIRA_submission@omb.eop.gov.* The OMB will consider all written comments it receives within 30 days of publication of this proposed rule. As previously indicated, written comments directed to the Department may be submitted within 90 days of publication of this notice.

The OMB and the Department are particularly interested in comments that:

- Evaluate whether the proposed collections of information are 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 IT (e.g., permitting electronic submission of responses).

Number of Respondents

All non-exempt Federal contractors with contracts, subcontracts, federally assisted construction contracts or subcontracts in excess of $10,000 are required to comply with the proposed rule. There are approximately 500,000 contractor firms registered in the General Service Administration's SAM. Therefore, OFCCP estimates there are 500,000 contractor firms.

Summary of Paperwork Burdens

The total estimated annual burden for contractor companies to comply with the proposed revised regulations is listed in Table 22, below. It is calculated as an annual burden based on a three-year approval of this information collection request. OFCCP believes that in the first year of implementation contractors will modify their equal opportunity clauses. Additionally, OFCCP estimates that in subsequent years 1 percent of its contractor universe will be new contractors and required to modify their equal opportunity clauses.

TABLE 22—ESTIMATED ANNUAL BURDEN FOR CONTRACTOR COMPANIES

New requirement	Estimated annual burden hours	Monetization
§ 60–1.4	42,500	$1,320,369
Total Cost	42,500	1,320,369

These paperwork burden estimates are summarized as follows:

Type of Review: New collection.

Agency: Office of Federal Contract Compliance Programs, Department of Labor.

Title: Prohibitions Against Pay Secrecy Policies and Actions.

OMB ICR Reference Number: 1250–XXXX.

Affected Public: Business or other for-profit; individuals.

Estimated Number of Annual Responses: 500,000.

Frequency of Response: On occasion.

Estimated Total Annual Burden Hours: 42,500.

Estimated Total Annual PRA Costs: $1,320,369.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this proposed rule does not include any Federal mandate that may result in excess of $100 million in expenditures by state, local, and tribal governments in the aggregate or by the private sector.

Executive Order 13132 (Federalism)

OFCCP has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' This rule will not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This proposed rule does not have tribal implications under Executive Order 13175 that requires a tribal summary impact statement. The proposed rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Effects on Families

The undersigned hereby certifies that the proposed rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

Executive Order 13045 (Protection of Children)

This proposed rule would have no environmental health risk or safety risk that may disproportionately affect children.

Environmental Impact Assessment

A review of this proposed rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.;* the regulations of the Council on Environmental Quality, 40 CFR part 1500 *et seq.;* and DOL NEPA procedures, 29 CFR part 11, indicates the proposed rule would not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

Executive Order 13211 (Energy Supply)

This proposed rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

Executive Order 12630 (Constitutionally Protected Property Rights)

This proposed rule is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

Executive Order 12988 (Civil Justice Reform Analysis)

This proposed rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The proposed rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 41 CFR Part 60–1

Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Investigations, Labor, and Reporting and recordkeeping requirements.

Patricia A. Shiu,

Director, Office of Federal Contract Compliance Programs.

Accordingly, part 60–1 of title 41 of the Code of Federal Regulations is proposed to be amended as follows:

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

■ 1. The authority citation for part 60–1 continues to read as follows:

Authority: Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 339, as amended by E.O. 11375, 32 FR 14303, 3 CFR, 1966–1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 1978 Comp., p. 230 and E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258.

■ 2. Section 60–1.3 is amended by adding definitions in alphabetical order for ''Compensation'', ''Compensation information'', and ''Essential job functions'' to read as follows:

§ 60–1.3 Definitions.

* * * * *

Compensation means any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and contributions to retirement.

Compensation information means information pertaining to any aspect of compensation, including but not limited to information about the amount and type of compensation as well as decisions, statements, or actions related to setting or altering employees' compensation.

* * * * *

Essential job functions—(1) *In general.* The term *essential job functions* means fundamental job duties of the employment position an individual holds. The term *essential job functions* does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) The application or interpretation of the ''essential job functions'' definition in this part is limited to the discrimination claims governed by Executive Order 13665 and its implementing regulations.

■ 3. Section 60–1.4 is revised to read as follows:

§ 60–1.4 Equal opportunity clause.

(a) *Government contracts.* Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation

conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

(4) The contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the contractor's non-compliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The contractor will include the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) *Federally assisted construction contracts.* (1) Except as otherwise provided, each administering agency shall require the inclusion of the following language as a condition of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

(3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

(4) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations,

or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance:

Provided, however, That in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided,* That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive Order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(2) [Reserved]

(c) *Subcontracts.* Each nonexempt prime contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

(d) *Inclusion of the equal opportunity clause by reference.* The equal opportunity clause may be included by reference in all Government contracts and subcontracts, including Government bills of lading, transportation requests, contracts for deposit of Government funds, and contracts for issuing and paying U.S. savings bonds and notes, and such other contracts and subcontracts as the Director of OFCCP may designate.

(e) *Incorporation by operation of the order.* By operation of the order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

(f) *Adaptation of language.* Such necessary changes in language may be made in the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

■ 4. Section 60–1.35 is added to subpart B to read as follows:

§ 60–1.35 Contractor Obligations and Defenses to Violation of the Nondiscrimination Requirement for Compensation Disclosures.

(a) *General defenses.* A contractor may pursue a defense to an alleged violation of paragraph (3) of the equal opportunity clauses listed in § 60–1.4(a) and (b) as long as the defense is not based on a rule, policy, practice, agreement, or other instrument that prohibits employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants, subject to paragraph (3) of the equal opportunity clause. Actions taken by a contractor which adversely affect an employee or applicant will not be deemed to be discrimination if the contractor would have taken the same adverse action in the absence of the employee's or applicant's protected activity, for example, by proving that the contractor disciplined the employee for violation of a consistently and uniformly applied rule, policy, practice, agreement, or other instrument that does not prohibit, or tend to prohibit, employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants.

(b) *Essential job functions defense.* Actions taken by a contractor which adversely affect an employee will not be deemed to be discrimination if the employee has access to the compensation information of other employees or applicants as part of such employee's essential job functions and disclosed the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, and the disclosure was not in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the contractor, or is consistent with the contractor's legal duty to furnish information.

(c) *Dissemination of nondiscrimination provision.* The contractor or subcontractor shall disseminate the nondiscrimination provision, using the language as prescribed by the Director of OFCCP, to employees and applicants:

(1) The nondiscrimination provision shall be incorporated into existing employee manuals or handbooks; and

(2) The nondiscrimination provision shall be disseminated to employees and to job applicants. Dissemination of the provision can be executed by electronic posting or by posting a copy of the provision in conspicuous places available to employees and applicants for employment.

[FR Doc. 2014–21945 Filed 9–15–14; 8:45 am]

BILLING CODE 4510–45–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 05–162; Report No. 2954]

Petition for Reconsideration of Action in Rulemaking Proceeding

AGENCY: Federal Communications Commission.

ACTION: Petition for reconsideration.

SUMMARY: In this document, a Petition for Reconsideration (Petition) has been

filed in the Commission's Rulemaking proceeding by Robert J. Buenzle, on behalf of Roy E. Henderson.

DATES: Oppositions to the Petition must be filed on or before October 2, 2014. Replies to an opposition must be filed on or before October 14, 2014.

ADDRESSES: Federal Communications Commission, 445 12th Street SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Andrew J. Rhodes, Media Bureau, (202) 418–2700, email: *Andrew.Rhodes@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of Commission's document, Report No. 2954, released June 12, 2012. The full text of Report No. 2954 is available for viewing and copying in Room CY–B402, 445 12th Street SW., Washington, DC or may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI) (1–800–378–3160). The Commission will not send a copy of this *document* pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), because this *document* does not have an impact on any rules of particular applicability.

Subjects: In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Enfield, New Hampshire; Hartford and White River Junction, Vermont; and Keeseville and Morrisonville, New York), published at 76 FR 9249, February 17, 2011, in MB Docket No. 05–162, and published pursuant to 47 CFR 1.429(e). *See also* § 1.4(b)(1) of the Commission's rules.

Number of Petitions Filed: 1.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2014–22167 Filed 9–16–14; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 79, No. 180

Wednesday, September 17, 2014

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

September 12, 2014.

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 October 17, 2014 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: National Veterinary Services Laboratories Request Forms.

OMB Control Number: 0579—NEW.

Summary of Collection: The Animal Health Protection Act (7 U.S.C. 8301–8317) provides the Secretary of Agriculture broad authority to prohibit or restrict the importation or entry of any animal, article, or means of conveyance, if USDA determines that the prohibition or restriction is necessary to prevent the introduction into or spread with the United States of any pest or disease of livestock. In connection with this disease prevention mission, the Animal and Plant Health Inspection Service (APHIS) National Veterinary Services Laboratories (NVSL) safeguard U.S. animal health and contribute to public health by ensuring that timely and accurate laboratory support is provided by their nationwide animal health diagnostic system.

Need and Use of the Information: APHIS will collect information using VS Form 4–9, Request for Reagents or Supplies; VS Form 4–10, NVSL Customer Contact Update; and VS Form 4–11, Request for Training at NVSL. These forms are used to safeguard the U.S. animal population from pests and diseases. If the information was collected less frequently or not collected, APHIS would be unable to process reagent orders or provide training that customer's desire.

Description of respondents: Individuals or households; Not for-profit Institutions; State, Local or Tribal Government.

Number of Respondents: 1,085.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 942.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2014–22158 Filed 9–16–14; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request—Special Supplemental Nutrition Program for Women, Infants and Children (WIC) Forms: FNS–698, FNS–699 and FNS–700; The Integrity Profile (TIP)

AGENCY: Food and Nutrition Service, 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 the proposed information collection. This is an extension, without change of a currently approved data collection.

DATES: Written comments must be received on or before November 17, 2014.

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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments may be sent to: Debra Whitford, Director, Supplemental Food Programs Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 520, Alexandria, VA 22302. 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 responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection form and instructions should be directed to: Sarah Widor, (703) 305–2746.

SUPPLEMENTARY INFORMATION:

Title: The Integrity Profile (TIP) Data Collection.

OMB Number: 0584–0401.

Form Numbers: FNS–698, FNS–699 and FNS–700.

Expiration Date: 03/31/2015.

Type of Request: Extension, without change, of a currently approved collection.

Abstract: Each year, WIC State agencies administering the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) are required by 7 CFR 246.12(j)(5) to submit to FNS an annual summary of the results of their vendor monitoring efforts in order to provide Congress, senior FNS officials, as well as the general public, assurances that every reasonable effort is being made to ensure integrity in the WIC Program. State agencies use the TIP web-based system to report the information. The number of State agencies reporting remains at 90, which includes 50 geographic State agencies, 34 Indian Tribal Organizations, the District of Columbia, Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Marianas, and the Virgin Islands. The reporting burden consists of three automated forms, the FNS–698, FNS–699 and FNS–700. The FNS–698 and FNS–699 are used to report State agency summary data, whereas the FNS–700 is used to capture information on each authorized WIC vendor. The number of vendors authorized by each WIC State agency varies from State to State. There are no changes in the burden hours associated with collection.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average of 25 minutes or 0.4175 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Affected Public: State and Tribal Agencies; Respondent Type; Directors or Administrators of WIC State agencies.

Estimated Number of Respondents: 90 respondents.

Estimated Number of Responses per Respondent: One.

Estimated Total Annual Responses: 90 responses.

Estimated Time per Respondent: 0.4175.

Estimated Total Annual Burden on Respondents: 37.57 rounded up to 38 burden hours.

Audrey Rowe,

Administrator, Food and Nutrition Service.

[FR Doc. 2014–22156 Filed 9–16–14; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2014–0027]

Notice of Request for Reinstatement of an Information Collection: Qualitative Feedback on Agency Service Delivery

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Food Safety and Inspection Service's intention to reinstate an information collection associated with qualitative customer and stakeholder feedback on service delivery by the Food Safety and Inspection Service.

DATES: Comments on this notice must be received on or before November 17, 2014.

ADDRESSES: FSIS invites interested persons to submit comments on this notice. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail, including CD–ROMs, etc.:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, Docket Clerk, Patriots Plaza 3, 1400 Independence Avenue SW., Mailstop 3782, Room 8–163A, Washington, DC 20250–3700.
- *Hand- or courier-delivered submittals:* Deliver to Patriots Plaza 3, 355 E Street SW., Room 8–163A, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2014–0027. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

Docket: For access to background documents or comments received, go to the FSIS Docket Room at Patriots Plaza 3, 355 E Street SW., Room 8–164, Washington, DC 20250–3700 between 8:00 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Paperwork Reduction Act Coordinator, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW., Room 6067, South Building, Washington, DC 20250; (202) 690–6510.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

Abstract: The proposed information collection activity provides a means for the Food Safety and Inspection Service (FSIS) to garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Agency's commitment to improving service delivery.

By ''qualitative feedback'' we mean information that provides useful insights on perceptions and opinions, but not a statistical survey that yields quantitative results that can be generalized to the population studied. Qualitative feedback provides insights into customer or stakeholder perceptions, experiences, and expectations; provides an early warning of issues with the Agency's customer service; and focuses attention on matters with respect to which communication, training, or changes in operations might improve delivery of products or services. This collection will allow for ongoing, collaborative, and actionable communications between the Agency and its customers and stakeholders. It will also allow the feedback to contribute directly to the improvement of program management.

The solicitation of qualitative feedback will target topics such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

FSIS will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collection is voluntary;
- The collection is low-burden for respondents (based on considerations of total burden hours, total number of

respondents, or burden-hours per respondent) and is low-cost for both the respondents and the Federal Government;

• The collection is non-controversial and does not raise issues of concern to other Federal agencies;

• The collection is targeted to the solicitation of opinions from respondents who have had experience with the program, or who may have experience with the program in the near future;

• Personally identifiable information (PII) is collected only to the extent necessary and is not retained;

• Information gathered is intended to be used only internally for general service improvement and program management purposes and is not intended for release outside of FSIS (if released, FSIS will indicate the qualitative nature of the information);

• Information gathered will not be used for the purpose of substantially informing policy decisions; and

• Information gathered will yield qualitative information; the collection will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance.

As a general matter, this information collection will not result in any new system of records containing privacy information and will not involve questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, or other matters that are commonly considered private.

FSIS previously had approval from OMB for this information collection. The approval was for 27,000 burden hours; however, the Agency only used a total of 4,729 hours to conduct qualitative surveys and food safety education research. We are asking OMB to approve reinstatement of this collection with a reduced burden estimate for similar upcoming activities.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.25 hours per response.

Respondents: Individuals and households; businesses and organizations; State, local, or Tribal government.

Estimated annual number of respondents: 3,474.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 3,474.

Estimated total annual burden on respondents: 5,000 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Copies of this information collection assessment can be obtained from Gina Kouba, Paperwork Reduction Act Coordinator, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW., Room 6077, South Building, Washington, DC 20250, (202) 690–6510.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of FSIS's functions, including whether the information will have practical utility; (b) the accuracy of FSIS's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20253.

Additional Public Notification

FSIS will announce this notice online through the FSIS Web page located at *http://www.fsis.usda.gov/wps/portal/fsis/topics/regulations/federal-register.*

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at *http://www.fsis.usda.gov/wps/portal/fsis/programs-and-services/email-subscription-service.*

Options range from recalls to export information to regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password-protect their accounts.

USDA Nondiscrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

How To File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail

U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW., Washington, DC 20250–9410.

Fax

(202) 690–7442.

Email

program.intake@usda.gov.

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC, on: September 11, 2014.

Alfred V. Almanza,

Administrator.

[FR Doc. 2014–22205 Filed 9–16–14; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

Notice of Request for New Approval of Information Collection

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces that the Foreign Agricultural Service (FAS) intends to request a new approval of an information collection process for the Trade Show Evaluation form that is used in support of FAS' Exporter Assistance Programs.

DATES: Comments on this notice must be received by November 17, 2014 to be assured of consideration.

Request for Comments: Send comments regarding (a) 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; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments and questions regarding the Trade Show Evaluation forms should be sent to: Maria Nemeth-Ek, Deputy Director, Trade Services Staff, Office of Trade Programs, Foreign Agricultural Service, U.S. Department of Agriculture, 1400 Independence Avenue SW., Stop 1020, Washington, DC 20250–1020. All written comments received will be available for public inspection at the above address during business hours from 8:00 a.m. to 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Maria Nemeth-Ek at the address stated above or telephone (202) 720–3623, or by email at: *Maria.Nemeth-Ek@fas.usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: Trade Show Evaluation Forms.

OMB Number: 0551–New.

Type of Request: New approval of information collection process.

Abstract: FAS requests the approval of a Trade Show Evaluation form used to collect information from participants of USDA/FAS-endorsed trade shows. This form is used by FAS' Office of Trade Programs/Trade Services Staff (OTP/TSS) to gather feedback from participants in USDA-endorsed trade shows and helps to improve the services provided by FAS. This form will also allow FAS to capture information about the companies' experiences at the trade show in a more concise manner and update contact information of the offices responsible for managing the trade show program.

Each year a certain number of trade shows are selected to be endorsed by USDA/FAS, to host a U.S.A. Pavilion for U.S. companies to promote their products to foreign buyers. A list of USDA endorsed shows is available at: *www.fas.usda.gov/topics/exporting/trade-shows.*

The data collected through the Trade Show Evaluation form is tabulated by FAS to provide information on performance measures that track progress towards attaining FAS' export objectives. This information is necessary to manage, plan, and evaluate the effectiveness of FAS' services, which are intended to help U.S. companies market and sell their products overseas.

Estimate of Burden: The burden to U.S. exporters is estimated to average 0.13 hours (8 minutes) per response.

Respondents: U.S. agricultural exporters of food, farm, and forest products.

Estimated Number of Respondents: 1400 per annum.

Estimated Number of Responses per Respondent: 1 per annum.

Estimated Total Annual Burden of Respondents: 182 hours per annum.

Copies of this information collection can be obtained from Connie Ehrhart, the Agency Information Collection Coordinator, at (202) 690–1578.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Persons with disabilities who require an alternative means to communicate information (Braille, large print, audiotape, etc.) should contact USDA's Target Center at (202) 720–2600 (voice and TDD).

Dated: September 5, 2014.

Philip C. Karsting,

Administrator, Foreign Agricultural Service.

[FR Doc. 2014–22124 Filed 9–16–14; 8:45 am]

BILLING CODE 3410–10–P

BROADCASTING BOARD OF GOVERNORS

Privacy Act of 1974; New System of Records

AGENCY: The Broadcasting Board of Governors.

ACTION: Notice of a new system of records.

SUMMARY: BBG proposes to add a new financial and acquisition management system to its inventory of records system subject to the Privacy Act of 1974 (5 U.S.C. 522a), as amended. The primary purpose of the system are: (a) To integrate program, budgetary, financial, travel, and procurement information; (b) To ensure that agency financial and procurement activities are in conformance with laws, existing rules and regulations, good business practices; (c) To maintain information at the proper account and/or organizational level for agency operations. This action is necessary to meet the requirement of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the agency (5 U.S.C. 522a(e)(4)).

DATES: This action will be effective without further notice on October 27, 2014, unless comments are received that would result in a contrary determination.

ADDRESSES: Send written comments to the Broadcasting Board of Governors, ATTN: Paul Kollmer, Chief Privacy Officer, 330 Independence Avenue, Room 3349, Washington, DC 20237.

FOR FURTHER INFORMATION CONTACT: Renea Ramos, *cfo-financial-operations@bbg.gov.*

Dated: September 9, 2014.

André Mendes,

Director of Global Operations.

BBG 21—Office of Chief Financial Officer (BBG Financial and Acquisition Management System)

SYSTEM NAME:

Broadcasting Board of Governors (BBG) Financial and Acquisition Management System

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

BBG Financial and Acquisition Management System records and files are maintained in the Phoenix Data Center (PDC), with records also stored at the Broadcasting Board of Governors (BBG), 330 Independence Avenue SW., Washington, DC 20237.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

BBG vendors/contractors, grant recipients, employees, interns, students, consultants, experts, and others.

CATEGORIES OF RECORDS IN THE SYSTEM:

Business related information

These records contain information about vendors/contractors and grant recipients, and may include the following elements: Names including name of company, titles, points of contact information, telephone numbers, fax numbers, addresses, email addresses, vendor or record numbers (system unique identifiers), Tax Identification Numbers (TIN), Social Security Numbers (SSN), Dun & Bradstreet (D&B) Data Universal Numbering System (DUNS) and DUNS Plus 4 numbers, Commercial and Government Entity (CAGE) codes, or contract, agreement, and debarment information.

Information related to employees, interns, students, consultants, experts, and others

These records contain information about BBG employees, interns, students, consultants, experts, and others that are in connection with BBG activities. The records may include the following elements: Names, titles, points of contact, telephone numbers, fax numbers, addresses, email addresses, record numbers (system unique identifiers), TINs, SSNs, and travel information.

Financial related information

May be associated with the categories of records listed above that are within this system and may include the following elements: Financial institution names, lockbox numbers, routing transit numbers, account numbers, account types, debts (e.g., unpaid bills/invoices, overpayments, etc.), and remittance addresses.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

31 U.S.C. 3501, et seq., 31 U.S.C. 7701(c), 41 CFR parts 300–304, 2 CFR 25.215, and Federal Acquisition Regulation, 48 CFR. Where the employee identification number is the social security number, collection of this information is authorized by Executive Order 9397 as amended by Executive Order 13478.

PURPOSE:

Serves as the BBG's core financial and acquisitions management system that integrates program, budgetary, financial, travel, and procurement information. Records are collected to ensure that agency financial and procurement activities are in conformance with laws, existing rules and regulations, good business practices, and for the maintenance of information at the proper account and/or organizational level for agency operations.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Disclosure in response to a compromise of information

To appropriate agencies, entities, and persons when (a) it is suspected or confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the BBG has determined that, as a result of the suspected or confirmed compromise, there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the BBG or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the BBG's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm. Also see Statement of General Routine Uses.

Disclosure to consumer reporting agencies:

Disclosures may be made from this system to consumer reporting agencies in accordance with 5 U.S.C. 552a(b)(12) and 31 U.S.C. 3711(e).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained in electronic and paper format. Electronic records are stored in secure computerized databases and/or on computer disc. Paper records and records on computer disc are stored in locked rooms and/or file cabinets.

RETRIEVABILITY:

Records are retrievable by the following, including but not limited to, record and system unique identifiers, DUNS and/or DUNS Plus 4 numbers, CAGE codes, TINs (including SSN), names, titles, addresses, or by any of the elements listed above within the categories of records within this system.

SAFEGUARDS:

Records are safeguarded in a secured environment. Buildings where records are stored have security cameras and 24-hour security guard service. The records are maintained in limited access areas during duty hours and in locked file cabinets and/or locked offices or file rooms at all other times. Access is limited to those personnel who require access to the records in the performance of their agency duties. Access to electronic records is controlled through the use of access codes and/or information technology security.

RETENTION AND DISPOSAL:

These records will be maintained in accordance with the General Records Schedule. After which, they will be retired or destroyed in accordance with and as approved by the National Archives and Records Administration (NARA).

SYSTEM MANAGER AND ADDRESS:

Chief Financial Officer, Office of the Chief Financial Officer, Broadcasting Board of Governors, 330 Independence Avenue SW., Washington, DC 20237.

NOTIFICATION PROCEDURES:

Individuals who want to know whether this system of records contains information about them, or who want access to their records, or who want to contest the contents of a record, should make a written request to: FOIA/Privacy Act Officer, Broadcasting Board of Governors (BBG), Suite 3349, 330 Independence Ave. SW., Washington, DC 20237. Individuals' requests should contain the name and address of the system manager (listed above) and the following information to enable their records to be located and identified:

A. Full legal name; B. Date of Birth; C. Social Security Number; D. Last employing organization (include duty station location) and the approximate dates of employment or contact; and E. Signature.

Records access procedures: Individuals wishing to request access to their records should follow the Notification Procedures (listed above). Individuals requesting access will also be required to provide adequate identification, such as driver's license, employee identification card, and/or other identifying document. Additional identification procedures may be required in some instances. To request a file other than your own, you must have a notarized, signed statement giving you express permission to access the file from the individual to whom the file pertains.

CONTESTING RECORD PROCEDURES:

The BBG's rules for access and for contesting contents and appealing determinations by the individual concerned appear at 22 CFR part 505. The right to contest records is limited to information that is incomplete, irrelevant, erroneous or untimely.

RECORD SOURCE CATEGORIES:

From individuals (e.g., vendors/contractors, employees, etc.) that are covered within this system as described within the categories of records listed above, and through agency personnel who obtain the information through agency duties.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2014–22147 Filed 9–16–14; 8:45 am]

BILLING CODE 8610–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD498

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting; Correction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of a correction to a public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's Spiny Dogfish Advisory Panel will meet to develop comments relative to the 2015 spiny dogfish fishing year. Comments will be reviewed by the Spiny Dogfish Monitoring Committee and the Council in their consideration of alternative management measures for the 2015 fishing year.

DATES: The meeting will be held on Monday, September 29, 2014, from 9 a.m. to 12 noon.

ADDRESSES: The meeting will be held via webinar with a listening station also available at the Council address below. Webinar link: *http://mafmc.adobeconnect.com/dogfish/*

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The original meeting notice published in the **Federal Register** on September 11, 2014 (79 FR 54268). The notice stated that the meeting would be held on Tuesday, September 29, 2014. It should have read Monday, September 29, 2014. All other previously-published information remains unchanged.

Dated: Sept 11, 2014.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2014–22090 Filed 9–16–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XD444

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to San Francisco Bay Area Water Emergency Transportation Authority Central Bay Operations and Maintenance Facility Project in Alameda, California

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received an application from the San Francisco Bay Area Water Emergency Transportation Authority (WETA) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to a proposed Central Bay Operations and Maintenance Facility Project. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to WETA to incidentally take, by Level B Harassment only, marine mammals during the specified activity.

DATES: Comments and information must be received no later than October 17, 2014.

ADDRESSES: Comments on the application should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *itp.guan@noaa.gov.* Comments sent via email, including all attachments, must not exceed a 25-megabyte file size. NMFS is not responsible for comments sent to addresses other than those provided here.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

An electronic copy of the application may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

NMFS is also preparing an Environmental Assessment (EA) in accordance with the National Environmental Policy Act (NEPA) and will consider comments submitted in response to this notice as part of that process. The EA will be posted at the foregoing internet site once it is finalized.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

On April 9, 2014, NMFS received an application from WETA for the taking of marine mammals incidental to the construction of a Central Bay Operations and Maintenance Facility. After NMFS provided comments on the draft IHA application, WETA submitted a revised IHA application on May 15, 2014. NMFS determined that the application was adequate and complete on July 31, 2014.

WETA proposes to construct a Central Bay Operations and Maintenance Facility (Project) to serve as the central San Francisco Bay base for WETA's ferry fleet, Operations Control Center (OCC), and Emergency Operations Center (EOC) in the City of Alameda in California. The proposed activity would occur between August 1 and November 30, 2015. The following specific aspects of the proposed activities are likely to result in the take of marine mammals: pile removal and vibratory and impact pile driving. Take, by Level B Harassment only, of individuals of California sea lion and Pacific harbor seal is anticipated to result from the specified activity.

Description of the Specified Activity

Overview

The Project would involve construction of the WETA Central Bay Operations and Maintenance Facility in the City of Alameda, California. This Project would require the removal of 35 existing concrete piles and the installation of 61 steel piles by impact hammer and 24 plastic piles by vibratory hammer in San Francisco Bay. Once constructed, the facility would provide maintenance services, such as fueling, engine oil changes, concession supply, and light repair work, for WETA ferry boats operating in the central San Francisco Bay. In addition, the facility would be the location for operational activities of WETA, including day-to-day management and oversight of services, crew, and facilities. In the event of a regional disaster, the facility would also function as an emergency operations center, serving passengers and sustaining water transit service for emergency response and recovery.

Dates and Duration

WETA plans to conduct all in-water construction work activities during the period from August 1 to November 30, 2015. Pile removal and installation would occur over only approximately 12 days during that period, and these activities would not be continuous.

For pile removal, the contractor conducting the removal will finalize the most effective method of removing the existing piles. Once the contractor has an effective method in place, it should take approximately 30 minutes to extract each pile. Thirty-five piles would be removed, requiring a total of approximately 17½ hours. This time would be spread over a period of three days and would not be continuous.

For pile installation, the structural steel piles would be driven in place by a diesel impact hammer. Each pile would require approximately 450–600 hammer strikes to be put in place. This is an estimated number of strikes, as limited geotechnical exploration has been performed at the site and the required structural capacity of the piles is yet to be determined. It is estimated that 3 to 12 piles would be driven per day during in-water pile driving operations, with an actual drive time for each pile ranging from 10 to 30 minutes per pile, assuming the hammer operates continuously. Sixty-one steel piles would be installed, requiring a total of approximately 10 to 30½ hours.

The plastic fender piles would likely be driven into place with a vibratory hammer, which would not create significant underwater noise. It would require 15 to 30 minutes of vibration to put each plastic pile in place. Twenty-four plastic piles would be installed, requiring a total of approximately 6 to 12 hours. All of the pile driving, including installation of the steel and plastic piles, will be spread over a period of ten days and would not be continuous.

Specified Geographic Region

The Project site is located southeast of the intersection of West Hornet Avenue and Ferry Point Road near Pier 3 in the City of Alameda (see Figure 1 of the IHA application). The Project site is within the Alameda Naval Air Station (NAS) Base Realignment and Closure (BRAC) area, now known as Alameda Point (see Figure 2 of the IHA application). The former Alameda NAS, which was closed in 1997, occupied roughly 1,700 acres of land and roughly 1,000 acres of water. The Project site is owned by the City of Alameda and was leased to the United States Navy as part of the NAS.

The Project site includes approximately 21,500 square feet (0.5 acre) of landside space and approximately three acres of waterside space in San Francisco Bay. The Project site is designated as Mixed Use Planned Development District (MX) and is zoned General Industrial District (M–2) by the City of Alameda.

Detailed Description of Activities

The Project has three elements involving noise production that may impact marine mammals:

- Removal of 35 existing concrete piles;
- Installation of 61 steel piles (twenty-six 30″ epoxy coated steel guide piles for floats, eleven 24″ piles for shoreline deck, sixteen 24″ epoxy coated steel dolphin piles, and eight 18″ epoxy coated steel fender panel piles) via impact hammer; and
- Installation of 24 plastic piles (18″ plastic fender piles) via vibratory hammer.

Detailed descriptions of these activities are provided below.

Pile Removal

Thirty-five (35) existing concrete piles will be removed as part of the Project. In general, the piles will be removed by attaching a choker to the pile and pulling. If necessary, a vibrating extractor will be used. Once the contractor conducting the removal has an effective method in place, it should take about 30 minutes to extract each pile. To remove all 35 existing piles, noise impacts associated with driving will occur over a period of three days, will be limited to daylight hours, and will not be continuous. As a vibrating extractor may be used, for the purposes of managing potential impacts to marine mammals, the same zones of influence applied to vibratory hammer operations for pile installation will be applied to pile removal operations.

Pile Installation

A total of 61 steel piles will be installed as part of the Project. These piles will be installed by impact hammer. The largest piles to be installed are 30-inch diameter steel piles, and these would produce the highest sound levels. Twenty-six 30-inch diameter piles will be installed, and noise impacts associated with driving these piles will occur over a period of six days, will be limited to daylight hours, and will not be continuous. In addition, twenty-seven 24-inch steel piles (sixteen of which will be epoxy coated) will be

installed for construction of the new ferry maintenance facility, and the driving of these piles will occur over a period of six days, overlapping with the days driving the 30-in diameter piles, will be limited to daylight hours, and will not be continuous. Finally, eight 18-inch epoxy coated steel piles will be installed, and pile driving for these piles will occur over a single day, will be limited to daylight hours, and will not be continuous.

The Project will also include installation of 24 plastic piles, which are 18 inches in diameter. A vibratory hammer will be used to install these plastic piles. Sound pressure waves resulting from the driving of plastic piles are different than those of steel piles. In comparison to steel piles, pressure levels produced from plastic piles hit with a hammer have lesser extremes in overpressure and underpressure in the sound waveform. Vibratory hammers produce sound pressure levels (SPLs) that are considerably lower than those produced by impact hammers. Specific data on vibratory hammer sound levels for driving plastic piles could not be located, but installation of the plastic piles with a vibratory hammer, instead of an impact hammer, is less likely to produce sound that would result in injury to or mortality of marine mammals. In total, the installation of all of the piles, including the steel piles and the plastic piles, will occur over a period of ten days, will be limited to daylight hours, and will not be continuous.

Description of Marine Mammals in the Area of the Specified Activity

The marine mammal species under NMFS jurisdiction most likely to occur in the proposed construction area include Pacific harbor seal (*Phoca vitulina richardsi*) and California sea lion (*Zalophus californianus*). Although harbor porpoise (*Phocoena phocoena*), killer whale (*Orcinus orca*), and gray whale (*Eschrichtius robustus*) have been sighted near the vicinity of the proposed construction area, their presence at the activity area is considered unlikely, because the proposed construction area is not typical habitat for these species. The southern sea otter (*Enhydra lutris*) also may occur in the proposed construction area, but that species is managed by the U.S. Fish and Wildlife Service and is not considered further in this proposed IHA notice. A list of the marine mammal species under NMFS jurisdiction and their abundance and Endangered Species Act (ESA) status is provided in Table 1.

General information on the marine mammal species found in California waters can be found in Caretta *et al.* (2013), which is available at the following URL: *http://www.nmfs.noaa.gov/pr/sars/pdf/po2012.pdf.* Refer to that document for information on these species. Specific information concerning these species in the vicinity of the proposed action area is provided below.

TABLE 1—LIST OF MARINE MAMMAL SPECIES UNDER NMFS JURISDICTION THAT OCCUR IN THE VICINITY OF THE WETA CENTRAL BAY OPERATIONS AND MAINTENANCE FACILITY PROJECT AREA

Common name	Scientific name	Stock	ESA Status	Abundance
California sea lion	*Zalophus californianus*	U.S	Not listed	296,750
Harbor seal	*Phoca vitulina richardsi*	California	Not listed	30,196

California Sea Lion

California sea lions in San Francisco Bay are part of the U.S. stock, which begins at the U.S./Mexico border and extends northward into Canada. The U.S. stock was estimated at 296,750 in the 2012 Stock Assessment Report (SAR) and may be at carrying capacity, although more data are needed to verify that determination (Carretta *et al.* 2013). Because different age and sex classes are not all ashore at any given time, the population assessment is based on an estimate of the number of births and number of pups in relation to the known population. The current population estimate is derived from visual surveys conducted in 2007 of the different age and sex classes observed ashore at the primary rookeries and haul-out sites in southern and central California, coupled with an assessment done in 2008 of the number of pups born in the southern California rookeries (Carretta *et al.* 2013). California sea lions' occurrence at the proposed project area is not common, but their presence is expected.

California sea lions are not listed under the ESA.

Harbor Seal

Harbor seals are members of the true seal family (Phocidae). For management purposes, differences in mean pupping date (Temte 1986), movement patterns (Jeffries 1985; Brown 1988), pollutant loads (Calambokidis *et al.* 1985), and fishery interactions have led to the recognition of three separate harbor seal stocks along the west coast of the continental U.S. (Boveng 1988). The three distinct stocks are: (1) Inland waters of Washington State (including Hood Canal, Puget Sound, Georgia Basin, and the Strait of Juan de Fuca out to Cape Flattery), (2) outer coast of Oregon and Washington, and (3) California (Carretta *et al.* 2011). Harbor seals found in the vicinity of the proposed action area belong to the California stock.

Pacific harbor seals display year-round site fidelity, though they have been known to swim several hundred miles to find food or suitable breeding habitat. Although generally solitary in the water, harbor seals come ashore at haul-outs that are used for resting, thermoregulation, birthing, and nursing pups. Haul-out sites are relatively consistent from year to year (Kopec and Harvey 1995), and females have been recorded returning to their own natal haul-out when breeding (Green *et al.* 2006).

In the vicinity of the proposed project area, harbor seals use the westernmost tip of Breakwater Island as a haul-out site and forage in the Breakwater Gap area. The tip is approximately 1 mile west of the Project site. Although it is not considered a primary haul-out site for San Francisco Bay, Breakwater Island is reportedly the only haul-out site in the Central Bay that is accessible to seals throughout the full tidal range. Aerial surveys of seal haul-outs conducted in 1995-97 and incidental counts made during summer tern foraging studies conducted in 1984-93 usually counted fewer than 10 seals present at any one time. There is some evidence that more harbor seals have been using the westernmost tip of Breakwater Island in recent years, or that it is more important as a winter haul-out. Seventy-three seals were counted on Breakwater Island in January 1997, and 20 were observed hauled-out on April 4, 1998. A small pup was observed during May 1997; however, site characteristics are not

ideal for the island to be a major pupping area (USFWS 1998).

Harbor seals have also been using an abandoned small craft marina dock located at the Project site for haul-out purposes. This dock was previously connected to land, which may have decreased its desirability for use by seals, due to access by people, dogs, and other animals. The dock has been deteriorating over time, because it is not maintained. In 2010, the portion connecting the floating dock to land broke off and sank, leaving remnant parts of the floating dock isolated from land. Since 2010, additional remnant parts of the marina have also been lost. At present, seals have been observed by local residents hauling out on the portion of the dock that is furthest from shore.

Harbor seals are not listed under the ESA.

Potential Effects of the Specified Activity on Marine Mammals

This section includes a summary and discussion of the ways that the types of stressors associated with the specified activity (in-water pile removal and pile driving) have been observed to impact marine mammals. This discussion may also include reactions that we consider to rise to the level of a take and those that we do not consider to rise to the level of a take (for example, with acoustics, we may include a discussion of studies that showed animals not reacting at all to sound or exhibiting barely measurable avoidance). This section is intended as a background of potential effects and does not consider either the specific manner in which this activity will be carried out or the mitigation that will be implemented, and how either of those will shape the anticipated impacts from this specific activity. The ''Estimated Take by Incidental Harassment'' section later in this document will include a quantitative analysis of the number of individuals that are expected to be taken by this activity. The ''Negligible Impact Analysis'' section will include the analysis of how this specific activity will impact marine mammals and will consider the content of this section, the ''Estimated Take by Incidental Harassment'' section, the ''Proposed Mitigation'' section, and the ''Anticipated Effects on Marine Mammal Habitat'' section to draw conclusions regarding the likely impacts of this activity on the reproductive success or survivorship of individuals and from that on the affected marine mammal populations or stocks.

Acoustic Impacts

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms have been derived using auditory evoked potentials, anatomical modeling, and other data, Southall *et al.* (2007) designate ''functional hearing groups'' for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): functional hearing is estimated to occur between approximately 7 Hz and 22 kHz (however, a study by Au *et al.* (2006) of humpback whale songs indicate that the range may extend to at least 24 kHz);
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): functional hearing is estimated to occur between approximately 200 Hz and 180 kHz; and
- Pinnipeds in Water: functional hearing is estimated to occur between approximately 75 Hz and 75 kHz, with the greatest sensitivity between approximately 700 Hz and 20 kHz.

As mentioned previously in this document, two marine mammal species (both of which are pinniped species) are likely to occur in the proposed seismic survey area. WETA and NMFS determined that in-water pile removal and pile driving during the Central Bay Operations and Maintenance Facility Project has the potential to result in behavioral harassment of the marine mammal species and stocks in the vicinity of the proposed activity.

Marine mammals exposed to high-intensity sound repeatedly or for prolonged periods can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Kastak *et al.* 1999; Schlundt *et al.* 2000; Finneran *et al.* 2002; 2005). TS can be permanent (PTS), in which case the loss of hearing sensitivity is unrecoverable, or temporary (TTS), in which case the animal's hearing threshold will recover over time (Southall *et al.* 2007). Since marine mammals depend on acoustic cues for vital biological functions, such as orientation, communication, finding prey, and avoiding predators, hearing impairment could result in the reduced ability of marine mammals to detect or interpret important sounds. Repeated noise exposure that causes TTS could lead to PTS.

Experiments on a bottlenose dolphin (*Tursiops truncates*) and beluga whale (*Delphinapterus leucas*) showed that exposure to a single watergun impulse at a received level of 207 kPa (or 30 psi) peak-to-peak (p-p), which is equivalent to 228 dB (p-p) re 1 μPa, resulted in a 7 and 6 dB TTS in the beluga whale at 0.4 and 30 kHz, respectively. Thresholds returned to within 2 dB of the pre-exposure level within 4 minutes of the exposure (Finneran *et al.* 2002). No TTS was observed in the bottlenose dolphin. Although the source level of one hammer strike for pile driving is expected to be much lower than the single watergun impulse cited here, animals being exposed for a prolonged period to repeated hammer strikes could receive more noise exposure in terms of sound exposure level (SEL) than from the single watergun impulse (estimated at 188 dB re 1 μPa^2-s) in the aforementioned experiment (Finneran *et al.* 2002).

Chronic exposure to excessive, though not high-intensity, noise could cause masking at particular frequencies for marine mammals that utilize sound for vital biological functions (Clark *et al.* 2009). Masking is the obscuring of sounds of interest by other sounds, often at similar frequencies. Masking generally occurs when sounds in the environment are louder than, and of a similar frequency as, auditory signals an animal is trying to receive. Masking can interfere with detection of acoustic signals, such as communication calls, echolocation sounds, and environmental sounds important to marine mammals. Therefore, under certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired.

Masking occurs at the frequency band which the animals utilize. Since noise generated from in-water vibratory pile removal and driving is mostly concentrated at low frequency ranges, it may have little effect on high-frequency echolocation sounds by odontocetes (toothed whales), which may hunt

California sea lion and harbor seal. However, the lower frequency man-made noises are more likely to affect the detection of communication calls and other potentially important natural sounds, such as surf and prey noise. The noises may also affect communication signals when those signals occur near the noise band, and thus reduce the communication space of animals (e.g., Clark *et al.* 2009) and cause increased stress levels (e.g., Foote *et al.* 2004; Holt *et al.* 2009).

Unlike TS, masking can potentially impact the species at community, population, or even ecosystem levels, as well as individual levels. Masking affects both senders and receivers of the signals and could have long-term chronic effects on marine mammal species and populations. Recent science suggests that low frequency ambient sound levels in the world's oceans have increased by as much as 20 dB (more than 3 times, in terms of SPL) from pre-industrial periods, and most of these increases are from distant shipping (Hildebrand 2009). All anthropogenic noise sources, such as those from vessel traffic and pile removal and driving, contribute to the elevated ambient noise levels, thus intensifying masking.

Nevertheless, the sum of noise from WETA's proposed Central Bay Operations and Maintenance Facility Project construction activities is confined to a limited area by surrounding landmasses; therefore, the noise generated is not expected to contribute to increased ocean ambient noise. In addition, due to shallow water depths in the project area, underwater sound propagation of low-frequency sound (which is the major noise source from pile driving) is expected to be poor.

Finally, in addition to TS and masking, exposure of marine mammals to certain sounds could lead to behavioral disturbance (Richardson *et al.* 1995), such as: Changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities, such as socializing or feeding; visible startle response or aggressive behavior, such as tail/fluke slapping or jaw clapping; avoidance of areas where noise sources are located; and/or flight responses (e.g., pinnipeds flushing into water from haulouts or rookeries).

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could be expected to be biologically significant if the change affects growth, survival, or reproduction. Some of these types of significant behavioral modifications include:

- Drastic change in diving/surfacing patterns (such as those thought to be causing beaked whale strandings due to exposure to military mid-frequency tactical sonar);
- Habitat abandonment due to loss of desirable acoustic environment; and
- Cessation of feeding or social interaction.

The onset of behavioral disturbance from anthropogenic noise depends on both external factors (characteristics of noise sources and their paths) and the receiving animals (hearing, motivation, experience, demography), and is therefore difficult to predict (Southall *et al.* 2007).

The proposed project area is not a prime habitat for marine mammals, nor is it considered an area frequented by marine mammals. Therefore, behavioral disturbances that could result from anthropogenic noise associated with WETA's construction activities are expected to affect only a small number of marine mammals on an infrequent and limited basis.

Visual Disturbance

The activities of workers in the project area may also cause behavioral reactions by marine mammals, such as pinnipeds flushing from the jetty or pier or moving farther from the disturbance to forage. There is a riprap breakwater that starts at the Alameda shoreline southeast of the proposed facility that harbor seals use as a haul-out site and to forage in the breakwater gap area. However, observations of the area show that it is unlikely that more than 10 to 20 individuals of harbor seals (or California sea lions) would be present in the project vicinity at any one time. Therefore, even if pinnipeds were flushed from the haul-out, a stampede is very unlikely, due to the relatively low number of animals onsite. In addition, proposed mitigation and monitoring measures would minimize the startle behavior of pinnipeds and prevent the animals from flushing into the water.

Anticipated Effects on Marine Mammal Habitat

No permanent impacts to marine mammal habitat are proposed to or would occur as a result of the proposed Project. The WETA's proposed Central Bay Operations and Maintenance Facility Project would not modify the existing habitat. Therefore, no restoration of the habitat would be necessary. A temporary, small-scale loss of foraging habitat may occur for marine mammals, if the marine mammals leave the area during pile extraction and driving activities.

Acoustic energy created during pile replacement work would have the potential to disturb fish within the vicinity of the pile replacement work. As a result, the affected area could temporarily lose foraging value to marine mammals. During pile driving, high noise levels may exclude fish from the vicinity of the pile driving. Hastings and Popper (2005) identified several studies that suggest fish will relocate to avoid areas of damaging noise energy. The acoustic frequency and intensity ranges that have been shown to negatively impact fish (FHWG 2008) and an analysis of the potential noise output of the proposed Project indicate that Project noise has the potential to cause temporary hearing loss in fish over a distance of approximately 42 meters from pile driving activity. If fish leave the area of disturbance, pinniped habitat in that area may have temporarily decreased foraging value when piles are driven using impact hammering.

The duration of fish avoidance of this area after pile driving stops is unknown. However, the affected area represents an extremely small portion of the total foraging range of marine mammals that may be present in and around the project area.

Because of the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or marine mammal populations.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant).

For WETA's proposed Central Bay Operations and Maintenance Facility Project, WETA worked with NMFS and proposed the following mitigation measures to minimize the potential impacts to marine mammals in the Project vicinity. The primary purposes of these mitigation measures are to

minimize sound levels from the activities, to monitor marine mammals within designated zones of influence corresponding to NMFS' current Level B harassment thresholds and, if marine mammals with the ZOI appear disturbed by the work activity, to initiate immediate shutdown or power down of the piling hammer, making it very unlikely potential injury or TTS to marine mammals would occur and ensuring that Level B behavioral harassment of marine mammals would be reduced to the lowest level practicable.

Use of Noise Attenuation Devices

Noise attenuation systems (i.e., bubble curtains) will be used during all impact pile driving of steel piles to dampen the acoustic pressure and reduce the impact on marine mammals. By reducing underwater sound pressure levels at the source, bubble curtains would reduce the area over which Level B harassment would occur, thereby potentially reducing the numbers of marine mammals affected. In addition, the bubble curtain system would reduce sound levels below the threshold for injury (Level A harassment), and thus eliminate the need for an exclusion zone for Level A harassment.

Time Restrictions

Work would occur only during daylight hours, when visual monitoring of marine mammals can be conducted.

In addition, all in-water construction will be limited to the period between August 1 and November 30, 2015.

Establishment of Level B Harassment Zones of Influence

Before the commencement of in-water pile driving activities, WETA shall establish Level B behavioral harassment zones of influence (ZOIs) where received underwater sound pressure levels (SPLs) are higher than 160 dB (rms) and 120 dB (rms) re 1 μPa for impulse noise sources (impact pile driving) and non-impulses noise sources (vibratory pile driving and mechanic dismantling), respectively. The ZOIs delineate where Level B harassment would occur. Because of the relatively low source levels from vibratory pile driving and from impact pile driving with air bubble curtains, there will be no area where the noise level would exceed the threshold for Level A harassment for pinnipeds, which is 190 dB (rms) re 1 μPa. The modeled maximum isopleths for ZOIs are listed in Table 2.

TABLE 2—MODELED LEVEL B HARASSMENT ZONES OF INFLUENCE FOR VARIOUS PILE DRIVING ACTIVITIES

Pile driving methods	Pile material and size	Distance to 120 dB re 1 μPa (rms) (m)	Distance to 160 dB re 1 μPa (rms) (m)
Impact pile driving with air bubble curtain	30″ epoxy coated steel piles	NA	250
	24″ epoxy coated steel piles	NA	185
	18″ epoxy coated steel piles	NA	93
Vibratory pile driving	18″ plastic fender piles	2,154	NA

Once the underwater acoustic measurements are conducted during initial test pile driving, WETA shall adjust the sizes of the ZOIs, and monitor these zones as described under the Proposed Monitoring section below.

Soft Start

A ''soft-start'' technique is intended to allow marine mammals to vacate the area before the pile driver reaches full power. Whenever there has been downtime of 30 minutes or more without pile driving, the contractor will initiate the driving with ramp-up procedures described below.

For vibratory hammers, the contractor will initiate the driving for 15 seconds at reduced energy, followed by a 1-minute waiting period. This procedure shall be repeated two additional times before continuous driving is started. This procedure would also apply to vibratory pile extraction.

For impact driving, an initial set of three strikes would be made by the hammer at 40 percent energy, followed by a 1-minute waiting period, then two subsequent three-strike sets at 40 percent energy, with 1-minute waiting periods, before initiating continuous driving.

Shutdown Measures

Although no marine mammal exclusion zone exists, due to the implementation of noise attenuation devices (i.e., bubble curtains), WETA shall discontinue pile driving or pile removal activities if a marine mammal within a ZOI appears disturbed by the work activity. Work may not resume until the animal is seen to leave the ZOI or 30 minutes have passed since the disturbed animal was last sighted.

Mitigation Conclusions

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned
- The practicability of the measure for applicant implementation.

Any mitigation measure(s) prescribed by NMFS should be able to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

(1) Avoidance or minimization of injury or death of marine mammals wherever possible (goals 2, 3, and 4 may contribute to this goal).

(2) A reduction in the numbers of marine mammals (total number or number at biologically important time or location) exposed to received levels of pile driving and pile removal or other activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only).

(3) A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to received levels of pile driving and pile removal, or other activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only).

(4) A reduction in the intensity of exposures (either total number or number at biologically important time

or location) to received levels of pile driving, or other activities expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing the severity of harassment takes only).

(5) Avoidance or minimization of adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time.

(6) For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth, ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. WETA submitted a marine mammal monitoring plan as part of the IHA application. It can be found at *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. The plan may be modified or supplemented based on comments or new information received from the public during the public comment period.

Monitoring measures prescribed by NMFS should accomplish one or more of the following general goals:

(1) An increase in the probability of detecting marine mammals, both within the mitigation zone (thus allowing for more effective implementation of the mitigation) and in general to generate more data to contribute to the analyses mentioned below;

(2) An increase in our understanding of how many marine mammals are likely to be exposed to levels of pile driving that we associate with specific adverse effects, such as behavioral harassment, TTS, or PTS;

(3) An increase in our understanding of how marine mammals respond to stimuli expected to result in take and how anticipated adverse effects on individuals (in different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival) through any of the following methods:

- Behavioral observations in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
- Physiological measurements in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
- Distribution and/or abundance comparisons in times or areas with concentrated stimuli versus times or areas without stimuli;

(4) An increased knowledge of the affected species; and

(5) An increase in our understanding of the effectiveness of certain mitigation and monitoring measures.

Proposed Monitoring Measures

WETA shall employee NMFS-approved protected species observers (PSOs) to conduct marine mammal monitoring for its Central Bay Operations and Maintenance Facility Project. The PSOs will observe and collect data on marine mammals in and around the project area for 30 minutes before, during, and for 30 minutes after all pile removal and pile installation work. If a PSO observes a marine mammal within a ZOI that appears to be disturbed by the work activity, the PSO will notify the work crew to initiate shutdown measures.

Monitoring of marine mammals around the construction site shall be conducted using high-quality binoculars (e.g., Zeiss, 10 × 42 power). Marine mammal visual monitoring shall be conducted from the best vantage point available, including the pier, breakwater, and adjacent docks within the harbor, to maintain an excellent view of the ZOIs and adjacent areas during the survey period. Monitors would be equipped with radios or cell phones for maintaining contact with work crews.

Data collection during marine mammal monitoring will consist of a count of all marine mammals by species, a description of behavior (if possible), location, direction of movement, type of construction that is occurring, time that pile replacement work begins and ends, any acoustic or visual disturbance, and time of the observation. Environmental conditions such as weather, visibility, temperature, tide level, current, and sea state would also be recorded.

Reporting Measures

WETA would be required to submit weekly monitoring reports to NMFS that summarize the monitoring results, construction activities, and environmental conditions.

A final monitoring report would be submitted to NMFS within 90 days after completion of the construction work. This report would detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed. NMFS would have an opportunity to provide comments on the report, and if NMFS has comments, WETA would address the comments and submit a final report to NMFS within 30 days.

In addition, NMFS would require WETA to notify NMFS' Office of Protected Resources and NMFS' Stranding Network within 48 hours of sighting an injured or dead marine mammal in the vicinity of the construction site. WETA shall provide NMFS with the species or description of the animal(s), the condition of the animal(s) (including carcass condition, if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

In the event that WETA finds an injured or dead marine mammal that is not in the vicinity of the construction area, WETA would report the same information as listed above to NMFS as soon as operationally feasible.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

As discussed above, in-water pile removal and pile driving (vibratory and impact) generate loud noises that could potentially harass marine mammals in the vicinity of WETA's proposed Central Bay Operations and Maintenance Facility Project.

Currently, NMFS uses 120 dB re 1 μPa and 160 dB re 1 μPa at the received levels for the onset of Level B harassment from non-impulse (vibratory pile driving and removal) and impulse sources (impact pile driving) underwater, respectively. Table 3 summarizes the current NMFS marine mammal take criteria.

TABLE 3—CURRENT ACOUSTIC EXPOSURE CRITERIA FOR NON-EXPLOSIVE SOUND UNDERWATER

Criterion	Criterion definition	Threshold
Level A Harassment (Injury)	Permanent Threshold Shift (PTS) (Any level above that which is known to cause TTS).	180 dB re 1 μPa (cetaceans). 190 dB re 1 μPa (pinnipeds) root mean square (rms).
Level B Harassment	Behavioral Disruption (for impulse noises)	160 dB re 1 μPa (rms).
Level B Harassment	Behavioral Disruption (for non-impulse noise)	120 dB re 1 μPa (rms).

As explained above, ZOIs will be established that encompass the areas where received underwater SPLs exceed the applicable thresholds for Level B harassment. There will not be a zone for Level A harassment in this case, because the bubble curtain system will keep all underwater noise below the threshold for Level A harassment.

Incidental take is estimated for each species by estimating the likelihood of a marine mammal being present within a ZOI during active pile removal or driving. Expected marine mammal presence is determined by past observations and general abundance near the project area during the construction window. Typically, potential take is estimated by multiplying the area of the ZOI by the local animal density. This provides an estimate of the number of animals that might occupy the ZOI at any given moment. However, this type of calculation is not applicable in this case, because the ZOI will be relatively small and there is no specific local animal density for harbor seals or California sea lions. Based on observational data, the maximum number of harbor seals observed along the closest breakwater near the project vicinity ranges from 10 to 20 individuals. Observational data on California sea lions are not available, but they are generally less abundant than harbor seals; therefore, the number of harbor seals will be used to estimate impacts for both species.

While it is unlikely that 10 to 20 individuals would be present inside the ZOI at any one time, given the distance from the nearest haul-out site, as a worst-case, this analysis assumes that up to 20 individuals might be present.

For the Project, the total number of pile removal hours is estimated to not exceed 18 hours over 3 days, and the total number of pile driving hours is estimated to not exceed 60 hours over 10 days. Therefore, the estimated total number of days of activities that might impact marine mammals is 13 days. For the exposure estimate, it is assumed that the highest count of harbor seals observed, and the same number of California sea lions, will be foraging within the ZOI and be exposed multiple times during the Project.

The calculation for marine mammal exposures for this Project is estimated by:

Exposure estimate = N * (10 days of pile driving activity + 3 days of pile removal activity),

where:

N = # of animals potentially present = 20.

This formula results in the following exposure estimate:

Exposure estimate = 20 animals * 13 days = 260 animals.

Therefore, WETA is requesting authorization for Level B acoustical harassment of up to 260 harbor seals and up to 260 California sea lions due to pile removal and driving. A summary of the take estimates and the proportions of the stocks potentially affected is provided in Table 4.

TABLE 4—SUMMARY OF POTENTIAL MARINE MAMMAL TAKES AND PERCENTAGES OF STOCKS AFFECTED

	Estimated density	Estimated take by level B harassment	Abundance of stock	Percentage of stock potentially affected	Population trend
California sea lion	NA	260	396,750	0.06	Stable.
Harbor seal	NA	260	30,196	0.86	Stable.

Analysis and Preliminary Determinations

Negligible Impact

Negligible impact is ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival'' (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (i.e., population-level effects). An estimate of the number of Level B harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), as well as the number and nature of estimated Level A harassment takes, the number of estimated mortalities, and effects on habitat.

WETA's proposed Central Bay Operations and Maintenance Facility Project would involve pile removal and pile driving activities. Elevated underwater noises are expected to be generated as a result of these activities; however, these noises are expected to result in no mortality or Level A

harassment and limited, if any, Level B harassment of marine mammals. WETA would use noise attenuation devices (i.e., bubble curtains) during the impact pile driving, thus eliminating the potential for injury (including PTS) and TTS from impact driving. For vibratory pile removal and pile driving, noise levels are not expected to reach the level that may cause TTS, injury (including PTS), or mortality to marine mammals. Therefore, NMFS does not expect that any animals would experience Level A harassment (including injury or PTS) or Level B harassment in the form of TTS from being exposed to in-water pile removal and pile driving associated with WETA's construction project.

In addition, WETA's proposed activities are localized and of short duration. The entire project area is limited to WETA's Central Bay Operations and Maintenance Facility near Pier 3 in the City of Alameda. The entire Project would involve the removal of 35 existing concrete piles and installation of a total of 61 steel piles ranging from 18 inches to 30 inches in diameter and 24 plastic piles of 18-inch diameter. The duration for pile removal is expected to be fewer than three days and the duration for pile driving is expected to be fewer than 10 days, for a total of 13 days of activity. The duration for removing each pile would be about 30 minutes, and the duration for driving each pile would be about 10 to 30 minutes for impact steel pile driving and about 10 to 20 minutes for plastic vibratory pile driving. These low-intensity, localized, and short-term noise exposures may cause brief startle reactions or short-term behavioral modification by the animals. These reactions and behavioral changes are expected to subside quickly when the exposures cease. Moreover, the proposed mitigation and monitoring measures are expected to reduce potential exposures and behavioral modifications even further. Additionally, no important feeding and/or reproductive areas for marine mammals are known to be near the proposed action area. Therefore, the take resulting from the proposed Central Bay Operations and Maintenance Project is not reasonably expected to, and is not reasonably likely to, adversely affect the marine mammal species or stocks through effects on annual rates of recruitment or survival.

The Project also is not expected to have significant adverse effects on affected marine mammals' habitat, as analyzed in detail in the ''Anticipated Effects on Marine Mammal Habitat'' section. The project activities would not modify existing marine mammal habitat. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range, but because of the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from WETA's Central Bay Operations and Maintenance Facility Project will have a negligible impact on the affected marine mammal species or stocks.

Small Number

Based on analyses provided above, it is estimated that approximately 260 California sea lions and 260 Pacific harbor seals could be exposed to received noise levels that could cause Level B behavioral harassment from the proposed construction work at the WETA Central Bay Operations and Maintenance Facility in Alameda, CA. These numbers represent approximately 0.06% and 0.86% of the stocks and populations of these species that could be affected by Level B behavioral harassment, respectively (see Table 4 above), which are small percentages relative to the total populations of the affected species or stocks.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, which are expected to reduce the number of marine mammals potentially affected by the proposed action, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no subsistence uses of marine mammals in the proposed project area, and thus no subsistence uses impacted by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

No species listed under the ESA are expected to be affected by these activities. Therefore, NMFS has determined that a section 7 consultation under the ESA is not required.

National Environmental Policy Act (NEPA)

NMFS prepared a draft Environmental Assessment (EA) for the proposed issuance of an IHA, pursuant to NEPA, to determine whether or not this proposed activity may have a significant effect on the human environment. This analysis will be completed prior to the issuance or denial of this proposed IHA.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to WETA for conducting the Central Bay Operations and Maintenance Facility Project, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. The proposed IHA language is provided next.

This section contains a draft of the IHA itself. The wording contained in this section is proposed for inclusion in the IHA (if issued).

(1) This Authorization is valid from August 1, 2015, through July 31, 2016.

(2) This Authorization is valid only for activities associated with the San Francisco Bay Area Water Emergency Transportation Authority (WETA) Central Bay Operations and Maintenance Facility Project in the City of Alameda, California.

(3)(A) The species authorized for incidental harassment takings, by Level B harassment only, are: Pacific harbor seal (*Phoca vitulina richardsi*) and California sea lion (*Zalophus californianus*).

(B) This authorization for taking by harassment is limited to the following acoustic sources and from the following activities:

- Impact and vibratory pile driving;
- Pile removal; and
- Work associated with above piling activities.

(C) The taking of any marine mammal in a manner prohibited under this Authorization must be reported within 24 hours of the taking to the West Coast Regional Administrator, National Marine Fisheries Service (NMFS) at (562) 980–4000, and the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at (301) 427–8401, or her designee, at (301) 427–8401.

(4) The holder of this Authorization must notify the Chief of the Permits and

Conservation Division, Office of Protected Resources, at least 48 hours prior to the start of activities identified in 3(B) (unless constrained by the date of issuance of this Authorization, in which case notification shall be made as soon as possible).

(5) Prohibitions

(A) The taking, by incidental harassment only, is limited to the species listed under condition (3)(A) above and by the numbers listed in Table 4. The taking by Level A harassment, injury, or death of these species or the taking by harassment, injury, or death of any other species of marine mammal is prohibited and may result in the modification, suspension, or revocation of this Authorization.

(B) The taking of any marine mammal is prohibited whenever the required protected species observers (PSOs), required by condition 7(a), are not present in conformance with condition 7(a) of this Authorization.

(6) Mitigation

(A) Use of Noise Attenuation Devices

A pile driving energy attenuator (such as an air bubble curtain system) shall be used for all impact pile driving.

(B) Time Restriction

In-water construction work shall occur only during daylight hours, when visual monitoring of marine mammals can be conducted.

(C) Establishment of Level B Harassment Zones of Influence

(i) Before the commencement of in-water pile driving activities, WETA shall establish Level B behavioral harassment zones of influence (ZOIs) where received underwater sound pressure levels (SPLs) are higher than 160 dB (rms) and 120 dB (rms) re 1 μPa for impulse noise sources (impact pile driving) and non-impulses noise sources (vibratory pile driving and mechanic dismantling), respectively. The modeled isopleths for ZOIs are listed in Table 6.

TABLE 6—MODELED LEVEL B HARASSMENT ZONES OF INFLUENCE FOR VARIOUS PILE DRIVING ACTIVITIES

Pile driving methods	Pile material and size	Distance to 120 dB re 1 μPa (rms) (m)	Distance to 160 dB re 1 μPa (rms) (m)
Impact pile driving with air bubble curtain	30″ epoxy coated steel piles	NA	215
	24″ epoxy coated steel piles	NA	185
	18″ epoxy coated steel piles	NA	93
Vibratory pile driving	18″ plastic fender piles	2,154	NA

(ii) Once the underwater acoustic measurements are conducted during initial test pile driving, WETA shall adjust the sizes of the ZOIs, and monitor these zones as described under the Proposed Monitoring section below.

(D) Monitoring of marine mammals shall take place starting 30 minutes before pile driving begins until 30 minutes after pile driving ends.

(E) Soft Start

(i) When there has been downtime of 30 minutes or more without pile driving, the contractor will initiate the driving with ramp-up procedures described below.

(ii) For vibratory hammers, the contractor shall initiate the driving for 15 seconds at reduced energy, followed by a 1 minute waiting period. This procedure shall be repeated two additional times before continuous driving is started. This procedure shall also apply to vibratory pile extraction.

(iii) For impact driving, an initial set of three strikes would be made by the hammer at 40 percent energy, followed by a 1-minute waiting period, then two subsequent three-strike sets at 40 percent energy, with 1-minute waiting periods, before initiating continuous driving.

(F) Shutdown Measures

Although no marine mammal exclusion zone exists due to the implementation of noise attenuation devices (i.e., bubble curtain), WETA shall discontinue pile removal or pile driving activities if a marine mammal within a ZOI appears disturbed by the work activity. Work may not resume until the animal is seen to leave the ZOI or 30 minutes have passed since the disturbed animal was last sighted.

(7) Monitoring:

(A) Protected Species Observers

WETA shall employee NMFS-approved protected species observers (PSOs) to conduct marine mammal monitoring for its construction project. The PSOs will observe and collect data on marine mammals in and around the project area for 30 minutes before, during, and for 30 minutes after all pile removal and pile installation work. If a PSO observes a marine mammal within a ZOI that appears to be disturbed by the work activity, the PSO will notify the work crew to initiate shutdown measures.

(B) Monitoring of marine mammals around the construction site shall be conducted using high-quality binoculars (e.g., Zeiss, 10 x 42 power).

(C) Marine mammal visual monitoring shall be conducted from the best vantage point available, including the WETA pier, jetty, and adjacent docks within the harbor, to maintain an excellent view of the ZOIs and adjacent areas during the survey period. Monitors would be equipped with radios or cell phones for maintaining contact with work crews.

(D) Data collection during marine mammal monitoring shall consist of a count of all marine mammals by species, a description of behavior (if possible), location, direction of movement, type of construction that is occurring, time that pile replacement work begins and ends, any acoustic or visual disturbance, and time of the observation. Environmental conditions such as weather, visibility, temperature, tide level, current, and sea state would also be recorded.

(8) Reporting:

(A) WETA shall submit weekly monitoring reports to NMFS that summarize the monitoring results, construction activities, and environmental conditions.

(B) WETA shall provide NMFS with a draft monitoring report within 90 days of the conclusion of the construction work. This report shall detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed.

(C) If comments are received from the NMFS West Coast Regional Administrator or NMFS Office of Protected Resources on the draft report, a final report shall be submitted to NMFS within 30 days thereafter. If no comments are received from NMFS, the draft report will be considered to be the final report.

(D) In the unanticipated event that the construction activities clearly cause the take of a marine mammal in a manner prohibited by this Authorization (if issued), such as an injury, serious injury, or mortality, WETA shall immediately cease all operations and immediately report the incident to the Supervisor of Incidental Take Program, Permits and Conservation Division,

Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinators. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the incident;

(ii) description of the incident;

(iii) status of all sound source use in the 24 hours preceding the incident;

(iv) environmental conditions (e.g., wind speed and direction, sea state, cloud cover, visibility, and water depth);

(v) description of marine mammal observations in the 24 hours preceding the incident;

(vi) species identification or description of the animal(s) involved;

(vii) the fate of the animal(s); and

(viii) photographs or video footage of the animal (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with WETA to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. WETA may not resume their activities until notified by NMFS via letter, email, or telephone.

(E) In the event that WETA discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), WETA will immediately report the incident to the Supervisor of the Incidental Take Program, Permits and Conservation Division, Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinators. The report must include the same information identified above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with WETA to determine whether modifications in the activities are appropriate.

(F) In the event that WETA discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), WETA shall report the incident to the Supervisor of the Incidental Take Program, Permits and Conservation Division, Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinators, within 24 hours of the discovery. WETA shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. WETA can continue its operations under such a case.

(9) This Authorization may be modified, suspended or withdrawn if the holder fails to abide by the conditions prescribed herein or if the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals, or if there is an unmitigable adverse impact on the availability of such species or stocks for subsistence uses.

(10) A copy of this Authorization must be in the possession of each contractor who performs construction activities as part of the WETA Central Bay Operations and Maintenance Facility Project.

Request for Public Comments

NMFS requests comment on our analysis, the draft authorization, and any other aspect of the Notice of Proposed IHA for WETA. Please include with your comments any supporting data or literature citations to help inform our final decision on WETA's request for an MMPA authorization.

Dated: September 11, 2014.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2014–22174 Filed 9–16–14; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities: Notice of Intent to Renew Collection 3038–0095, Large Trader Reporting for Physical Commodity Swaps

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (CFTC) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. 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 of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on large trading reporting for physical commodity swaps.

DATES: Comments must be submitted on or before November 17, 2014.

ADDRESSES: Comments may be mailed to Dana Brown, Division of Market Oversight, U.S. Commodity Futures Trading Commission, 1155 21st Street NW., Washington, DC 20581. You may also submit comments, identified by ''Large Trader Reporting for Physical Commodity Swaps,'' by any of the following methods:

- *Agency Web site, via its Comments Online process: http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.
- *Hand delivery/Courier:* Same as Mail, above.
- *Federal eRulemaking Portal: http://www.regulations.gov/search/index.jsp.* Follow the instructions for submitting comments through the Portal.

Please submit your comments using only one method.

FOR FURTHER INFORMATION CONTACT: Dana Brown, (202) 418–5093; FAX: (202) 418–5527; email: *dbrown@cftc.gov.*

SUPPLEMENTARY INFORMATION:

Title: Large Trader Reporting for Physical Commodity Swaps, (OMB Control No. 3038–0095). This is a request for extension of a currently approved information collection.

Abstract: Under the PRA, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''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 provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the CFTC is publishing notice of the proposed collection of information listed below.

With respect to the following collection of information, the CFTC invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;

• The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Ways to enhance the quality, usefulness, and clarity of the information to be collected; and

• Ways to minimize the burden of 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.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the ICR will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

Large Trader Reporting for Physical Commodity Swaps, OMB Control Number 3038–0095—Extension

The information collected pursuant to this rule, 17 CFR 1.40, is in the public interest and is necessary for market surveillance.

Burden Statement:

The Commission estimates the burden of this collection of information as follows:

ESTIMATED ANNUAL REPORTING BURDEN

17 CFR section	Annual number of respondents	Total annual responses	Hours per response	Total hours
20	3998	3998	1.58	6317

There are no capital costs or operating and maintenance costs associated with this collection.

Dated: September 12, 2014.

Christopher J. Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2014–22176 Filed 9–16–14; 8:45 am]

BILLING CODE 6351–01–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (CNCS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, CNCS is soliciting comments concerning its proposed renewal of the AmeriCorps Member Exit Questionnaire.

Copies of the information collection request can be obtained by contacting the office listed in the Addresses section of this Notice.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by November 17, 2014.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) By mail sent to: Corporation for National and Community Service, Office of Research and Evaluation; Diana Epstein, Senior Research Analyst, 10901A; 1201 New York Avenue NW., Washington, DC, 20525.

(2) By hand delivery or by courier to the CNCS mailroom at Room 8100 at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except Federal holidays.

(3) Electronically through *www.regulations.gov.*

Individuals who use a telecommunications device for the deaf (TTY–TDD) may call 1–800–833–3722 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Diana Epstein, 202–606–7564, or by email at your *DEpstein@cns.gov.*

SUPPLEMENTARY INFORMATION: CNCS is particularly interested in comments that:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CNCS, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submissions of responses).

Background

All members in the three AmeriCorps programs—AmeriCorps State & National, VISTA, and the National Civilian Community Corps (NCCC)—are

[1] 17 CFR 145.9.

invited to complete a questionnaire upon completing their service term. The questionnaire asks members about their motivations for joining AmeriCorps, experiences while serving, and future plans and aspirations. Completion of the questionnaire is not required to successfully exit AmeriCorps, receive any stipends, educational awards, or other benefits of service. The purpose of the information collection is to learn more about the member experience and member perceptions of their AmeriCorps experience in order to improve the program. Members complete the questionnaire electronically through the AmeriCorps Member Portal. Members are invited to respond as their exit date nears and are allowed to respond for an indefinite period following the original invitation.

Current Action

CNCS seeks to renew the current information collection. The questionnaire submitted for clearance is a combination of new and existing content from the previously cleared exit questionnaire. The new content reflects changing agency and program priorities. In addition, some approved questions have been edited to make them easier to understand and to provide more useful information for programs. The new questions include data points on problem-solving and cross-cultural communication skills.

The information collection will otherwise be used in the same manner as the existing application. CNCS also seeks to continue using the current application until the revised application is approved by OMB. The current application expired on 7/31/2014.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Performance Measurement in AmeriCorps.

OMB Number: 3045–0094.

Agency Number: None.

Affected Public: AmeriCorps members.

Total Respondents: 80,000.

Frequency: Annual.

Average Time per Response: Averages 15 minutes.

Estimated Total Burden Hours: 20,000.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: September 11, 2014.

Stephen Plank,

Office of Research & Evaluation.

[FR Doc. 2014–22077 Filed 9–16–14; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2014–0006]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by October 17, 2014.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: Global Air Transportation Execution System; OMB Control Number 0701–XXXX.

Type of Request: New Collection.

Number of Respondents: 184,589.

Responses per Respondent: 1.

Annual Responses: 184,589.

Average Burden per Response: 5 minutes.

Annual Burden Hours: 15,382 hours.

Needs and Uses: Passenger records are used to prepare aircraft manifests for passenger identification processing and movement on military aircraft, commercial contract (charter) aircraft, and on seats reserved (blocked) on regularly scheduled commercial aircraft at military and civilian airports. Records contain PII are used to: Develop billing data to the user Military Services or other organizations; determine passenger movement trends; forecast future travel requirements; resolve transportation related problems; and screening for customs, immigration, and transportation security purposes.

Affected Public: Individuals or Households.

Frequency: On occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet 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 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.

DOD Clearance Officer: Mr. Frederick Licari.

Written requests for copies of the information collection proposal should be sent to Mr. Frederick Licari at WHS/ESD Directives Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: September 11, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2014–22053 Filed 9–16–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID USAF–2014–0007]

Submission for OMB Review; Comment Request

ACTION: Notice.

SUMMARY: The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by October 17, 2014.

FOR FURTHER INFORMATION CONTACT: Fred Licari, 571–372–0493.

SUPPLEMENTARY INFORMATION:

Title, Associated Form and OMB Number: Tender of Service for Personal Property Household Goods and Unaccompanied Baggage Shipments, DD Form 619; OMB Control Number 0701–XXXX.

Type of Request: New Collection.

Number of Respondents: 876.

Responses per Respondent: 260.

Annual Responses: 227,760.

Average Burden per Response: 5 minutes.

Annual Burden Hours: 18,980 hours.

Needs and Uses: The DD Form 619 is the certification by the member/

employee that the requested accessorial services were actually performed. The DD Form 619 is used by the Transportation Service Provider to support invoicing and payment for accessorial services performed.

Affected Public: Businesses or Other For Profit.

Frequency: On occasion.

Respondent's Obligation: Required to Obtain or Retain Benefits.

OMB Desk Officer: Ms. Jasmeet Seehra.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet 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 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.

DOD Clearance Officer: Mr. Frederick Licari.

Written requests for copies of the information collection proposal should be sent to Mr. Frederick Licari at WHS/ESD Directives Division, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Dated: September 11, 2014.

Aaron Siegel,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2014–22076 Filed 9–16–14; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID USA–2014–0034]

Privacy Act of 1974; System of Records

AGENCY: Department of the Army, DoD.

ACTION: Notice to add a new System of Records.

SUMMARY: The Department of the Army proposes to add a new system of records, A0040–66 ARNG, Medical Readiness and Waivers Records, in its inventory of record systems subject to the Privacy Act of 1974, as amended. This system is used by the Army National Guard (ARNG) and U.S. Army Reserves (USAR) Surgeons to support recruiting and medical readiness of personnel in the Reserve Components.

DATES: Comments will be accepted on or before October 17, 2014. This proposed action will be effective the day following the end of the comment period unless comments are received which result in a contrary determination.

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: Mr. Leroy Jones, Jr., Department of the Army, Privacy Office, U.S. Army Records Management and Declassification Agency, 7701 Telegraph Road, Casey Building, Suite 144, Alexandria, VA 22325–3905 or by calling (703) 428–6185.

SUPPLEMENTARY INFORMATION: The Department of the Army 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 at *http://dpclo.defense.gov/.* 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 27, 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 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: September 11, 2014.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

A0040–66 ARNG

SYSTEM NAME:

Medical Readiness and Waivers Records.

SYSTEM LOCATION:

National Guard Bureau, Office of the Chief Surgeon, Army National Guard Readiness Center, 111 South George Mason Drive, Arlington VA 22204–1373.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Members of the Army National Guard in Title 32 status and/or Title 10 status; members of the U.S. Army Reserves in Title 10 status; and prospects for accession into the Army National Guard.

Note: Title 32 status: On active duty but remain a member of a state National Guard. Title 10 status: Considered to be an active duty member of the U.S. Army.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, Unit, unit address, Unit Identification Code, telephone number, email address, DoD ID Number, Social Security Number (SSN), internal tracking identification number, medical treatment records used to document physical and psychological health; and dental records. These records may include records of inpatient and/or outpatient status to include records of all forms of treatment at non-military medical treatment facilities.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 3013, Secretary of the Army; 10 U.S.C. 1071–1085, Medical and Dental Care; 50 U.S.C. Supplement IV, Appendix 454, as amended, Persons liable for training and service; 42 U.S.C. Chapter 117, Sections 11131–11152, Reporting of Information; 10 U.S.C. 1097a and 1097b TRICARE Prime and TRICARE Program; 10 U.S.C. 1079, Contracts for Medical Care for Spouses and Children; 10 U.S.C. 1079a, CHAMPUS; 10 U.S.C. 1086, Contracts for Health Benefits for Certain Members, Former Members, and Their Dependents; 10 U.S.C. 1095, as amended by Pub. L. 99–272, Health care services incurred on behalf of covered beneficiaries: Collection from third-party payers; DoD Instruction 6130.03, Medical Standards for Appointment, Enlistment, or Induction in the Military Services; Army Regulation 40–68, Clinical Quality Management; DoD

Directive 6040.37, Confidentiality of Medical Quality Assurance (QA) Records; DoD 6010.8–R, Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Army Regulation 40–66, Medical Record Administration and Health Care Documentation; Army Regulation 40–501, Standards of Medical Fitness; USAREC Regulation 601–56, Waiver, Future Soldier Program Separation, and Void Enlistment Processing Procedures; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

This system is used by the Army National Guard (ARNG) and U.S. Army Reserves (USAR) Surgeons to support recruiting and medical readiness of personnel in the Reserve Components. The primary functions of this system are to aid in the continuity of care of Guardsmen and Reservists and to assist in determining the medical and psychological suitability of persons for service or assignment. This distinct record set is necessary due to the unique nature of the ARNG and USAR which typically do not receive their routine medical care at an Active Component military medical treatment facility (MTF); therefore, Military Treatment Records (MTRs) are not retained at an MTF. This distinct record set is also necessary for recruiting since the ARNG does not maintain records on medical waiver evaluations.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

Information may be disclosed to the Department of Veterans Affairs to adjudicate veterans' claims and provide medical care to Army members.

To the National Research Council, National Academy of Sciences, National Institutes of Health, Armed Forces Institute of Pathology, and similar institutions for authorized health research in the interest of the Federal Government and the public. When not essential for longitudinal studies, patient identification data shall be eliminated from records used for research studies. Facilities/activities releasing such records shall maintain a list of all such research organizations and an accounting disclosure of records released thereto.

To local and state government agencies for compliance with local laws and regulations governing control of communicable diseases, preventive medicine and safety, child abuse, and other public health and welfare programs.

To third party payers per 10 U.S.C. 1095 as amended by Public Law 99–272, Health care services incurred on behalf of covered beneficiaries: collection from third-party payers, for the purpose of collecting reasonable inpatient/outpatient hospital care costs incurred on behalf of retirees or dependents.

To former DoD health care providers, who have been identified as being the subjects of potential reports to the National Practitioner Data Bank as a result of a payment having been made on their behalf by the U.S. Government in response to a malpractice claim or litigation, for purposes of providing the provider an opportunity, consistent with current requirements and Army Regulation 40–68, Clinical Quality Management, to provide any pertinent information and to comment on expert opinions, relating to the claim for which payment has been made.

The DoD Blanket Routine Uses set forth at the beginning of the Army's systems of records notices may apply to this system.

Note: Records of identity, diagnosis, prognosis, or treatment of any client/patient, irrespective of whether or when he/she ceases to be a client/patient, maintained in connection with the performance of any alcohol or drug abuse prevention and treatment function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States, shall, except as provided therein, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized in 42 U.S.C. 290dd–2. This statute takes precedence over the Privacy Act of 1974 in regard to accessibility of such records except to the individual to whom the record pertains. The DoD Blanket Routine Uses do not apply to these types of records.

Note: This system of records contains individually identifiable health information. The DoD Health Information Privacy Regulation (DoD 6025.18–R) issued pursuant to the Health Insurance Portability and Accountability Act of 1996, applies to most such health information. DoD 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of 1974, as amended, or mentioned in this system of records notice.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and electronic storage media.

RETRIEVABILITY:

The patient surname, SSN, or internal tracking identification number.

SAFEGUARDS:

Records are maintained in a controlled facility. Physical entry is restricted by the use of locks, identification badges, key cards, guards, closed circuit TV, 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 Cards (CAC) and Personal Identity Verification (PIV) cards.

RETENTION AND DISPOSAL:

Until the National Archives and Records Administration approves the disposition of these records, treat as permanent.

SYSTEM MANAGER(S) AND ADDRESS:

National Guard Bureau, Office of the Chief Surgeon, Army National Guard Readiness Center, 111 South George Mason Drive, Arlington, VA 22204–1373.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Army National Guard Joint Force Headquarters Office within their respective state for Army National Guard Soldiers and the United States Army Military Personnel Management Directorate for United States Army Reservists.

An individual must include a written signature and self-declaration citing that, under penalty of perjury, they are requesting records of themselves.

Requests should include the patient's full name, SSN and/or DoD ID Number and any other details which will assist in locating the record such as the name of the hospital and/or year of treatment of records they are seeking, as well as a full mailing address where records may be sent.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written

inquiries to the Army National Guard Joint Force Headquarters Office within their respective state for Army National Guardsmen and the United States Army G–1 Military Personnel Management Directorate for United States Army Reservists.

An individual must include a written signature and self-declaration citing that, under penalty of perjury, they are requesting records of themselves.

Requests should include the patient's full name, SSN and/or DoD ID Number and any other details which will assist in locating the record such as the name of the hospital and/or year of treatment of records they are seeking, as well as a full mailing address where records may be sent.

CONTESTING RECORD PROCEDURES:

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340–21; 32 CFR part 505; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

From the individual, physicians, and medical personnel at military and non-military treatment facilities.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2014–22094 Filed 9–16–14; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent to Grant Exclusive Patent License; Grey Matter, LLC

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant to Grey Matter, LLC a revocable, nonassignable, exclusive license to practice in the field of use of Periodic Mesoporous Organosilicate (PMO) material for use as wearable Personal Protective Equipment (PPE). Wearable PPE will be designed for use in job-related occupational safety, health purposes, and other recreational activities. The PMO material will be designed to help protect from the hazardous chemicals of chlorine, ammonia, hydrogen chloride, sulfuric acid, hydrogen fluoride, formalin (formaldehyde), mercury, nitric acid, sulfur dioxide, phosgene, hydrogen bromide, nitric oxide, octamethylpyrophosphoramide, boron trifluoride, methyl bromide, phosphoryl trichloride, chlorine dioxide, bromine, nitrogen dioxide, phosphorous trichloride, fluorotrichloromethane, hydrogen sulfide, molybdophosphoric acid, toluene-2, 4-diisocyanate, fluorine, malathion, parathion, acetylene tetrabromide, 0-anisidine, sulfur trioxide, phosphine arsine, ethlene dibromide, pentachlorophenol, azinphos-methyl, 1,1,2,2-tetrachloroethane, potassium cyanide, tetrafluoroboric acid, tetrachloroethylene, cadium, deltamethrin, ethylamine, methylamine, ethylene dibromide, aldicarb, dichloroethyl ether, and nitrogen trifluoride in the United States, the Government-owned inventions described in U.S. Patent No. 7,754,145: Fluorphore Embedded/Incorporating/Bridged Periodic Mesoporous Organosilicas as Recognition Photo-Decontamination Catalysts, Navy Case No. 097,346//U.S. Patent Application No. 14/209,728: Microwave Initiation for Deposition of Porous Organosilicate Materials on Fabrics, Navy Case No. 102,325 and any continuations, divisionals or re-issues thereof.

DATES: Anyone wishing to object to the grant of this license must file written objections along with supporting evidence, if any, not later than October 2, 2014.

ADDRESSES: Written objections are to be filed with the Naval Research Laboratory, Code 1004, 4555 Overlook Avenue SW., Washington, DC 20375–5320.

FOR FURTHER INFORMATION CONTACT: Rita Manak, Head, Technology Transfer Office, NRL Code 1004, 4555 Overlook Avenue SW., Washington, DC 20375–5320, telephone 202–767–3083. Due to U.S. Postal delays, please fax 202–404–7920, email: *rita.manak@nrl.navy.mil* or use courier delivery to expedite response.

Authority: 35 U.S.C. 207, 37 CFR Part 404.

Dated: September 10, 2014.

N.A. Hagerty-Ford,

Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2014–22141 Filed 9–16–14; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

[FE Docket No. 14–96–LNG]

Alaska LNG Project LLC; Application for Long-Term Authorization To Export Liquefied Natural Gas Produced From Domestic Natural Gas Resources to Non-Free Trade Agreement Countries for a 30-Year Period

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application (Application) filed on July 18, 2014, by Alaska LNG Project LLC (Alaska LNG), requesting long-term multi-contract authorization to export 20 million metric tons per annum (mtpa) of liquefied natural gas (LNG) produced from Alaskan sources in a volume equivalent to approximately 929 billion cubic feet per year (Bcf/yr) of natural gas, or approximately 2.55 Bcf per day (Bcf/d).[1] Alaska LNG seeks authorization to export the LNG by vessel from a proposed Liquefaction Facility to be constructed in the Nikiski area of the Kenai Peninsula in south central Alaska (Project), to any country with which the United States does not have a free trade agreement (FTA) requiring national treatment for trade in natural gas and with which trade is not prohibited by U.S. law or policy (non-FTA countries).[2] Alaska LNG requests this authorization for a 30-year term to commence on the earlier of the date of first export or 12 years from the date the requested authorization is granted. Alaska LNG seeks to export the LNG on its own behalf and as agent for other parties who hold title to the LNG at the time of export. The Application was filed under section 3 of the Natural Gas Act (NGA).

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and

[1] Alaska LNG states that the conversion factor of 46.467 Bcf per million metric ton is appropriate due to the relatively high heating content (Btu/cubic foot gas) and associated physical characteristics of LNG produced from Alaska sources. According to Alaska LNG, the conversion factors used in applications to export LNG from the lower 48 states of the United States are not applicable in this proceeding.

[2] In the Application, Alaska LNG also requests authorization to export LNG to any nation that currently has, or in the future may enter into, a FTA requiring national treatment for trade in natural gas (FTA countries). DOE/FE will review Alaska LNG's request for a FTA export authorization separately pursuant to NGA § 3(c), 15 U.S.C. 717b(c). Alaska LNG notes that the total volume requested in the Application (20 mtpa) represents LNG in an aggregate amount for export to both non-FTA and FTA countries.

written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., Eastern time, November 17, 2014.

ADDRESSES: *Electronic Filing by email: fergas@hq.doe.gov.*

Regular Mail: U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, P.O. Box 44375, Washington, DC 20026–4375.

Hand Delivery or Private Delivery Services (e.g., FedEx, UPS, etc.): U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Larine Moore or Lisa Tracy, U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478; (202) 586–4523.

Edward Myers, Cassandra Bernstein, U.S. Department of Energy, Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–3397, (202) 586–9793.

SUPPLEMENTARY INFORMATION:

Background

Applicant. Alaska LNG is a Delaware Limited Liability Company with its principal place of business in Anchorage, Alaska. Alaska LNG states that its current members are ExxonMobil Alaska LNG LLC, ConocoPhillips Alaska LNG Company, and BP Alaska LNG LLC (collectively, the Members). According to Alaska LNG, affiliates of the Members currently hold oil and gas leasehold interests in Alaska, including in the Prudhoe Bay and Point Thomson Units.[3]

Liquefaction Project. Alaska LNG plans to construct one integrated, interdependent Project. According to Alaska LNG, the Project facilities will include four main components: (i) A Liquefaction Facility consisting of three LNG trains with a total maximum capacity of 20 mtpa, with storage and LNG delivery facilities for the marine loading of LNG;[4] (ii) an approximately 800-mile long, large-diameter gas pipeline from the liquefaction facility to the gas treatment plant, which will have multiple compressor stations and at least five off-take points for delivery of gas to Alaska; (iii) a gas treatment plant on the North Slope of Alaska consisting of three or more amine processing/treating train modules with compression, dehydration, and chilling, to be built in a modular fashion and sealifted to its location; and (iv) transmission lines between the gas treatment plant and producing fields on the North Slope. Alaska LNG states it will be required to build each component of this greenfield Project.

Alaska LNG states that the Project is unique due to its significant size, scope, costs, required upstream development, and project development timeline. Alaska LNG asserts that these factors distinguish the Project from any LNG export project in the lower 48 states. According to Alaska LNG, the Project would be the largest integrated gas and LNG project of its kind ever designed and constructed.

Current Application

Alaska LNG seeks long-term multi-contract authorization to export LNG produced from Alaska in a volume equivalent to 929 Bcf/yr (2.55 Bcf/d) of natural gas. Alaska LNG states that it plans to export the LNG from the Project to any non-FTA country with which trade is not prohibited by U.S. law or policy. Alaska LNG requests this authorization for a 30-year term commencing on the earlier of the date of first export or 12 years from the date the requested authorization is granted.

Business Model. Alaska LNG seeks to export the requested LNG on its own behalf and as agent for any or all of the following: (i) Each of its Members; (ii) the respective affiliates of its Members; (iii) the State of Alaska or its nominee; and (iv) other third parties, under contracts to be executed in the future, as applicable. Alaska LNG maintains that the requested agency rights ''would encompass any exports of any State of Alaska (or its nominee) share of LNG from the Project facilities.''[5] Alaska LNG contemplates that the title holder at the point of export likely may be another party, such as the respective affiliates of its Members or other third parties, pursuant to a LNG sales and purchase contract.

Alaska LNG further states that it will comply with all DOE/FE requirements for exporters and agents as set forth in recent DOE/FE orders, including registering each LNG title holder for whom Alaska LNG seeks to export as agent. Alaska LNG states that this registration will include a written statement by the title holder acknowledging and agreeing to comply with all applicable requirements included by DOE/FE in Alaska LNG's export authorization. Alaska LNG further states that it will include those requirements in a subsequent purchase or sale agreement entered into by that title holder. In addition, Alaska LNG states that it will file under seal with DOE/FE any relevant long-term commercial agreements between Alaska LNG and the LNG title holder, once those agreements have been executed.

Export Term and Commencement of Export Operations. Alaska LNG maintains that the requested 30-year export term and 12-year commencement term are required to support the size of this Project, as well as the continued development of natural gas resources on the North Slope. Alaska LNG emphasizes the massive size, scope, and cost of this ''integrated mega-project.''[6] Alaska LNG estimates that the Project will cost between $45 billion and $65 billion to construct, which it states is an unprecedented investment warranting a 30-year export term, as opposed to the 20-year term that DOE/FE typically authorizes for non-FTA LNG export projects in the lower 48 states.[7] Specifically, Alaska LNG notes that DOE/FE's reasoning for authorizing a 20-year export term for those projects does not apply to this unique Alaska Project.[8] Alaska LNG further asserts that a 30-year export term is supported by its natural gas reserves and resources estimates, is consistent with typical industry design standards for the Liquefaction Facility life, and will provide long-term access to market outlets needed to allow reasonable ability to recover investments.

With respect to the requested 12-year period for the commencement of export operations, Alaska LNG notes that DOE/FE typically requires export operations in the lower 48 states to commence no

[3] Alaska LNG notes that, on May 8, 2014, Alaska Governor Sean Parnell signed Senate Bill 138 into law, enabling the State of Alaska to participate in the Alaska LNG Project. Alaska LNG notes that it may seek to amend the Application to add a State of Alaska designee. *See* Alaska LNG App. at 3.

[4] Alaska LNG states that, to date, it has secured more than 200 acres of land for the Project, nearly half of the total acreage of the proposed Liquefaction Facility site. A map of the Project and an affidavit concerning the land acquired for the Project is attached to the Application as Appendices C and D, respectively.

[5] Alaska LNG App. at 10.

[6] *Id.* at 5, 40–41.

[7] *See id.* at 37–38 (citing DOE/FE final and conditional orders granted to LNG export projects in the lower 48 states); *see also id.* at 10.

[8] *See id.* at 38–39 (asserting that this Project is not subject to the same authorization constraints based on the 2012 LNG Export Study commissioned by DOE/FE, which focused on non-FTA export projects in the lower 48 states).

later than seven years from the date the authorization is issued. It stresses, however, that construction of the Project will take place in unique Arctic construction conditions. In particular, Alaska LNG points to the challenges of moving equipment and a workforce over long distances in the extreme Arctic conditions, as well as the limitations in the construction timeline caused by the unpredictable Artic weather conditions. Alaska LNG maintains that, due to its complexity, the Project will require a Pre-Front End Engineering Design (FEED) phase of between one to three years, in addition to the typical FEED phase. Alaska LNG also highlights the expansive scope of the Project, which it anticipates, will lengthen the environmental review and permitting timelines under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* In sum, Alaska LNG states that these Artic construction conditions, coupled with inherently longer upstream resource development periods and other factors, necessitate both a longer export term and start-up period.

Application Processing and Request for Conditional Authorization. Alaska LNG contends that, due to the unique nature of the proposed Project and the geographically separate supply base in Alaska, the Application should be processed differently than applications for LNG export projects proposed in the lower 48 states. Alaska LNG maintains that DOE/FE has consistently treated applications to export LNG from Alaska differently from lower 48 applications.[9]

Alaska LNG contends that the many unique features of the Project warrant exercise of DOE/FE's discretion to issue a conditional decision on the Application. Therefore, Alaska LNG requests that the Application not be subject to any procedures recently proposed or adopted by DOE/FE regarding its processing of non-FTA LNG export applications.[10] In this regard, we note that DOE/FE's revised procedures for acting on non-FTA LNG export applications are now in effect, but they ''apply only to exports from the lower-48 states.'' [11] In the notice finalizing the revised procedures, DOE/FE made clear that it ''will consider whether to issue a conditional decision on [the Alaska LNG] application, or any future application to export from Alaska, in the context of those proceedings.'' [12]

In asserting that the Project is unlike any export project in the lower 48 states and should be processed differently, Alaska LNG highlights the estimated cost and scope of the Project. It emphasizes that all components of the Project must be built, meaning that the Project cannot leverage an extensive existing gas grid. Lastly, Alaska LNG maintains that because Alaska and its supply of natural gas are geographically isolated from the lower 48 states, the Application stands on its own merits without regard to the cumulative impacts of LNG exports from the lower 48 states and should be processed as such.

Export Sources. Alaska LNG seeks authorization to export natural gas from Alaska, in particular from the North Slope Point Thomson Unit and Prudhoe Bay Unit production fields. According to Alaska LNG, affiliates of Members of Alaska LNG are leaseholders of natural gas resources in Alaska, thus providing the Project with access to natural gas. Alaska LNG expects that the natural gas developed and produced by the respective affiliates of its Members will be delivered to the Liquefaction Facility where LNG will be produced and made available for export.

Public Interest Considerations

Alaska LNG contends that the Application fully addresses each of the public interest criteria considered by DOE/FE in the context of an Alaska-based project, and that the proposed export is not inconsistent with the public interest. In support of the Application, Alaska LNG addresses the following six criteria:

Domestic Need for the Natural Gas Proposed to be Exported—Regional. According to Alaska LNG, DOE/FE has recognized that Alaska is geographically isolated from the lower 48 states and, therefore, its natural gas reserves and resources should be analyzed separately. Alaska LNG asserts that the estimated recoverable natural gas reserves and resources in Alaska are abundant and more than sufficient to meet demand for both Alaska in-state consumption and Alaska LNG's proposed export over the 30-year export term. Based on the studies and analyses provided in the Application,[13] Alaska LNG contends that the proposed export authorization will not have a detrimental impact on the regional domestic supply of natural gas. Alaska LNG further asserts that the proposed exports will have positive market and macroeconomic impacts on Alaska and the United States as a whole.

Impact of the Proposed Exports on Natural Gas Market Prices. Citing the Socio-Economic Report prepared by NERA Economic Consulting in support of the Application, Alaska LNG states that the Project would lead to lower natural gas prices in Alaska. Alaska LNG points to NERA's determination that, by model year 2048, the Alaska market price of natural gas is $5.02/MMBtu lower in the Expected Demand scenario with LNG exports than in the Baseline with no LNG exports, a 39 percent price difference.[14]

Presidential Finding Concerning Alaska Natural Gas. Alaska LNG addresses Section 12 of the Alaska Natural Gas Transportation Act (ANGTA), which states that ''before any Alaska natural gas in excess of 1,000 Mcf [thousand cubic feet] per day may be exported to any nation other that Canada or Mexico, the President must make and publish an express finding that such exports will not diminish the total quantity or quality nor increase the total price of energy available to the United States.'' [15] Alaska LNG states that President Ronald Reagan issued such a finding in 1988, concluding '' 'that exports of Alaska natural gas in quantities in excess of 1,000 Mcf per day will not diminish the total quantity or quality nor increase the total price of energy available to the United States.' '' [16]

Alaska LNG contends that this 1988 Presidential Finding is not limited in scope to a particular project or time period. Rather, the Finding expressly '' 'remove[d] the [ANGTA] Section 12 regulatory impediment to Alaskan natural gas exports in a manner that allows any private party to develop this

[9] Alaska LNG App. at 7 n.17 (citing DOE/FE orders, including *ConocoPhillips Alaska Natural Gas Corp.,* DOE/FE Order No. 3418, Order Granting Blanket Authorization to Export Liquefied Natural Gas by Vessel from the Kenai LNG Facility Near Kenai, Alaska to Non-Free Trade Agreement Nations, at 5 (Apr. 14, 2014)).

[10] *See id.* at 5 (discussing DOE/FE's proposed notice to revise the Order of Precedence for Processing Non-FTA Export Applications, 79 FR 32,261 (June 4, 2014)).

[11] Dep't of Energy, Procedures for Liquefied Natural Gas Export Decisions, 79 FR 48,132, 48,135 n.6 (Aug. 15, 2014) (stating that, for applications to export LNG from the lower 48 states to non-FTA countries, DOE/FE is suspending its practice of issuing conditional decisions prior to final authorization decisions).

[12] *Id.* at 48,135 n.6.

[13] *See, e.g.,* DeGolyer and MacNaughton, ''Report on a Study of Alaska Gas Reserves and Resources for Certain Gas Supply Scenarios as of Dec. 31, 2012'' (Apr. 2014) (Supply Report), attached to the Application as Appendix E; NERA Economic Consulting, ''Socio-Economic Impact Analysis of Alaska LNG Project'' (June 19, 2014) (Socio-Economic Report), attached to the Application as Appendix F.

[14] NERA Economic Consulting, ''Socio-Economic Impact Analysis of Alaska LNG Project'' (Socio-Economic Report), June 19, 2014.

[15] 15 U.S.C. 719j.

[16] Alaska LNG App. at 27 (quoting Presidential Finding Concerning Alaska Natural Gas, 53 FR 999 (Jan. 15, 1988)).

resource and sets up competition for this purpose.' '' [17] According to the Presidential Finding, ''removal of this impediment . . . will benefit our entire Nation.'' [18]

Alaska LNG notes that, although the Presidential Finding was issued in the context of earlier efforts to develop the vast natural gas resources on the North Slope (specifically, the Yukon Pacific project),[19] its broad language applies equally to Alaska LNG's Application to develop these same resources. According to Alaska LNG, the Yukon Pacific project bears remarkable similarities to its proposed Project. Further, in the *Yukon Pacific* proceeding, DOE/FE concluded that the Presidential Finding '' 'removed the section 12 impediment to exports of North Slope natural gas,' '' and is a '' 'generic finding' '' that DOE/FE could apply to the facts of the case.[20]

Alaska LNG maintains that the facts of today's natural gas landscape support the continued validity of the Presidential Finding. Therefore, Alaska LNG asserts that the Presidential Finding is valid and applicable to this Project, and that the requirement of ANGTA Section 12 has been satisfied.

Economic Benefits. Alaska LNG maintains that the requested authorization will benefit local, regional, and national economies and is not inconsistent with the public interest. According to Alaska LNG, the proposed export would make natural gas, otherwise stranded on the North Slope, available to both the global LNG market and Alaska in-state markets. Alaska LNG also asserts that the Project will create new jobs and opportunities for American workers, is consistent with President Obama's National Export Initiative,[21] and will improve the U.S. balance of trade.

Benefits to National Energy Security. Alaska LNG maintains that the LNG exports associated with the requested authorization will support U.S. energy security. Alaska LNG points to DOE/FE's findings on national energy security in recent non-FTA LNG export proceedings and to the Socio-Economic Report, which analyzes the impact of natural gas exports on enhancing energy security using the metrics of supply assurance, price stability, and foreign policy.

Environmental Benefits. Alaska LNG maintains that LNG exports significantly benefit the environment because natural gas is cleaner burning than other fossil fuels. According to Alaska LNG, an increased supply of natural gas made possible through LNG exports can help countries reduce their reliance on less environmentally friendly fuels. To the extent its proposed exports are used by foreign countries as a substitute for coal and fuel oil, Alaska LNG maintains that its exports would reduce emissions significantly over the 30-year export term.

Based on these factors, Alaska LNG maintains that the proposed exports are not inconsistent with the public interest. Additional details can be found in Alaska LNG's Application, which is posted on the DOE/FE Web site at: *http://energy.gov/fe/downloads/alaska-lng-project-llc-14-96-lng.*

Environmental Impact

Alaska LNG requests that DOE/FE grant its request to export LNG to non-FTA countries conditioned on FERC's completion of the NEPA review and approval of Project construction. Alaska LNG notes that it has been standard practice for DOE/FE to complete its NEPA review as a cooperating agency in FERC's review of proposed export facilities. Alaska LNG further states that it will seek any necessary permits from other federal, state, and local agencies, as well as conduct any necessary consultations. Alaska LNG notes that it expects to commence FERC's pre-filing process in 2014.

DOE/FE Evaluation

The Application will be reviewed pursuant to section 3(a) of the NGA, 15 U.S.C. 717b(a). In reviewing this LNG export Application, DOE will consider issues required by law or policy. To the extent determined to be relevant or appropriate, DOE/FE's review will include the impact of LNG exports associated with this Application on Alaskan regional domestic need for the natural gas proposed for export, adequacy of domestic natural gas supply in Alaska, and other issues, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Parties that may oppose the Application should address these issues in their comments and/or protests, as well as other issues deemed relevant to the Application.

Interested persons will be provided 60 days from the date of publication of this Notice in which to submit comments, protests, motions to intervene, notices of intervention, or motions for additional procedures.

Public Comment Procedures

In response to this Notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention, as applicable. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene, or notices of intervention must meet the requirements specified by the regulations in 10 CFR Part 590.

Filings may be submitted using one of the following methods: (1) Emailing the filing to *fergas@hq.doe.gov* with FE Docket No. 14–96–LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office of Oil and Gas Global Security and Supply at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Oil and Gas Global Security and Supply at the address listed in **ADDRESSES** before 4:30 p.m. EST. All filings must include a reference to FE Docket No. 14–96–LNG. **Please Note:** If submitting a filing via email, please include all related documents and attachments (e.g., exhibits) in the original email correspondence. Please do not include any active hyperlinks or password protection in any of the documents or attachments related to the filing. All electronic filings submitted to DOE must follow these guidelines to ensure that all documents are filed in a timely manner. Any hardcopy filing submitted greater in length than 50 pages must also include, at the time of the filing, a digital copy on disk of the entire submission.

A decisional record on the Application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral

[17] *Id.* at 27–28 (quoting Presidential Finding, 53 Fed. Reg. 999).

[18] Presidential Finding, 53 FR 999.

[19] *See id.* at 28 (citing *Yukon Pacific Corp.,* ERA Docket No. 87–68–LNG, Order No. 350 (Nov. 16, 1989)).

[20] Alaska LNG App. at 29–30 (quoting *Yukon Pacific Corp.,* Order No. 350, at 7, 27).

[21] Exec. Order 13534, 75 FR 12,433 (Mar. 11, 2010).

presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision, and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application is available for inspection and copying in the Division of Natural Gas Regulatory Activities docket room, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE Web address: *http://www.fe.doe.gov/programs/gasregulation/index.html.*

Issued in Washington, DC, on September 11, 2014.

Lisa C. Tracy,

Acting Director, Division of Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Oil and Natural Gas.

[FR Doc. 2014–22226 Filed 9–16–14; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge Reservation. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, October 8, 2014; 6:00 p.m.

ADDRESSES: Department of Energy Information Center, Office of Science and Technical Information, 1 Science.gov Way, Oak Ridge, Tennessee 37830.

FOR FURTHER INFORMATION CONTACT: Melyssa P. Noe, Federal Coordinator, Department of Energy Oak Ridge Operations Office, P.O. Box 2001, EM–90, Oak Ridge, TN 37831. Phone (865) 241–3315; Fax (865) 576–0956 or email: *noemp@emor.doe.gov* or check the Web site at *http://energy.gov/orem/services/community-engagement/oak-ridge-site-specific-advisory-board.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

- Welcome and Announcements
- Comments from the Deputy Designated Federal Officer
- Comments from the DOE, Tennessee Department of Environment and Conservation, and Environmental Protection Agency Liaisons
- Public Comment Period
- Presentation
- Additions/Approval of Agenda
- Motions/Approval of September 10, 2014 meeting minutes
- Status of Recommendations with DOE
- Committee Reports
- Federal Coordinator Report
- Adjourn

Public Participation: The EM SSAB, Oak Ridge, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Melyssa P. Noe at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to the agenda item should contact Melyssa P. Noe at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Melyssa P. Noe at the address and phone number listed above. Minutes will also be available at the following Web site: *http://energy.gov/orem/services/community-engagement/oak-ridge-site-specific-advisory-board.*

Issued at Washington, DC, on September 12, 2014.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2014–22194 Filed 9–16–14; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Commission To Review the Effectiveness of the National Energy Laboratories

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open meeting of the Commission to Review the Effectiveness of the National Energy Laboratories (Commission). The Commission was created pursuant section 319 of the Consolidated Appropriations Act, 2014, Public Law 113–76, and in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App. 2. This notice is provided in accordance with the Act.

DATES: Monday, October 6, 2014; 10:30 a.m.–4:00 p.m.

ADDRESSES: Institute for Defense Analyses, Room 1301, 4850 Mark Center Drive, Alexandria, VA 22311.

FOR FURTHER INFORMATION CONTACT: Karen Gibson, Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585; telephone (202) 586–3787; email *crenel@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Background: The Commission was established to provide advice to the Secretary on the Department's National Laboratories. The Commission will review the National Energy Laboratories for alignment with the Department's strategic priorities, clear and balanced missions, unique capabilities to meet current energy and national security challenges, appropriate size to meet the Department's energy and national security missions, and support of other Federal agencies. The Commission will also look for opportunities to more effectively and efficiently use the

capabilities of the National Laboratories and review the use of laboratory-directed research and development (LDRD) to meet the Department's science, energy, and national security goals.

Purpose of the Meeting: This meeting is the third meeting of the Commission.

Tentative Agenda: The meeting will start at 10:30 a.m. on October 6. The tentative meeting agenda includes a review of work by the DOE National Laboratories supporting other agencies, as well as a discussion of technology transfer and technology partnering at the laboratories. Key presenters will address and discuss these topics with comments from the public. The meeting will conclude at 4:00 p.m.

Public Participation: The meeting is open to the public. Individuals who would like to attend must RSVP to Karen Gibson no later than 5:00 p.m. on Wednesday, October 1, 2014, by email at: *crenel@hq.doe.gov.* Please provide your name, organization, citizenship, and contact information. Anyone attending the meeting will be required to present government issued identification. Individuals and representatives of organizations who would like to offer comments and suggestions may do so at the end of the meeting. Approximately 30 minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak but will not exceed 5 minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak should register to do so beginning at 10:30 a.m. on October 6.

Those not able to attend the meeting or who have insufficient time to address the committee are invited to send a written statement to Karen Gibson, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, or to email at: *crenel@hq.doe.gov.*

Minutes: The minutes of the meeting will be available on the Commission's Web site at: *http://energy.gov/labcommission.*

Issued in Washington, DC, on September 11, 2014.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2014–22190 Filed 9–16–14; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. RF–041]

Extension of Waiver to Panasonic Appliances Refrigeration Systems Corporation of America Corporation From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedures

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

ACTION: Extension of Waiver.

SUMMARY: The U.S. Department of Energy (DOE) is granting a waiver extension (Case No. RF–041) to Panasonic Appliances Refrigeration Systems Corporation of America (PAPRSA) to waive the requirements of the DOE electric refrigerator and refrigerator-freezer test procedures for determining the energy consumption of a specific hybrid basic model, PR5180JKBC. Under today's extension, PAPRSA shall be required to test and rate this hybrid wine chiller/beverage center basic model using an alternate test procedure that requires PAPRSA to test the wine chiller compartment at 55 °F instead of the prescribed temperature of 39 °F per title 10 of the Code of Federal Regulations (10 CFR) part 430, subpart B, appendix A. PAPRSA shall also use the K factor (correction factor) value of 0.85 when calculating the energy consumption.

DATES: This extension of waiver is effective September 17, 2014.

FOR FURTHER INFORMATION CONTACT:

Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371, Email: *Bryan.Berringer@ee.doe.gov.*

Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0103. Telephone: (202) 586–8145. Email: *Michael.Kido@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: In accordance with 10 CFR 430.27(g), DOE gives notice of the issuance of its extension of waiver as set forth below. The extension of waiver grants PAPRSA a waiver from the applicable residential refrigerator and refrigerator-freezer test procedures found in 10 CFR part 430, subpart B, appendix A for certain basic models of hybrid wine chiller/beverage center products, provided that PAPRSA tests and rates such products using the alternate test procedure described in this notice. Today's extension prohibits PAPRSA from making representations concerning the energy efficiency of these products unless the product has been tested in a manner consistent with the provisions and restrictions in the alternate test procedure set forth in the extension below, and the representations fairly disclose the test results. Distributors, retailers, and private labelers are held to the same standard when making representations regarding the energy efficiency of these products. 42 U.S.C. 6293(c).

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes the residential electric refrigerators and refrigerator-freezers that are the focus of this notice.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results that measure energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for residential electric refrigerators and refrigerator-freezers is set forth in 10 CFR part 430, subpart B, appendix A.

DOE's regulations allow a person to seek a waiver from the test procedure requirements for a particular basic model of a type of covered consumer product when (1) the petitioner's basic model for which the petition for waiver was submitted contains one or more design characteristics that prevent testing according to the prescribed test procedure, or (2) when prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner

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

representative of its energy consumption characteristics.

The granting of a waiver is subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(f)(2). As soon as practicable after the granting of any waiver, DOE will publish in the **Federal Register** a notice of proposed rulemaking to amend its regulations so as to eliminate any need for the continuation of such waiver. As soon thereafter as practicable, DOE will publish in the **Federal Register** a final rule. 10 CFR 430.27(l). The waiver process also allows the granting of an interim waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. 10 CFR 430.27(e). Within one year of issuance of an interim waiver, DOE will either: (i) Publish in the **Federal Register** a determination on the petition for waiver; or (ii) Publish in the **Federal Register** a new or amended test procedure that addresses the issues presented in the waiver. 10 CFR 430.27(h)(1).

A petitioner may request that DOE extend the scope of a waiver or an interim waiver to include additional basic models employing the same technology as the basic model(s) set forth in the original petition. DOE will publish any such extension in the **Federal Register**. 10 CFR 430.27(g).

II. PAPRSA's Extension of Waiver: Assertions and Determinations

On July 2, 2014, PAPRSA requested an extension of its previous waivers (Case Nos. RF–022 and RF–031) under 10 CFR 430.27(g) for its hybrid wine chiller/beverage center basic model, PR5180JKBC pertaining to appendix A to subpart B of 10 CFR part 430. Because PAPRSA has elected to utilize Appendix A to Subpart B of Part 430 prior to the September 15, 2014 effective date to measure the energy consumption of its new basic hybrid model, testing of the refrigerated beverage compartment will be conducted at 39 °F as specified in Appendix A, as opposed to 38 °F as specified in the Appendix A1 test method under which PAPRSA's waiver hybrid models were previously certified. DOE is publishing PAPRSA's extension of waiver in its entirety.

DOE granted a similar waiver to PAPRSA through an interim waiver (78 FR 35894 (June 14, 2013)) and a subsequent Decision and Order (78 FR 57139 (September 17, 2013)) under Case No. RF–031. Additionally, DOE granted a similar waiver to Sanyo E&E Corporation (Sanyo) through an interim waiver (77 FR 19654 (April 2, 2012)) and a subsequent Decision and Order (77 FR 49443 (August 16, 2012)) under Case No. RF–022. On October 4, 2012, DOE issued a notice of correction to the Decision and Order incorporating a K factor (correction factor) value of 0.85 when calculating the energy consumption (77 FR 60688). Sanyo E&E Corporation has since changed its corporate name to Panasonic Appliances Refrigeration Systems Corporation of America, meaning that it is the same manufacturer to which DOE granted the August 2012 waiver. PAPRSA submitted a petition for waiver and application for interim waiver from the test procedure applicable to residential electric refrigerators and refrigerator-freezers set forth in 10 CFR Part 430, subpart B, appendix A1. In its petition, PAPRSA sought a waiver from the existing DOE test procedure applicable to refrigerators and refrigerator-freezers under 10 CFR Part 430 for PAPRSA's hybrid models that consist of single-cabinet units with a refrigerated beverage compartment in the top portion and a wine storage compartment in the bottom of the units. DOE issued guidance that clarified the test procedures to be used for hybrid products such as the PAPRSA model at issue here: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/refrigerator_definition_faq.pdf*. This guidance specifies that basic models such as the ones PAPRSA identifies in its petition, which do not have a separate wine storage compartment with a separate exterior door, are to be tested according to the DOE test procedure in Appendix A1, with the temperatures specified therein. PAPRSA asserts that the wine storage compartment cannot be tested at the prescribed temperature of 38 °F, because the minimum compartment temperature is 45 °F. PAPRSA submitted an alternate test procedure to account for the energy consumption of its wine chiller/beverage centers. That alternate procedure would test the wine chiller compartment at 55 °F, instead of the prescribed 38 °F. To justify the use of this standardized temperature for testing, PAPRSA stated in its petition that it designed these models to provide an average temperature of 55 to 57 °F, which it determined is a commonly recommended temperature for wine storage, suggesting that this temperature is presumed to be representative of expected consumer use. 77 FR 19656. DOE notes that the test procedures for wine chillers adopted by the Association of Home Appliance Manufacturers (AHAM), California Energy Commission (CEC), and Natural Resources Canada all use a standardized compartment temperature of 55 °F for wine chiller compartments, which is consistent with PAPRSA's approach.

III. Conclusion

After careful consideration of all the material submitted by PAPRSA, it is ordered that:

(1) The extension of waiver submitted by the Panasonic Appliances Refrigeration Systems Corporation of America (Case No. RF–041) is hereby granted as set forth in the paragraphs below.

(2) PAPRSA shall be required to test and rate the following PAPRSA model according to the alternate test procedure set forth in paragraph (3) below:

PR5180JKBC

(3) PAPRSA shall be required to test the products listed in paragraph (2) above according to the test procedures for electric refrigerator-freezers prescribed by DOE at 10 CFR part 430, Appendix A, except that, for the PAPRSA products listed in paragraph (2) only, test the wine chiller compartment at 55 °F, instead of the prescribed 39 °F.

PAPRSA shall also use the K factor (correction factor) value of 0.85 when calculating the energy consumption of one of the models listed above. Therefore, the energy consumption is defined by the higher of the two values calculated by the following two formulas (according to 10 CFR part 430, subpart B, Appendix A):

Energy consumption of the wine compartment:

$$EWine = ET1 + [(ET2 - ET1) \times (55\ °F - TW1)/(TW2 - TW1)] * 0.85$$

Energy consumption of the refrigerated beverage compartment:

$$EBeverage\ Compartment = ET1 + [(ET2 - ET1) \times (39\ °F - TBC1)/(TBC2 - TBC1)].$$

(4) Representations. PAPRSA may make representations about the energy use of its hybrid wine chiller/beverage center products for compliance, marketing, or other purposes only to the extent that such products have been tested in accordance with the provisions outlined above and such representations fairly disclose the results of such testing.

(5) This waiver shall remain in effect consistent with the provisions of 10 CFR 430.27(l).

(6) This waiver is issued on the condition that the statements, representations, and documentary materials provided by the petitioner are valid. DOE may revoke or modify this waiver at any time if it determines the factual basis underlying the petition for

waiver is incorrect, or the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

(7) This waiver applies only to those basic models set out in PAPRSA's July 2, 2014 extension of waiver. Granting of this extension does not release a petitioner from the certification requirements set forth at 10 CFR part 429.

Issued in Washington, DC, on September 10, 2014.

Kathleen B. Hogan,

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

BEFORE THE

U.S. DEPARTMENT OF ENERGY

Washington, DC 20585

In the Matter of: *Panasonic Appliances Refrigeration Systems Corporation of America*, Petitioner

Case Number: RF–022; RF–301

REQUEST FOR EXTENSION OF WAIVER AND INTERIM WAIVER

Panasonic Appliances Refrigeration Systems Corporation of America (''PAPRSA'') respectfully submits this Request for Extension of Waiver and Interim Waiver (''Request'') pursuant to 10 C.F.R. § 430.27(g). PAPRSA intends to introduce a new basic hybrid wine chiller/beverage center model (''hybrid model'') listed below that contains the same design characteristics that prevent testing of the basic model according to the test procedures prescribed in 10 C.F.R. § 430, subpart B, appendix A and for which PAPRSA received two previous waivers and interim waivers as a result. As detailed more fully below, the Department of Energy (''DOE'') has previously granted PAPRSA [1] two separate waivers from DOE's electric refrigerator and refrigerator-freezer test procedures for determining the energy consumption of substantially similar hybrid models in Case Nos. RF–022 and RF–301 (the ''waiver hybrid models'').[2] PAPRSA has developed a new basic hybrid model, **PR5180JKBC**, that contains the same design characteristics as its waiver hybrid models that make it impossible to certify, rate, and sell this new hybrid model under the existing testing procedures. PAPRSA therefore respectfully requests that DOE extend the previously granted waivers and interim waivers to these new basic hybrid models and that it be permitted to employ the alternative testing method for this new basic hybrid model that has already been approved by DOE for the waiver hybrid models.

1. Existing Waiver Background and Product Characteristics of PAPRSA's Hybrid Models

On June 2, 2011, PAPRSA submitted a petition for waiver with respect to the test procedures for its waiver hybrid models that consist of a combination of a refrigerated ''beverage'' compartment in the top portion of these single-cabinet units and a wine storage compartment on the bottom of the units, and for which an alternative testing procedure was necessary in order to certify, rate, and sell such models. The waiver hybrid models include the following models: JUB248LB, JUB248RB, JUB248LW, JUB248RW, KBCO24LS, KBCS24LS, KBCO24RS, KBCS24RS, and MBCM24FW.

As PAPRSA previously explained, PAPRSA designed the wine storage compartments of its waiver hybrid models to operate between a minimum temperature of 45 °F and a maximum temperature of 64 °F, with an average temperature of 55 to 57 °F. In fact, heaters are used to ensure that the temperature in the wine storage compartment never drops below 45 °F, as wines chilled below this temperature risk becoming crystallized and, therefore, ruined. Currently, however, DOE's testing procedures contained in 10 C.F.R. § 430, subpart B, appendix A1, mandate that energy consumption be measured when the compartment temperature is set at 38 °F. Based on the design characteristics of its waiver hybrid models noted above, however, PAPRSA needed a waiver with respect to DOE's testing procedures in order to properly ''certify, rate, and sell such models,'' because the existing test procedures contained in 10 C.F.R. § 430, subpart B, appendix A1, do not contemplate a product that is designed to be incapable of achieving a temperature below 45 °F.

On April 2, 2012, DOE published PAPRSA's previous petition for waiver and sought public comment, and DOE subsequently extended the deadline for comments after PAPRSA submitted a request for extension to clarify the scope of its original petition for waiver. *See* **Federal Register**, Vol. 77, No. 96, 29331–29333. No comments were filed opposing the relief requested in PAPRSA's petition for waiver.

On August 9, 2012, DOE granted PAPRSA a waiver from DOE's electric refrigerator and refrigerator-freezer test procedures for determining the energy consumption of the basic models listed in its June 2, 2011 petition for waiver. *See* **Federal Register**, Vol. 77, No. 159, 49443–44. In permitting PAPRSA to test the wine chiller compartment at 55 °F, DOE noted ''that the test procedures for wine chillers adopted by the Association of Home Appliance Manufacturers (AHAM), California Energy Commission (CEC), and Natural Resources Canada all use a standardized compartment temperature of 55 °F for wine chiller compartments, which is consistent with [PAPRSA's] approach.'' *Id.* at 49444.

On September 26, 2012, DOE issued a correction to its August 9, 2012 order that incorporated the K factor (correction factor) value of .85 that PAPRSA should utilize when calculating the energy consumption of its waiver hybrid models. *See* **Federal Register**, Vol. 77, No. 193, 60688–89. Accordingly, DOE ultimately directed PAPRSA to utilize the following test procedure for its waiver hybrid models:

Energy consumption is defined by the higher of the two values calculated by the following two formulas (according to 10 CFR part 430, subpart B, Appendix A1):

Energy consumption of the wine compartment:

$$EWine = (ET1 + [(ET2–ET1) \times (55\ °F–TW1)/(TW2–TW1)]) * 0.85$$

Energy consumption of the refrigerated beverage compartment:

$$EBeverage\ Compartment = ET1 + [(ET2–ET1) \times (38\ °F–TBC1)/(TBC2–TBC1)].$$

See **Federal Register**, Vol. 77, No. 193 at 60689.

On April 29, 2013, PAPRSA submitted a second petition for waiver and interim waiver for a substantially similar hybrid model, SR5180JBC, that shares the same design characteristics that led DOE to approve PAPRSA's June 2, 2011 waiver request. No comments were filed opposing the relief requested in PAPRSA's second petition for waiver and interim waiver. On September 17, 2013, DOE again granted PAPRSA a waiver from DOE's electric refrigerator and refrigerator-freezer test procedures

[1] The first waiver granted in Case No. RF–022 was issued to SANYO E&E Corporation. Effective April 1, 2013, SANYO E&E Corporation changed its corporate name to Panasonic Appliances Refrigeration Systems Corporation of America. Throughout this Petition, PAPRSA will be used to refer to both SANYO E&E Corporation and Panasonic Appliances Refrigeration Systems Corporation of America, unless otherwise indicated.

[2] PAPRSA notes at the outset that its waiver hybrid models were tested and certified by incorporating the standards contained 10 C.F.R. § 430, subpart B, appendix A1 as they relate to the refrigerated beverage compartment of these single cabinet units. For the new basic hybrid model, PAPRSA is electing to utilize 10 C.F.R. § 430, subpart B, appendix A prior to the September 15, 2014 effective date to measure the energy consumption of its new basic hybrid model.

for determining the energy consumption of basic hybrid model SR5180JBC. *See* **Federal Register**, Vol. 78, No. 180, 57139–41.

2. Request to Extend Scope of Previously Granted Waivers and Interim Waivers to New Basic Hybrid Model under Previously Approved Alternative Testing Procedure

As indicated above, PAPRSA has developed a new basic hybrid model, **PR5180JKBC**, that shares the same design characteristics that led DOE to approve PAPRSA's two prior petitions for waiver. This new basic hybrid model is a single cabinet hybrid model that would be classified as a compact refrigerator with automatic defrost without through-the-door ice service, but which has a wine-chiller compartment designed for an average temperature of 55 to 57 °F. Just as PAPRSA's waiver hybrid models, this new basic hybrid model contains a heater that makes it impossible for the temperature of the wine-chiller compartment to reach a temperature below 45 °F. Thus, testing this new hybrid model at 39 °F is simply not possible and not representative of the energy consumption characteristics of this new basic hybrid model.

Further, this new basic hybrid model, just as PAPRSA's waiver hybrid models, will have a door-opening usage aligned with household freezers, thus 0.85 should also be the employed K factor (correction factor) for this basic hybrid model. *See* Appendix B1 to Subpart 430, 5.2.1.1, because Subpart 430 does not recognize wine chiller as a category.

In short, there are no material differences between this new basic hybrid model and PAPRSA's waiver hybrid models as it impacts this Request. The design differences between the new basic hybrid model and the waiver hybrid models are the introduction of a more efficient compressor and new external electronic controls. Although the new basic hybrid model will be more energy efficient, the design characteristics of the new basic hybrid model are the same as the characteristics of PAPRSA's waiver hybrid models that led DOE to grant the prior two waivers. Accordingly, PAPRSA respectfully requests that it be permitted to use the following testing procedure for its new basic hybrid model:

Energy consumption is defined by the higher of the two values calculated by the following two formulas (according to 10 CFR part 430, subpart B, Appendix A):

Energy consumption of the wine compartment:

EWine = (ET1 + [(ET2–ET1) × (55 °F–TW1)/(TW2–TW1)]) *0.85

Energy consumption of the refrigerated beverage compartment:

EBeverage Compartment = ET1 + [(ET2–ET1) × (39 °F–TBC1)/(TBC2–TBC1)].[3]

Accordingly, PAPRSA respectfully requests that DOE extend the waivers that DOE previously granted it and that PAPRSA be permitted to use this approved alternative testing method to test, certify and rate the new basic hybrid models in the same manner as its waiver hybrid models subject to the existing waivers.

3. Grounds for Interim Waiver

Pursuant to 10 CFR part 430.27(b)(2), applicants for an interim waiver should address the likely success of their petition and what economic hardships and/or competitive disadvantages are likely to arise absent the grant of an interim waiver.

As detailed above, it is highly likely that DOE will grant this Request, as PAPRSA is simply seeking to test a new basic hybrid model under the alternative testing procedure already approved twice by DOE for PAPRSA's other hybrid models subject to the existing waivers. The new basic hybrid models contain no materially different design characteristics that should warrant a different result.

Further, as DOE has previously stated, ''[f]ully recognizing that product development occurs faster than the test procedure rulemaking process, the Department's rules permit manufacturers of models not contemplated by the test procedures . . . to petition for a test procedure waiver in order to certify, rate, and sell such models.'' GC Enforcement Guidance on the Application of Waivers and on the Waiver Process at 2 (rel. Dec. 23, 2010);[4] *see also* DOE FAQ Guidance Regarding Coverage of Wine Chillers, Etc. in the R/F Standard/Test Procedure at 2 (rel. Feb. 10, 2011) (''DOE recognizes the potential disparity in treatment among these hybrid products. As DOE indicated . . . , the Department plans to engage in a future rulemaking to more comprehensively address these types of products.'').

Certain manufacturers design comparable hybrid models so that the beverage center compartment does not reach below 40 °F, and thus are not covered products under DOE's regulations. Unless PAPRSA is granted an interim waiver, it will be at a competitive disadvantage by being unable to introduce the new basic hybrid model to compete with manufacturers that design their hybrid models in a manner that falls outside of DOE's jurisdiction.

Thus, given that this Request is likely to be granted and PAPRSA will face economic hardship unless an interim waiver is granted, permitting PAPRSA to immediately certify the new basic hybrid model under the alternative testing method already approved by DOE is in the public interest.

Respectfully submitted,

Alan G. Fishel
Adam D. Bowser
Arent Fox LLP, 1717 K St. NW., Washington, DC 20036–5369, (202) 857–6450, fishel.alan@arentfox.com, bowser.adam@arentfox.com, Counsel for Panasonic Appliances Refrigeration Systems Corporation of America

July 2, 2014

[FR Doc. 2014–22175 Filed 9–16–14; 8:45 am]

BILLING CODE 6450–01–P

[3] As a result of electing to utilize Appendix A to Subpart B of Part 430 prior to the September 15, 2014 effective date to measure the energy consumption of its new basic hybrid model, testing of the refrigerated beverage compartment will be conducted at 39 °F as specified in Appendix A, as opposed to 38 °F as specified in Appendix A1 and under which PAPRSA's waiver hybrid models were previously certified.

[4] Available at *http://www.gc.energy.gov/documents/LargeCapacityRCW_guidance_122210.pdf.*

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. RF–040]

Notice of Petition for Waiver of Sub-Zero From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedure and Grant of Interim Waiver

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

ACTION: Notice of Petition for Waiver, Notice of Granting Application for Interim Waiver, and Request for Public Comments.

SUMMARY: This notice announces receipt and publication of a petition for waiver submitted by the Sub-Zero Group, Inc. from specified portions of the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of electric refrigerators and refrigerator-freezers. Sub-Zero's request pertains to the specific hybrid refrigerated ''storage-wine storage'' basic models set forth in its petition. Sub-Zero

seeks permission to use an alternate test procedure to test the wine chiller compartment of these devices at 55 °F instead of the prescribed temperature of 39 °F. That procedure would apply a K factor (correction factor) value of 0.85 when calculating the energy consumption of a tested model and replace the energy consumption calculation currently required under 10 CFR Part 430, Appendix A. DOE solicits comments, data, and information concerning Sub-Zero's petition and the suggested alternate test procedure. Today's notice also grants Sub-Zero with an interim waiver from the electric refrigerator-freezer test procedure, subject to use of the alternative test procedure set forth in this notice.

DATES: DOE will accept comments, data, and information with respect to the Sub-Zero Petition until October 17, 2014.

ADDRESSES: You may submit comments, identified by case number ''RF–040,'' by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: AS_Waiver_Requests@ee.doe.gov.* Include the case number [Case No. RF–040] in the subject line of the message.
- *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–5B/1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza SW., Washington, DC 20024; (202) 586–2945, between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE rulemakings regarding similar refrigerator-freezers. Please call Ms. Brenda Edwards at the above telephone number for additional information.

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–5B, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. Email: *Bryan.Berringer@ee.doe.gov.*

Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0103. Telephone: (202) 586–8145. Email: *Michael.Kido@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes the electric refrigerators and refrigerator-freezers that are the focus of this notice.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results which measure the energy efficiency, energy use, or estimated annual operating costs of a covered product, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for electric refrigerators and electric refrigerator-freezers is contained in 10 CFR part 430, subpart B, appendix A.

The regulations set forth in 10 CFR 430.27, which were recently amended, contain provisions that enable a person to petition DOE to obtain a waiver from the test procedure requirements for covered products. See 79 FR 26591 (May 9, 2014) (revising 10 CFR 430.27, effective June 9, 2014). (DOE notes that while the previous version of 10 CFR 430.27 was effective at the time of Sub-Zero's submission, the substantive aspects of this regulation have not been changed by the May 9th rule.) Under 10 CFR 430.27, the Assistant Secretary for Energy Efficiency and Renewable Energy (the Assistant Secretary) will grant a waiver if it is determined that the basic model for which the petition for waiver was submitted contains one or more design characteristics that prevents testing of the basic model according to the prescribed test procedures, or if the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(l). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. DOE may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(l). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(m).

The waiver process also allows the Assistant Secretary to grant an interim waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. 10 CFR 430.27(g). An interim waiver remains in effect for 180 days or until DOE issues its determination on the petition for waiver, whichever occurs earlier. DOE may extend an interim waiver for an additional 180 days. 10 CFR 430.27(h).

II. Petition for Waiver of Test Procedure

Sub-Zero is seeking a waiver from the test procedure applicable to residential electric refrigerators and refrigerator-freezers set forth in 10 CFR part 430, Subpart B, Appendix A. In its petition, Sub-Zero explained that it produces a hybrid refrigerator basic model (i.e. refrigerators that have a combination of one or more refrigerated storage compartments and a wine storage compartment). Sub-Zero asserts that the DOE test procedure does not contain a method to test these types of hybrid products in a manner that would ''truly represent[ ] the energy-consumption characteristics of these products'' and offered an alternate test procedure that Sanyo E&E Corporation (Sanyo), now Panasonic Appliances Refrigeration Systems Corporation of America (PAPRSA), used in prior waiver requests. See 77 FR 49443 (Aug. 16, 2012) and 78 FR 57139 (Sept. 17, 2013). (On October 4, 2012, a correction notice to the August 16, 2012 Decision and Order was published. See 77 FR 60688.) These earlier decisions incorporated a K factor (correction factor) value of 0.85 when calculating the energy consumption of a tested model (77 FR 60688). Sub-Zero is requesting that it be permitted to apply the same procedure when testing the energy usage of its hybrid refrigerated storage-wine storage models.

Against this background, DOE had previously issued guidance in 2011 that clarified the test procedures to be used for hybrid products such as the Sub-Zero models at issue. That guidance is available at the following link: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/*

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

refrigerator_definition_faq.pdf. The guidance specifies that basic models that do not have a separate wine storage compartment with a separate exterior door, such as those models identified in Sub-Zero's petition, are to be tested using the DOE test procedure in Appendix A, with the temperatures specified therein. Sub-Zero's waiver request seeks to replace the application of this general guidance with the more recent and specific approach outlined in determinations for similar hybrid products offered by Sanyo and PAPRSA when measuring the efficiency of these products.

Sub-Zero also requests an interim waiver from the existing DOE test procedure. An interim waiver may be granted if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. See 10 CFR 430.27(g).

For the reasons discussed above, DOE has determined that use of the currently required DOE test procedure would provide test results so unrepresentative as to provide materially inaccurate comparative data. Therefore, it appears likely that Sub-Zero's petition for waiver will be granted. For these same reasons, DOE has also determined that it is desirable for public policy reasons to grant Sub-Zero immediate relief pending a determination of the petition for waiver. DOE grants Sub-Zero's application for interim waiver from testing of its hybrid refrigerated storage-wine storage basic models.

Therefore, *it is ordered that:*

The application for interim waiver filed by Sub-Zero is hereby granted for Sub-Zero's hybrid refrigerated storage-wine storage basic product lines are subject to the following specifications and conditions below. Sub-Zero shall be required to test and rate its hybrid refrigerated storage-wine storage product line according to the alternate test procedure as set forth in section III, ''Alternate test procedure.''

The following basic models are included in Sub-Zero's petition:

IW–30R

DOE makes decisions on waivers for only those models specifically set out in the petition, not future models that may be manufactured by the petitioner. Sub-Zero may submit a subsequent petition for waiver for additional models of electric refrigerators and refrigerator-freezers for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that the grant of a waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429.

Further, this interim waiver is conditioned upon the presumed validity of statements, representations, and documents provided by the petitioner. DOE may revoke or modify this interim waiver at any time upon a determination that the factual basis underlying the petition for waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

III. Alternate Test Procedure

Sub-Zero submitted an alternate test procedure to account for the energy consumption of its hybrid refrigerated storage-wine storage products. That alternate procedure would test this product according to the procedure specified in appendix A to subpart B of 10 CFR part 430 except with a standardized temperature for the wine chiller compartment of 55 °F, instead of the prescribed 39 °F. Sub-Zero shall also use the K factor (correction factor) value of 0.85 when calculating the energy consumption of the model listed and calculate the energy consumption of this model as follows:

Energy consumption is defined by the higher of the two values calculated by the following two formulas (according to 10 CFR part 430, subpart B, Appendix A):

Energy consumption of the wine compartment:

$$E_{Wine} = ET1 + [(ET2 - ET1) \times (55\ °F - TW1)/(TW2 - TW1)] * 0.85$$

Energy consumption of the refrigerated beverage compartment:

$$E_{Refrigerated\ Compartment} = ET1 + [(ET2 - ET1) \times (39\ °F - TRC1)/(TRC2 - TRC1)].$$

IV. Summary and Request for Comments

Through today's notice, DOE grants Sub-Zero an interim waiver from the specified portions of the test procedure applicable to Sub-Zero's line of hybrid refrigerated storage-wine storage basic models and announces receipt of Sub-Zero's petition for waiver from those same portions of the test procedure. DOE is publishing Sub-Zero's petition for waiver in its entirety. The petition contains no confidential information. The petition includes a suggested alternate test procedure to determine the energy consumption of Sub-Zero's specified hybrid refrigerators. Sub-Zero is required to follow this alternate procedure as a condition of its interim waiver, and DOE is considering including this alternate procedure in its subsequent Decision and Order.

DOE solicits comments from interested parties on all aspects of the petition, including the suggested alternate test procedure and calculation methodology. Any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner is: Paul V. Sikir, Vice President of Design Engineering, Sub-Zero Group, Inc., 4717 Hammersley Road, Madison, Wisconsin 53711. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

Issued in Washington, DC, on September 10, 2014.

Kathleen B. Hogan,

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

SUB-ZERO GROUP, INC.
4717 Hammersley Road
Madison, WI 53711

May 19th, 2014

The Honorable David Danielson
Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy
U.S. Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

Dear Secretary Danielson:

Pursuant to 10 CFR 430.27, Sub-Zero respectfully requests expedited attention to this Petition for both an interim and final waiver to modify the DOE test procedure (10 CFR 430 Subpart B Appendix A) for Sub-Zero hybrid refrigerated storage-wine storage products. Without this waiver, we are unable to certify models as compliant with new DOE minimum efficiency standards effective in 2014. This request is similar to past petitions for waivers that have been granted by DOE to Sanyo (77FR49443) and PAPRSA (78FR35894).

The Department's regulations provide that the Assistant Secretary will grant a Petition upon ''determination that the basic model for which the waiver was requested contains a design characteristic which either prevents testing of the basic model according to the prescribed test procedures, or the

prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data.'' Sub-Zero requests that the Assistant Secretary grant this petition on both grounds.

In granting the Sanyo petition, DOE acknowledged that wine storage compartments cannot be tested at the prescribed temperature of 38 °F (now 39 °F in the revised Refrigerator Test Procedure), because the minimum wine compartment temperature is higher. Sanyo submitted an alternate test procedure to account for the energy consumption of its wine storage/beverage center models. That alternate procedure would test the wine storage compartment at 55 °F, instead of the prescribed 38 °F. To justify the use of this standardized temperature for testing; Sanyo stated in its petition that it designed these models to provide an average wine compartment temperature of 55 to 57 °F, which it determined is a commonly recommended temperature for wine storage. This temperature is presumed to be representative of expected consumer use. DOE also noted that the test procedures for wine products adopted by the Association of Home Appliance Manufacturers (AHAM), California Energy Commission (CEC), and Natural Resources Canada all use the standardized temperature of 55 °F for wine storage compartments; consistent with Sanyo's petition. Furthermore, DOE prescribed that Sanyo also use the proposed K factor (correction factor) value of 0.85 when calculating energy consumption.

DOE granted Sanyo's waiver petition in 2012, acknowledging that the existing test procedure cannot properly measure the energy consumed in actual consumer usage. Thereafter in 2013, DOE granted PAPRSA's similar waiver application.

Sub-Zero is a family-owned company that has been headquartered in Madison, Wisconsin for over 65 years. Sub-Zero developed the niche market for customized built-in residential refrigeration and manufactures all our products in the United States, with factories in Wisconsin and Arizona. While technically not a ''small business'' using DOE's definition, Sub-Zero is a small producer of refrigeration products striving to compete in an age of large, multi-national manufacturers and is one of the few remaining U.S. companies that produce all of its products here in the U.S. The company's future viability is clearly threatened by this situation and we sincerely ask DOE to grant immediate relief.

Issues with the DOE Test Procedure

Sub-Zero is requesting a waiver to the test procedures for its hybrid models that consist of a combination of one or more refrigerated storage compartments and a wine storage compartment. While DOE considers such hybrid models as covered products, there is no current DOE test procedure appropriate to these hybrid models. Therefore, the current testing requirements do not measure energy usage in a manner that truly represents the energy-consumption characteristics of these products. Further, it is not even possible to test these models under the existing testing procedures. DOE fully recognizes these issues associated with testing hybrid wine products and has initiated a rulemaking to address these products in the future. Therefore Sub-Zero requests this waiver until such time as DOE's rulemaking is complete.

As explained in the Sanyo petition, wine connoisseurs recommend an average of 55–57 °F for the long term storage of wine, and Sub-Zero has also designed the wine storage compartments of its products with this ideal average temperature in mind. Since various wines have different ideal drinking temperatures, products are designed such that the wine storage compartment can achieve a range of temperatures above 39 °F. DOE's test procedures (10 CFR 430 Subpart B Appendix A) specify that energy consumption be determined at a compartment temperature of 39 °F and therefore cannot apply to a product that is designed to be incapable of achieving this temperature. Further, as described in the Sanyo petition, hybrid models will typically have door-opening usage aligned with household freezers and wine storage products. Thus, the K factor (correction factor) of .85 from CAN/CSA 300–08 6.3.1.2 and AHAM/ANSI HRF–1 should be used to determine energy consumption.

Proposed Modified Test Procedure

As in the two previously granted petitions, the wine storage compartment shall be tested at 55 °F.

Sub Zero shall use the K factor (correction factor) value of 0.85 when calculating the energy consumption of the models listed below.

The energy consumption is defined by the higher of the two values calculated by the following two formulas (according to 10 CFR Part 430, subpart B, Appendix A):

Energy consumption of the wine compartment:

$$E_{Wine} = ET1 + [(ET2 - ET1) \times (55\ °F - TW1)/(TW2 - TW1)] * 0.85$$

Energy consumption of the refrigerated compartment:

$$E_{Refrigerated\ Compartment} = ET1 + [(ET2 - ET1) \times (39\ °F - TRC1)/(TRC2 - TRC1)].$$

Affected Models

The basic models of Sub-Zero hybrid refrigerated storage-wine storage products affected are:

IW–30R

In conclusion, this is a critical issue for our company and we request that DOE expedite the handling of this petition for an interim and final waiver. Sub-Zero would be pleased to discuss this waiver petition with DOE and provide any additional information that the Department might require. We will also notify all manufacturers known to us of similar domestically marketed products of this waiver petition.

Sincerely,

Paul V. Sikir

Vice President of Design Engineering

Via email: *AS_Waiver_Requests@ee.doe.gov*

[FR Doc. 2014–22227 Filed 9–16–14; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. RF–042]

Petition for Waiver of GE Appliances From the Department of Energy Residential Refrigerator and Refrigerator-Freezer Test Procedure and Grant of Interim Waiver

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

ACTION: Notice of Petition for Waiver, Notice of Granting Application for Interim Waiver, and Request for Public Comments.

SUMMARY: This notice announces receipt of a petition for waiver from GE Appliances (GE) seeking an exemption from specified portions of the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of electric refrigerators and refrigerator-freezers. GE seeks to use an alternate test procedure to address certain issues involved in testing certain specific basic models identified in its petition that are equipped with dual-compressor systems that GE contends cannot be accurately tested using the currently applicable DOE test

procedure. DOE solicits comments, data, and information concerning GE's petition and its suggested alternate test procedure. Today's notice also grants GE with an interim waiver from the electric refrigerator-freezer test procedure, subject to use of the alternative test procedure set forth in this notice.

DATES: DOE will accept comments, data, and information with respect to the GE Petition until October 17, 2014.

ADDRESSES: You may submit comments, identified by case number ''RF–042,'' by any of the following methods:

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

• *Email: AS_Waiver_Requests@ee.doe.gov.* Include the case number [Case No. RF–042] in the subject line of the message.

• *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J/1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Please submit one signed original paper copy.

• *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Please submit one signed original paper copy.

Docket: For access to the docket to review the background documents relevant to this matter, you may visit the U.S. Department of Energy, 950 L'Enfant Plaza SW., Washington, DC 20024; (202) 586–2945, between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays. Available documents include the following items: (1) This notice; (2) public comments received; (3) the petition for waiver and application for interim waiver; and (4) prior DOE rulemakings regarding similar refrigerator-freezers. Please call Ms. Brenda Edwards at the above telephone number for additional information.

FOR FURTHER INFORMATION CONTACT:

Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Program, Mail Stop EE–2J, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. Email: *Bryan.Berringer@ee.doe.gov.*

Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–71, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0103. Telephone: (202) 586–8145. Email: *Michael.Kido@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975, as amended (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances, which includes the electric refrigerators and refrigerator-freezers that are the focus of this notice.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results that measure the energy efficiency, energy use, or estimated annual operating costs of a covered product, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for electric refrigerators and electric refrigerator-freezers is contained in 10 CFR part 430, subpart B, appendix A.

The regulations set forth in 10 CFR 430.27 contain provisions that enable a person to seek a waiver from the test procedure requirements for covered products. The DOE will grant a waiver if it is determined that the basic model for which the petition for waiver was submitted contains one or more design characteristics that prevents testing of the basic model according to the prescribed test procedures, or if the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(f)(2). Petitioners must include in their petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. The Assistant Secretary may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(f)(2). Waivers remain in effect pursuant to the provisions of 10 CFR 430.27(l).

The waiver process also allows the DOE to grant an interim waiver from test procedure requirements to manufacturers that have petitioned DOE for a waiver of such prescribed test procedures. 10 CFR 430.27(e)(2). Within one year of issuance of an interim waiver, DOE will either: (i) Publish in the **Federal Register** a determination on the petition for waiver; or (ii) publish in the **Federal Register** a new or amended test procedure that addresses the issues presented in the waiver. 10 CFR 430.27(h)(1). When DOE amends the test procedure to address the issues presented in a waiver, the waiver will automatically terminate on the date on which use of that test procedure is required to demonstrate compliance. 10 CFR 430.27(h)(2).

II. Petition for Waiver of Test Procedure

On June 27, 2014, GE submitted a petition for waiver from the test procedure applicable to residential electric refrigerators and refrigerator-freezers set forth in 10 CFR part 430, subpart B, appendix A. GE is seeking a waiver because it is developing new refrigerator-freezers that incorporate a dual-compressor design that it believes is not properly accounted for in DOE's amended test procedure published on April 21, 2014 (78 FR 22320). In its petition, GE seeks a waiver from the new DOE test procedure applicable to refrigerators and refrigerator-freezers under 10 CFR part 430 for two basic models of dual-compressor system products. Specifically, based upon the information provided by GE, these basic models demonstrate non-uniform cycling of their compressors, which prevents the verification of two criteria in the Appendix A test procedure—to ensure (a) that the first part of the test comprise a period of stable operation, and (b) that the second part of the test (used to measure the energy use contribution of the defrost cycle(s)) start and end during periods of stable operation.

DOE previously granted a similar waiver to GE through a subsequent Decision and Order (78 FR 38699 (June 27, 2013)) under Case No. RF–029 pertaining to 10 CFR part 430, subpart B, appendix A1. DOE also granted similar waivers to Sub-Zero (77 FR 5784 (February 6, 2012)), LG (77 FR 18327 (March 26, 2013)); and Samsung (78 FR 35899 (June 14, 2014)) and (79 FR 19884 (April 10, 2014)).

In its final rule published on April 21, 2014 (78 FR 22320), which amended the test procedure for refrigerators and refrigerator-freezers in Appendix A, DOE incorporated provisions to address the testing of products with multiple compressors, which were intended to obviate the need for waivers for multiple-compressor products such as the ones previously granted to GE and others, if these products are tested using the new Appendix A. However, in its petition for waiver, GE contends that due to certain characteristics of the basic models listed in the petition, the

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

Appendix A test procedure does not accurately measure the energy consumption of these basic models. Specifically, GE claims that requirements in the Appendix A test procedure—to ensure (a) that the first part of the test comprise a period of stable operation, and (b) that the second part of the test (used to measure the energy use contribution of the defrost cycle(s)) start and end during periods of stable operation—cannot be applied to these basic models, because their compressor cycles do not repeat uniformly, which is one of the assumptions built into the test procedure.

In lieu of using Appendix A, GE has submitted an alternate test procedure to account for the energy consumption of its refrigerator-freezer models with dual compressors. GE's alternative test is essentially the same as the test for multiple-compressor products with automatic defrost in section 4.2.3 of Appendix A, except that (a) the test period for the first part of the test would not be required to meet the requirements for evaluation of stable operation provided in section 1.22 of Appendix A, (b) the second part of the test would have a minimum duration—this would be at least 24 hours, unless a second defrost (other than the target defrost captured within the test period) occurs before the end of 24 hours, in which case, the test period duration would be at least 18 hours, (c) the start of the second part of the test would occur ''at the end of a regular freezer compressor on-cycle after the previous defrost occurrence'' rather than during a period of stable operation as defined in section 1.22 of Appendix A, and (d) the end of the second part of the test would occur ''at the end of a freezer compressor on-cycle before the next defrost occurrence'' rather than during a period of stable operation as defined in section 1.22 of Appendix A.

GE believes its alternate test procedure will allow for the accurate measurement of the energy use of these products, which GE contends is not achieved by the current Appendix A test procedure. Specifically, due to the non-uniform compressor cycles of this product, which prevent consistent application of the requirements provided in section 1.22 of Appendix A for evaluating the stable operation of a tested unit, the alternative test would not explicitly impose these stable operation requirements. Based on the information provided by GE, the variation in test results associated with different selections of test periods would be insignificant as long as the test starts after the 24-hour stabilization period, which is required both by the Appendix A test procedure and the alternative test procedure suggested by GE. Further, GE's alternative test's minimum duration for the second part of the test would also not significantly affect the results.

Although not explicitly stated in the alternative test method, or in GE's petition, DOE understands the term ''stable operation'' used in the petition to have a different meaning than the same term as used in Appendix A, since the alternative test method does not use the same stability criteria. In this case, DOE understands ''stable operation'' to mean operation after steady-state conditions have been achieved but excluding any defrost cycles or events associated with a defrost cycle, such as precooling or recovery, and that this term would apply in the same way for the first and second parts of the test. DOE understands the term also to mean operation in which the average rate of change of compartment temperatures is zero or very close to zero—the temperatures may fluctuate around representative average temperatures as the compressors cycle on and off, but over several compressor cycles, these average compartment temperatures would not significantly change. The key difference in this interpretation of stable operation as compared with the definition in Appendix A is that it involves neither assignment of a specific maximum rate of change of the average temperature nor specification of a method to verify that operation is stable. DOE further notes that this particular use of the term ''stable operation'' is limited solely to the basic models that are the subject of this waiver, as DOE has verified using information provided by GE about the actual operational characteristics of these models that such a test is appropriate in this limited case.

GE also requests an interim waiver from the existing DOE test procedure. An interim waiver may be granted if it is determined that the applicant will experience economic hardship if the application for interim waiver is denied, if it appears likely that the petition for waiver will be granted, and/or the Assistant Secretary determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. See 10 CFR 430.27(e)(2).

As noted previously, DOE recently addressed multiple compressor products in its April 21, 2014 final rule. In considering GE's petition for waiver, DOE sought additional details about the specific operating characteristics of the products that are the subject of the petition in order to determine whether they cannot be tested using the section of the amended test procedure that was adopted specifically to address such products. GE indicated in its petition that the compressors serving the fresh food and freezer compartments of these models have non-synchronous cycles that do not repeat uniformly, which prevents these models from achieving the temperature stability conditions specified in the Appendix A test procedure. To better understand GE's claim and the issues raised in the petition, DOE requested data regarding the operational characteristics of these products, which GE provided. DOE was specifically concerned that the use of GE's proposed test method could present the risk of truncation error in the energy use measurement or the possibility of variation between separate tests of the same unit due to temperature drift in the compartments or differences in the operational state of the compressors at the beginning or end of the test period. The data provided by GE indicated that these models demonstrate non-uniform cycling that makes direct use of the Appendix A requirements for evaluating temperature stability problematic—these requirements may be appropriate for some operating modes of the basic models, but not for other operating modes. The data also showed that the use of GE's proposed test method is unlikely to result in significant variation in test measurements for these particular models on the basis of the selected test period. DOE notes, however, that these conclusions are limited to the models listed in GE's petition based upon the data provided by GE and that other basic models may demonstrate operating characteristics that differ from these models as to make this alternative test method inappropriate for measuring their energy use. Should DOE receive petitions for waiver requesting use of the alternative test identified in this notice for other basic models, DOE may request from the manufacturer information about the operation of those basic models that would demonstrate that their energy use can be accurately measured using this alternative test and that such models cannot in fact be tested using the currently assigned test method in Appendix A.

For the reasons discussed above, DOE has determined that use of the currently required DOE test procedure for the specific GE models identified in its petition would provide test results so unrepresentative as to provide materially inaccurate comparative data. Therefore, it appears likely that GE's

petition for waiver will be granted. For these same reasons, DOE has also determined that it is desirable for public policy reasons to grant GE immediate relief pending a determination of the petition for waiver. DOE grants GE's application for interim waiver from testing of the two basic models of refrigerator-freezers identified in petition for waiver and request for interim waiver.

Therefore, *it is ordered that:*

The application for interim waiver filed by GE is hereby granted for GE's refrigerator-freezer product lines that incorporate dual compressors subject to the following specifications and conditions below. GE shall be required to test and rate its refrigerator-freezer product line containing dual compressors according to the alternate test procedure as set forth in section III, ''Alternate test procedure.''

The interim waiver applies to the following basic models:

ZIC30*****
ZIK30*****

DOE makes decisions on waivers and interim waivers for only those models specifically set out in the petition, not future models that may be manufactured by the petitioner. GE may submit a new or amended petition for waiver and request for grant of interim waiver, as appropriate, for additional models of refrigerator-freezers for which it seeks a waiver from the DOE test procedure. In addition, DOE notes that granting of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429.

Further, this interim waiver is conditioned upon the presumed validity of statements, representations, and documents provided by the petitioner. DOE may revoke or modify this interim waiver at any time upon a determination that the factual basis underlying the petition for waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic models' true energy consumption characteristics.

III. Alternate Test Procedure

EPCA requires that manufacturers use DOE test procedures when making representations about the energy consumption and energy consumption costs of products covered by the statute. (42 U.S.C. 6293(c)) Consistent representations are important for manufacturers to use in making representations about the energy efficiency of their products and to demonstrate compliance with applicable DOE energy conservation standards. Pursuant to its regulations applicable to waivers and interim waivers from applicable test procedures at 10 CFR 430.27, DOE will consider setting an alternate test procedure for GE in a subsequent Decision and Order.

During the period of the interim waiver granted in this notice, GE shall test the products listed above according to the test procedures for residential electric refrigerator-freezers prescribed by DOE at 10 CFR part 430, subpart B, appendix A, except that, for the GE basic models listed above only, the energy consumption shall be determined as follows:

$$ET = (1440 \text{ x } EP1/T1) + \sum_{i=1}^{D} [(EP2_i - (EP1 \text{ x } T2_i/T1)) \text{ x } (12/CT_i)]$$

Where:

— ET is the test cycle energy (kWh/day);
— 1440 = number of minutes in a day
— EP1 is the dual compressor energy expended during the first part of the test (If at least one compressor cycles, the test period for the first part of the test shall include a whole number of complete primary compressor cycles comprising at least 24 hours of stable operation, unless a defrost occurs prior to completion of 24 hours of stable operation, in which case the first part of the test shall include a whole number of complete primary compressor cycles comprising at least 18 hours of stable operation);
—T1 is the length of time for EP1 (minutes);
—D is the total number of compartments with distinct defrost systems;
—i is the variable that can equal to 1,2 or more that identifies the compartment with distinct defrost system;
—EP2i is the total energy consumed during the second (defrost) part of the test being conducted for compartment i. (kWh);
—T2i is the length of time (minutes) for the second (defrost) part of the test being conducted for compartment i.
—12 = conversion factor to adjust for a 50% run-time of the compressor in hours/day
—CTi is the compressor on time between defrosts for only compartment i. CTi for compartment i with long time automatic defrost system is calculated as per 10 CFR Part 430, Subpart B, Appendix A clause 5.2.1.2. CTi for compartment i with variable defrost system is calculated as per 10 CFR part 430 subpart B, Appendix A clause 5.2.1.3. (hours rounded to the nearest tenth of an hour).

Stabilization:

The test shall start after a minimum 24 hours stabilization run for each temperature control setting.

Test Period for EP2i, T2i:

EP2i includes precool, defrost, and recovery time for compartment i, as well as sufficient dual compressor cycles to allow T2i to be at least 24 hours, unless a defrost occurs prior to completion of 24 hours, in which case the second part of the test shall include a whole number of complete primary compressor cycles comprising at least 18 hours. The test period shall start at the end of a regular freezer compressor on-cycle after the previous defrost occurrence (refrigerator or freezer). The test period also includes the target defrost and following freezer compressor cycles, ending at the end of a freezer compressor on-cycle before the next defrost occurrence (refrigerator or freezer).

Test Measurement Frequency

Measurements shall be taken at regular interval not exceeding 1 minute.

* * * * *

IV. Summary and Request for Comments

Through today's notice, DOE grants GE an interim waiver from the specified portions of the test procedure applicable to certain basic models of refrigerator-freezers with dual compressors and announces receipt of GE's petition for waiver from those same portions of the test procedure. DOE is publishing GE's petition for waiver pursuant to 10 CFR 430.27(b)(1)(iv). The petition includes a suggested alternate test procedure to determine the energy consumption of GE's specified basic models of refrigerator-freezers with dual compressors. GE is required to follow this alternate procedure as a condition of its interim waiver, and DOE is considering including this alternate procedure in its subsequent Decision and Order.

DOE solicits comments from interested parties on all aspects of the petition, including the suggested alternate test procedure and calculation

methodology. Pursuant to 10 CFR 430.27(b)(1)(iv), any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner is: Earl F. Jones, Senior Counsel, GE Appliances, Appliance Park 2–225, Louisville, KY 40225. All submissions received must include the agency name and case number for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

Issued in Washington, DC, on September 10, 2014.

Kathleen B. Hogan,

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

U.S. Department of Energy

Application for Interim Waiver and Petition for Waiver, 10CFR430, Subpart B, Appendix A1-Uniform Test Method for Measuring the Energy Consumption of Refrigerator-freezers

Case No. Non-Confidential Version

Submitted by: Earl F. Jones Senior Counsel, GE Appliances, Appliance Park 2–225, Louisville, KY 40225, *earl.jones@ge.com*, 502–452–3164 (voice), 502–452–0395 (fax).

U.S. Department of Energy Application for Interim Waiver and Petition for Waiver, 10CFR430, Subpart B, Appendix A—Uniform Test Method for Measuring Refrigerator-Freezers

I. Introduction

GE Appliances, an operating division of General Electric Co., (''GE'') is a leading manufacturer and marketer of household appliances, including, as relevant to this proceeding, refrigerator-freezers (''refrigerators''), files this Petition for Waiver and Application for Interim Waiver (collectively, ''Petition''). On May 2, 2013, the Assistant Secretary granted an interim waiver [2] and on June 27 the final waiver [3] pursuant to GE's February 28 petition advising the Department that the energy consumption of GE's new dual compressor refrigerator could not be accurately measured using the test procedure set forth in 430 Subpart B, Appendix A1. GE continued to test the product under the waiver-approved test procedure. In issuing the new refrigerator test procedure on April 21, 2014,[4] the Assistant Secretary nullified all Appendix A1 waivers, including the one granted to GE. The Department's decision was explained as follows:

After DOE grants a waiver, the agency must, pursuant to its waiver provisions, initiate a rulemaking to amend its regulations to eliminate the continued need for the waiver. 10 CFR 430.27 (m). This final rule addresses this requirement for the Sub-Zero waiver by amending Appendix A to include a test procedure for multiple-compressor products that is based on the Sub-Zero waiver procedure.

The Sub-Zero, Samsung, LG, and GE waivers for multiple-compressor products will terminate on September 15, 2014, the same date that manufacturers must use the test procedures in Appendix A for testing.[5]

The conclusion that GE can use the Appendix A test procedure to accurately measure energy consumption of the new 2014 models of the product that was previously covered by waiver is, unfortunately, erroneous. GE has made this point to DOE consistently and on multiple occasions: First, in the 2013 waiver petition, next, at the NOPR stakeholders meeting held on July 25, 2013,[6] and, finally, in its NOPR comments.[7]

GE's representative at the stakeholders meeting most clearly described the operation of GE's refrigerator:

MR. BROWN: Bill with GE Appliances.

Again, *I would reiterate that stability for multiple compressor products is not the same as stability for a single compressor product.* If you did achieve .042 degrees per hour, it may be more due to luck than actually the product [being] what you'd consider to be stable. Again, with both compressors operating on their own schedule, with their own controls, you may see that the fresh food [temperature] is stable and the freezer's not. Then you'd keep going further and the freezer is stable and the fresh food is not. So that's again why we chose just to use a longer period of time instead of trying to invoke this .042 degrees per hour.

* * * * *

So again, I would reiterate for multiple compressor products, that . . . looking at stability with a strict .042 degrees per hour like you would on a single compressor product is . . . just not applicable to the multiple compressor product.

MR. BROOKMAN: Okay, thank you. Lucas.

MR. ADIN: Lucas Adin, DOE.

Just a quick follow-up question for clarification. So it sounds like, based on your comment Bill, that a single stability criteria for multiple compressor products may not be appropriate because of how they operate. It's different from single compressor products.

But is it reasonable to say that multiple compressor products do get to some form of stability that is, you know, unique to perhaps each individual product, but at least it's something that you know will repeat consistently over time, or is it something that you can actually identify?

MR. BROWN: Yes. This is Bill with GE again.

You may see a repeating operation in the freezer, and you may see it in the fresh food. But you'd see it on different time frames. So where a freezer temperature may be high, the fresh food may be low, and you know, if you just picture a sine curve, these are sine curves that are out of phase with one another.

So you would never get to a point, or you may never get a point where you've got both of these meeting this type of stability criteria at the same time. So instead of trying to search through the data, to find if there just happens to be [a] place where this occurs, we just chose in our waiver to . . . use a long period of time [8] (emphasis supplied).

One reason GE's product does not achieve stability as described in Appendix A is that it has two compartments—one for fresh food and one for frozen foods—but unlike what we understand to be the Sub-Zero design, the GE compressors are not designed to synchronize such that both compartments achieve temperature stability at the same time. Stated another way, it is not designed such that . . . ''the compartment temperature averages for the first and last complete compressor cycles [of each compressor system can] lie completely within the second part of the test [and] within 0.5 °F (0.3 °C) of the average compartment temperature measured for the first part of the test.'' Appendix A, 4.2.3.4.2, *paraphrased.* (See below for full section.) [9]

While the Appendix A test procedure does adopt the definition of steady state condition that was first approved in the Sub-Zero waiver and subsequently GE's waiver, it imposes an unachievable goal for GE by requiring that a 0.5 °F (0.3 °C) steady state condition be achieved by comparing the compartment temperatures during a single freezer compressor cycle to the average compartment temperatures achieved during 24 hours of fresh food and freezer compressor cycles. This can only be done if the cycles repeat uniformly. As described above and illustrated below, this does not occur with the GE dual compressor refrigerator.

The non-synchronous nature of the compressors' operation is depicted in

[2] 78 FR 25724 et seq.

[3] 78 FR 38699 et seq.

[4] 79 FR 22320 et seq.

[5] 79 FR at 22323.

[6] EERE–2012–BT–TP–0016–0023, p. 85–88.

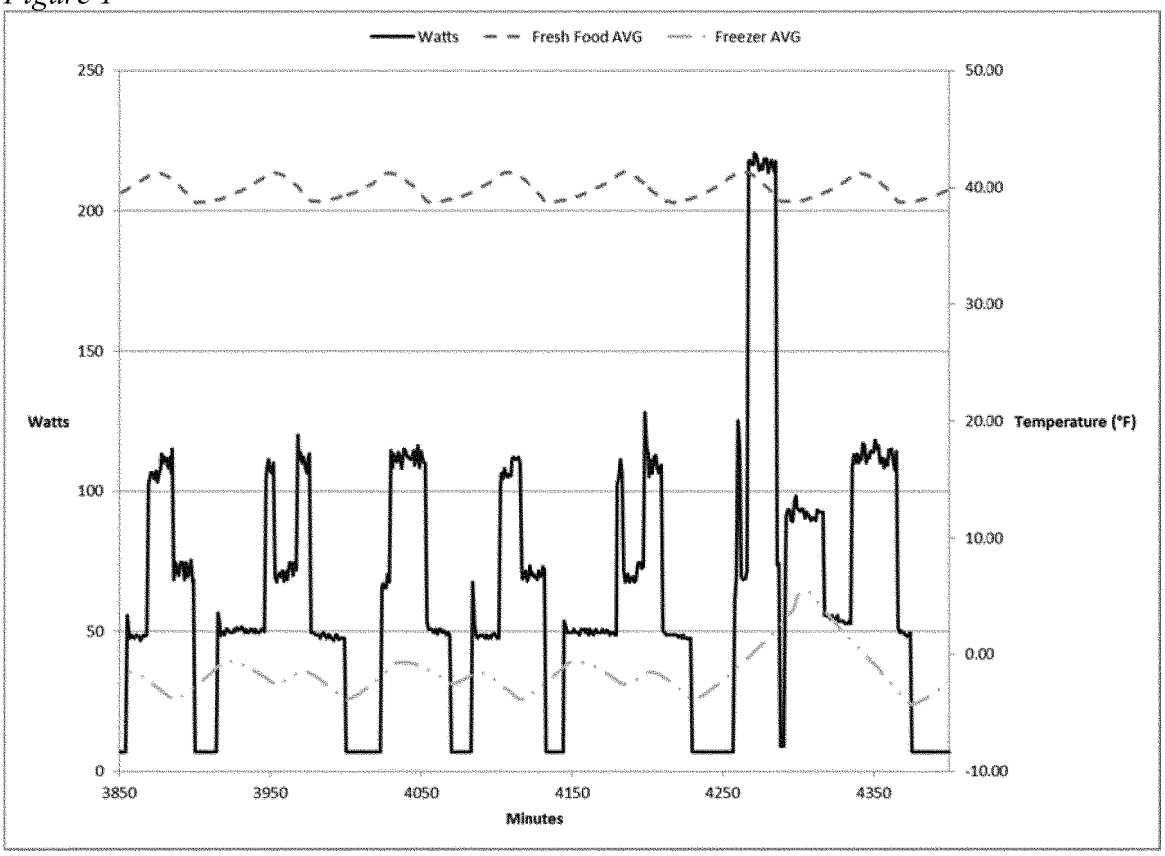
[7] 79 FR at 22328 and 22329.

[8] EERE–2012–BT–TP–0016–0023, at p. 88.

[9] For each compressor system, the compartment temperature averages for the first and last complete compressor cycles that lie completely within the second part of the test must be within 0.5 °F (0.3 °C) of the average compartment temperature measured for the first part of the test.

the following plot of Watts and compartment temperatures versus time.

Figure 1



As is apparent from the above, at no time during the freezer compressor cycles before the defrost (at appx. 4270 mins.) are the fresh food and freezer temperatures in phase: While the fresh food temperature cycles repeat with each fresh food compressor cycle, the freezer temperature cycles repeat with every two freezer compressor cycles. Thus, the Appendix A assumption that the cycles are uniform and in phase does not hold for these GE models. The only relevant impact of this non-uniformity is the confounding effect on making the required calculation. The product provides improved consumer utility because it provides for better temperature and humidity control.[10]

II. GE's Proposed Waiver

Based on the above GE requests that the Assistant Secretary grant it a waiver from the Appendix A test procedure and allow GE to test its refrigerator-freezer model pursuant to the modified procedure previously approved in 78 FR 38699, case No. RF–029, and submitted herewith as Attachment 1. This request is filed pursuant to 10 C.F.R. § 430.27 [11] as the test procedure does not allow the energy used by GE's new 2014 model.

The waiver should continue in effect until DOE amends the test procedure to accommodate such products. GE also requests that the Department grant an interim waiver to test and rate the models listed on Attachment 2.

We would be pleased to discuss this request with DOE and provide further information as needed.

GE requests expedited treatment of the Petition and Application. It is critical that the Waiver request be acted on, and hopefully granted, in July 2014 in order to provide sufficient time for final design and testing by the September 15, 2014 effective date of the energy efficiency standard.

I hereby certify that all manufacturers of domestically marketed units of the same product type have been notified of this Petition and Application, list of which is found in Attachment 3, hereto.

Respectfully submitted,

Earl F. Jones, Senior Counsel and Authorized Representative of GE Appliances

Attachment 1

[10] GE's new models provide the additional environmental benefit of not using HFC refrigerants: Instead the two compressors use isobutane, which has a GWP of two orders of magnitude less than HFC–134a.

[11] The Department's regulations provide that the Assistant Secretary will grant a Petition upon ''determin[ation] that the basic model for which the waiver was requested contains a design characteristic which either prevents testing of the basic model according to the prescribed test procedures, or the prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data.'' 10 CFR § 430.27(l). GE requests that the Assistant Secretary grant this Petition on both grounds.

$$ET = (1440 \text{ x } EP1/T1) + \sum_{i=1}^{D} [(EP2_i - (EP1 \text{ x } T2_i/T1)) \text{ x } (12/CT_i)]$$

Where:

—ET is the test cycle energy (kWh/day);

—1440 = number of minutes in a day

—EP1 is the dual compressor energy expended during the first part of the test (If at least one compressor cycles, the test period for the first part of the test shall include a whole number of complete primary compressor cycles comprising at least 24 hours of stable operation, unless a defrost occurs prior to completion of 24 hours of stable operation, in which case the first part of the test shall include a whole number of complete primary compressor cycles comprising at least 18 hours of stable operation);

—T1 is the length of time for EP1 (minutes);

—D is the total number of compartments with distinct defrost systems;

—i is the variable that can equal to 1,2 or more that identifies the compartment with distinct defrost system;

—$EP2_i$ is the total energy consumed during the second (defrost) part of the test being conducted for compartment i. (kWh);

—$T2_i$ is the length of time (minutes) for the second (defrost) part of the test being conducted for compartment i.

—12 = conversion factor to adjust for a 50% run-time of the compressor in hours/day

—CT_i is the compressor-on time between defrosts for only compartment i. CT_i for compartment i with long time automatic defrost system is calculated as per 10 CFR Part 430, Subpart B, Appendix A clause 5.2.1.2. CT_i for compartment i with variable defrost system is calculated as per 10 CFR part 430 subpart B, Appendix A clause 5.2.1.3. (hours rounded to the nearest tenth of an hour).

Stabilization:

The test shall start after a minimum 24 hours stabilization run for each temperature control setting.

Test Period for $EP2_i$, $T2_i$:

$EP2_i$ includes precool, defrost, and recovery time for compartment i, as well as sufficient dual compressor cycles to allow $T2_i$ to be at least 24 hours, unless a defrost occurs prior to completion of 24 hours, in which case the second part of the test shall include a whole number of complete primary compressor cycles comprising at least 18 hours. The test period shall start at the end of a regular freezer compressor on-cycle after the previous defrost occurrence (refrigerator or freezer). The test period also includes the target defrost and following freezer compressor cycles, ending at the end of a freezer compressor on-cycle before the next defrost occurrence (refrigerator or freezer).

Test Measurement Frequency

Measurements shall be taken at regular intervals not exceeding 1 minute.

* * * * *

Attachment 2

ZIC30*****

ZIK30*****

[FR Doc. 2014–22228 Filed 9–16–14; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP14–548–000]

Natural Gas Pipeline Company of America LLC ; Notice of Application

Take notice that on September 2, 2014, Natural Gas Pipeline Company of America LLC (NGPL), 3250 Lacey Road, Downers Grove, Illinois 60615, filed an application pursuant to section 7(b) of the Natural Gas Act (NGA) for authorization to abandon by sale to Devon Gas Services, L.P. approximately 96.28 miles of pipeline; 5,325 horsepower of compression; and various taps and meters in Texas and Oklahoma, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions concerning this application may be directed to Bruce H. Newsome, Vice President, Natural Gas Pipeline Company of America LLC, 3250 Lacey Road, Suite 700, Downers Grove, Illinois 60515, by telephone at (630) 725–3070, or by email at *bruce_newsome@kindermorgan.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice, the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit seven copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings

associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and five copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern Time on October 1, 2014.

Dated: September 10, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–22097 Filed 9–16–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2355–000]

Exelon Generation Company, LLC; Notice of Authorization for Continued Project Operation

On August 29, 2012, the Exelon Generation Company, LLC, licensee for the Muddy Run Pumped Storage Project, filed an Application for a New License pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. The Muddy Run Pumped Storage Project is located on Muddy Run, a tributary to the Susquehanna River, in Lancaster and York, Counties, Pennsylvania.

The license for Project No. 2355 was issued for a period ending August 31, 2014. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2355 is issued to the licensee for a period effective September 1, 2014 through August 31, 2015 or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before August 31, 2015, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that the licensee, Exelon Generation Company, LLC, is authorized to continue operation of the Muddy Run Pumped Storage Project, until such time as the Commission acts on its application for a subsequent license.

Dated: September 10, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–22101 Filed 9–16–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 405–000]

Exelon Generation Company, LLC; Notice of Authorization for Continued Project Operation

On August 31, 2012 the Exelon Generation Company, LLC, licensee for the Conowingo Hydroelectric Project, filed an Application for a New License pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. The Conowingo Hydroelectric Project is located on the Susquehanna River, in Hartford and Cecil Counties, Maryland and Lancaster and York Counties, Pennsylvania.

The license for Project No. 405 was issued for a period ending September 1, 2014. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 405 is issued to the licensee for a period effective September 2, 2014 through September 1, 2015 or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before September 1, 2015, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that the licensee, Exelon Generation Company, LLC, is authorized to continue operation of the Conowingo Hydroelectric Project, until such time as the Commission acts on its application for a subsequent license.

Dated: September 10, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–22099 Filed 9–16–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1888–000]

York Haven Power Company, LLC; Notice of Authorization for Continued Project Operation

On August 30, 2012, the York Haven Power Company, LLC, licensee for the York Haven Hydroelectric Project, filed an Application for a New License pursuant to the Federal Power Act (FPA) and the Commission's regulations thereunder. The York Haven Hydroelectric Project is located on the Susquehanna River, in Dauphin, Lancaster and York, Counties, Pennsylvania.

The license for Project No. 1888 was issued for a period ending September 1, 2014. Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 1888 is issued to the licensee for a period effective September 2, 2014 through September 1, 2015 or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before September 1, 2015, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that the licensee, York Haven Power Company, LLC, is authorized to continue operation of the York Haven Hydroelectric Project, until such time as the Commission acts on its application for a subsequent license.

Dated: September 10, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–22100 Filed 9–16–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: PR14–52–000.
Applicants: Acadian Gas Pipeline System.
Description: Tariff filing per 284.123(b)(2) + (g): Petition for Rate Approval to be effective 9/8/2014; TOFC: 1310.
Filed Date: 9/8/14.
Accession Number: 201400908–5115.
Comments Due: 5 p.m. ET 9/29/14.
284.123(g) Protests Due: 5 p.m. ET 11/7/14.

Docket Numbers: PR14–53–000.
Applicants: Cypress Gas Pipeline, LLC.
Description: Tariff filing per 284.123(b)(2) + (g): Petition for Rate Approval to be effective 9/8/2014; TOFC: 1310.
Filed Date: 9/8/14.
Accession Number: 201400908–5119.
Comments Due: 5 p.m. ET 9/29/14.
284.123(g) Protests Due: 5 p.m. ET 11/7/14.

Docket Numbers: RP14–1256–000.
Applicants: Transcontinental Gas Pipe Line Company.
Description: § 4(d) rate filing per 154.204: Cash Out Reference Spot Price for Zone 2 to be effective 9/15/2014.
Filed Date: 9/9/14.
Accession Number: 20140909–5163.
Comments Due: 5 p.m. ET 9/22/14.

Docket Numbers: RP14–1257–000.
Applicants: Gulf South Pipeline Company, LP.
Description: § 4(d) rate filing per 154.204: Amendment to Neg Rate Agmt (FPL 40097–6) to be effective 9/1/2014.
Filed Date: 9/10/14.
Accession Number: 20140910–5024.
Comments Due: 5 p.m. ET 9/22/14.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified date(s). Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: September 10, 2014.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2014–22181 Filed 9–16–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC14–139–000.
Applicants: Spring Canyon Energy LLC, Spring Canyon Energy II LLC, Spring Canyon Energy III LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act and Request for Waivers and Expedited Action of Spring Canyon Energy LLC, et. al.
Filed Date: 9/10/14.
Accession Number: 20140910–5054.
Comments Due: 5 p.m. ET 10/1/14.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG14–102–000.
Applicants: Hoopeston Wind, LLC.
Description: Self-Certification of EG or FC of Hoopeston Wind, LL.
Filed Date: 9/10/14.
Accession Number: 20140910–5167.
Comments Due: 5 p.m. ET 10/1/14.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER14–2176–001.
Applicants: Midcontinent Independent System Operator, Inc.

Description: Compliance filing per 35: 2014–09–10_SA 6500 Escanaba SSR Compliance Filing to be effective 6/15/2014.

Filed Date: 9/10/14.

Accession Number: 20140910–5153.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: ER14–2180–001.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Compliance filing per 35: 2014–09–10 Schedule 43 Escanaba Compliance Filing to be effective 6/15/2014.

Filed Date: 9/10/14.

Accession Number: 20140910–5155.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: ER14–2432–001.

Applicants: Southern California Edison Company.

Description: Tariff Amendment per 35.17(b): Amended LGIA with SP Antelope DSR LLC to be effective 7/16/2014.

Filed Date: 9/10/14.

Accession Number: 20140910–5146.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: ER14–2820–001.

Applicants: Spring Canyon Energy II LLC.

Description: Tariff Amendment per 35.17(b): Supplement to Market-Based Rate Application to be effective 9/30/2014.

Filed Date: 9/10/14.

Accession Number: 20140910–5058.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: ER14–2822–000.

Applicants: PJM Interconnection, LLC.

Description: Tariff Withdrawal per 35.15: Notice of Cancellation of Original Service Agreement No. 3529; Queue No. Y2–037 to be effective 9/10/2014.

Filed Date: 9/10/14.

Accession Number: 20140910–5064.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: ER14–2823–000.

Applicants: Double C Generation Limited Partnership.

Description: § 205(d) rate filing per 35.13(a)(2)(iii): Notice of Succession to be effective 12/8/2011.

Filed Date: 9/10/14.

Accession Number: 20140910–5162.

Comments Due: 5 p.m. ET 10/1/14.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES14–52–000.

Applicants: Consolidated Edison Company of New York, Inc.

Description: Application of Consolidated Edison Company of New York, Inc.

Filed Date: 9/10/14.

Accession Number: 20140910–5053.

Comments Due: 5 p.m. ET 10/1/14.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: September 10, 2014.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2014–22180 Filed 9–16–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC14–138–000.

Applicants: Montauk Energy Holdings, LLC, Bowerman Power LFG, LLC, McKinney LFG, LLC, Monmouth Energy, Inc., TX LFG Energy, LP, Toyon Landfill Gas Conversion, LLC, Tulsa LFG, LLC.

Description: Application for Authorization under Section 203 of the Federal Power Act; Request for Expedited Consideration; and Request for Confidential Treatment of Montauk Energy Holdings, LLC, et. al.

Filed Date: 9/9/14.

Accession Number: 20140909–5224.

Comments Due: 5 p.m. ET 9/30/14.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG14–97–000.

Applicants: Spring Canyon Interconnection LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Spring Canyon Interconnection LLC.

Filed Date: 9/10/14.

Accession Number: 20140910–5030.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: EG14–98–000.

Applicants: Spring Canyon Energy III LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Spring Canyon Energy III LLC.

Filed Date: 9/10/14.

Accession Number: 20140910–5031.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: EG14–99–000.

Applicants: Spring Canyon Energy II LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status Spring Canyon Energy II LLC.

Filed Date: 9/10/14.

Accession Number: 20140910–5033.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: EG14–100–000.

Applicants: Spring Canyon Energy LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Spring Canyon Energy LLC.

Filed Date: 9/10/14.

Accession Number: 20140910–5034.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: EG14–101–000.

Applicants: Seiling Wind Interconnection Services, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Seiling Wind Interconnection Services, LLC.

Filed Date: 9/10/14.

Accession Number: 20140910–5036.

Comments Due: 5 p.m. ET 10/1/14.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–1302–001.

Applicants: Southern California Edison Company.

Description: Compliance filing per 35: SCE Compliance Filing for Nevada Hydro Settlement to be effective 8/11/2012.

Filed Date: 9/8/14.

Accession Number: 20140908–5000.

Comments Due: 5 p.m. ET 9/29/14.

Docket Numbers: ER14–2808–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Supplemental Information/Request of Midcontinent Independent System Operator, Inc.

Filed Date: 9/9/14.

Accession Number: 20140909–5226.

Comments Due: 5 p.m. ET 9/30/14.

Docket Numbers: ER14–2815–000.

Applicants: Southern California Edison Company.

Description: § 205(d) rate filing per 35.13(a)(2)(iii): First Amended LGIA for

the Rising Tree Wind Farm Project to be effective 9/11/2014.

Filed Date: 9/10/14.

Accession Number: 20140910–5000.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: ER14–2816–000.

Applicants: Spring Canyon Energy LLC.

Description: Baseline eTariff Filing per 35.1: Filing of Assignment, Co-Tenancy, and Shared Facilities Agreement to be effective 9/15/2014.

Filed Date: 9/10/14.

Accession Number: 20140910–5028.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: ER14–2817–000.

Applicants: Spring Canyon Energy II LLC.

Description: Baseline eTariff Filing per 35.1: Filing of Assignment, Co-Tenancy, and Shared Facilities Agreement to be effective 9/15/2014.

Filed Date: 9/10/14.

Accession Number: 20140910–5029.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: ER14–2818–000.

Applicants: Spring Canyon Interconnection LLC.

Description: Baseline eTariff Filing per 35.1: Filing of Assignment, Co-Tenancy, and Shared Facilities Agreement to be effective 9/15/2014.

Filed Date: 9/10/14.

Accession Number: 20140910–5032.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: ER14–2819–000.

Applicants: Spring Canyon Energy III LLC.

Description: Baseline eTariff Filing per 35.1: Filing of Assignment, Co-Tenancy, and Shared Facilities Agreement to be effective 9/15/2014.

Filed Date: 9/10/14.

Accession Number: 20140910–5035.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: ER14–2820–000.

Applicants: Spring Canyon Energy II LLC.

Description: Initial rate filing per 35.12 Application for Market-Based Rate Authorization to be effective 9/30/2014.

Filed Date: 9/10/14.

Accession Number: 20140910–5037.

Comments Due: 5 p.m. ET 10/1/14.

Docket Numbers: ER14–2821–000.

Applicants: Spring Canyon Energy III LLC.

Description: Initial rate filing per 35.12 Application for Market-Based Rate Authorization to be effective 10/20/2014.

Filed Date: 9/10/14.

Accession Number: 20140910–5038.

Comments Due: 5 p.m. ET 10/1/14.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: September 10, 2014.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2014–22179 Filed 9–16–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC14–136–000.

Applicants: JPM Capital Corporation, FC Energy Finance I, Inc.

Description: Application for Disposition of Facilities of JPM Capital Corporation, et al.

Filed Date: 9/8/14.

Accession Number: 20140908–5230.

Comments Due: 5 p.m. ET 9/29/14.

Docket Numbers: EC14–137–000.

Applicants: Origin Wind Energy, LLC, Goodwell Wind Project, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act for the Disposition of Jurisdictional Facilities, Request for Expedited Consideration and Confidential Treatment of Origin Wind Energy, LLC, et al.

Filed Date: 9/8/14.

Accession Number: 20140908–5233.

Comments Due: 5 p.m. ET 9/29/14.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG14–96–000.

Applicants: Tonopah Solar Energy, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Tonopah Solar Energy, LLC.

Filed Date: 9/9/14.

Accession Number: 20140909–5033.

Comments Due: 5 p.m. ET 9/30/14.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–3417–007*; ER10–2895–011; ER14–1964–002; ER13–2143–004; ER10–3167–003; ER13–203–003; ER11–2292–011; ER11–3942–010; ER11–2293–011; ER10–2917–011; ER11–2294–010; ER12–2447–009; ER13–1613–004; ER10–2918–012; ER12–199–010; ER10–2920–011; ER11–3941–009; ER10–2921–011; ER10–2922–011; ER13–1346–003; ER10–2966–011; ER11–2383–005; ER10–3178–004.*

Applicants: Alta Wind VIII, LLC, Bear Swamp Power Company LLC, BIF II Safe Harbor Holdings, LLC, Black Bear Development Holdings, LLC, Black Bear Hydro Partners, LLC, Black Bear SO, LLC, Brookfield Energy Marketing Inc., Brookfield Energy Marketing LP, Brookfield Energy Marketing US LLC, Brookfield Power Piney & Deep Creek LLC, Brookfield Renewable Energy Marketing US, Brookfield Smoky Mountain Hydropower LLC, Brookfield White Pine Hydro LLC, Carr Street Generating Station, L.P., Coram California Development, L.P., Erie Boulevard Hydropower, L.P., Granite Reliable Power, LLC, Great Lakes Hydro America LLC, Hawks Nest Hydro LLC, Mesa Wind Power Corporation, Rumford Falls Hydro LLC, Safe Harbor Water Power Corporation, Windstar Energy, LLC.

Description: Notice of Change in Status of the Brookfield Companies.

Filed Date: 9/8/14.

Accession Number: 20140908–5241.

Comments Due: 5 p.m. ET 9/29/14.

Docket Numbers: ER13–343–003.

Applicants: CPV Maryland, LLC.

Description: Notice of Change in Status of CPV Maryland, LLC.

Filed Date: 9/8/14.

Accession Number: 20140908–5219.

Comments Due: 5 p.m. ET 9/29/14.

Docket Numbers: ER14–2805–000.

Applicants: Public Service Company of Colorado.

Description: § 205(d) rate filing per 35.13(a)(2)(iii): 2014–09–08_NSP–WI Muni Utilities–T–L NOC Filing to be effective 9/1/2014.

Filed Date: 9/8/14.

Accession Number: 20140908–5184.

Comments Due: 5 p.m. ET 9/29/14.

Docket Numbers: ER14–2806–000.

Applicants: PJM Interconnection, LLC.

Description: § 205(d) rate filing per 35.13(a)(2)(iii): Original Service Agreement No. 3936; Queue No. Z2–017 to be effective 8/7/2014.

Filed Date: 9/8/14.

Accession Number: 20140908–5201.
Comments Due: 5 p.m. ET 9/29/14.

Docket Numbers: ER14–2807–000.
Applicants: Southern California Edison Company.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Distribution Service Agreement with US Topco Energy, Inc. to be effective 11/9/2014.
Filed Date: 9/9/14.
Accession Number: 20140909–5001.
Comments Due: 5 p.m. ET 9/30/14.

Docket Numbers: ER14–2809–000.
Applicants: CPV Maryland, LLC.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Revised Market-Based Rate Tariff Filing to be effective 11/9/2014.
Filed Date: 9/9/14.
Accession Number: 20140909–5116.
Comments Due: 5 p.m. ET 9/30/14.

Docket Numbers: ER14–2810–000.
Applicants: CPV Sentinel, LLC.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Revised Market-Based Rate Tariff Filing to be effective 11/9/2014.
Filed Date: 9/9/14.
Accession Number: 20140909–5117.
Comments Due: 5 p.m. ET 9/30/14.

Docket Numbers: ER14–2811–000.
Applicants: CPV Keenan II Renewable Energy Company.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Revised Market-Based Rate Tariff Filing to be effective 11/9/2014.
Filed Date: 9/9/14.
Accession Number: 20140909–5118.
Comments Due: 5 p.m. ET 9/30/14.

Docket Numbers: ER14–2812–000.
Applicants: CPV Shore, LLC.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Revised Market-Based Rate Tariff Filing to be effective 11/9/2014.
Filed Date: 9/9/14.
Accession Number: 20140909–5119.
Comments Due: 5 p.m. ET 9/30/14.

Docket Numbers: ER14–2813–000.
Applicants: PacifiCorp.
Description: Tariff Withdrawal per 35.15: Termination of Klamath Energy Construction Agreement to be effective 11/12/2014.
Filed Date: 9/9/14.
Accession Number: 20140909–5125.
Comments Due: 5 p.m. ET 9/30/14.

Docket Numbers: ER14–2814–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) rate filing per 35.13(a)(2)(iii): Original Service Agreement No. 3940; Queue No. Y3–054 to be effective 8/11/2014.
Filed Date: 9/9/14.
Accession Number: 20140909–5178.
Comments Due: 5 p.m. ET 9/30/14.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: September 9, 2014.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2014–22178 Filed 9–16–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 9842–006]

Mr. Ray F. Ward; Application Tendered for Filing With the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Minor New License.
b. *Project No.:* 9842–006.
c. *Date filed:* August 28, 2014.
d. *Applicant:* Mr. Ray F. Ward.
e. *Name of Project:* Ward Mill Hydroelectric Project.
f. *Location:* On the Watauga River, in the Township of Laurel Creek, Watauga County, North Carolina. The project does not occupy lands of the United States.
g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825(r).
h. *Applicant Contact:* Andrew C. Givens, Cardinal Energy Service, Inc., 620 N. West St., Suite 103, Raleigh, North Carolina 27603, (919) 834–0909.
i. *FERC Contact:* Adam Peer at (202) 502–8449, *adam.peer@ferc.gov.*
j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2001).
k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.
l. *Deadline for filing additional study requests and requests for cooperating agency status:* October 27, 2014

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–9842–006.

m. The application is not ready for environmental analysis at this time.

n. The Ward Mill Project consists of: (1) An existing 130-foot-long by 20-foot-high dam; (2) An existing 4.6 acre reservoir with an estimated gross storage capacity of 16.3 acre-feet; (3) a 14-foot-long, 5-foot-wide, and 7.5-foot-tall penstock made of rock, concrete and reinforced steel; (4) a powerhouse containing two generating units for a total installed capacity of 168 kilowatts; (5) existing transmission facilities; and (6) appurtenant facilities. The project is estimated to generate from below 290,000 to over 599,000 kilowatt-hours annually. The dam and existing facilities are owned by the applicant. No new project facilities are proposed.

o. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the

''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. *Procedural schedule and final amendments:* The application will be processed according to the following preliminary Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Issue Acceptance or Deficiency Letter October 2014

Request Additional Information October 2014

Issue Notice of Acceptance January 2015

Issue Scoping Document 1 for comments February 2015

Comments on Scoping Document 1 April 2015

Issue Scoping Document 2 May 2015

Issue notice of ready for environmental analysis May 2015

Commission issues EA January 2016

Comments on EA February 2016

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: September 10, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–22096 Filed 9–16–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2503–154]

Duke Energy Carolinas, LLC; Notice of Application Tendered for Filing With the Commission and Establishing Procedural Schedule for Licensing and Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 2503–154.

c. *Date Filed:* August 27, 2014.

d. *Applicant:* Duke Energy Carolinas, LLC.

e. *Name of Project:* Keowee-Toxaway Hydroelectric Project.

f. *Location:* The existing Keowee-Toxaway Project is located on the Toxaway, Keowee, and Little Rivers in Oconee County and Pickens County, South Carolina and Transylvania County, North Carolina. The Keowee-Toxaway Project occupies no federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S. C. 791 (a)–825(r).

h. *Applicant Contact:* Jennifer Huff, Duke Energy Carolinas, LLC, 526 S. Church Street, Charlotte, NC 28202; Telephone (980) 373–4392.

i. *FERC Contact:* Stephen Bowler, (202) 502–6861 or *stephen.bowler@ferc.gov*

j. This application is not ready for environmental analysis at this time.

k. *The Project Description:*

The Keowee-Toxaway Project consists of two developments: The upstream, 710.1–MW Jocassee Development and the downstream, 157.5-megawatt (MW) Keowee Development owned by Duke Energy Carolinas, LLC. The Jocassee Development includes: A 385-foot-high, 1,800-foot-long main earthfill dam with top elevation at 1,125 feet above mean sea level (msl); two circular intake structures passing water to two water conveyance tunnels leading to four turbines; two saddle dikes (825 feet and 500 feet in length); a partially-open powerhouse just downstream of the dam containing four reversible pump-turbine units authorized for an installed capacity of 177.5 MW each; a 50-foot-wide, concrete, ogee-type spillway with two Taintor gates; a 230-kilovolt (kV) transmission system; and appurtenant facilities. The maximum hydraulic capacity is 36,200 cfs.

The Jocassee Development is operated as a pumped-storage project, with the pump-turbines used for generating power during peak demand periods (typically during the day), and for pumping water back through the tunnels to Lake Jocassee (typically during the night). The pumps have a capacity of 32,720 cfs. The Jocassee Development is also the lower lake for the 1,065 MW Bad Creek Hydroelectric Project No. 2740, which is also owned by Duke, but is not part of this relicensing.

The Keowee Development includes: a 165-foot-high, 3,500-foot-long earthfill dam impounding the Keowee River, and a 165-foot-high, 1,800-foot-long earthfill dam impounding the Little River; four saddle dikes (1,900 feet, 225 feet, 350 feet, and 650 feet in length); an intake dike at the Oconee Nuclear Station; a 176-foot wide, concrete, ogee-type spillway with four Taintor gates; a concrete intake structure leading to two penstocks; a concrete powerhouse at the base of Keowee dam containing two Francis-type, mixed flow turbine-generator units authorized for an installed capacity of 78.8 MW each; a 150-foot by 500-foot concrete tailrace; a 230-kV transmission system; and appurtenant facilities. The maximum hydraulic capacity is 24,920 cfs.

Duke and several stakeholders signed a relicensing agreement (settlement), which resolves all issues to relicensing the project among the signatories.

l. *Locations of the Application:* A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY).

A copy is also available for inspection and reproduction at the address in item (h) above.

m. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Procedural Schedule:*

The application will be processed according to the following preliminary Hydro Licensing Schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Notice of Acceptance/Notice of Ready for Environmental Analysis	October 26, 2014.
Filing of recommendations, preliminary terms and conditions, and fishway prescriptions	December 25, 2014.
Commission issues Draft EA	June 23, 2015.
Comments on Draft Environmental Assessment (EA)	July 23, 2015.

Milestone	Target date
Modified terms and conditions	September 21, 2015.
Commission issues Final EA	December 20, 2015.

o. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: September 10, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–22102 Filed 9–16–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Supplemental Notice of Meeting

On August 19, 2014, a Notice was issued announcing that Commissioner Philip D. Moeller will convene a meeting at the Federal Energy Regulatory Commission on Thursday, September 18, 2014, from 2:00 p.m. to 4:45 p.m., in the Commission Meeting Room at the agency's headquarters. That notice is hereby supplemented with the following information.

Due to the large number of persons who have expressed an interest to speak at the meeting, Commissioner Moeller kindly requests that each speaker keep their remarks and responses succinct and focused on issues directly related to the topic of the meeting (*i.e.,* discussing ideas to facilitate and improve the way in which natural gas is traded, and explore the concept of establishing a centralized trading platform for natural gas).

The meeting format will consist of a roundtable discussion and persons speaking are not expected to have prepared remarks or formal presentations. There will also be an opportunity to file written comments after the meeting on any issue that was discussed at the meeting. Written comments will be limited to no more than five (5) pages and be due by October 1, 2014 by email to *jason.stanek@ferc.gov.* All comments received will then be publically posted on Commissioner Moeller's Web site at *www.ferc.gov* in the ''Highlights'' section.

This is an in-person meeting only, and the meeting will not be transcribed, webcast, or be available by telephone. As noted previously, this meeting is open to the public and there is no registration to attend.

Dated: September 9, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–22098 Filed 9–16–14; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Sunshine Act Meeting Notice

The following notice of meeting is published pursuant to section 3(a) of the government in the Sunshine Act (Pub. L. 94–409), 5 U.S.C. 552b:

AGENCY HOLDING MEETING: Federal Energy Regulatory Commission, DOE.

DATE AND TIME: September 18, 2014 10 a.m.

PLACE: Room 2C, 888 First Street NE., Washington, DC 20426.

STATUS: Open.

MATTERS TO BE CONSIDERED: Agenda * **Note**—Items listed on the agenda may be deleted without further notice.

CONTACT PERSON FOR MORE INFORMATION: Kimberly D. Bose, Secretary, Telephone (202) 502–8400.

For a recorded message listing items struck from or added to the meeting, call (202) 502–8627.

This is a list of matters to be considered by the Commission. It does not include a listing of all documents relevant to the items on the agenda. All public documents, however, may be viewed on line at the Commission's Web site at *http://www.ferc.gov* using the eLibrary link, or may be examined in the Commission's Public Reference Room.

1008TH—MEETING

Item No.	Docket No.	Company
	Administrative	
A–1	AD02–7–000	Customer Matters, Reliability, Security and Market Operations.
A–2	AD02–1–000	Agency Business Matters.
A–3	AD14–17–000	Update on MISO 2016 Resource Adequacy Forecast.
	Electric	
E–1	ER13–93–001, ER13–94–001, ER13–94–002, ER13–94–003.	Avista Corporation.
	ER13–98–001, ER13–99–001, ER13–99–002.	Puget Sound Energy, Inc.
	ER13–836–001, ER13–836–002	MATL LLP.
	NJ13–1–001	Bonneville Power Administration.
E–2	ER13–75–001, ER13–75–003, ER13–75–005.	Public Service Company of Colorado.
	ER13–77–001, ER13–77–002, ER13–77–003.	Tucson Electric Power Company
	ER13–78–001, ER13–78–002, ER13–78–003.	UNS Electric, Inc.
	ER13–79–001, ER13–79–002, ER13–79–003.	Public Service Company of New Mexico.

1008TH—MEETING—Continued

Item No.	Docket No.	Company
	ER13–82–001, ER13–82–002, ER13–82–003.	Arizona Public Service Company.
	ER13–91–001, ER13–91–002, ER13–91–003.	El Paso Electric Company
	ER13–96–001, ER13–96–002, ER13–96–003.	Black Hills Power, Inc.
	ER13–97–001, ER13–97–002, ER13–97–003.	Black Hills Colorado Electric Utility Company, LP.
	ER13–105–001, ER13–105–002, ER13–105–003.	NV Energy, Inc.
	ER13–120–001, ER13–120–002, ER13–120–003.	Cheyenne Light, Fuel, and Power Company
E–3	ER12–1194–000	Midwest Independent Transmission System Operator, Inc.
E–4	RM14–12–000	Demand and Energy Data Reliability Standard.
E–5	RM05–5–022	Standards for Business Practices and Communication Protocols for Public Utilities.
E–6	RC11–6–004	North American Electric Reliability Corporation.
E–7	QM13–2–002	PPL Electric Utilities Corporation.
E–8	EF14–4–000	Western Area Power Administration.
E–9	EL14–43–000	East Texas Electric Cooperative, Inc., Sam Rayburn Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas, Inc. v. Entergy Texas, Inc.
	EL14–69–000	Entergy Texas, Inc. v. East Texas Electric Cooperative, Inc.,Sam Rayburn Electric Cooperative, Inc., and Tex-La Electric Cooperative of Texas, Inc.
E–10	EL14–57–000	City of Hastings, Nebraska, Hastings Utilities, Electric Division and City of Grand Island, Nebraska, Grand Island Utilities, Electric Division v. Southwest Power Pool, Inc.
E–11	EL14–51–000	Pacific Gas and Electric Company.
E–12	EL14–68–000	Bloom Energy Corporation.
E–13	OMITTED	
E–14	ER13–1556–002	Entergy Services, Inc.
E–15	OMITTED	
E–16	RM14–13–000	Communications Reliability Standards.
E–17	ER05–1065–008, ER05–1065–014, OA07–32–015.	Entergy Services, Inc.
	ER12–1071–002	Entergy Arkansas, Inc.
E–18	ER11–2777–001, ER11–2779–001, ER11–2782–001, ER11–2786–001, ER11–2788–001, ER11–2789–001, (Consolidated).	Midwest Independent Transmission System Operator, Inc. and Ameren Illinois Company.
	ER11–2772–002, ER11–2778–002, ER11–2779–002, ER11–2782–002, ER11–2786–002, ER11–2788–002, ER11–2789–002, ER11–2790–002, (Consolidated).	
E–19	OA08–53–003	Midwest Independent Transmission System Operator, Inc.
	Gas	
G–1	IS14–106–000	Shell Pipeline Company LP.
G–2	OMITTED.	
	Hydro	
H–1	RM14–22–000	Revisions and Technical Corrections to Conform the Commission's Regulations to the Hydropower Regulatory Efficiency Act of 2013.
H–2	P–13287–005	City of New York, New York.
H–3	P–14520–001	City of Banning, California.
	Certificates	
C–1	CP14–12–001	Sabine Pass Liquefaction, LLC and Sabine Pass LNG, L.P.

Issued: September 11, 2014.

Kimberly D. Bose,

Secretary.

A free Web cast of this event is available through *www.ferc.gov.* Anyone with Internet access who desires to view this event can do so by navigating to *www.ferc.gov's* Calendar of Events and locating this event in the Calendar. The event will contain a link to its Web cast. The Capitol Connection provides technical support for the free Web casts. It also offers access to this event via television in the DC area and via phone bridge for a fee. If you have any questions, visit *www.CapitolConnection.org* or contact Danelle Springer or David Reininger at 703–993–3100.

Immediately following the conclusion of the Commission Meeting, a press briefing will be held in the Commission Meeting Room. Members of the public may view this briefing in the designated

overflow room. This statement is intended to notify the public that the press briefings that follow Commission meetings may now be viewed remotely at Commission headquarters, but will not be telecast through the Capitol Connection service.

[FR Doc. 2014–22279 Filed 9–15–14; 4:15 pm]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CD14–25–000]

City of Berlin, New Hampshire; Notice of Preliminary Determination of a Qualifying Conduit Hydropower Facility and Soliciting Comments and Motions To Intervene

On August 28, 2014, the City of Berlin, New Hampshire filed a notice of intent to construct a qualifying conduit hydropower facility, pursuant to section 30 of the Federal Power Act (FPA), as amended by section 4 of the Hydropower Regulatory Efficiency Act of 2013 (HREA). The proposed Ammonoosuc Water Treatment Plant Hydroelectric Project would have an installed capacity of 21 kilowatts (kW) and would be located on the existing 16-inch-diameter raw water transmission main immediately upstream from the pressure-reducing valve for a water treatment plant. The project would be located near the City of Berlin in Coos County, New Hampshire.

Applicant Contact: Roland L. Viens, Superintendent, City of Berlin, New Hampshire, City Hall, 168 Main Street, Berlin, NH 03570, Phone No. (603) 752–1677.

FERC Contact: Robert Bell, Phone No. (202) 502–6062, email: *robert.bell@ferc.gov.*

Qualifying Conduit Hydropower Facility Description: The proposed project would consist of: (1) One proposed inline integrated turbine/generator with an installed capacity of 21 kW; (2) a proposed concrete powerhouse; and (3) appurtenant facilities. The proposed project would have an estimated annual generating capacity of 85 megawatt-hours.

A qualifying conduit hydropower facility is one that is determined or deemed to meet all of the criteria shown in the table below.

TABLE 1—CRITERIA FOR QUALIFYING CONDUIT HYDROPOWER FACILITY

Statutory provision	*Description*	*Satisfies (Y/N)*
FPA 30(a)(3)(A), as amended by HREA.	The conduit the facility uses is a tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.	Y
FPA 30(a)(3)(C)(i), as amended by HREA.	The facility is constructed, operated, or maintained for the generation of electric power and uses for such generation only the hydroelectric potential of a non-federally owned conduit.	Y
FPA 30(a)(3)(C)(ii), as amended by HREA.	The facility has an installed capacity that does not exceed 5 megawatts	Y
FPA 30(a)(3)(C)(iii), as amended by HREA.	On or before August 9, 2013, the facility is not licensed, or exempted from the licensing requirements of Part I of the FPA.	Y

Preliminary Determination: Based upon the above criteria, Commission staff preliminarily determines that the proposal satisfies the requirements for a qualifying conduit hydropower facility, which is not required to be licensed or exempted from licensing.

Comments and Motions to Intervene: Deadline for filing comments contesting whether the facility meets the qualifying criteria is 45 days from the issuance date of this notice.

Deadline for filing motions to intervene is 30 days from the issuance date of this notice.

Anyone may submit comments or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210 and 385.214. Any motions to intervene must be received on or before the specified deadline date for the particular proceeding.

Filing and Service of Responsive Documents: All filings must (1) bear in all capital letters the ''COMMENTS CONTESTING QUALIFICATION FOR A CONDUIT HYDROPOWER FACILITY'' or ''MOTION TO INTERVENE,'' as applicable; (2) state in the heading the name of the applicant and the project number of the application to which the filing responds; (3) state the name, address, and telephone number of the person filing; and (4) otherwise comply with the requirements of sections 385.2001 through 385.2005 of the Commission's regulations.[1] All comments contesting Commission staff's preliminary determination that the facility meets the qualifying criteria must set forth their evidentiary basis.

The Commission strongly encourages electronic filing. Please file motions to intervene and comments using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Locations of Notice of Intent: Copies of the notice of intent can be obtained directly from the applicant or such copies can be viewed and reproduced at the Commission in its Public Reference Room, Room 2A, 888 First Street NE., Washington, DC 20426. The filing may also be viewed on the web at *http://*

[1] 18 CFR 385.2001–2005 (2013).

www.ferc.gov/docs-filing/elibrary.asp using the ''eLibrary'' link. Enter the docket number (e.g., CD14–25–000) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659.

Dated: September 10, 2014.

Kimberly D. Bose,

Secretary.

[FR Doc. 2014–22095 Filed 9–16–14; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2014–0567; FRL–9915–58]

Agency Information Collection Activities; Proposed Collection; Comment Request

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA), this document announces that EPA is planning to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB). The ICR, entitled: ''Pesticide Program Public Sector Collections (FIFRA Sections 18 and 24(c))'' and identified by EPA ICR No. 2311.02 and OMB Control No. 2070–0182, represents the renewal of an existing ICR that is scheduled to expire on May 31, 2015. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection that is summarized in this document. The ICR and accompanying material are available in the docket for public review and comment.

DATES: Comments must be received on or before November 17, 2014.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2014–0567, by one of the following methods:

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

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

FOR FURTHER INFORMATION CONTACT: Rame Cromwell, Field External and Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: 703 308–9068, email address: *cromwell.rame@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What information is EPA particularly interested in?

Pursuant to PRA section 3506(c)(2)(A) (44 U.S.C. 3506(c)(2)(A)), EPA specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility.
2. Evaluate the accuracy of the Agency's estimates of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
3. Enhance the quality, utility, and clarity of the information to be collected.
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

II. What information collection activity or ICR does this action apply to?

Title: Pesticide Program Public Sector Collections (FIFRA) Sections 18 and 24(c).

ICR number: EPA ICR No. 2311.02.

OMB control number: OMB Control No. 2070–0182.

ICR status: This ICR is currently scheduled to expire on May 31, 2015. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: This ICR covers the paperwork burden under the PRA associated with two types of pesticide registration requests made by states, U.S. Territories, or Federal agencies. Specifically, this ICR covers emergency exemption requests, which allow for an unregistered use of a pesticide, and requests by states to register a pesticide use to meet a special local need (SLN). Section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizes the EPA to grant emergency exemptions to states, U.S. Territories, and Federal agencies to allow an unregistered use of a pesticide for a limited time if EPA determines that emergency conditions exist. Section 18 requests include unregistered pesticide use exemptions for specific agricultural, public health, and quarantine purposes. Section 24(c) of FIFRA authorizes the EPA to grant permission to a particular state to register additional uses of a federally registered pesticide for distribution and use within that state to meet a SLN.

Burden statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 18,315 hours annually for state government ''applicants'' for FIFRA section 18 program, and for applicants under the FIFRA 24(c) program an annual estimate of 15,860 hours, for a combined total of 34,175 burden hours annually. Burden is defined in 5 CFR 1320.3(b).

The ICR, which is available in the docket along with other related materials, provides a detailed explanation of the collection activities and the burden estimate that is only briefly summarized here:

Respondents/Affected Entities: Entities potentially affected by this ICR are pesticide registrants, which may be identified by pesticide and other agricultural chemical manufacturing (North American Industrial Classification System (NAICS) code 325320) and governments that administer environmental quality programs (NAICS code 9241).

Estimated total number of potential respondents: 980.

Frequency of response: On occasion.

Estimated total average number of responses for each respondent: 1.

Estimated total annual burden hours: 34,175 hours.

Estimated total annual costs: $2,332,954. This includes an estimated cost of $1,086,403 for the Section 18 program and an estimated cost of $1,236,551 for the Section 24(c) program. This ICR does not involve any capital investment or maintenance and operational costs.

III. Are there changes in the estimates from the last approval?

There is no change in the estimated respondent burden hours per SLN application for this ICR from the currently-approved ICR for Section 24(c) applications, for either registrants or states. The total annual respondent burden estimate (registrants + states) has decreased slightly from 16,900 to 15,860 hours due to a small decrease in the average number of petitions received annually, from about 325 to 305. Although EPA does not require Section 24(c)'s and cannot estimate precisely how many submissions will be received in the future, the Agency expects to receive approximately 305 Section 24(c) applications annually over the next 3 years. As a result of the decrease in the number of applications and updating the wage rates, the estimated respondent cost increased slightly from $1.235 million to $1.237 million.

The estimated unit burden for a given FIFRA section 18 application is unchanged. EPA estimates an increase in the number of section 18 application submissions and estimated annual burden relative to the existing, approved collection. EPA estimates that the total annual respondent burden has increased from 12,672 hours to about 18,315 hours. The increase corresponds with an increase in the average number of Section 18s requested per year, from 128 to 185. Although EPA does not require Section 18s and cannot estimate precisely how many submissions will be received in the future, the Agency expects to receive approximately 185 Section 18 applications annually over the next 3 years. As a result of the increase in the number of applications and updating the wage rates, the estimated respondent cost increased from $739 thousand to $1.086 million.

IV. What is the next step in the process for this ICR?

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. EPA will issue another **Federal Register** document pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: September 5, 2014.

James Jones,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2014–22027 Filed 9–16–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9916–80–OEI]

Cross-Media Electronic Reporting: Authorized Program Revision Approval, State of Oklahoma

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: This notice announces the Environmental Protection Agency (EPA's) approval of the State of Oklahoma's request to revise/modify certain of its EPA-authorized programs to allow electronic reporting.

DATES: EPA's approval is effective on September 17, 2014.

FOR FURTHER INFORMATION CONTACT: Karen Seeh, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 566–1175, *seeh.karen@epa.gov*.

SUPPLEMENTARY INFORMATION: On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR) was published in the **Federal Register** (70 FR 59848) and codified as part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Subpart D of CROMERR requires that state, tribal or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and obtain EPA approval. Subpart D provides standards for such approvals based on consideration of the electronic document receiving systems that the state, tribe, or local government will use to implement the electronic reporting. Additionally, § 3.1000(b) through (e) of 40 CFR part 3, subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the state, tribe or local government in place of procedures available under existing program-specific authorization regulations. An application submitted under the subpart D procedures must show that the state, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable subpart D requirements. Once an authorized program has EPA's approval to accept electronic documents under certain programs, CROMERR § 3.1000(a)(4) requires that the program keep EPA apprised of any changes to laws, policies, or the electronic document receiving systems that have the potential to affect the program's compliance with CROMERR § 3.2000.

On October 2, 2013, the Oklahoma Department of Environmental Quality (OK DEQ) submitted an amended application titled ''Electronic Document Receiving System'' for revisions/modifications of its EPA-approved electronic reporting program under its EPA-authorized programs under title 40 CFR to allow new electronic reporting. EPA reviewed OK DEQ's request to revise/modify its EPA-authorized programs and, based on this review, EPA determined that the application met the standards for approval of authorized program revisions/modifications set out in 40 CFR part 3, subpart D. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve Oklahoma's request to revise/modify its following EPA-authorized programs to allow existing and expanded electronic reporting under 40 CFR parts 51, 62, and 141 is being published in the **Federal Register**: Part 52—Approval and Promulgation of Implementation Plans; Part 62—Approval and Promulgation of State Plans for Designated Facilities and Pollutants; and Part 142—National Primary Drinking Water Regulations Implementation.

OK DEQ was notified of EPA's determination to approve its application with respect to the authorized programs listed above.

Also, in today's notice, EPA is informing interested persons that they may request a public hearing on EPA's action to approve the State of Oklahoma request to revise its authorized public

water system program under 40 CFR part 142, in accordance with 40 CFR 3.1000(f). Requests for a hearing must be submitted to EPA within 30 days of publication of today's **Federal Register** notice. Such requests should include the following information:

(1) The name, address and telephone number of the individual, organization or other entity requesting a hearing;

(2) A brief statement of the requesting person's interest in EPA's determination, a brief explanation as to why EPA should hold a hearing, and any other information that the requesting person wants EPA to consider when determining whether to grant the request;

(3) The signature of the individual making the request, or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

In the event a hearing is requested and granted, EPA will provide notice of the hearing in the **Federal Register** not less than 15 days prior to the scheduled hearing date. Frivolous or insubstantial requests for hearing may be denied by EPA. Following such a public hearing, EPA will review the record of the hearing and issue an order either affirming today's determination or rescinding such determination.

If no timely request for a hearing is received and granted, EPA's approval of the State of Oklahoma request to revise its part 142—National Primary Drinking Water Regulations Implementation program to allow electronic reporting will become effective 30 days after today's notice is published, pursuant to CROMERR section 3.1000(f)(4).

Dated: September 11, 2014.

Matthew Leopard,

Acting Director, Office of Information Collection.

[FR Doc. 2014–22154 Filed 9–16–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2014–0233; FRL–9916–72]

Office of Pesticide Programs; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA's Office of Pesticide Programs, the U.S. Department of Agriculture (USDA), and the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services), are holding a 1-day workshop to provide a forum for stakeholders to offer scientific and technical feedback on the interim approaches that were issued in November 2013 by EPA, USDA, and the Services in response to the National Academy of Sciences (NAS) report entitled, ''Assessing Risks to Endangered and Threatened Species from Pesticides.'' The workshop is an opportunity for stakeholders and agencies to continue their dialogue on the technical aspects of implementing the NAS recommendations, building upon public meetings held in November and December 2013, April 2014, and the implementation of the enhanced stakeholder engagement process that was finalized in March 2013. The workshop is not designed to, or intended to be a decisionmaking forum; consensus will not be sought or developed at the meeting. This meeting furthers the agencies' goal of developing a consultation process for pesticide impacts on listed species that is efficient, inclusive, and transparent.

DATES: The meeting will be held on October 6, 2014, from 9 a.m. to 5 p.m.

Requests to participate in the meeting must be received on or before September 26, 2014.

To request accommodation of a disability, please contact the person listed under **FOR FURTHER INFORMATON CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held in the Rachel Carson Room at FWS, Skyline, Bldg. 7, 5275 Leesburg Pike, Bailey's Crossroads, VA. See Unit III. for additional information.

Requests to participate in the meeting, identified by docket identification (ID) number EPA–HQ–OPP–2014–0233, are submitted to the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT:

For general information contact: Catherine Eiden, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–7887; email address: *eiden.catherine@epa.gov*.

For meeting logistics or registration contact: Keith A Paul, U.S. Fish and Wildlife Service Headquarters, Ecological Services, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone: (703) 358–2675; fax: (703) 358–1800; cell: 530–840–0658; *keith_paul@fws.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you develop, manufacture, formulate, sell, and/or apply pesticide products, and if you are interested in the potential impacts of pesticide use on listed species. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

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

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

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2014–0233, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets*.

II. Background

The workshop is an opportunity for stakeholders and agencies to continue their dialogue on the technical aspects of implementing the NAS recommendations, building upon public meetings held in November and December 2013, April 2014, and the implementation of the enhanced stakeholder engagement process that was finalized in March 2013. The workshop is not designed, or intended to be a decisionmaking forum; consensus will not be sought, or developed at the meeting.

Stakeholders will be asked to provide scientific and technical information that could potentially be used by the agencies to inform various scientific determinations that will be made during the course of evaluation pesticides, including:

1. Systematic methods for implementing ''Weight of Evidence'' analysis that consider both quantitative and qualitative data.

2. Approaches for ensuring ''Data Quality.''

3. The consideration of ''uncertainty'' in the scientific assessment process.

While the focus of this public meeting is on the three topics noted in this unit, comments on all aspects of the materials previously provided to the public will be accepted. The agencies' interim approach document entitled, ''Interagency Approach for Implementation of the National Academy of Sciences Report'' dated November 13, 2013, and the presentation materials from the November 2013 stakeholder workshop are available at the following Web site: *http://www.epa.gov/oppfead1/endanger/2013/nas.html*.

In addition to the scientific and technical information presented by stakeholders, representatives from Federal agencies will join the dialogue to ask clarifying questions of the presenters and to respond to questions regarding the pesticide registration process and Endangered Species Act consultation. The agencies see this forum as an integral component of the stakeholder engagement process developed for pesticide consultations and contributes to the agencies' commitment to adapt and refine the interim approaches as we progress through the initial consultations.

III. Participation in This Meeting

1. Requests to participate in the meeting, identified by docket ID number EPA–HQ–OPP–2014–0233, must be received on or before September 26, 2014. Do not submit any information considered confidential business information (CBI) in your request to participate in the meeting sent to the person listed under **FOR FURTHER INFORMATION CONTACT**.

2. Public parking is available for attendees; follow the blue signs to the lot. There is a fee for all day parking.

3. Attendees will need to present identification at the Security check-in.

4. Webinar and teleconference information will be provided to participants requesting access via webinar and telephone.

Authority: 7 U.S.C. 136 *et seq.*

Dated: September 11, 2014.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2014–22162 Filed 9–16–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9916–77–OW]

Information Session; Stakeholder Input on Implementation of the Water Infrastructure Finance and Innovation Act of 2014

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is announcing plans to hold an information and stakeholder input session on September 22, 2014 in New York City, New York to discuss implementation of the ''Water Infrastructure Finance and Innovation Act of 2014'' (WIFIA). A second session will be held on September 23, 2014 in New York City if registration for the first day exceeds room capacity. Additional information and stakeholder input sessions will be held in locations around the country through December, 2014. Locations and dates for the additional sessions will be announced when they become available.

WIFIA is an innovative financing mechanism for water-related infrastructure of national or regional significance. It was signed into law on June 11, 2014 as Public Law 113–121. EPA will be providing an overview of the statute, assistance options and terms, and ideas for implementing the program. EPA would like participants to discuss project ideas and potential selection criteria; opportunities, challenges, and questions about implementation; and future stakeholder engagement. The intended audience is municipal, state, and regional utility decision makers; private finance sector representatives; and other interested organizations and parties.

DATES: The session will be held on September 22, 2014, with a possible additional session on September 23, 2014, if necessary.

ADDRESSES: The session will be held at: EPA Region 2, Room 27A, 27th Floor, 290 Broadway, New York City, NY 10007.

FOR FURTHER INFORMATION CONTACT: For further information about this notice, including registration information, contact Jordan Dorfman, EPA Headquarters, Office of Water, Office of Wastewater Management at tel.: 202–564–0614 or email: *WIFIA@epa.gov*. Members of the public are invited to participate in the session as capacity allows.

Authority: Water Infrastructure Finance and Innovation Act, Public Law 113–121.

Dated: September 10, 2014.

Andrew D. Sawyers,

Director, Office of Wastewater Management.

[FR Doc. 2014–22157 Filed 9–16–14; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OEI–2014–0197; FRL 9916–58–OEI]

Creation of a New System of Records Notice: Case Records System

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency's (EPA) Office of Administrative Law Judges (OALJ) is giving notice that it proposes to create a new system of records pursuant to the provisions of the Privacy Act of 1974 (5 U.S.C. 552a). The EPA is implementing the Case Records System, which is a system of records, to manage its administrative adjudicatory proceedings. The Case Records System is a docketing, filing, case tracking, and document management system used to store and manage documents relevant to administrative adjudicatory proceedings before the OALJ. Litigants, administrative law judges (ALJs), and other interested parties may submit a variety of documents to the system, including pleadings, motions, briefs, exhibits, orders, hearing transcripts and initial decisions.

DATES: *Effective Date:* Persons wishing to comment on this system of records notice must do so by October 27, 2014.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OEI–2014–0197, by one of the following methods:

- *www.regulations.gov:* Follow the online instructions for submitting comments.
- *Email: oei.docket@epa.gov*.
- *Fax:* 202–566–1752.
- *Mail:* OEI Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.
- *Hand Delivery:* OEI Docket, EPA/DC, WJC West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. 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–OEI–2014–0197. 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 for which disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov.* 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, 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.*

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 for which 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 OEI Docket, EPA/DC, WJC West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. 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 OEI Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT:

Bruce Franklin, Administrative Manager, OALJ, can be reached at (202) 564–6214.

SUPPLEMENTARY INFORMATION:

General Information

The EPA proposes to create a new system of records under the Privacy Act to manage documents relevant to administrative adjudicatory proceedings before the OALJ. The OALJ is an independent office in the EPA's Office of Administration and Resources Management (OARM). The Administrative Law Judges (ALJs) conduct hearings and render decisions in proceedings between the EPA or other federal government agencies and persons, businesses, government entities, and other organizations which are regulated or alleged to be regulated under environmental laws. ALJs preside in enforcement and permit proceedings in accordance with the Administrative Procedure Act. Most enforcement actions before the ALJs are for the assessment of civil penalties and case documents are generally made available to the public.

The Case Records System is a docketing, filing, case tracking, and document management system used to store and manage documents relevant to administrative adjudicatory proceedings before the OALJ. The system is maintained by OALJ in Washington, DC and consists of file folders locked in file cabinets in the office and electronic documents stored in a password-protected computer database. The system is accessible to employees of the OALJ in connection with the performance of their authorized duties. When fully implemented, except for information protected from disclosure by law, the information in the system will be published on the internet. The general public will be provided ''read-only'' access via the internet.

Litigants and ALJs may submit a variety of documents to the system, including pleadings, motions, briefs, exhibits, orders, hearing transcripts and initial decisions. Some of the documents in the system may contain personally identifiable information (PII) of a sensitive nature (''sensitive PII'' as defined in EPA's Privacy Policy, CIO–2151.0 (2007), e.g., social security numbers, or comparable identification number; financial information associated with individuals; and medical information associated with individuals). Because case documents are generally made available to the public, the OALJ encourages parties to carefully review documents and redact sensitive PII prior to submitting the documents to the OALJ. The OALJ will examine documents submitted for filing in its system that are likely to contain sensitive PII and redact that information prior to making the documents available to the public.

Dated: August 28, 2014.

Renee P. Wynn,

Acting Assistant Administrator and Acting Chief Information Officer.

EPA–66

SYSTEM NAME:

Case Records System.

SYSTEM LOCATION:

The paper records will be located at the EPA, Office of Administration and Resources Management (OARM), Office of Administrative Law Judges (OALJ), Ronald Reagan Building, Room M1200, 1300 Pennsylvania Ave. NW., Washington, DC 20004. The electronic records will be located on Agency servers housed in Research Triangle Park, North Carolina.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system covers any persons, including public citizens, representatives of federal, state, or local governments and businesses who submit documents in contested administrative adjudicatory proceedings before the EPA OALJ.

CATEGORIES OF RECORDS IN THE SYSTEM:

The sources of information in the system are limited to documents submitted by the parties to a matter (e.g., briefs, motions, exhibits) and by the ALJ presiding over the matter (e.g., orders, initial decisions). Parties may submit a wide range of document types to the OALJ containing various types of information including, but not limited to, names, addresses, social security numbers, medical and/or financial information contained in opinions of law, pleadings, motions, exhibits, and other documents submitted by the parties to a matter and the presiding ALJ. This includes information found in individual tax returns and other documents related to a party's ability to pay a monetary civil penalty.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 11001 et seq. (Emergency Planning & Community Right-to-Know Act (EPCRA)); 42 U.S.C. 6901 et seq. (Resource Conservation and Recovery Act (RCRA)); 15 U.S.C. 2601 et seq. (Toxic Substances Control Act (TSCA)); 7 U.S.C. 136 et seq. (Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)); 42 U.S.C. 9601 et seq. (Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)); 33 U.S.C. 1251 (Federal Water Pollution Control Act (FWPCA), commonly known as the Clean Water

Act (CWA)); 42 U.S.C. 7401 (Clean Air Act (CAA)); 40 CFR 22.4 (Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits).

PURPOSE(S):

The information contained in the system is primarily for the purpose of ALJs to render determinations with respect to matters before them and communicating the determinations to the appropriate individuals and organizations, as well as to the general public. When fully implemented, the electronic filing portion of the system will provide for online filing, tracking, and accounting of filings (e.g., pleadings, motions, briefs, exhibits, orders, and determinations) in all cases, both pending and archived. Other uses of the system and the information contained, therein, include:

- Responding to Freedom of Information Act requests;
- Providing the chief judge management information necessary to assess workload, assign incoming cases and monitor case progress;
- Allowing individual judges to monitor the progress of assigned cases;
- Providing ready access to case docketing information to support staff to enable timely response to complainants, government and private counsel, and respondents concerning the status of a particular case; and
- Promoting adjudicative transparency by providing public access to OALJ litigation documents.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

General Routine Uses A, E, F, G, H, K, and L apply to this system. Records may also be disclosed to the general public.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

- Storage: The records in the system are stored in paper files and computer databases.
- Retrievability: Paper files are retrieved by the names of the parties to a particular case or the docket number. All records stored in computer databases are full-text indexed and are searchable by any data element. Once fully implemented, the general public will be able to access most records over the Internet by any data element.
- Safeguards: Paper records are maintained in lockable file cabinets in secure, access-controlled rooms, areas, or buildings. Computer records are maintained in a secure, password protected computer database on servers located in secure, access-controlled rooms, areas or buildings at Agency facilities in Research Triangle Park, North Carolina. When fully implemented, the electronic filing portion of the system (known as the ''OALJ E-Filing System'') will warn the user that information submitted via the OALJ E-Filing System is made public and that users should redact any sensitive PII from the document prior to submitting it. Users of the OALJ E-Filing System must affirm that they have read and understood the warning each time prior to submitting the document electronically. The OALJ published a *Privacy Act Statement & Notice of Disclosure of Confidential and Personal Information* on its Web site, which instructs users how to submit documents that contain un-redacted PII. Notwithstanding this public notice, the OALJ will examine documents submitted for sensitive personally identifiable information (PII) and, if found, redact the PII prior to making the document available to the public. The OALJ Case Tracking System portion of the Case Records System allows the employees of OALJ to exclude specific documents from being published to the Internet.
- Retention and Disposal: The records will be maintained under EPA Records Schedules *508*, *509*, and *510*.
- System Manager(s) Address and Contact Information: Bruce Franklin, Administrative Manager, Office of Administrative Law Judges, Ronald Reagan Building, Room M1200, 1300 Pennsylvania Avenue NW., Washington, DC 20004.

NOTIFICATION PROCEDURE:

Any individual who wants to know whether this system of records contains a record about him or her, who wants access to his or her record, or who wants to contest the contents of a record, should make a written request to the EPA FOIA Office, Attn: Privacy Act Officer, MC 2822T, 1200 Pennsylvania Avenue NW., Washington, DC 20460.

RECORD ACCESS PROCEDURE:

Request for access must be made in accordance with the procedures described in the EPA's Privacy Act regulations at 40 CFR part 16. Requesters will be required to provide adequate identification, such as a driver's license, employee identification card, or other identifying document. Additional identification procedures may be required in some instances.

CONTESTING RECORDS PROCEDURES:

Requests for correction or amendment must identify the record to be changed and the corrective action sought. Complete EPA Privacy Act procedures are described in EPA's Privacy Act regulations at 40 CFR part 16.

RECORD SOURCE CATEGORIES:

Sources include parties to administrative adjudicatory proceedings before the OALJ and the employees within the OALJ. A party may be any persons, including public citizens and representatives of federal, state, or local governments, and businesses who submit documents in contested administrative adjudicatory proceedings before the EPA OALJ.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

Nothing in this notice shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding. 5 U.S.C. 552a(d)(5).

[FR Doc. 2014–22164 Filed 9–16–14; 8:45 am]

BILLING CODE P

FEDERAL COMMUNICATIONS COMMISSION

Information Collections Being Submitted for Review and Approval to the Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communication Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it

displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before October 17, 2014. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, OMB, via email *Nicholas_A._Fraser@omb.eop.gov;* and to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the OMB control number as shown in the ''Supplementary Information'' section below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page <*http://www.reginfo.gov/public/do/PRAMain*>, (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION:

OMB Control Numbers: 3060–0386.

Title: Special Temporary Authorization (STA) Requests; Notifications and Informal Filings; Sections 1.5, 73.1615, 73.1635, 73.1740 and 73.3598; CDBS Informal Forms; Section 74.788; Low Power Television, TV Translator and Class A Television Digital Transition Notifications; FCC Form 337.

Form Numbers: FCC Form 337.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for profit entities; Not for profit institutions; State, local or Tribal government.

Number of Respondents/Responses: 6,509 respondents; 6,509 responses.

Estimated Hours per Response: 0.5–4 hours.

Frequency of Response: On occasion reporting requirement; One time reporting requirement.

Total Annual Burden: 5,325 hours.

Total Annual Cost: $2,126,510.

Obligation to Respond: Required to obtain benefits. The statutory authority for this information collection is contained in sections 1, 4(i) and (j), 7, 154(i), 301, 302, 303, 307, 308, 309, 312, 316, 318, 319, 324, 325, 336 and 337 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Act Assessment: No impact(s).

Needs and Uses: The FCC Form 337, Application for Extension of Time to Construct a Digital Television Broadcast Station, is used by all low power television, TV translator and Class A television digital permittees to apply for extension of time within which to construct their digital facility. This form must be filed at least sixty, but not more than ninety, days prior to the applicable construction deadline. Applicants who file this form based on financial hardships must retain documentation fully detailing and supporting their financial representations as well as any steps taken to overcome the circumstances preventing construction.

OMB Control Number: 3060–1070.

Title: Allocation and Service Rules for the 71–76 GHz, 81–86 GHz, and 92–95 GHz Bands.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; not-for-profit institutions; and State, local, or Tribal Government.

Number of Respondents: 504 respondents; 3,000 responses.

Estimated Time per Response: 1.5 to 9 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. 151, 154(i), 303(f) and (r), 309, 316, and 332 of the Communications Act of 1934, as amended.

Total Annual Burden: 9,000 hours.

Total Annual Cost: $910,000.

Privacy Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality. The Commission has not granted assurances of confidentially to those parties submitting the information. In those cases where a respondent believes information requires confidentiality, the respondent can request confidential treatment and the Commission will afford such confidentiality for 20 days, after which the information will be available to the public.

Needs and Uses: The Commission is seeking an extension of this information collection in order to obtain the full three year approval from OMB. There are no program changes to the reporting, recordkeeping and/or third-party disclosure requirements but we are revising estimates based on experience and the possible addition of a fourth database manager. The recordkeeping, reporting, and third party disclosure requirements will be used by the Commission to verify licensee compliance with the Commission rules and regulations, and to ensure that licensees continue to fulfill their statutory responsibilities in accordance with the Communications Act of 1934. The Commission's rules promote the private sector development and use of 71–76 GHz, 81–86 GHz, and 92–95 GHz bands (70/80/90 GHz bands). Such information has been used in the past and will continue to be used to minimize interference, verify that applicants are legally and technically qualified to hold license, and to determine compliance with Commission rules.

OMB Control Number: 3060–0906.

Title: Annual DTV Ancillary/Supplemental Services Report for DTV Stations, FCC Form 317; 47 CFR 73.624(g).

Form Number: FCC Form 317.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions.

Number of Respondents and responses: 9,391 respondents, 18,782 responses.

Frequency of Response: Recordkeeping requirement, annual reporting requirement.

Obligation to Respond: Required to obtain benefits—Statutory authority for this collection of information is contained in Sections 154(i), 303, 336 and 403 of the Communications Act of 1934, as amended.

Estimated Time per Response: 2–4 hours.

Total Annual Burden: 56,346 hours.

Total Annual Costs: $1,408,650.

Nature and Extent of Confidentiality: There is no need for confidentiality required with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: Each licensee/permittee of a digital television (DTV)

station must file on an annual basis FCC Form 317. Specifically, required filers include the following (but we generally refer to all such entities herein as a ''DTV licensee/permittee''):

A licensee of a digital commercial or noncommercial educational (NCE) full power television (TV) station, low power television (LPTV) station, TV translator or Class A TV station.

A permittee operating pursuant to digital special temporary authority (STA) of a commercial or NCE full power TV station, LPTV station, TV translator or Class A TV station.

Each DTV licensee/permittee must report whether they provided ancillary or supplementary services at any time during the reporting cycle.

Each DTV licensee/permittee is required to retain the records supporting the calculation of the fees due for three years from the date of remittance of fees. Each NCE licensee/permittee must also retain for eight years documentation sufficient to show that its entire bitstream was used ''primarily'' for NCE broadcast services on a weekly basis.

OMB Control No.: 3060–1035.

Title: Part 73, Subpart F International Broadcast Stations.

Form No.: FCC Forms 309, 310 and 311.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents/Responses: 225 respondents; 225 responses.

Estimated Time per Response: 2–720 hours.

Frequency of Response: Recordkeeping requirement; On occasion, semi-annual, weekly and annual reporting requirements.

Obligation To Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in 47 U.S.C. 154, 303, 307, 334, 336 and 554.

Total Annual Burden: 20,096 hours.

Annual Cost Burden: $97,025.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: In general, there is no need for confidentiality with this collection of information.

Needs and Uses: The Federal Communications Commission (''Commission'') is requesting that the Office of Management and Budget (OMB) approve a three year extension of the information collection titled ''Part 73, Subpart F International Broadcast Stations'' under OMB Control No. 3060–1035.

This information collection is used by the Commission to assign frequencies for use by international broadcast stations, to grant authority to operate such stations and to determine if interference or adverse propagation conditions exist that may impact the operation of such stations. The Commission collects this information pursuant to 47 CFR Part 73, subpart F. If the Commission did not collect this information, it would not be in a position to effectively coordinate spectrum for international broadcasters or to act for entities in times of frequency interference or adverse propagation conditions. Therefore, the information collection requirements are as follows:

FCC Form 309—Application for Authority To Construct or Make Changes in an International, Experimental Television, Experimental Facsimile, or a Developmental Broadcast Station—The FCC Form 309 is filed on occasion when the applicant is requesting authority to construct or make modifications to the international broadcast station.

FCC Form 310—Application for an International, Experimental Television, Experimental Facsimile, or a Developmental Broadcast Station License—The FCC Form 310 is filed on occasion when the applicant is submitting an application for a new international broadcast station.

FCC Form 311—Application for Renewal of an International or Experimental Broadcast Station License—The FCC Form 311 is filed by applicants who are requesting renewal of their international broadcast station licenses.

47 CFR 73.702(a) states that six months prior to the start of each season, licensees and permittees shall by informal written request, submitted to the Commission in triplicate, indicate for the season the frequency or frequencies desired for transmission to each zone or area of reception specified in the license or permit, the specific hours during which it desires to transmit to such zones or areas on each frequency, and the power, antenna gain, and antenna bearing it desires to use. Requests will be honored to the extent that interference and propagation conditions permit and that they are otherwise in accordance with the provisions of section 47 CFR 73.702(a).

47 CFR 73.702(b) states that two months before the start of each season, the licensee or permittee must inform the Commission in writing as to whether it plans to operate in accordance with the Commission's authorization or operate in another manner.

47 CFR 73.702(c) permits entities to file requests for changes to their original request for assignment and use of frequencies if they are able to show good cause. Because international broadcasters are assigned frequencies on a seasonal basis, as opposed to the full term of their eight-year license authorization, requests for changes need to be filed by entities on occasion.

47 CFR 73.702 (note) states that permittees who during the process of construction wish to engage in equipment tests shall by informal written request, submitted to the Commission in triplicate not less than 30 days before they desire to begin such testing, indicate the frequencies they desire to use for testing and the hours they desire to use those frequencies.

47 CFR 73.702(e) states within 14 days after the end of each season, each licensee or permittee must file a report with the Commission stating whether the licensee or permittee has operated the number of frequency hours authorized by the seasonal schedule to each of the zones or areas of reception specified in the schedule.

47 CFR 73.782 requires that licensees retain logs of international broadcast stations for two years. If it involves communications incident to a disaster, logs should be retained as long as required by the Commission.

47 CFR 73.759(d) states that the licensee or permittee must keep records of the time and results of each auxiliary transmitter test performed at least weekly.

47 CFR 73.762(b) requires that licensees notify the Commission in writing of any limitation or discontinuance of operation of not more than 10 days.

47 CFR 73.762(c) states that the licensee or permittee must request and receive specific authority from the Commission to discontinue operations for more than 10 days under extenuating circumstances.

47 CFR 1.1301–1.1319 cover certifications of compliance with the National Environmental Policy Act and how the public will be protected from radio frequency radiation hazards.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary Office of the Managing Director.

[FR Doc. 2014–22169 Filed 9–16–14; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within twelve days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012294.

Title: APL/LGL Space Charter and Cooperative Working Agreement.

Parties: American President Lines, Ltd. and Liberty Global Logistics LLC.

Filing Party: Eric. C. Jeffrey, Esq.; Nixon Peabody LLP; 401 9th Street NW., Suite 900; Washington, DC 20004.

Synopsis: The agreement authorizes APL to charter space to and otherwise cooperate with LGL in connection with the U.S. Global Privately Owned Vehicle Contract in the trade between the United States, on the one hand, and the Mediterranean, the Middle East, and the Far East (including South East Asia), on the other hand.

Agreement No.: 012295.

Title: Hoegh/Hyundai Glovis Middle East Space Charter Agreement.

Parties: Hoegh Autoliners AS; and Hyundai Glovis Co. Ltd.

Filing Party: Wayne Rohde, Esq.; Cozen O'Connor; 1627 I Street NW., Suite 1100; Washington, DC 20006.

Synopsis: The agreement would authorize Hyundai Glovis to charter space to Hoegh in the trade from the U.S. East and Gulf Coasts, on the one hand, to Spain, Lebanon, Saudi Arabia, Oman, United Arab Emirates, Bahrain, Jordan, Qatar, Kuwait, and Singapore, on the other hand.

Agreement No.: 012296.

Title: GWF/MSC U.S. Central America Space Charter Agreement.

Parties: Great White Fleet Liner Services, Ltd.; and MSC Mediterranean Shipping Company S.A.

Filing Party: Wayne Rohde, Esq.; Cozen O'Connor; 1627 I Street NW., Suite 1100; Washington, DC 20006.

Synopsis: The agreement authorizes the parties to discuss and agree on the provision and operation of vessels by MSC and the chartering of space on said vessels to GWF in the trade between the U.S. East and Gulf Coasts, on the one hand, and the Bahamas, Guatemala, Honduras, Costa Rica, and Panama, on the other hand.

By Order of the Federal Maritime Commission.

Dated: September 12, 2014.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2014–22173 Filed 9–16–14; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 9, 2014.

A. Federal Reserve Bank of San Francisco (Gerald C. Tsai, Director, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *TAB Bank Holdings, Inc.,* Salt Lake City, Utah, to become a bank holding company by acquiring 100 percent of the voting shares of Transportation Alliance Bank, Inc., DBA TAB Bank, Ogden, Utah, upon its conversion to a commercial bank.

Board of Governors of the Federal Reserve System, September 10, 2014.

Michael J. Lewandowski,

Associate Secretary of the Board.

[FR Doc. 2014–22127 Filed 9–16–14; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Proposed Collection; Comment Request; Evidence-Based Falls Prevention Program Standardized Data Collection

AGENCY: Administration on Aging (AoA), Administration for Community Living (ACL), HHS.

ACTION: Notice.

SUMMARY: The Administration on Aging (AoA), Administration for Community Living (ACL), is announcing that the proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments on the collection of information by October 17, 2014.

ADDRESSES: Submit written comments on the collection of information by fax 202.395.6974 to the OMB Desk Officer for ACL, Office of Information and Regulatory Affairs, OMB.

FOR FURTHER INFORMATION CONTACT: Michele Boutaugh, 404–987–3411 or *Michele.boutaugh@acl.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, the Administration on Aging, Administration for Community Living, has submitted the following proposed collection of information to OMB for review and clearance.

ACL/AoA proposes to use this set of data collection tools to monitor grantees receiving cooperative agreements in response to the funding opportunity: ''PPHF—2014—Evidence-Based Falls Prevention Programs Financed Solely by 2014 Prevention and Public Health Funds (PPHF–2014).'' This data collection is necessary for monitoring grant program operations and outcomes. ACL/AoA proposes to gather information to monitor grantee progress, record location of sponsoring agencies and sites where programs are held, and document falls program participant attendance and health and demographic characteristics and short-term post participation impact. ACL/AoA intends

to use an online data entry system for the program and participant survey data. In response to the 60-day **Federal Register** notice related to this proposed data collection and published on June 27, 2014, four sets of relevant comments were received. Most of the comments were minor suggestions for improving the ease of use and acceptability of the data collection tools. The originally proposed data collection tools, the comments with responses and a revised set of data collection tools may be found on the ACL/AoA Web site at: *http://www.aoa.gov/AoARoot/AoA_Programs/Tools_Resources/collection_tools.aspx*. ACL/AoA estimates the burden of this collection of information as 224 hours for project staff, 820 hours for local agency and database entry staff, and 2,000 hours for individuals. Total burden is 3,044 hours per year.

Dated: September 12, 2014.

Kathy Greenlee,

Administrator and Assistant Secretary for Aging.

[FR Doc. 2014–22184 Filed 9–16–14; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Announcement of the Intent To Award a Single-Source Cooperative Agreement to the Gerontology Institute, University of Massachusetts Boston

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living (ACL) announces the intent to award a single-source cooperative agreement in the amount of $75,000 to the Gerontology Institute, University of Massachusetts Boston (UMass Boston) to support and stimulate the expansion of work already underway by UMass Boston in providing pension counseling services to residents of the State of Illinois.

DATES: The award will be issued for a project period to run concurrently with the existing grantee's budget period.

FOR FURTHER INFORMATION CONTACT: Valerie Soroka, Office of Elder Rights, Administration on Aging, Administration for Community Living, 1 Massachusetts Avenue NW., Washington, DC 20001. Telephone: 202–357–3531; Email: *valerie.soroka@acl.hhs.gov*.

SUPPLEMENTARY INFORMATION: The ACL's Pension Counseling & Information Program consists of six regional pension counseling projects, covering 29 states. The state of Illinois, with 64 million workers and a pension participation rate of 42%, is one of the largest states without an ACL-funded pension counseling project. The Pension Action Center at UMass Boston, which conducts ACL's New England Pension Assistance Project, is currently providing pension counseling services to residents of Illinois with funding from the Retirement Research Foundation. Additional funds are needed to leverage the foundation's funding, in order to ensure that the current provision of services to Illinois residents will be continued. This supplementary funding would be provided for the approved period.

This program is authorized under Title II of the Older Americans Act (OAA) (42 U.S.C. 3032), as amended by the Older Americans Act Amendments of 2006, Public Law 109–365.

(Catalog of Federal Domestic Assistance 93.048)

Dated: September 11, 2014.

Kathy Greenlee,

Administrator and Assistant Secretary for Aging.

[FR Doc. 2014–22185 Filed 9–16–14; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0730]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Threshold of Regulation for Substances Used in Food-Contact Articles

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled, ''Threshold of Regulation for Substances Used in Food-Contact Articles'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, 8455 Colesville Road; COLE–14526, Silver Spring, MD 20993–0002, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: On October 30, 2013, the Agency submitted a proposed collection of information entitled, ''Threshold of Regulation for Substances Used in Food-Contact Articles'' to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0298. The approval expires on January 31, 2017. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: September 11, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–22123 Filed 9–16–14; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0062]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Medical Devices; Exception From General Requirements for Informed Consent

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Medical Devices; Exception From General Requirements for Informed Consent'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA).

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, 8455 Colesville Rd., COLE–14526, Silver Spring, MD 20993–0002, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: On July 23, 2014, the Agency submitted a proposed collection of information entitled ''Medical Devices; Exception From General Requirements for Informed Consent'' to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0586. The approval expires on August 31, 2017. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: September 11, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–22089 Filed 9–16–14; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0627]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Application for Food and Drug Administration Approval To Market a New Drug

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by October 17, 2014.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0001. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, 8455 Colesville Rd., COLE–14526, Silver Spring, MD 20993–0002, *PRAStaff@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Application for FDA Approval to Market a New Drug—(OMB Control Number 0910–0001)—Extension

Under section 505(a) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(a)), a new drug may not be commercially marketed in the United States, imported, or exported from the United States, unless an approval of an application filed with FDA under section 505(b) or 505(j) of the act is effective with respect to such drug. Under the FD&C Act, it is the sponsor's responsibility to provide the information needed by FDA to make a scientific and technical determination whether the product is safe and effective for use.

This approval request is for all information collection requirements imposed on applicants by the regulations under part 314 (21 CFR part 314) who apply for approval of a new drug application (NDA) or abbreviated new drug application (ANDA) in order to market or to continue to market a drug.

Section 314.50(a) requires that an application form (Form FDA 356h) be submitted that includes introductory information about the drug as well as a checklist of enclosures.

Section 314.50(b) requires that an index be submitted with the archival copy of the application and that it reference certain sections of the application.

Section 314.50(c) requires that a summary of the application be submitted that presents a good general synopsis of all the technical sections and other information in the application.

Section 314.50(d) requires that the NDA contain the following technical sections about the new drug: Chemistry, manufacturing, and controls; nonclinical pharmacology and toxicology; human pharmacokinetics and bioavailability; microbiology; clinical data; statistical; and pediatric use sections.

Section 314.50(e) requires the applicant to submit samples of the drug if requested by FDA. In addition, the archival copy of the application must include copies of the label and all labeling for the drug.

Section 314.50(f) requires that case report forms and tabulations be submitted with the archival copy.

Section 314.50(h) requires that patent information, as described under § 314.53, be submitted with the application. (The burden hours for § 314.50(h) are already approved by OMB under OMB control number 0910–0513 and are not included in the burden estimates in Table 1 of this document.)

Section 314.50(i) requires that patent certification information be submitted in section 505(b)(2) applications for patents claiming the drug, drug product, or method of use.

Section 314.50(j) requires that applicants that request a period of marketing exclusivity submit certain information with the application.

Section 314.50(k) requires that the application contain a financial certification or disclosure statement or both.

Section 314.50(l) requires that an archival, review, and field copy of the application be submitted, including the content of labeling and all labeling and labels.

Section 314.52 requires that any notice of certification of invalidity or non-infringement of a patent to each patent owner and the NDA holder be sent by a section 505(b)(2) applicant that relies on a listed drug. A 505(b)(2) applicant is required to amend its application at the time notice is provided to include a statement certifying that the required notice has been provided. A 505(b)(2) applicant also is required to amend its application to document receipt of the required notice.

Section 314.54 sets forth the content requirements for applications filed under section 505(b)(2) of the FD&C Act. (The information collection burden estimate for 505(b)(2) applications is included in table 1 of this document under the estimates for § 314.50 (a), (b), (c), (d), (e), (f), (g), (i), (j), (k) and (l)).

Section 314.60 sets forth reporting requirements for sponsors who amend an unapproved application.

Section 314.65 states that the sponsor must notify FDA when withdrawing an unapproved application.

Sections 314.70 and 314.71 require that supplements be submitted to FDA for certain changes to an approved application.

Section 314.72 requires sponsors to report to FDA any transfer of ownership of an application.

Section 314.80(c)(1) and (c)(2) sets forth requirements for expedited adverse drug experience postmarketing reports and followup reports, as well as for periodic adverse drug experience postmarketing reports (Form FDA 3500A). (The burden hours for § 314.80(c)(1) and (c)(2) are already approved by OMB under OMB control numbers 0910–0230 and 0910–0291 and are not included in the burden estimates in table 1 of this document.)

Section 314.80(i) establishes recordkeeping requirements for reports of postmarketing adverse drug experiences. (The burden hours for

§ 314.80(i) are already approved by OMB under OMB control numbers 0910–0230 and 0910–0291 and are not included in the burden estimates in table 1 of this document.)

Section 314.81(b)(1) requires that field alert reports be submitted to FDA (Form FDA 3331).

Section 314.81(b)(2) requires that annual reports be submitted to FDA (Form FDA 2252).

Section 314.81(b)(3)(i) requires that drug advertisements and promotional labeling be submitted to FDA (Form FDA 2253).

Section 314.81(b)(3)(iii) sets forth reporting requirements for sponsors who withdraw an approved drug product from sale. (The burden hours for § 314.81(b)(3)(iii) are already approved by OMB under OMB control number 0910–0045 and are not included in the burden estimates in table 1 of this document.)

Section 314.90 sets forth requirements for sponsors who request waivers from FDA for compliance with §§ 314.50 through 314.81. (The information collection burden estimate for NDA waiver requests is included in table 1 of this document under the estimates for each section that is in subpart B of part 314.)

Section 314.93 sets forth requirements for submitting a suitability petition in accordance with § 10.20 (21 CFR 10.20) and § 10.30. (The burden hours for § 314.93 are already approved by OMB under 0910–0183 and are not included in the burden estimates in table 1 of this document.)

Section 314.94(a) and (d) requires that an ANDA contain the following information: Application form; table of contents; basis for ANDA submission; conditions of use; active ingredients; route of administration, dosage form, and strength; bioequivalence; labeling; chemistry, manufacturing, and controls; samples; patent certification.

Section 314.95 requires that any notice of certification of invalidity or non-infringement of a patent to each patent owner and the NDA holder be sent by ANDA applicants.

Section 314.96 sets forth requirements for amendments to an unapproved ANDA.

Section 314.97 sets forth requirements for submitting supplements to an approved ANDA for certain changes to the application.

Section 314.98(a) sets forth postmarketing adverse drug experience reporting and recordkeeping requirements for ANDAs. (The burden hours for § 314.98(a) are already approved by OMB under OMB control numbers 0910–0230 and 0910–0291 and are not included in the burden estimates in table 1 of this document.)

Section 314.98(c) requires other postmarketing reports for ANDAs: Field alert reports (Form FDA 3331), annual reports (Form FDA 2252), and advertisements and promotional labeling (Form FDA 2253). (The information collection burden estimate for field alert reports is included in table 1 of this document under § 314.81(b)(1); the estimate for annual reports is included under § 314.81(b)(2); the estimate for advertisements and promotional labeling is included under § 314.81(b)(3)(i).)

Section 314.99(a) requires that sponsors comply with certain reporting requirements for withdrawing an unapproved ANDA and for a change in ownership of an ANDA.

Section 314.99(b) sets forth requirements for sponsors who request waivers from FDA for compliance with §§ 314.92 through 314.99. (The information collection burden estimate for ANDA waiver requests is included in table 1 of this document under the estimates for each section that is in subpart C of part 314.)

Section 314.101(a) states that if FDA refuses to file an application, the applicant may request an informal conference with FDA and request that the application be filed over protest.

Section 314.107(c) requires notice to FDA by the first applicant to submit a substantially complete ANDA containing a certification that a relevant patent is invalid, unenforceable, or will not be infringed of the date of first commercial marketing. (The information collection burden estimate for § 314.107(c) is included in table 1 of this document under the estimates for § 314.50 (a), (b), (c), (d), (e), (f), (g), (i), (j), (k) and (l)).

Section 314.107(e) requires that an applicant submit a copy of the entry of the order or judgment to FDA within 10 working days of a final judgment. (The information collection burden estimate for § 314.107(e) applications is included in table 1 of this document under the estimates for § 314.50 (a), (b), (c), (d), (e), (f), (g), (i), (j), (k) and (l)).

Section 314.107(f) requires that ANDA or section 505(b)(2) applicants notify FDA immediately of the filing of any legal action filed within 45 days of receipt of the notice of certification. A patent owner may also notify FDA of the filing of any legal action for patent infringement. If the patent owner or approved application holder who is an exclusive patent licensee waives its opportunity to file a legal action for patent infringement within the 45-day period, the patent owner or approved application holder must submit to FDA a waiver in the specified format. (The information collection burden estimate for § 314.107(f) is included in table 1 of this document under the estimates for § 314.50 (a), (b), (c), (d), (e), (f), (g), (i), (j), (k) and (l)).

Section 314.110(b)(3) states that, after receipt of an FDA complete response letter, an applicant may request an opportunity for a hearing on the question of whether there are grounds for denying approval of the application. (The burden hours for § 314.110(b)(3) are included under parts 10 through 16 (21 CFR parts 10 and 16) hearing regulations, in accordance with § 314.201, and are not included in the burden estimates in table 1 of this document.)

Section 314.122(a) requires that an ANDA or a suitability petition that relies on a listed drug that has been voluntarily withdrawn from sale must be accompanied by a petition seeking a determination whether the drug was withdrawn for safety or effectiveness reasons. (The burden hours for § 314.122(a) are already approved by OMB under OMB control number 0910–0183 and are not included in the burden estimates in table 1 of this document.)

Section 314.122(d) sets forth requirements for relisting petitions for unlisted discontinued products. (The burden hours for § 314.122(d) are already approved by OMB under OMB control number 0910–0183 and are not included in the burden estimates in table 1 of this document.)

Section 314.126(c) sets forth requirements for a petition to waive criteria for adequate and well-controlled studies. (The burden hours for § 314.126(c) are already approved by OMB under 0910–0183 and are not included in the burden estimates in table 1 of this document.)

Section 314.151(a) and (b) set forth requirements for the withdrawal of approval of an ANDA and the applicant's opportunity for a hearing and submission of comments. (The burden hours for § 314.151(a) and (b) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the burden estimates in table 1 of this document.)

Section 314.151(c) sets forth the requirements for withdrawal of approval of an ANDA and the applicant's opportunity to submit written objections and participate in a limited oral hearing. (The burden hours for § 314.151(c) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the

burden estimates in table 1 of this document.)

Section 314.153(b) sets forth the requirements for suspension of an ANDA when the listed drug is voluntarily withdrawn for safety and effectiveness reasons, and the applicant's opportunity to present comments and participate in a limited oral hearing. (The burden hours for § 314.152(b) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the burden estimates in table 1 of this document.)

Section 314.161(b) and (e) sets forth the requirements for submitting a petition to determine whether a listed drug was voluntarily withdrawn from sale for safety or effectiveness reasons. (The burden hours for § 314.161(b) and (e) are already approved by OMB under OMB control number 0910–0183 and are not included in the burden estimates in table 1 of this document.)

Section 314.200(c), (d), and (e) requires that applicants or others subject to a notice of opportunity for a hearing who wish to participate in a hearing file a written notice of participation and request for a hearing as well as the studies, data, and so forth, relied on. Other interested persons may also submit comments on the notice. This section also sets forth the content and format requirements for the applicants' submission in response to notice of opportunity for hearing. (The burden hours for § 314.200(c), (d), and (e) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the burden estimates in table 1 of this document.)

Section 314.200(f) states that participants in a hearing may make a motion to the presiding officer for the inclusion of certain issues in the hearing. (The burden hours for § 314.200(f) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the burden estimates in table 1 of this document.)

Section 314.200(g) states that a person who responds to a proposed order from FDA denying a request for a hearing provide sufficient data, information, and analysis to demonstrate that there is a genuine and substantial issue of fact which justifies a hearing. (The burden hours for § 314.200(g) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the burden estimates in table 1 of this document.)

Section 314.420 states that an applicant may submit to FDA a drug master file in support of an application, in accordance with certain content and format requirements.

Section 314.430 states that data and information in an application are disclosable under certain conditions, unless the applicant shows that extraordinary circumstances exist. (The burden hours for § 314.430 are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the burden estimates in table 1 of this document.)

Section 314.530(c) and (e) states that if FDA withdraws approval of a drug approved under the accelerated approval procedures, the applicant has the opportunity to request a hearing and submit data and information. (The burden hours for § 314.530(c) and (e) are included under parts 10 through 16 hearing regulations, in accordance with § 314.201, and are not included in the burden estimates in table 1 of this document.)

Section 314.530(f) requires that an applicant first submit a petition for stay of action before requesting an order from a court for a stay of action pending review. (The burden hours for § 314.530(f) are already approved by OMB under 0910–0194 and are not included in the burden estimates in table 1 of this document.)

Section 314.550 requires an applicant with a new drug product being considered for accelerated approval to submit copies of all promotional materials to FDA during the preapproval and post-approval periods.

Section 314.610(b)(1) requires that applicants include a plan or approach to postmarketing study commitments in applications for approval of new drugs when human efficacy studies are not ethical or feasible, and provide status reports of postmarketing study commitments. (The information collection burden estimate for § 314.610(b)(1) is included in table 1 of this document under the estimates for §§ 314.50 (a), (b), (c), (d), (e), (f), (k) and (l) and 314.81(b)(2)).

Section 314.610(b)(3) requires that applicants propose labeling to be provided to patient recipients in applications for approval of new drugs when human efficacy studies are not ethical or feasible. (The information collection burden estimate for § 314.610(b)(3) is included in table 1 of this document under the estimates for § 314.50(e)).

Section 314.630 requires that applicants provide postmarketing safety reporting for applications for approval of new drugs when human efficacy studies are not ethical or feasible. (The burden hours for § 314.630 are already approved by OMB under OMB control numbers 0910–0230 and 0910–0291 and are not included in the burden estimates in table 1 of this document.)

Section 314.640 requires that applicants provide promotional materials for applications for approval of new drugs when human efficacy studies are not ethical or feasible. (The information collection burden estimate for § 314.640 is included in table 1 of this document under the estimates for § 314.81(b)(3)(i)).

Respondents to this collection of information are all persons who submit an application or abbreviated application or an amendment or supplement to FDA under Part 314 to obtain approval of a new drug, and any person who owns an approved application or abbreviated application.

In the **Federal Register** of March 24, 2014 (79 FR 16003), FDA published a 60-day notice requesting public comment on the proposed collection of information. We received one comment. The comment requested clarification of the duties, responsibilities, and potential liabilities of the person denoted as the ''Authorized U.S. Agent'' in field 39 of Form FDA 356h. The comment also requested that the formatting for field 39 be revised to clarify, ''What exactly it is that the Authorized U.S. Agent is attesting to by its signature.''

FDA response: Neither the form nor the instructions are intended to capture the exact duties, responsibilities, and potential liabilities of the person identified in field 39. Rather, as the instructions indicate, field 39 is intended to capture a countersignature where one is required in accordance with 21 CFR 314.50(a)(5): If the person signing the form in Field 38 does not reside or have a place of business within the United States, the form must be countersigned in Field 39 by an attorney, agent, or other authorized official who resides or maintains a place of business within the United States.

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN

21 CFR Section; [FDA Form No.]	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
314.50(a), (b), (c), (d), (e), (f), (g), (i), (j), (k) and (l) [356h]	106	1.42	151	1,921	290,071
314.52	7	3	21	16	336
314.95	209	3	627	16	10,032
314.60	277	8.73	2,419	80	193,520
314.65	18	1.16	21	2	42
314.70 and 314.71	374	7.63	2,854	150	428,100
314.72	66	2.20	145	2	290
314.81(b)(1) [3331]	260	16.31	4,241	8	33,928
314.81(b)(2) [2252]	930	11.28	10,495	40	419,800
314.81(b)(3)(i) [2253]	520	87.43	45,461	2	90,922
314.94(a) and (d)	251	4.73	1,186	480	569,280
314.96	434	24.60	10,675	80	854,000
314.97	306	18.34	5,611	80	448,880
314.99(a)	219	3.01	659	2	1,318
314.101(a)	1	1	1	* .50	.50
314.420	524	1.98	1,038	61	63,318
314.550	20	7	140	120	16,800
Total					3,420,637.50

There are no capital costs or operating and maintenance costs associated with this collection of information.
* 30 minutes.

Dated: September 11, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–22088 Filed 9–16–14; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–1206]

Authorization of Emergency Use of an In Vitro Diagnostic Device for Detection of Ebola Zaire Virus; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the issuance of an Emergency Use Authorization (EUA) (the Authorization) for an in vitro diagnostic device for detection of the Ebola Zaire virus (detected in the West Africa outbreak in 2014). FDA is issuing this Authorization under the Federal Food, Drug, and Cosmetic Act (the FD&C Act), as requested by the U.S. Department of Defense (DoD). The Authorization contains, among other things, conditions on the emergency use of the authorized in vitro diagnostic device. The Authorization follows the September 22, 2006, determination by then-Secretary of the Department of Homeland Security (DHS), Michael Chertoff, that the Ebola virus presents a material threat against the U.S. population sufficient to affect national security. On the basis of such determination, the Secretary of Health and Human Services (HHS) declared on August 5, 2014, that circumstances exist justifying the authorization of emergency use of in vitro diagnostics for detection of Ebola virus subject to the terms of any authorization issued under the FD&C Act. The Authorization, which includes an explanation of the reasons for issuance, is reprinted in this document.

DATES: The Authorization is effective as of August 5, 2014.

ADDRESSES: Submit written requests for single copies of the EUA to the Office of Counterterrorism and Emerging Threats, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4338, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request or include a fax number to which the Authorization may be sent. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the Authorization.

FOR FURTHER INFORMATION CONTACT: Luciana Borio, Assistant Commissioner for Counterterrorism Policy, Office of Counterterrorism and Emerging Threats, and Acting Deputy Chief Scientist, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4340, Silver Spring, MD 20993–0002, 301–796–8510 (this is not a toll free number).

SUPPLEMENTARY INFORMATION:

I. Background

Section 564 of the FD&C Act (21 U.S.C. 360bbb–3) as amended by the Project BioShield Act of 2004 (Pub. L. 108–276) and the Pandemic and All-Hazards Preparedness Reauthorization Act of 2013 (Pub. L. 113–5) allows FDA to strengthen the public health protections against biological, chemical, nuclear, and radiological agents. Among other things, section 564 of the FD&C Act allows FDA to authorize the use of an unapproved medical product or an unapproved use of an approved medical product in certain situations. With this EUA authority, FDA can help assure that medical countermeasures may be used in emergencies to diagnose, treat, or prevent serious or life-threatening diseases or conditions caused by biological, chemical, nuclear, or radiological agents when there are no adequate, approved, and available alternatives.

Section 564(b)(1) of the FD&C Act provides that, before an EUA may be issued, the Secretary of HHS must declare that circumstances exist justifying the authorization based on one of the following grounds: (1) A determination by the Secretary of DHS that there is a domestic emergency, or a significant potential for a domestic emergency, involving a heightened risk of attack with a biological, chemical, radiological, or nuclear agent or agents; (2) a determination by the Secretary of DoD that there is a military emergency, or a significant potential for a military emergency, involving a heightened risk

to U.S. military forces of attack with a biological, chemical, radiological, or nuclear agent or agents; (3) a determination by the Secretary of HHS that there is a public health emergency, or a significant potential for a public health emergency, that affects, or has a significant potential to affect, national security or the health and security of U.S. citizens living abroad, and that involves a biological, chemical, radiological, or nuclear agent or agents, or a disease or condition that may be attributable to such agent or agents; or (4) the identification of a material threat by the Secretary of DHS pursuant to section 319F–2 of the Public Health Service (PHS) Act (42 U.S.C. 247d–6b) sufficient to affect national security or the health and security of U.S. citizens living abroad.

Once the Secretary of HHS has declared that circumstances exist justifying an authorization under section 564 of the FD&C Act, FDA may authorize the emergency use of a drug, device, or biological product if the Agency concludes that the statutory criteria are satisfied. Under section 564(h)(1) of the FD&C Act, FDA is required to publish in the **Federal Register** a notice of each authorization, and each termination or revocation of an authorization, and an explanation of the reasons for the action. Section 564 of the FD&C Act permits FDA to authorize the introduction into interstate commerce of a drug, device, or biological product intended for use when the Secretary of HHS has declared that circumstances exist justifying the authorization of emergency use. Products appropriate for emergency use may include products and uses that are not approved, cleared, or licensed under sections 505, 510(k), or 515 of the FD&C Act (21 U.S.C. 355, 360(k), and 360e) or section 351 of the PHS Act (42 U.S.C. 262). FDA may issue an EUA only if, after consultation with the HHS Assistant Secretary for Preparedness and Response, the Director of the National Institutes of Health, and the Director of the Centers for Disease Control and Prevention (to the extent feasible and appropriate given the applicable circumstances), FDA [1] concludes: (1) That an agent referred to in a declaration of emergency or threat can cause a serious or life-threatening disease or condition; (2) that, based on the totality of scientific evidence available to FDA, including data from adequate and well-controlled clinical trials, if available, it is reasonable to believe that: (A) The product may be effective in diagnosing, treating, or preventing (i) such disease or condition; or (ii) a serious or life-threatening disease or condition caused by a product authorized under section 564, approved or cleared under the FD&C Act, or licensed under section 351 of the PHS Act, for diagnosing, treating, or preventing such a disease or condition caused by such an agent; and (B) the known and potential benefits of the product, when used to diagnose, prevent, or treat such disease or condition, outweigh the known and potential risks of the product, taking into consideration the material threat posed by the agent or agents identified in a declaration under section 564(b)(1)(D) of the FD&C Act, if applicable; (3) that there is no adequate, approved, and available alternative to the product for diagnosing, preventing, or treating such disease or condition; and (4) that such other criteria as may be prescribed by regulation are satisfied.

No other criteria for issuance have been prescribed by regulation under section 564(c)(4) of the FD&C Act. Because the statute is self-executing, regulations or guidance are not required for FDA to implement the EUA authority.

II. EUA Request for an In Vitro Diagnostic Device for Detection of the Ebola Zaire Virus

On September 22, 2006, then-Secretary of DHS, Michael Chertoff, determined that the Ebola virus presents a material threat against the U.S. population sufficient to affect national security.[2] On August 5, 2014, under section 564(b)(1) of the FD&C Act, and on the basis of such determination, the Secretary of HHS declared that circumstances exist justifying the authorization of emergency use of in vitro diagnostics for detection of Ebola virus, subject to the terms of any authorization issued under section 564 of the FD&C Act. Notice of the declaration of the Secretary was published in the **Federal Register** on August 12, 2014 (79 FR 47141). On August 4, 2014, DoD submitted a complete request for, and on August 5, 2014, FDA issued an EUA for the Ebola Zaire (Target 1) Real-Time PCR (TaqMan®) (EZ1 rRT–PCR) Assay, subject to the terms of this authorization.

III. Electronic Access

An electronic version of this document and the full text of the Authorization are available on the Internet at *http://www.regulations.gov.*

IV. The Authorization

Having concluded that the criteria for issuance of the Authorization under section 564(c) of the FD&C Act are met, FDA has authorized the emergency use of an in vitro diagnostic device for detection of the Ebola Zaire virus (detected in the West Africa outbreak in 2014) subject to the terms of the Authorization. The Authorization in its entirety (not including the authorized versions of the fact sheets and other written materials) follows and provides an explanation of the reasons for its issuance, as required by section 564(h)(1) of the FD&C Act.

BILLING CODE 4164–01–P

[1] The Secretary of HHS has delegated the authority to issue an EUA under section 564 of the FD&C Act to the Commissioner of Food and Drugs.

[2] Pursuant to section 564(b)(1) of the FD&C Act (21 U.S.C. 360bbb–3(b)(1)), the HHS Secretary's declaration that supports EUA issuance must be based on one of four determinations, including the identification by the Secretary of DHS of a material threat pursuant to section 319F–2 of the PHS Act sufficient to affect national security or the health and security of U.S. citizens living abroad (section 564(b)(1)(D) of the FD&C Act).

DEPARTMENT OF HEALTH & HUMAN SERVICES

Food and Drug Administration
Silver Spring, MD 20993

August 5, 2014

Robert E. Miller, PhD, RAC
Director, Division of Regulated Activities and Compliance
Department of the Army
U.S. Army Medical Materiel Development Activity
1430 Veterans Drive
Fort Detrick, MD 21702-5009

Dear Dr. Miller:

This letter is in response to your request that the Food and Drug Administration (FDA) issue an Emergency Use Authorization (EUA) for emergency use of the U.S. Department of Defense (DoD) *Ebola Zaire (Target 1)* Real-Time PCR (TaqMan®) (EZ1 rRT-PCR) Assay for the presumptive detection of Ebola Zaire virus (detected in the West Africa outbreak in 2014) on specified instruments in individuals in affected areas with signs and symptoms of Ebola virus infection or who are at risk for exposure or may have been exposed to the Ebola Zaire virus (detected in the West Africa outbreak in 2014) in conjunction with epidemiological risk factors, by laboratories designated by DoD, pursuant to section 564 of the Federal Food, Drug, and Cosmetic Act (the Act) (21 U.S.C. § 360bbb-3).

On September 22, 2006, then-Secretary of the Department of Homeland Security (DHS), Michael Chertoff, determined, pursuant to section 319F-2 of the Public Health Service (PHS) Act (42 U.S.C. § 247d-6b), that the Ebola virus presents a material threat against the United States population sufficient to affect national security.[1] Pursuant to section 564(b)(1) of the Act (21 U.S.C. § 360bbb-3(b)(1)), and on the basis of such determination, the Secretary of HHS declared on August 5, 2014, that circumstances exist justifying the authorization of emergency use of *in vitro* diagnostics for detection of Ebola virus, subject to the terms of any authorization issued under 21 U.S.C. § 360bbb-3(a).[2]

Having concluded that the criteria for issuance of this authorization under section 564(c) of the Act (21 U.S.C. § 360bbb-3(c)) are met, I am authorizing the emergency use of the EZ1 rRT-PCR Assay (as described in the Scope of Authorization section of this letter (Section II)) in individuals in affected areas with signs and symptoms of Ebola virus infection or who are at risk for exposure or may have been exposed to the Ebola Zaire virus (detected in the West Africa outbreak in 2014) in conjunction with epidemiological risk factors (as described in the Scope of Authorization section of this letter (Section II)) for the presumptive detection of Ebola Zaire

[1] Pursuant to section 564(b)(1) of the Act (21 U.S.C. § 360bbb-3(b)(1)), the HHS Secretary's declaration that supports EUA issuance must be based on one of four determinations, including the identification by the DHS Secretary of a material threat pursuant to section 319F-2 of the PHS Act sufficient to affect national security or the health and security of United States citizens living abroad (section 564(b)(1)(D) of the Act).
[2] U.S. Department of Health and Human Services. *Declaration that Circumstances Exist Justifying an Authorization Pursuant to Section 564 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3(b).* August 5, 2014.

virus (detected in the West Africa outbreak in 2014) by laboratories designated by DoD, subject to the terms of this authorization.

I. Criteria for Issuance of Authorization

I have concluded that the emergency use of the EZ1 rRT-PCR Assay for the presumptive detection of Ebola Zaire virus (detected in the West Africa outbreak in 2014) in the specified population meets the criteria for issuance of an authorization under section 564(c) of the Act, because I have concluded that:

1. The Ebola Zaire virus (detected in the West Africa outbreak in 2014) can cause Ebola hemorrhagic fever, a serious or life-threatening disease or condition to humans infected with this virus;

2. Based on the totality of scientific evidence available to FDA, it is reasonable to believe that the EZ1 rRT-PCR Assay, when used with the specified instruments, may be effective in diagnosing Ebola Zaire virus (detected in the West Africa outbreak in 2014), and that the known and potential benefits of the EZ1 rRT-PCR Assay, when used with the specified instruments for diagnosing Ebola Zaire virus (detected in the West Africa outbreak in 2014) infection, outweigh the known and potential risks of such product; and

3. There is no adequate, approved, and available alternative to the emergency use of the EZ1 rRT-PCR Assay for diagnosing Ebola Zaire virus (detected in the West Africa outbreak in 2014).[3]

II. Scope of Authorization

I have concluded, pursuant to section 564(d)(1) of the Act, that the scope of this authorization is limited to the use of the authorized EZ1 rRT-PCR Assay by laboratories designated by DoD for the presumptive detection of Ebola Zaire virus (detected in the West Africa outbreak in 2014) in individuals in affected areas with signs and symptoms of Ebola virus infection or who are at risk for exposure or may have been exposed to the Ebola Zaire virus (detected in the West Africa outbreak in 2014) in conjunction with epidemiological risk factors.

The Authorized EZ1 rRT-PCR Assay:

The EZ1 rRT-PCR Assay is a real-time reverse transcriptase PCR (rRT-PCR) for the *in vitro* qualitative detection of Ebola Zaire virus (detected in the West Africa outbreak in 2014) in Trizol-inactivated whole blood or Trizol-inactivated plasma specimens from individuals in affected areas with signs and symptoms of Ebola virus infection or who are at risk for exposure or may have been exposed to the Ebola Zaire virus (detected in the West Africa outbreak in 2014) in conjunction with epidemiological risk factors. The test procedure consists of nucleic

[3] No other criteria of issuance have been prescribed by regulation under section 564(c)(4) of the Act.

acid extraction followed by rRT-PCR on only the ABI 7500 FAST DX instrument, the JBAIDS instrument, or the Roche LightCycler instrument.

The EZ1 rRT-PCR Assay consists of two primer/probe sets: EZ1 and RNase P along with the assay master mix and Positive Template Controls (PTC) for each primer/probe set. RNA is extracted from Trizol-inactivated whole blood collected with EDTA as the anticoagulant, or Trizol-inactivated plasma, using the Qiagen QIAamp Viral RNA Mini Kit, purchased separately from the assay, prior to running on an authorized instrument. The QIAamp Viral RNA Mini Kit simplifies purification of viral RNA from Trizol-inactivated whole blood with a fast spin-column procedure. Viral RNA binds specifically to the QIAamp silica membrane, and pure viral RNA is eluted in the buffer provided with the kit. The resulting purified RNA is analyzed on one of the authorized instruments using provided Ebola Zaire and RNase P master mixes with appropriate controls in place.

The EZ1 rRT-PCR Assay includes the following assay controls:

- **RNTC** (Reagents No Template Control) is a negative control used in the amplification step to demonstrate no reagent contamination.
- **SNTC** (Sample Negative Control) is a negative control used in the amplification step to demonstrate no contamination in the sample loading.
- **EZ1 PTC** (Positive Template Control) is a positive control used in the amplification step to confirm target amplification and EZ1 reagent function.
- **RP-PTC** (RNase P Positive Template Control) is a positive control used in the amplification step to ensure the RNase P reagents function.
- **NPC** (Negative Processing Control) is a processing control used during the extraction step to demonstrate that no cross contamination occurred.

The above described EZ1 rRT-PCR Assay, when labeled consistently with the labeling authorized by FDA entitled "*Ebola Zaire (Target 1)* Real-Time PCR (TaqMan®) (EZ1 rRT-PCR) Assay on ABI® 7500 Fast Dx, LightCycler®, and JBAIDS: Instruction Booklet" (available at http://www.fda.gov/MedicalDevices/Safety/EmergencySituations/ucm161496.htm), which may be revised by DoD in consultation with FDA, is authorized to be distributed to and used by laboratories designated by DoD under this EUA, despite the fact that it does not meet certain requirements otherwise required by federal law.

The above described EZ1 rRT-PCR Assay is authorized to be accompanied by the following information pertaining to the emergency use, which is authorized to be made available to health care professionals and patients:

- **Fact Sheet for Health Care Providers: Interpreting *Ebola Zaire (Target 1)* Real-Time PCR (TaqMan®) (EZ1 rRT-PCR) Assay Results**

- **Fact Sheet for Patients: Understanding Results from the *Ebola Zaire (Target 1)* Real-Time PCR (TaqMan®) (EZ1 rRT-PCR) Test**

As described in Section IV below, DoD is also authorized to make available additional information relating to the emergency use of the authorized EZ1 rRT-PCR Assay that is consistent with, and does not exceed, the terms of this letter of authorization.

I have concluded, pursuant to section 564(d)(2) of the Act, that it is reasonable to believe that the known and potential benefits of the authorized EZ1 rRT-PCR Assay in the specified population, when used for presumptive detection of Ebola Zaire virus (detected in the West Africa outbreak in 2014), outweigh the known and potential risks of such a product.

I have concluded, pursuant to section 564(d)(3) of the Act, based on the totality of scientific evidence available to FDA, that it is reasonable to believe that the authorized EZ1 rRT-PCR Assay may be effective in the diagnosis of Ebola Zaire virus (detected in the West Africa outbreak in 2014) infection pursuant to section 564(c)(2)(A) of the Act. The FDA has reviewed the scientific information available to FDA including the information supporting the conclusions described in Section I above, and concludes that the authorized EZ1 rRT-PCR Assay, when used to diagnose of Ebola Zaire virus (detected in the West Africa outbreak in 2014) infection in the specified population, meets the criteria set forth in section 564(c) of the Act concerning safety and potential effectiveness.

The emergency use of the authorized EZ1 rRT-PCR Assay under this EUA must be consistent with, and may not exceed, the terms of this letter, including the Scope of Authorization (Section II) and the Conditions of Authorization (Section IV). Subject to the terms of this EUA and under the circumstances set forth in the Secretary of DHS's determination described above and the Secretary of HHS's corresponding declaration under section 564(b)(1), the EZ1 rRT-PCR Assay described above is authorized to diagnose Ebola Zaire virus (detected in the West Africa outbreak in 2014) infection in individuals in affected areas with signs and symptoms of Ebola virus infection or who are at risk for exposure or may have been exposed to the Ebola Zaire virus (detected in the West Africa outbreak in 2014) in conjunction with epidemiological risk factors.

This EUA will cease to be effective when the HHS declaration that circumstances exist to justify the EUA is terminated under section 564(b)(2) of the Act or when the EUA is revoked under section 564(g) of the Act.

III. Waiver of Certain Requirements

I am waiving the following requirements for the EZ1 rRT-PCR Assay during the duration of this EUA:

- Current good manufacturing practice requirements, including the quality system requirements under 21 CFR Part 820 with respect to the design, manufacture, packaging, labeling, storage, and distribution of the EZ1 rRT-PCR Assay.

- Labeling requirements for cleared, approved, or investigational devices, including labeling requirements under 21 CFR 809.10 and 21 CFR 809.30, except for the intended use statement (21 CFR 809.10(a)(2), (b)(2)), adequate directions for use (21 U.S.C. 352(f)), (21 CFR 809.10(b)(5), (7), and (8)), any appropriate limitations on the use of the

device including information required under 21 CFR 809.10(a)(4), and any available information regarding performance of the device, including requirements under 21 CFR 809.10(b)(12).

IV. Conditions of Authorization

Pursuant to section 564 of the Act, I am establishing the following conditions on this authorization:

U.S. Department of Defense (DoD)

A. DoD will distribute the authorized EZ1 rRT-PCR Assay with the authorized labeling, as may be revised by DoD in consultation with FDA, only to laboratories designated by DoD.

B. DoD will provide to laboratories designated by DoD the authorized EZ1 rRT-PCR Assay Fact Sheet for Health Care Providers and the authorized EZ1 rRT-PCR Assay Fact Sheet for Patients.

C. DoD will make available on its website the authorized EZ1 rRT-PCR Assay Fact Sheet for Health Care Providers and the authorized EZ1 rRT-PCR Assay Fact Sheet for Patients.

D. DoD will inform laboratories designated by DoD and relevant public health authority(ies) of this EUA, including the terms and conditions herein.

E. DoD will ensure that laboratories designated by DoD using the authorized EZ1 rRT-PCR Assay have a process in place for reporting test results to health care professionals and relevant public health authorities, as appropriate.

F. DoD will track adverse events and report to FDA under 21 CFR Part 803.

G. Through a process of inventory control, DoD will maintain records of device usage.

H. DoD will collect information on the performance of the assay, and report to FDA any suspected occurrence of false positive or false negative results of which DoD becomes aware.

I. DoD is authorized to make available additional information relating to the emergency use of the authorized EZ1 rRT-PCR Assay that is consistent with, and does not exceed, the terms of this letter of authorization.

J. Only DoD may request changes to the authorized EZ1 rRT-PCR Assay Fact Sheet for Health Care Providers or the authorized EZ1 rRT-PCR Assay Fact Sheet for Patients. Such requests will be made by DoD in consultation with FDA.

Laboratories Designated by DoD

K. Laboratories designated by DoD will include with reports of the results of the EZ1 rRT-PCR Assay the authorized Fact Sheet for Health Care Providers and the authorized Fact Sheet for Patients. Under exigent circumstances, other appropriate methods for disseminating these Fact Sheets may be used, which may include mass media.

L. Laboratories designated by DoD will perform the EZ1 assay only on the ABI 7500 FAST DX instrument, JBAIDS instrument, or Roche LightCycler instrument.

M. Laboratories designated by DoD will have a process in place for reporting test results to health care professionals and relevant public health authorities, as appropriate.

N. Laboratories designated by DoD will collect information on the performance of the assay, and report to DoD any suspected occurrence of false positive or false negative results of which they become aware.

O. All laboratory personnel using the assay should be appropriately trained in RT-PCR techniques and use appropriate laboratory and personal protective equipment when handling this kit.

DoD and Laboratories Designated by DoD

P. DoD and laboratories designated by DoD will ensure that any records associated with this EUA are maintained until notified by FDA. Such records will be made available to FDA for inspection upon request.

Conditions Related to Advertising and Promotion

Q. All advertising and promotional descriptive printed matter relating to the use of the authorized EZ1 rRT-PCR Assay shall be consistent with the Fact Sheets and authorized labeling, as well as the terms set forth in this EUA and the applicable requirements set forth in the Act and FDA regulations.

R. All advertising and promotional descriptive printed matter relating to the use of the authorized EZ1 rRT-PCR Assay shall clearly and conspicuously state that:

- This test has not been FDA cleared or approved;
- This test has been authorized by FDA under an Emergency Use Authorization for use by laboratories designated by DoD;
- This test has been authorized only for the detection of Ebola Zaire virus (detected in the West Africa outbreak in 2014) and not for any other viruses or pathogens; and

Page 7 – Dr. Miller, U.S. Department of Defense

- This test is only authorized for the duration of the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostics for detection of Ebola Zaire virus under section 564(b)(1) of the Act, 21 U.S.C. § 360bbb-3(b)(1), unless the authorization is terminated or revoked sooner.

No advertising or promotional descriptive printed matter relating to the use of the authorized EZ1 rRT-PCR Assay may represent or suggest that this test is safe or effective for the diagnosis of Ebola Zaire virus (detected in the West Africa outbreak in 2014).

The emergency use of the authorized EZ1 rRT-PCR Assay as described in this letter of authorization must comply with the conditions and all other terms of this authorization.

V. Duration of Authorization

This EUA will be effective until the declaration that circumstances exist justifying the authorization of the emergency use of *in vitro* diagnostics for detection of Ebola virus is terminated under section 564(b)(2) of the Act or the EUA is revoked under section 564(g) of the Act.

Sincerely,

Margaret A. Hamburg, M.D.
Commissioner of Food and Drugs

Enclosures

Dated: September 9, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–22086 Filed 9–16–14; 8:45 am]

BILLING CODE 4164–01–C

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–D–1120]

Guidance for Industry on Abbreviated New Drug Application Submissions—Refuse-to-Receive Standards; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''ANDA Submissions—Refuse-to-Receive Standards.'' It finalizes the draft guidance with the same name that published on October 1, 2013. This guidance is intended to assist applicants preparing to submit to FDA abbreviated new drug applications (ANDAs) and related submissions (i.e., prior approval supplements for new strengths). The guidance represents the FDA's current thinking regarding the types of serious deficiencies that may cause FDA to refuse-to-receive the submission.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Benjamin Chacko, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1673, Silver Spring, MD 20993–0002, 240–402–7924.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled ''ANDA Submissions—Refuse-to-Receive Standards.'' This guidance is intended to assist applicants preparing to submit to FDA ANDAs, and prior approval supplements to ANDAs, for which the applicant is seeking approval of a new strength of the drug product. The guidance highlights deficiencies that may cause FDA to refuse-to-receive an ANDA. A refuse-to-receive decision indicates that FDA determined that an ANDA is not sufficiently complete to permit a substantive review.

Under the provisions of the Generic Drug User Fee Amendments of 2012, the Office of Generic Drugs (OGD) is tasked with a number of activities, including the development of ''enhanced refusal to receive standards for ANDAs and other related submissions by the end of year 1 of the program. . . .'' Recent data underscore the need for improvement in the quality of original ANDA submissions. Between 2009 and 2012, OGD refused to receive 497 ANDAs, primarily because the submissions contained serious deficiencies. FDA evaluates each incoming ANDA individually to determine whether its format and content meet threshold standards to permit a substantive review and thus can be received by FDA. The Agency cannot receive an ANDA unless it contains the information required under section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)) and related regulations (e.g., 21 CFR 314.101(b)(1)). This guidance explains in some detail the kind of omissions that can lead to a refuse-to-receive determination. The guidance is intended to assist applicants preparing ANDAs and related submissions to help improve the quality of those submissions and ensure that their format and content are sufficiently complete to permit a substantive review.

This guidance finalizes the draft guidance published in the **Federal Register** on October 1, 2013 (78 FR 60292). Comments on the draft guidance were considered while finalizing this guidance. Specifically, certain changes from the draft guidance include clarifying the definitions of ''major'' and ''minor'' deficiencies, clarifying the remedy process and period for minor deficiencies, and providing a non-exhaustive list of minor deficiencies. This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the Agency's current thinking on ''ANDA Submissions—Refuse-to-Receive Standards.'' It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collection of information in 21 CFR part 314 for ANDA and related submissions has been approved under OMB control number 0910–0001.

III. Comments

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: September 11, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–22068 Filed 9–16–14; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–1292]

Draft Guidance for Industry on Abbreviated New Drug Application Submissions—Refuse To Receive for Lack of Proper Justification of Impurity Limits; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''ANDA Submissions—Refuse to Receive for Lack of Proper Justification of Impurity Limits.'' This draft guidance is intended to assist applicants preparing to submit

to FDA abbreviated new drug applications (ANDAs) and related submissions (i.e., prior approval supplements) for which the applicant is seeking approval of a new strength of the drug product. The draft guidance highlights deficiencies about impurity information that may cause FDA to refuse to receive an ANDA.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by November 17, 2014.

ADDRESSES: Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Elizabeth Giaquinto, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave, Bldg. 75, Rm. 1670, Silver Spring, MD 20993–0002, 240–402–7930.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''ANDA Submissions—Refuse to Receive Lack of Proper Justification of Impurity Limits.'' This draft guidance is intended to assist applicants preparing to submit to FDA ANDAs, and prior approval supplements to ANDAs, for which the applicant is seeking approval of a new strength of the drug product. The draft guidance highlights serious deficiencies in impurity information that may cause FDA to refuse to receive an ANDA. Specifically, these deficiencies include: (1) Failing to justify proposed limits for specified identified impurities in drug substances and drug products that are above qualification thresholds; (2) failing to justify proposed limits for specified unidentified impurities that are above identification thresholds; and (3) proposing limits for unspecified impurities (e.g., any unknown impurity) above identification thresholds.

Under the provisions of the Generic Drug User Fee Amendments of 2012, the Office of Generic Drugs (OGD) is tasked with a number of activities, including the development of ''enhanced refusal to receive standards for ANDAs and other related submissions by the end of year 1 of the program. . . .'' Recent data underscore the need for improvement in the quality of original ANDA submissions. Between 2009 and 2012, OGD refused to receive 497 ANDAs, primarily because the submissions contained serious deficiencies. FDA evaluates each incoming ANDA individually to determine whether its format and content meet threshold criteria to permit a substantive review and thus can be received by FDA. The Agency cannot receive an ANDA unless it contains the information required under section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)) and related regulations (e.g., 21 CFR 314.101(b)(1)). FDA issued the draft guidance for industry ''ANDA Submissions—Refuse-to-Receive Standards'' to explain in some detail the kind of omissions that can lead to a refuse-to-receive determination. This guidance is being issued concurrently with the final version of the guidance for industry, ''ANDA Submissions—Refuse to Receive Standards.'' FDA intends to develop additional guidance documents further clarifying the enhanced refusal to receive standards.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on ''ANDA Submissions—Refuse to Receive for Lack of Proper Justification for Impurity Limits.'' It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR 314.94 have been approved under 0910–0001.

III. Comments

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: September 11, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–22110 Filed 9–16–14; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–0001]

Cardiovascular and Renal Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Cardiovascular and Renal Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on October 30, 2014, from 8 a.m. to 5:30 p.m.

Location: FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading ''Resources for You,'' click on ''Public Meetings at the FDA White

Oak Campus.'' Please note that visitors to the White Oak Campus must enter through Building 1.

Contact Person: Kristina Toliver, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, *CRDAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

Agenda: The committee will discuss new drug application (NDA) 206316, edoxaban tablets, submitted by Daiichi Sankyo, Inc., for the prevention of stroke and systemic embolism (blood clots other than in the head) in patients with nonvalvular atrial fibrillation (A Fib; abnormally rapid and chaotic contractions of the atria, the upper chambers of the heart).

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before October 16, 2014. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before October 7, 2014. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by October 8, 2014.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Kristina Toliver at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: September 11, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–22071 Filed 9–16–14; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–0001]

Electronic Cigarettes and the Public Health; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

The Food and Drug Administration (FDA), Center for Tobacco Products, is announcing a public workshop to obtain information on electronic cigarettes and the public health. The workshop will include presentations and panel discussions about the current state of the science, and will focus on product science, packaging, constituent labeling, and environmental impacts. FDA intends to follow this workshop with two additional electronic cigarette workshops, with one on individual health effects and one on population health effects.

Dates and Times: The public workshop will be held on December 10, 2014, from 8 a.m. to 5 p.m. and on December 11, 2014, from 8:30 a.m. to 3:30 p.m. Individuals who wish to attend the public workshop must register by November 25, 2014.

Location: The public workshop will be held at the FDA White Oak Conference Center, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (Rm. 1503A), Silver Spring, MD 20993. Entrance for the public meeting participants (non-FDA employees) is through Building 1 where routine security check procedures will be performed. For parking, transportation, security, and information regarding special accommodations due to a disability, please refer to *http://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

Contact Person: Caryn Cohen, Office of Science, Center for Tobacco Products, Food and Drug Administration, Document Control Center, Bldg. 71, Rm. G335, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 1–877–287–1373, email: *workshop.CTPOS@fda.hhs.gov.*

Registration to Attend the Workshop: If you wish to attend the workshop in person or by Webcast, you must register by submitting either an electronic or written request no later than November 25, 2014. Please submit electronic requests at *https://www.surveymonkey.com/s/CTP-December-Workshop.* Persons without Internet access may send written requests for registration to Caryn Cohen (see *Contact Person*). Requests for registration must include the prospective attendee's name, title, affiliation, address, email address if available, and telephone number. Registration is free and you may register to either attend in-person or view the live Webcast. Both seating and viewership are limited, so early registration is recommended. FDA may limit the number of registrants from a single organization, as well as the total number of participants, if registration reaches full capacity. For those registrants with Internet access, confirmation of registration will be emailed to you no later than November 26, 2014. Onsite registration may be allowed if space is available. If registration reaches maximum capacity,

FDA will post a notice closing registration at *http://www.fda.gov/TobaccoProducts/NewsEvents/ucm238308.htm*. If you need special accommodations due to a disability, please contact Caryn Cohen (see *Contact Person*) no later than December 3, 2014.

Presenters and Panelists: FDA is interested in gathering scientific information from individuals with a broad range of perspectives on technical topics to be discussed at the workshop. To be considered to serve as a presenter, please provide the following:

- A brief abstract for each presentation. The abstract should identify the specific topic(s) to be addressed and the amount of time requested.
- A one-page biosketch that describes and supports the speaker's scientific expertise on the specific topic(s) being presented, nature of the individual's experience and research in the scientific field, positions held, and any program development activities.

Panelists will sit on a panel to discuss their scientific knowledge on the questions and presentations in each session. To be considered to serve as a panelist, please provide the following:

- A one-page biosketch that describes and supports the speaker's scientific expertise on the specific topic(s) being presented, nature of the individual's experience and research in the scientific field, positions held, and any program development activities.

If you are interested in serving as a presenter or panelist, please submit the above information, along with the topic on which you would like to speak, to *workshop.CTPOS@fda.hhs.gov* by November 4, 2014.

Oral Presentations by Members of the Public: This workshop includes a public comment session. Persons wishing to present during the public comment session must make this request at the time of registration and should identify the topic they wish to address from among those topics under consideration, which are identified in section II. FDA will do its best to accommodate requests to present. FDA urges individuals and organizations with common interests to consolidate or coordinate their comments, and request a single time for a joint presentation. For those requesters with Internet access, Caryn Cohen (see *Contact Person*) will email you regarding your request to speak by November 26, 2014.

Transcripts: A transcript of the proceedings will be available after the workshop at *http://www.fda.gov/TobaccoProducts/NewsEvents/ucm238308.htm* as soon as the official transcript is finalized. It will also be posted to the docket at *http://www.regulations.gov* once the docket is opened.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing a public workshop to gather scientific information and stimulate discussion among scientists about electronic cigarettes (e-cigarettes). The focus of this workshop will be product science (specifically device designs and characteristics, and e-liquid and aerosol constituents), product packaging, constituent labeling, and environmental impact. FDA intends to follow this workshop with two additional workshops that will address other scientific topics related to e-cigarettes, including: (1) The impact of e-cigarettes on individual health, including clinical pharmacology, topography, abuse liability, dependence, and health effects and (2) the impact of e-cigarettes on the population, including discussions of product appeal (e.g., impact of advertising, marketing, flavorings, consumer perceptions) and product safety labeling.

On April 25, 2014, FDA published a proposed rule to extend its tobacco product authorities to additional products that meet the statutory definition of ''tobacco product'' (Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Regulations on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products; 79 FR 23141, April 25, 2014, Docket No. FDA–2014–N–0189) (proposed deeming rule). If the proposed deeming rule is finalized as proposed, e-cigarettes that are tobacco products would be subject to FDA regulation under the FD&C Act. As stated in the proposed deeming rule, FDA ''is aware of the recent significant increase in the prevalence in e-cigarette use'' (79 FR 23141 at 23152), and there is much to be learned about these relatively new entrants to the market.

These workshops are intended to better inform FDA about these products. Should the Agency move forward as proposed to regulate e-cigarettes, additional information about the products would assist the Agency in carrying out its responsibilities under the law. This would be true regardless of the details of any such final rule. Accordingly, FDA is working to obtain such information now rather than waiting for the conclusion of the deeming rulemaking.

Participants should note that this workshop is not intended to inform the Agency's deeming rulemaking. All comments regarding the proposed deeming rule were to be submitted to the Agency by August 8, 2014 (Docket No. FDA–2014–N–0189). As such, the scope of this workshop is limited to the topics presented in Section II.

At the start of this first workshop in this series, FDA will announce via a **Federal Register** notice the establishment of a docket for submission of written comments. Regardless of attendance at the public workshops, interested persons will be invited to submit comments to the docket. The forthcoming **Federal Register** notice will provide information on how to submit comments. Please note that this docket will only pertain to this workshop. Comments submitted to the docket will not be added to other dockets, such as the docket for the proposed rule deeming additional tobacco products subject to the FD&C Act.

II. Topics for Discussion

The public workshop will include presentations and panel discussion regarding e-cigarettes and the public health, specifically relating to the products themselves. Topics to be addressed include, for example: (1) Product science (including design, chemistry, and toxicology); packaging, labeling, and environmental impact assessments; (2) potential risks and benefits of product characteristics; (3) strategies to mitigate risk to users; (4) methods for evaluating product performance, constituents, stability, etc.; and (5) potential risks to the environment. Additional information related to workshop presentations and discussion topics, including specific questions to be addressed at the workshop, can be found at *http://www.fda.gov/TobaccoProducts/NewsEvents/ucm238308.htm*.

Dated: September 11, 2014.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2014–22122 Filed 9–16–14; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; ADCC.

Date: October 15, 2014.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Ramesh Vemuri, Ph.D., Chief, Scientific Review Branch, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2C–212, Bethesda, MD 20892, 301–402–7700, *rv23r@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: September 11, 2014.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–22133 Filed 9–16–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Energy and Aging.

Date: November 17, 2014.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To Review And Evaluate Grant Applications.

Place: National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue, Bethesda, Md 20892, (Telephone Conference Call).

Contact Person: Jeannette L. Johnson, Ph.D., National Institutes on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7705, *JOHNSONJ9@NIA.NIH.GOV*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: September 11, 2014.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–22131 Filed 9–16–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Rodent Colony Pathology Monitoring Contract.

Date: October 8, 2014.

Time: 3:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Bita Nakhai, Ph.D., Scientific Review Branch, National Institute On Aging, Gateway Bldg. 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301–402–7701, *nakhaib@nia.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: September 11, 2014.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–22132 Filed 9–16–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Cancer Institute Council of Research Advocates.

The meeting will be open to the public, 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.

Name of Committee: National Cancer Institute Council of Research Advocates.

Date: October 21, 2014.

Time: 9:00 a.m. to 3:30 p.m.

Agenda: NCI Update, How Advocates Can Advance Cancer Immunotherapy Research, Distress Screening, Working Group Discussion.

Place: National Institutes of Health, 31 Center Drive, Building 31, C-Wing, Conference Rooms 6 & 8, Bethesda, MD 20892.

Contact Person: Kelley Landy, NCI Office of Advocacy Relations, National Cancer Institute, 31 Center Drive, Building 31, Room 10A28, Bethesda, MD 20892, 301–594–3194, *Kelley.landy@nih.gov.*

Any interested person may file written comments with the committee by forwarding the 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.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *deainfo.nci.nih.gov/advisory/ncra/ncra.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention

Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS).

Dated: September 11, 2014.

Melanie J. Gray, Program Analyst,

Office of Federal Advisory Committee Policy.

[FR Doc. 2014–22129 Filed 9–16–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; 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 Board of Scientific Counselors, NIDCD.

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 as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the NATIONAL INSTITUTE ON DEAFNESS AND OTHER COMMUNICATION DISORDERS, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NIDCD.

Date: October 30–31, 2014.

Open: October 30, 2014, 8:30 a.m. to 9:15 a.m.

Agenda: Reports from institute staff.

Place: National Institutes of Health, Building 35A, Room 610, 35A Covent Drive, Bethesda, MD 20892.

Closed: October 30, 2014, 9:15 a.m. to 6:00 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 35A, Room 610, 35A Covent Drive, Bethesda, MD 20892.

Closed: October 31, 2014, 8:00 a.m. to 10:45 a.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators

Place: National Institutes of Health, Building 35A, Room 610, 35A Covent Drive, Bethesda, MD 20892.

Contact Person: Andrew J. Griffith, Ph.D., MD, Director, Division of Intramural Research, National Institute on Deafness and Other Communication Disorders, 35A Convent Drive, GF 103, Rockville, MD 20892, 301–496–1960, *griffita@nidcd.nih.gov.*

Any interested person may file written comments with the committee by forwarding the 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.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nidcd.nih.gov/about/groups/bsc/,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: September 11, 2014.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–22134 Filed 9–16–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel PAR13–132: Understanding and Promoting Health Literacy.

Date: October 10, 2014.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Villa Florence Hotel, 225 Powell Street, San Francisco, CA 94102.

Contact Person: Rebecca Henry, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, MSC 7770, Bethesda, MD 20892, 301–435–1717, *henryrr@mail.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group Development—2 Study Section.

Date: October 16–17, 2014.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Washington, DC Downtown, 1199 Vermont Avenue, Washington, DC 20005.

Contact Person: Rass M. Shayiq, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institute of Health, 6701 Rockledge Drive, Room 2182, MSC 7818, Bethesda, MD 20892, (301) 435–2359, *shayiqr@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group Intercellular Interactions Study Section.

Date: October 16–17, 2014.

Time: 8:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn Bethesda, 7301 Waverly Street, Bethesda, MD 20814.

Contact Person: Wallace Ip, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5128, MSC 7840, Bethesda, MD 20892, 301–435–1191, *ipws@mail.nih.gov.*

Name of Committee: Immunology Integrated Review Group Cellular and Molecular Immunology—B Study Section.

Date: October 16–17, 2014.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Wyndham Grand Chicago Riverfront Hotel, 71 E. Wacker Drive, Chicago, IL 60601.

Contact Person: Betty Hayden, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4206, MSC 7812, Bethesda, MD 20892, 301–435–1223, *haydenb@csr.nih.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group Hemostasis and Thrombosis Study Section.

Date: October 16, 2014.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Bukhtiar H. Shah, Ph.D., DVM, Scientific Review Officer, Vascular and

Hematology IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4120, MSC 7802, Bethesda, MD 20892, (301) 806–7314, *shahb@csr.nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group Modeling and Analysis of Biological Systems Study Section.

Date: October 16–17, 2014.

Time: 8:00 a.m. to 5:00 p.m

Agenda: To review and evaluate grant applications.

Place: The William F. Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: Craig Giroux, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5150, Bethesda, MD 20892, 301–435–2204, *girouxcn@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group Cellular and Molecular Biology of Glia Study Section.

Date: October 16–17, 2014.

Time: 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Monaco Alexandria, 480 King Street, Alexandria, VA 22314.

Contact Person: Carole L. Jelsema, Ph.D., Chief and Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4176, MSC 7850, Bethesda, MD 20892, (301) 435–1248, *jelsemac@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group Membrane Biology and Protein Processing Study Section.

Date: October 16–17, 2014.

Time: 8:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Palomar, 2121 P Street NW., Washington, DC 20037.

Contact Person: Janet M. Larkin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5142, MSC 7840, Bethesda, MD 20892, 301–806–2765, *larkinja@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Cellular Aspects of Diabetes and Obesity Study Section.

Date: October 16–17, 2014.

Time: 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Robert Garofalo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6156, MSC 7892, Bethesda, MD 20892, 301–435–1043, *garofalors@csr.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Cellular, Molecular and Integrative Reproduction Study Section.

Date: October 16–17, 2014.

Time: 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

Contact Person: Gary Hunnicutt, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6164, MSC 7892, Bethesda, MD 20892, 301–435–0229, *hunnicuttgr@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group; Biology of the Visual System Study Section.

Date: October 16–17, 2014.

Time: 8:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Michael H. Chaitin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5202, MSC 7850, Bethesda, MD 20892, (301) 435–0910, *chaitinm@csr.nih.gov.*

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group; Pathogenic Eukaryotes Study Section.

Date: October 16–17, 2014.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Mayflower Hotel, 1127 Connecticut Avenue NW., Washington, DC 20036.

Contact Person: Tera Bounds, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3198, MSC 7808, Bethesda, MD 20892, 301 435–2306, *boundst@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Biobehavioral Mechanisms of Emotion, Stress and Health Study Section.

Date: October 16–17, 2014.

Time: 8:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Guest Suites Santa Monica, 1707 Fourth Street, Santa Monica, CA 90401.

Contact Person: Maribeth Champoux, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3170, MSC 7848, Bethesda, MD 20892, (301) 594–3163, *champoum@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: September 11, 2014.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–22128 Filed 9–16–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of 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 Cancer Institute Special Emphasis Panel; NCI Provocative Questions Group B.

Date: October 30, 2014.

Time: 7:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center 5701 Marinelli Road Bethesda, MD 20852.

Contact Person: Peter J. Wirth, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W514, Bethesda, MD 20892–9750, 240–276–6434, *pw2q@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/sep/sep.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: September 11, 2014.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–22130 Filed 9–16–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the NIH Scientific Management Review Board (SMRB). On October 14, 2014, SMRB members will meet to discuss challenges and solutions to engaging pre-college students in biomedical science, as well as ways to streamline the NIH grant review, award, and management process while maintaining proper oversight. Stakeholders and other experts will give presentations on these topics.

The NIH Reform Act of 2006 (Pub. L. 109–482) provides organizational authorities to HHS and NIH officials to: (1) Establish or abolish national research institutes; (2) reorganize the offices within the Office of the Director, NIH including adding, removing, or transferring the functions of such offices or establishing or terminating such offices; and (3) reorganize divisions, centers, or other administrative units within an NIH national research institute or national center including adding, removing, or transferring the functions of such units, or establishing or terminating such units. The purpose of the SMRB is to advise appropriate HHS and NIH officials on the use of these organizational authorities and identify the reasons underlying the recommendations.

The meeting will be open to the public, 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. Times are subject to change.

Name of Committee: Scientific Management Review Board.

Date: October 14, 2014.

Time: 10:15 a.m. to 6:00 p.m.

Agenda: At this meeting, SMRB members will present preliminary findings and recommendations of the SMRB Working Group on Pre-college Engagement in Biomedical Science regarding ways NIH can cultivate sustained interest in biomedical science among students from pre-kindergarten through high school in order to contribute to a healthy biomedical workforce pipeline. Stakeholders in pre-college programs and education evaluation experts will give presentations on this topic. SMRB members will also hear from representatives of research funding agencies and organizations regarding their approach to grant review, award, and management. Time will be allotted on the agenda for public comment. Sign up for public comments will begin approximately at 9:15 a.m. on October 14, 2014, and will be restricted to one sign-in per person. In the event that time does not allow for all those interested to present oral comments, any interested person may file written comments with the committee by forwarding the 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.

Place: National Institutes of Health, Building 31, 6th Floor, Conference Room 6, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Juanita Marner, Office of Science Policy, Office of the Director, NIH, National Institutes of Health, 6705 Rockledge Drive, Suite 750, Bethesda, MD 20892, *smrb@mail.nih.gov,* (301) 435–1770.

The meeting will be webcast. The draft meeting agenda and other information about the SMRB, including information about access to the webcast, will be available at *http://smrb.od.nih.gov.*

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxis, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: September 11, 2014.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2014–22135 Filed 9–16–14; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0136]

Agency Information Collection Activities: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security 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: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours or to the information collected. This document is published to obtain comments from the public and affected agencies.

DATES: Written comments should be received on or before October 17, 2014 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** (79 FR 28937) on May 20, 2014, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10. CBP invites the general public and other Federal agencies to comment

on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3507). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden, including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

OMB Number: 1651–0136.

Abstract: The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

Current Actions: This submission is being made to extend the expiration date with no change to the burden hours or to the information collected.

T*ype of Review:* Extension (without change).

Affected Public: Individuals and Businesses.

Estimated Number of Respondents: 60,000.

Annual Frequency of Response: 1.

Estimated Time per Response: 13 minutes.

Estimated Total Annual Burden Hours: 13,000 hours.

September 10, 2014.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2014–22126 Filed 9–16–14; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5760–N–02]

60 Day Notice of Proposed Information Collection: Comment Request; Office of Economic Resilience Progress Report Template

AGENCY: Office of Economic Resilience (OER), 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.

The Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Pub. L. 112–10, approved April 15, 2011) (Appropriations Act), provided a total of $100,000,000 to HUD for a Sustainable Communities Initiative to improve regional planning efforts that integrate housing and transportation decisions, and increase the capacity to improve land use and zoning. Of that total, $70,000,000 is available for the Sustainable Communities Regional Planning Grant Program, and $30,000,000 is available for the Community Challenge Planning Grant Program.

The Consolidated Appropriations Act, 2010 (Pub. L. 111–117, December 16, 2009), provided a total of $150 million in fiscal year 2010 to HUD for a Sustainable Communities Initiative to improve regional planning efforts that integrate housing and transportation decisions, and increase the capacity to improve land use and zoning.

The Department of Housing and Urban Development's Sustainable Communities Initiative (SCI) Planning Grant Programs, which comprise of the Sustainable Communities Regional Planning Grant Program, the Community Challenge Planning Grant Program, and the Capacity Building for Sustainable Communities Grant Program, require progress reporting by grantees on a semi-annual basis (i.e., Twice per year: January 30th and July 30th). The grant program terms and conditions require the grantee to submit a semi-annual progress report which reflects activities undertaken, obstacles encountered and solutions achieved, and accomplishments. Progress reports that show progress of the program in meeting approved work plan goals, objectives are to be submitted.

DATES: *Comments Due Date:* November 17, 2014.

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: Collette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll free number) or email at *Collette.Pollard@hud.gov* . Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Thaddeus Wincek, Office of Economic Resilience, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202)

402–6617 (this is not a toll free number) for copies of the proposed forms and other available information.

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: OER Progress Report Template.

OMB Approval Number: 2501–0030.

Type of Request: Extension of currently approved collection.

Form Number: HUD Form 40105.

Description of the need for the information and proposed use: The Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Pub. L. 112–10, approved April 15, 2011) (Appropriations Act), provided a total of $100,000,000 to HUD for a Sustainable Communities Initiative to improve regional planning efforts that integrate housing and transportation decisions, and increase the capacity to improve land use and zoning. Of that total, $70,000,000 is available for the Sustainable Communities Regional Planning Grant Program, and $30,000,000 is available for the Community Challenge Planning Grant Program.

The Consolidated Appropriations Act, 2010 (Pub. L. 111–117, December 16, 2009), provided a total of $150 million in fiscal year 2010 to HUD for a Sustainable Communities Initiative to improve regional planning efforts that integrate housing and transportation decisions, and increase the capacity to improve land use and zoning.

This information collection is necessary to fulfill the reporting requirements of the Department of Housing and Urban Development's Sustainable Communities Initiative (SCI) Planning Grant Programs, which comprise of the Sustainable Communities Regional Planning Grant Program, the Community Challenge Planning Grant Program, and the Capacity Building for Sustainable Communities Grant Program. All grant programs require progress reporting by grantees on a semi-annual basis (i.e. Twice per year: January 30th and July 30th). The grant program terms and conditions require the grantee to submit a semi-annual progress report which reflects activities undertaken, obstacles encountered and solutions achieved, and accomplishments. Progress reports that show progress of the program in meeting approved work plan goals, objectives are to be submitted.

Respondents: Sustainable Communities Initiative (SCI) grantees.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Total	56	Semi-annually	112	1.5	168	$40.00	$6,720.00

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: September 10, 2014.

Harriet Tregoning,

Director, Office of Economic Resilience, Department of Housing and Urban Development.

[FR Doc. 2014–22170 Filed 9–16–14; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5759–N–12]

60-Day Notice of Proposed Information Collection: HOPE VI Public Housing Programs

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, PIH, 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:* November 17, 2014.

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: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street SW., Room 4176, Washington, DC 20410–5000; telephone 202–402–3400 (this is not a toll-free number) or email at *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 via TTY by calling the Federal Information 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 Proposal: HOPE VI Public Housing Program.

OMB Control Number: 2577–0208.

Description of the need for the information and proposed use: Section 24 of the U.S. Housing Act of 1937, as added by section 535 of the Quality Housing and Work Responsibility Act of 1998 (Pub. L. 105–276, 112 Stat. 2461, approved October 21, 1998) and revised by the HOPE VI Program

Reauthorization and Small Community Main Street Rejuvenation and Housing Act of 2003 (Pub. L. 108–186, 117 Stat. 2685, approved December 16, 2003), establishes the HOPE VI program for the purpose of making assistance available on a competitive basis to public housing agencies (PHAs) in improving the living environment for public housing residents of severely distressed public housing projects through the demolition, rehabilitation, reconfiguration, or replacement of severely distressed public housing projects (or portions thereof); in revitalizing areas in which public housing sites are located, and contributing to the improvement of the surrounding community; in providing housing that avoids or decreases the concentration of very low-income families; and in building sustainable communities. In addition, the HOPE VI Program Reauthorization and Small Community Main Street Rejuvenation and Housing Act of 2003 added to the HOPE VI program the purpose of making assistance available on a competitive basis to small units of local government to develop affordable housing as part of Main Street rejuvenation projects. The program authorization was renewed by the Consolidated Appropriations Act, 2010 (Pub. L. 111–117, approved December 16, 2009), which extends the program until September 30, 2011. Under this requirement, the Department only has a few months to award and obligate the 2011 funds or they will be returned to the Treasury. These information collections are required in connection with the annual publication in the **Federal Register** of Notices of Funding Availability (NOFAs), contingent upon available funding and authorization, which announce the availability of funds provided in annual appropriations for HOPE VI Revitalization, Demolition grants, and HOPE VI Main Street grants.

Eligible public housing agencies (PHAs) (for HOPE VI Revitalization and Demolition) and eligible local units of government (for HOPE VI Main Street) interested in obtaining HOPE VI grants are required to submit applications to HUD, as explained in each program NOFA. The information collection conducted in the applications enables HUD to conduct a comprehensive, merit-based selection process in order to identify and select the applications to receive funding. With the use of HUD-prescribed forms, the information collection provides HUD with sufficient information to approve or disapprove applications.

Applicants that are awarded HOPE VI grants are required to report on a quarterly basis on the sources and uses of all amounts expended for revitalization, demolition, or Main Street activities. HOPE VI Revitalization grantees use a fully-automated, Internet-based process for the submission of quarterly reporting information. HUD reviews and evaluates the collected information and uses it as a primary tool with which to monitor the status of HOPE VI Revitalization projects and the HOPE VI Revitalization program.

Agency Form Numbers: HUD–52774, HUD–52780, HUD–52785, HUD–52787, HUD–52798, HUD–52790, HUD–52797, HUD–52799, HUD–52800, HUD–52825–A, HUD–52860–A, HUD–52861, HUD–53001–A, HUD 96010, and HUD 96011.

Members of Affected Public: Public Housing Agencies.

Estimation of the total number of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:

For HOPE VI Revitalization Application: 30 respondents, once annually, 195.5 hours average per response results in a total annual reporting burden of 5,865.0 hours.

For HOPE VI Demolition Applications: 34 respondents, once annually, 40.25 hours average per response results in a total annual reporting burden of 1,368.50 hours.

For HOPE VI Main Street Applications: 15 respondents, once annually, 48.67 hours average per response results in a total annual reporting burden of 675.0 hours.

For HOPE VI Revitalization Quarterly Reporting: 207 respondents, 4 times annually, 20 hours average per response results in a total annual reporting burden of 16,560 hours.

Grand total: These information collections, along with other Non-NOFA information collection items required in connection with the HOPE VI program including budget updates, supportive services and relocation plans, and cost certificates result in an annual total reporting burden of 26,516.00 hours.

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.

Date: September 10, 2014.

Merrie Nichols-Dixon,

Deputy Director, Office of Policy, Programs and Legislative Initiatives.

[FR Doc. 2014–22168 Filed 9–16–14; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5813–N–01]

Performance Review Board

AGENCY: Office of the Deputy Secretary, HUD.

ACTION: Notice of appointments.

SUMMARY: The Department of Housing and Urban Development announces the establishment of two Performance Review Boards to make recommendations to the appointing authority on the performance of its senior executives. Nelson Bregon, Towanda Brooks, and Linda Cruciani will serve as members of the Departmental Performance Review Board to review career SES performance assessments. Laura Hogshead, Mark Linton, and Lynn Ross will serve as members of the Departmental Performance Review Board to review Schedule C SES performance assessments. The address is: Department of Housing and Urban Development, Washington, DC 20410–0050.

FOR FURTHER INFORMATION CONTACT: Persons desiring any further information about the Performance Review Board and its members may contact Juliette Middleton, Director, Office of Executive Resources, Department of Housing and Urban Development, Washington, DC 20410. Telephone (202) 402–3058. (This is not a toll-free number.)

Dated: September 9, 2014.

Helen R. Kanovsky,

Acting Deputy Secretary.

[FR Doc. 2014–22217 Filed 9–16–14; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5763–N–08]

Implementation of the Privacy Act of 1974, as Amended; Notice of New System of Records—Application Submission and Processing System

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice of New System of Records.

SUMMARY: Pursuant to the Privacy Act of 1974 (U.S.C. 552a (e)(4)), as amended, and Office of Management and Budget (OMB), Circular No. A–130, notice is hereby given that the Department of Housing and Urban Development (HUD), Office of Multifamily Housing (MFH), proposes to establish a new system of records: The MFH Application Submission and Processing System (ASAP). MFH ASAP will be an a comprehensive, automated underwriting system to support the processing and tracking MFH insurance applications from pre-application through final closing. The system provides an improved way of managing data and the electronic processing of the lender applications. Upon full implementation, this new system will replace in its entirety the MFH Development Application Processing system (DAP) and the supporting system of records.

DATES: *Effective Date:* This action shall be effective without further notice on October 17, 2014 unless comments are received that would result in a contrary determination.

Comments Due Date: October 17, 2014.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Rules Docket Clerk, Office of the General Counsel, Department of Housing and Urban Development, 451 Seventh Street SW., Room 10276, Washington, DC 20410–0500. Communication should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying between 8:00 a.m. and 5:00 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: Donna Robinson-Staton, Chief Privacy Officer, 451 Seventh Street SW., Washington, DC 20410 (Attention: Capitol View Building, 4th Floor), telephone number: (202) 402–8073. [The above telephone number is not a toll free number.] A telecommunications device for hearing- and speech-impaired persons (TTY) is available by calling the Federal Information Relay Service's toll-free telephone number (800) 877–8339.

SUPPLEMENTARY INFORMATION: This system of records is maintained by HUD's Office of Multifamily Housing, and includes personally identifiable information provided to HUD from which information is retrieved by a name or unique identifier. The system encompasses programs and services in place for the Department's data collection and management practices. Publication of this notice allows HUD to satisfy its reporting requirement and keep an up-to-date accounting of its system of records publications. The new system proposal will incorporate Federal privacy requirements and HUD policy requirements. The Privacy Act provides safeguards to protect individuals against invasions of personal privacy by requiring Federal agencies to protect records contained in an agency system of records from unauthorized disclosure, by ensuring that information is current for its intended use, and by providing adequate safeguards to prevent misuse of such information. Additionally, this notice demonstrates the Department's focus on industry best practices in protecting the personal privacy of the individuals covered by this system notification. This notice states the name and location of the system of records, the authority for and manner of its operations, the categories of individuals that it covers, the type of records that it contains, the sources of the information for those records, the routine uses made of the records, and the types of exemptions in place for the records. In addition, the notice includes the business addresses of the HUD officials who will inform interested persons of the procedures whereby they may gain access to and/or request amendments to records pertaining to them.

This publication does meet the threshold requirements for filing a report to the Office of Management and Budget (OMB), the Senate Committee on Homeland Security and Governmental Affairs, and the House Committee on Government Reform as instructed by Paragraph 4c of Appendix 1 to OMB Circular No. A–130, ''Federal Agencies Responsibilities for Maintaining Records About Individuals,'' July 25, 1994 (59 FR 37914).

Authority: 5 U.S.C. 552a; 88 Stat. 1896; 42 U.S.C. 3535(d).

Dated: September 5, 2014.

Rafael C. Diaz,

Chief Information Officer.

SYSTEM OF RECORDS NO.: HSNG.MF/HTD.01

SYSTEM NAME:

Multifamily Housing (MFH) Application Submission and Processing (ASAP) System—P280.

SYSTEM LOCATION:

U.S. Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; Hewlett-Packard Enterprise Services, Building 6000, 2020 Union Carbide Drive, South Charleston, WV 25303. Backup, recovery, and archived digital media is stored in secure facilities located with Iron Mountain, 1545 Hansford St. Charleston, WV 25311. HUD also operates Field and Regional Offices [1] where Privacy Act records for MFH ASAP are maintained and/or accessed. Multifamily Accelerated Processing (MAP) and Healthcare approved Lenders nationwide will also have access to the system but will have limited access to only their individual submission packages.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: MORTGAGEES (HUD APPROVED MAP AND HEALTHCARE LENDERS).

CATEGORIES OF RECORDS IN THE SYSTEM:

Project Files/records in the system for every Multifamily and Healthcare project will contain the following information: Mortgagees name and Mortgagors, Employee identification Number/Tax Identification Number/Social Security Number, Project name, Project Sponsor's Name, Project Number, Account Number, and Unit Address. The project level data mentioned above is derived from the various HUD required forms. **Note:** Certain records contained in this system, which pertain to individuals, contain principally proprietary information concerning sole proprietorships. Some of the records in the system which pertain to individuals may reflect personal information; however, only the records reflecting personal information are subject to the Privacy Act.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sec. 113 of the Budget and Accounting Act of 1950 31 U.S.C. 66a. (Pub. L. 81–784). National Housing Act

[1] *http://portal.hud.gov/hudportal/HUD?src=/localoffices.*

as amended (12 U.S.C. 1702 et seq.). HUD is authorized to collect the Social Security Number (SSN) by Section 165(a) of the Housing and Community Development Act of 1987, Public Law 100–242 and by 42 U.S.C. 3543.

PURPOSE(S):

The MFH ASAP system is an automated underwriting system that supports processing, tracking and underwriting activities for MFH and its Office of Healthcare Program (OHP) applications. The system will be designed to support underwriting of applications submitted to HUD by approved lenders for FHA insurance related to Multifamily Housing or Healthcare projects. It will help to increase the sharing of information throughout MFH and OHP making the process more efficient, accurate, and transparent, thereby improving the partner relationships with both internal and external parties. Currently, the applications process relies heavily on manual processing and only meets the needs of the pipeline data tracking at a minimum for MFH. The system is expected to provide an end-to-end solution from concept phase to final closing for MFH, and will align with the OHP process improvement for both the Office of Residential Care Facilities (ORCF) (Section 232 program) and the Office of Hospital Facilities (OHF) (Section 242 program) that provide access to quality healthcare and residential facilities.

This MFH ASAP project initiative will provide an improved way of managing the pipeline data and electronic processing of the lender applications benefiting both MFH and OHP. This fully integrated solution allows electronic submission of applications using a web portal, enhancement to reporting capabilities, and document management solutions. Upon full implementation, this new system will replace in its entirety the MFH Development Application Processing system (DAP) and it supporting system of records notification.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, other routine uses are as follows:

(a) To the U.S. Treasury—for disbursements and adjustments.

(b) To the Internal Revenue Service—for reporting payments for mortgage interest, for reporting of discharge indebtedness and real estate taxes.

(c) To HUD Business Partners (Public Housing Authorities and Community Development Corporations serving as Performance-Based Contract Administrators (PBCAs))—to manage their portfolio.

(d) To contractors, grantees, experts, consultants, and the agents of thereof, and others performing and/or working on a contract, service, grant, cooperative agreement with HUD, when necessary to accomplish an agency function related to its system of records, limited to only those data elements considered relevant to accomplishing an agency function. Individuals providing information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to HUD officers and employees.

(e) To contractors, experts, consultants with whom HUD has a contract, service agreement or other assignment of the Department, when necessary to utilize relevant data for purposes of testing new technology and systems designed to enhance program operations and performance with the understanding that data disclosure restrictions apply under the Freedom of Information Act and Privacy Act.

(f) To appropriate agencies, entities, and persons when: (a) HUD suspects or has confirmed that the security or confidentiality of information in a system of records has been compromised; (b) HUD has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of systems or programs (whether maintained by HUD or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HUD's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm for purposes of facilitating responses and remediation efforts in the event of a data breach.

(g) To appropriate agencies, entities, and persons to the extent such disclosures are compatible with the purpose for which the records in this system are collected, as set forth by Appendix I—HUD's Library of Routine Uses published in the **Federal Register** on July 17, 2012 at 77 FR 41996.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

For electronic records, all data is stored at a secured data center on the production MFH ASAP database servers. Backup, recovery and archived digital media is stored in secure facilities located with Iron Mountain. All printed/hard copies that currently exist for projects will need to be created and stored in each HUD office in locked file cabinets when not in use. The printed/hard copies will later be shipped to Tulsa, OK, upon completing the final endorsement phase. **Note:** Upon full implementation of new MFH ASAP, paper copies will no longer exist and require storage. The existing paper copies will have be uploaded into the new system format for electronic storage.

RETRIEVABILITY:

Electronic and Manual records can only be retrieved via the project number or the project status. **Note:** Upon full implementation of MFH ASAP, hard copy records will no longer exist and/or require retrieval methods. The existing paper copies will have be uploaded into the new system format for electronic retrieval.

SAFEGUARDS:

Strict access controls are governed for electronic records by the use of a user ID and password that require authentication before access is granted to MFH ASAP. All printed/hard copies that currently exist for projects will need to be created and stored in each HUD office in locked file cabinets when not in use, which access is limited to those personnel who service the records. **Note:** Upon full implementation of MFH ASAP, hard copies will no longer exist for the new system. Paper records that existed under the prior manual process will have been uploaded into the new system format for electronic safeguarding. Records that existing under the prior manual process will have be shipped to the designated storage and archive facility who will safeguard the records in accordance with Departmental safeguarding procedures and policies.

RETENTION AND DISPOSAL:

MFH ASAP retention and disposal procedures are in accordance with approved General Service Administration schedules of retention and disposal included in HUD's Handbook 2228.2, appendix 14, items 21–26. Electronic and hard copy records will be retained between 10 and 40

years depending on financial terms. Afterwards, electronic records are purged or deleted from the system when eligible to be destroyed using one of the methods described by the NIST SP 800–88 ''Guideline for media Sanitization'' (September 2006). Paper based records when eligible to be destroyed will be destroyed by shredding or burn. **Note:** Upon full implementation of new MFH ASAP system, paper copy records will no longer be produced. The paper copies that existed under the prior manual system process will have be uploaded into the new system format, and official documentation will have been archived to the designated facility and destroyed when eligible to be destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Daniel Sullivan, Deputy Director, Multifamily Housing Development, Department of Housing and Urban Development, 451 Seventh Street SW., Room 6148, Washington, DC 20410.

NOTIFICATION AND RECORD ACCESS PROCEDURES:

For Information, assistance, or inquiries about the existence of records contact the Chief Privacy Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4156, Washington, DC 20410. Verification of your identity must include original signature and be notarized. Written request must include the full name, Social Security Number, date of birth, current address, and telephone number of the individual making the request. The Department's rules for providing access to records to the individual concerned appear in 24 CFR Part 16.

CONTESTING RECORD PROCEDURES:

The Department's rules for contesting contents of records and appealing initial denials appear in 24 CFR Part 16. Procedures for the amendment or correction of records, and for applicants want to appeal initial agency determination appear in 24 CFR Part 16. If additional information is needed, contact:

(i) In relation to contesting contents of records, the Privacy Act Officer at HUD, 451 Seventh Street SW., Room 4178 (Attention: Capitol View Building, 4th Floor), DC 20410;

(ii) In relation to appeals of initial denials, HUD, Departmental Privacy Appeals Officer, Office of General Counsel, 451 Seventh Street SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

HUD Employees and contractors who gather and process HUD information related to Multifamily Housing or Healthcare projects; Mortgagees (HUD approved Multifamily MAP or Healthcare Lenders) who submit application package for these projects. Data will also be derived from various HUD required forms. Other data is electronically submitted by HUD sources systems: Integrated Real Estate Management System (iREMS), the Online Property Integrated Information Suite (OPIIS), and Subsidiary Ledger.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

For the Privacy Act, records are disclosed pursuant to routine use statements supplied under notice. For the Freedom of Information Act, records submitted to HUD by multifamily and healthcare mortgagors and mortgagee (lender), as well as information gathered by agency employees as part of this process are subject to FOIA and is presumptively releasable unless it is clearly exempt and withheld under FOIA Exemption, which protects (1) commercial or financial information (2) obtained from a person that is (3) confidential.

[FR Doc. 2014–22183 Filed 9–16–14; 8:45 am]

BILLING CODE 4210–67–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–914]

Certain Sulfentrazone, Sulfentrazone Compositions, and Processes for Making Sulfentrazone; Notice of the Commission's Determination Denying Complainant's Motion for Temporary Relief

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to affirm with modifications the initial determination (''ID'') of the presiding administrative law judge (''ALJ'') denying the complainant's motion for temporary relief.

FOR FURTHER INFORMATION CONTACT: Robert Needham, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–5468. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on April 14, 2014, based on a complaint filed by FMC Corporation (''FMC'') on March 5, 2014. 79 *FR* 20907–08. The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337''), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain sulfentrazone active ingredient and formulated sulfentrazone compositions made by a process that infringes certain claims of U.S. Patent No. 7,169,952 (''the '952 patent''). The Commission's notice of investigation named as respondents Beijing Nutrichem Science and Technology Stock Co., Ltd., of Beijing, China (''Beijing Nutrichem''); Summit Agro USA, LLC, of Cary, North Carolina; Summit Agro North America, Holding Corporation of New York, New York (together, ''Summit''); and Jiangxi Heyi Chemicals Co. Ltd. of Jiujiang City, China (''Heyi''). *Id.* at 20908. The ALJ later granted FMC's motion to amend the complaint and notice of investigation to replace Beijing Nutrichem with Nutrichem Co., Ltd. (''Nutrichem''). Order No. 9 (May 29, 2014), *not reviewed* June 23, 2014. The Office of Unfair Import Investigations is also a party to the investigation.

FMC filed a motion for a temporary exclusion order and a temporary cease and desist order against Summit, Heyi, and Nutrichem (''Respondents'') along with its Complaint. On August 12, 2014, the ALJ issued an ID denying FMC's motion. The ALJ found that FMC had not shown that any of the temporary relief factors weighed in favor of granting temporary relief. The ALJ found that FMC had not shown that it was likely to succeed on the merits because FMC had not shown that it would likely succeed on the issues of invalidity, infringement, the technical prong of the domestic industry requirement, or the economic prong of the domestic industry requirement. The ALJ also found that FMC had not shown

irreparable harm if temporary relief is not granted, that the balance of hardships favor granting temporary relief, or that the public interest favors granting temporary relief.

On August 22, 2014, FMC filed comments contending that the ALJ made numerous errors of law and fact in the ID. On August 26, 2014, Respondents and the Commission investigative attorney filed responses contending that the ALJ did not err.

Having examined the record of this investigation, including the ALJ's ID and the submissions from the parties, the Commission has determined that FMC has not proven that it is entitled to temporary relief. The Commission affirms the ALJ's findings with certain modified reasoning. A Commission Opinion will issue shortly.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: September 11, 2014.

Jennifer D. Rohrbach,

Supervisory Attorney.

[FR Doc. 2014–22137 Filed 9–16–14; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–882]

Certain Digital Media Devices, Including Televisions, Blu-Ray Disc Players, Home Theater Systems, Tablets and Mobile Phones, Components Thereof and Associated Software; Notice of a Commission Determination to Review in Part A Final Initial Determination Finding no Violation of Section 337, on Review to Modify-In-Part and Vacate-In-Part the Determination; Grant of Consent Motion To Terminate the Investigation as to Certain Respondents; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the final initial determination (''ID'') of the presiding administrative law judge (''ALJ'') finding no violation of section 337 by the following remaining respondents in the above-captioned investigation: Samsung Electronics Co., Ltd. of Gyeonggi-do, Republic of Korea; Samsung Electronics America, Inc. of Ridgefield Park, New Jersey; Samsung Telecommunications America, LLC of Richardson, Texas (collectively, ''Samsung''); LG Electronics, Inc. of Seoul, Republic of Korea; LG Electronics U.S.A., Inc. of Englewood Cliffs, New Jersey; LG Electronics MobileComm U.S.A., Inc. of San Diego, California (collectively, ''LG''); Toshiba Corporation of Tokyo, Japan; and Toshiba American Information Systems, Inc. of Irvine, California (collectively, ''Toshiba''). On review, the Commission has determined to modify-in-part and vacate-in-part the final ID. The Commission has also determined to grant the joint motion to terminate the above-captioned investigation as to respondents Panasonic Corporation of Osaka, Japan; Panasonic Corporation of North America of Secaucus, New Jersey (collectively, ''Panasonic'') based upon a settlement agreement. The Commission has terminated the investigation with a finding of no violation of section 337.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, *Esq.,* Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–2310. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server 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*. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 18, 2013 based on a complaint filed on May 13, 2013, by Black Hills Media, LLC (''BHM'') of Wilmington, Delaware. 78 *FR* 36573–74. The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain digital media devices, including televisions, blu-ray disc players, home theater systems, tablets and mobile phones, components thereof and associated software by reason of infringement of certain claims of the following U.S. Patent Nos.: 8,028,323 (''the '323 patent''); 8,214,873 (''the '873 patent''); 8,230,099 (''the '099 patent''); 8,045,952 (''the '952 patent''); 8,050,652 (''the '652 patent''); and 6,618,593 (''the '593 patent''). The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337. The complaint named the following respondents: Samsung; LG; Toshiba; Panasonic; Sharp Corporation of Osaka, Japan; and Sharp Electronics Corporation of Mahwah, New Jersey (collectively, ''Sharp'').

On September 10, 2013, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 17) granting Google Inc.'s motion to intervene as a party to the investigation. On November 20, 2013, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 23) terminating the investigation as to Sharp based on a settlement agreement. On January 7, February 11, and April 10, 2014, the Commission issued notice of its determinations not to review the ALJ's IDs (Order Nos. 32, 35, and 49–50) terminating the investigation as to the following: The '323 and '099 patents; claims 2, 6–8, 15–19, 22, 25–27, 31, 35–36, and 44 of the '873 patent; claims 3–4, 6–7, 10, 42–45, 47–50, 52, and 55 of the '652 patent; claims 1, 4, 10, 13–17, 19, and 20–21 of the '593 patent; and claims 1–4 and 10–12 of the '952 patent. On March 14, 2014, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 47) terminating the investigation as to claims 1, 11, and 13 of the '652 patent and claim 27 of the '873 patent with respect to Panasonic. On July 3, 2014, BHM and Panasonic filed an unopposed joint motion to terminate the investigation as to Panasonic based on a settlement agreement. Therefore, the remaining respondents are LG, Samsung, and Toshiba.

On July 7, 2014, the ALJ issued the final ID finding no violation of section 337 by the remaining respondents. The ALJ found that: (1) There was no importation of ''articles that infringe'' under section 337(a)(1)(B)(i) as to any of respondents' accused products with respect to any asserted claim of the patents at issue; (2) none of the accused products of the remaining respondents infringe any asserted claim of the patents at issue; (3) the domestic industry requirement (both economic and technical prongs) had not been satisfied with respect to any asserted

patent; and (4) the asserted claims of the '873 patent are invalid under 35 U.S.C. 112, ¶ 1 and 35 U.S.C. 102 and/or 103. On July 16, 2014, the ALJ issued his recommendation on remedy and bonding (''RD'') in the event the Commission found a violation of section 337. On July 21, 2014, BHM filed a petition for review of the final ID only with respect to the '873 and '652 patents and the remaining respondents (including intervenor) filed a joint petition for review with respect to all asserted patents. On July 29, 2014, BHM, the remaining respondents, and the Commission investigative attorney each filed a response to the opposing petition for review. On July 30, 2014, the remaining respondents (including intervenor), filed an unopposed motion for leave to file a corrected joint response to BHM's petition for review along with the corrected joint response. The Commission has determined to grant respondents' motion.

Upon considering the record in this investigation, including the final ID and the parties' submissions, the Commission has determined to review-in-part the final ID under 19 CFR 210.44. On such review of the final ID, the Commission has modified a specific portion of the final ID and has vacated all portions of the final ID that reference *Suprema, Inc.* v. *ITC,* 742 F.3d 1350 (Fed. Cir. 2013), *reh'g en banc granted and vacated,* 2014 WL 3036241 (May 13, 2014). Specifically, the Commission has modified the following portion of the final ID: Section VIII.A.4, on page 460, before the last period ''.'' of the citation to *Certain Male Prophylactic Devices,* the citation language ''; *Certain Integrated Circuit Chips and Products Containing the Same,* Inv. No. 337–TA–859, Comm'n Op. at 30–51 (August 22, 2014)'' has been inserted. The Commission has also vacated the following portions of the final ID: (1) Section III.A, the last paragraph on pages 9–10; (2) Section III.A.1, the citation language ''*Suprema,* slip op. at 18 ('' and the closing parenthesis '')'' in this citation on page 10; (3) the entirety of Section III.A.2.a on page 11; and (4) the entirety of Section III.C.3 on pages 20–23. The Commission has determined not to review the remainder of the final ID under 19 CFR 210.42(h)(2).

In addition, the Commission has determined that BHM did not petition for review of the ALJ's finding in the final ID of invalidity of the asserted claims of the '873 patent under 35 U.S.C. 102 and/or 103, and therefore has abandoned these issues under 19 CFR 210.43(b)(2). *See Allied Corp.* v. *ITC,* 850 F.2d 1573 (Fed. Cir. 1988). The Commission has also determined that BHM has petitioned for review of certain issues based on arguments that BHM did not set forth in detail in its pre- and/or post-hearing briefing before the ALJ, and therefore the Commission has determined that these issues are waived and deemed abandoned. *See Ajinomoto Co., Inc.* v. *ITC,* 597 F.3d 1267 (Fed. Cir. 2010); Order No. 2 (ALJ's Ground Rules, June 19, 2013). These abandoned issues are the following: (1) Infringement of the '652 patent by accused Samsung and LG products with the Slacker application preinstalled; and (2) satisfaction of the economic prong of the domestic industry requirement with respect to all asserted patents. Specifically, these issues are found to be waived and therefore deemed abandoned because: (1) BHM did not present evidence of infringement with respect to Samsung and LG product models with the Slacker application preinstalled before the ALJ; and (2) BHM did not argue allocations of [[ ]] investments under 19 U.S.C. 1337(a)(3)(A), (B) with respect to specific domestic industry products (that practice the asserted patents) identified in its ''Identification of Models of Domestic Industry Products'' in its pre-hearing brief.

The Commission has also determined to grant the joint motion to terminate the investigation as to Panasonic. Section 337(c) provides, in relevant part, that the Commission may terminate an investigation ''on the basis of an agreement between the private parties to the investigation.'' When the investigation is before the Commission, as is the case here, the Commission may act on a motion to terminate on the basis of settlement. *See Certain Insect Traps,* Inv. No. 337–TA–498, Notice of Commission Determination to Terminate the Investigation in its Entirety on the Basis of a Settlement Agreement, 69 Fed. Reg. 63176 (Oct. 29, 2004). Section 210.21(b) of the Commission's Rules of Practice and Procedure (19 CFR 210.21(b)), which implements section 337(c), requires that a motion for termination based upon a settlement contain a copy of that settlement agreement, as well as a statement that there are no other agreements, written or oral, express or implied, between the parties concerning the subject matter of the investigation. The joint motion complies with these requirements.

The Commission also considers the public interest when terminating an investigation based upon a settlement agreement. 19 CFR 210.50(b)(2). We find no evidence that termination of the investigation as to Panasonic will prejudice the public interest or that settlement will adversely impact the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers. Moreover, the public interest favors settlement to avoid needless litigation and to conserve public and private resources. Accordingly, the Commission hereby grants the consent motion to terminate this investigation as to Panasonic on the basis of a settlement agreement.

Finally, the Commission has terminated the investigation with a finding of no violation of section 337.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in Part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: September 11, 2014.

Jennifer D. Rohrbach,

Supervisory Attorney.

[FR Doc. 2014–22139 Filed 9–16–14; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0080]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Notification of Change of Mailing or Premise Address

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: 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.

DATES: Comments are encouraged and will be accepted for 60 days until November 17, 2014.

FOR FURTHER INFORMATION CONTACT: If you have additional 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, *Christopher.R.Reeves@usdoj.gov,* Chief, Federal Explosives Licensing Center,

244 Needy Road, Martinsburg, WV 25405.

SUPPLEMENTARY INFORMATION: 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;

• Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; 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.

Overview of this information collection 1140–0080:

1 *Type of Information Collection:* Extension of an existing collection.

2 *The Title of the Form/Collection:* Notification of Change of Mailing or Premise Address.

3 *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: None.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

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.

Abstract: 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:* An estimated 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:* The estimated annual public burden associated with this collection is 170 hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 3E–405B, Washington, DC 20530.

Dated: September 11, 2014.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2014–22085 Filed 9–16–14; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

[OMB Number 1140–0040]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Application for an Amended Federal Firearms License

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: 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.

DATES: Comments are encouraged and will be accepted for 60 days until November 17, 2014.

FOR FURTHER INFORMATION CONTACT: If you have additional 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, *Tracey.Robertson@atf.gov,* Chief, Federal Firearms Licensing Center, 244 Needy Road, Martinsburg, WV 25405.

SUPPLEMENTARY INFORMATION: 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;

• Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; 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.

Overview of this information collection 1140–0040:

1. *Type of Information Collection:* Extension of an existing collection.

2. *The Title of the Form/Collection:* Application for an Amended Federal Firearms License.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number: ATF Form 5300.38.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: Individual or households.

Abstract: The form is primarily used when a Federal firearms licensee makes application to change the location of the business premises. The form is also used for changes of trade or business name, changes of mailing address, changes of contact information, changes of hours of operation/availability, and allows for licensees to indicate any changes of business structure.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 18,000 respondents will take 30 minutes to complete the form.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 9,000 hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States

Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 3E–405B, Washington, DC 20530.

Dated: September 11, 2014.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2014–22084 Filed 9–16–14; 8:45 am]

BILLING CODE 4410–FY–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—National Armaments Consortium

Notice is hereby given that, on August 18, 2014, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), National Armaments Consortium (''NAC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Ace Electronic Defense System, Aberdeen Proving Ground, MD; Applied Minds, LLC, Glendale, CA; C Z and Associates, Inc., Minnetrista, MN; Digital Fusion Solutions, Inc., Huntsville, AL; Hydracore, Inc., Metuchen, NJ; JWF Defense Systems, Johnstown, PA; Laser Techniques Company, LLC, Redmond, WA; Lithchem Energy, Folcroft, PA; National Nanotechnology Manufacturing Center, Inc., Swainsboro, GA; Nostromo LLC, Fairfax, VA; Omnis Inc., McLean, VA; SRC Inc., North Syracuse, NY; The Shenton Group, Inc., Gladwin, MI; Trijicon, Inc., Wixom, MI; Universal Global Products, LLC, Dover, NJ; URS Federal Services, Inc., Germantown, MD; Vistacom Inc., Allentown, PA; and WisEngineering, LLC, Dover, NJ, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NAC intends to file additional written notifications disclosing all changes in membership.

On May 2, 2000, NAC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 30, 2000 (65 FR 40693).

The last notification was filed with the Department on May 22, 2014. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on June 19, 2014 (79 FR 35186).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2014–22075 Filed 9–16–14; 8:45 am]

BILLING CODE 4410–11–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2014–056]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before October 17, 2014. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting Records Management Services (ACNR) using one of the following means:

Mail: NARA (ACNR), 8601 Adelphi Road, College Park, MD 20740–6001.

Email: request.schedule@nara.gov.

Fax: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Margaret Hawkins, Director, Records Management Services (ACNR), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1799. Email: *request.schedule@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions

requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending:

1. Department of Agriculture, Agricultural Marketing Service (DAA–0136–2014–0002, 3 items, 1 temporary item). Reference copies of annual summaries of market news reports and statistical detailed quotations. Proposed for permanent retention are the record copies of annual summaries and statistical detailed quotations.

2. Department of Commerce, National Oceanic and Atmospheric Administration (DAA–0370–2014–0002, 11 items, 9 temporary items). Records include source documents, drawings, and working files used for the creation of nautical charts and maps. Proposed for permanent retention are chart history files supplementing published maps and charts.

3. Department of Defense, Defense Finance and Accounting Service (DAA–0507–2014–0001, 5 items, 5 temporary items). Case files, reports, and tracking logs of internal investigations of administrative and criminal misconduct allegations. Also included are records related to assistance provided to investigation units in other agencies.

4. Department of Defense, Defense Health Agency (DAA–0330–2014–0012, 1 item, 1 temporary item). Master files of an electronic information system used to support wounded military patient transportation and medical care.

5. Department of Homeland Security, Agency-wide (DAA–0563–2013–0002, 2 items, 2 temporary items). Reports relating to situational awareness and suspicious activity.

6. Department of Homeland Security, Transportation Security Administration (N1–560–12–14, 7 items, 7 temporary items). Records related to background checks for non-U.S. citizens who pursue flight training.

7. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives (DAA–0436–2013–0004, 1 item, 1 temporary item). Master files of an electronic information system used to track and analyze gangs and gang activity.

8. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives (DAA–0436–2013–0006, 2 items, 2 temporary items). Records related to security of executive staff, including threat assessments and reports.

9. Department of Justice, Executive Office for Immigration Review (DAA–0582–2014–0002, 4 items, 4 temporary items). Bond proceeding files of detained immigrants.

10. Department of Labor, Employment and Training Administration (DAA–0369–2013–0003, 2 items, 2 temporary items). Grant files and related working papers.

11. Department of State, Office of the Chief of Protocol (DAA–0059–2014–0008, 2 items, 1 temporary item). Records of the Diplomatic Partnership Division including cultural events working files, correspondence, research material, and other administrative documentation. Proposed for permanent retention are the program files.

12. Department of Transportation, Federal Transit Administration (N1–408–12–2, 2 items, 2 temporary items). Inputs and master files of an electronic information system used to track grant activities.

13. Department of Transportation, National Highway Traffic Safety Administration (DAA–0416–2012–0005, 1 item, 1 temporary item). Master files of an electronic information system used to track impaired-driving data.

14. Department of the Treasury, Internal Revenue Service (DAA–0058–2014–0004, 27 items, 27 temporary items). Administrative records of the Criminal Investigation office including equipment inventories, correspondence files, internal control documents, and other related materials.

15. Central Intelligence Agency, Agency-wide (N1–263–14–1, 1 item, 1 temporary item). Record copies of email of all agency personnel who are not in senior leadership positions.

16. National Archives and Records Administration, Government-wide (DAA–GRS–2014–0005, 18 items, 18 temporary items). General Records Schedule for records of ethics program offices.

17. National Archives and Records Administration, Research Services (N2–59–14–1, 1 item, 1 temporary item). Records of the Department of State including galley proofs of external publications relating to the Department of State, correspondence related to the publications, and reviews of legislation and legislative reports. These records were accessioned to the National Archives but lack sufficient historical value to warrant continued preservation.

18. National Archives and Records Administration, Research Services (N2–84–14–2, 1 item, 1 temporary item). Records of the Department of State including bound volumes of circulars sent by the Department of State to American diplomatic and consular posts. These records were accessioned to the National Archives but lack sufficient historical value to warrant continued preservation.

19. Securities and Exchange Commission, Agency-wide (DAA–0266–2014–0004, 5 items, 4 temporary items). Records include office-level policies, supplemental procedures, and background files. Proposed for permanent retention are internal policy regulations.

Dated: September 11, 2014.

Paul M. Wester, Jr.,

Chief Records Officer for the U.S. Government.

[FR Doc. 2014–22177 Filed 9–16–14; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Cyberinfrastructure; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Cyberinfrastructure (25150)

Date and Time: October 29, 2014: 10:00 a.m.–5:00 p.m. October 30, 2014: 8:30 a.m.–1:00 p.m.

Place: National Science Foundation, 4201 Wilson Blvd., Room 1235, Arlington, VA 22230

Type of Meeting: Open

Contact Person: Mark Suskin, CISE, Division of Advanced Cyberinfrastructure, National Science Foundation, 4201 Wilson Blvd., Suite 1145, Arlington, VA 22230, Telephone: 703–292–8970

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To advise NSF on the impact of its policies, programs and activities in the ACI community. To provide advice to the Director/NSF on issues related to long-range planning.

Agenda: Updates on NSF wide ACI activities.

Dated: September 11, 2014.

Crystal Robinson,

Acting, Committee Management Officer.

[FR Doc. 2014–22091 Filed 9–16–14; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Polar Programs; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name and Committee Code: CReSIS STC Final Year Reverse Site Visit (1209).

Date/Time: October 7, 2014; 7:30a.m.–5:00p.m.; October 8, 2014; 8:00a.m.–4:00p.m.

Place: National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Type of Meeting: Part open.

Contact Persons: Dr. Julie Palais, Program Director, Antarctic Glaciology, Dr. Hedy Edmonds, Program Director, Arctic Natural Sciences, National Science Foundation, 4201 Wilson Blvd., Arlington, VA 22230. (703) 292–8033/8029.

Purpose of Meeting: NSF site visit to conduct a review of the management and other aspects of performance of the CReSIS Science & Technology Center.

Agenda: Meeting is open unless otherwise indicated.

Tuesday, 7 October 2014

7:30–8:00 Arrival (Room 110)
8:00–8:30 Welcome & Introductions—Palais/Edmonds
8:30–9:15 Climate, Ice Sheets, & Sea Level Rise—Joughin
9:15–10:15 Overview of CReSIS & Accomplishments—Gogineni
10:15–10:30 Break
10:30–12:00 Technology
Overview—Hale
Sensors—Leuschen
Platforms—Hale
Field Programs & Results—Anandakrishnan
12:00–2:45 Lunch & Student Poster Presentation in Atrium
3:00–4:00 Data Products & Models
Overview—Braaten
Signal Processing & Data Products—Paden
Use of Radar Data to Determine Snow Accumulation—Medley
Process Models—Joughin
Basin & Continental-scale Models Price/Anandakrishnan
4:00–5:00 Education
Overview—Hayden
Integration of Research into Education—Hale
REU Program—Monteau
K–12 Program—Hamilton/Barnett
5:00–5:30 Executive Session (NSF & Panel) & Panel Meets with Gogineni & Leuschen (Closed)

Wednesday, 8 October 2014

8:00–8:30 Arrival (Room 730; limited space available)
8:30–9:00 Response to Issues Raised the First Day—Gogineni
9:00–9:30 Diversity—Lawrence
9:30–10:15 Knowledge Transfer—Leuschen
10:15–11:00 Break & Panel Meets (Closed)
11:00–11:30 International Collaborations—Gogineni
11:30–12:00 Wrap up by the Panel Chair
12:00–4:00 Working Lunch/Panel Drafts & Provides
Report to NSF (Closed)

Reason for closing: The award being reviewed during the reverse site visit includes information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the award. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: September 10, 2014.

Crystal Robinson,

Acting, Committee Management Officer.

[FR Doc. 2014–22048 Filed 9–16–14; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2014–0196]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of pending NRC action to submit an information collection request to the Office of Management and Budget (OMB) and solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment about our intention to request the OMB's approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* Voluntary Reporting of Planned New Reactor Applications.

2. *Current OMB approval number:* 3150–XXXX.

3. *How often the collection is required:* Annually.

4. *Who is required or asked to report:* Applicants, licensees, and potential applicants report this information on a strictly voluntary basis.

5. *The number of annual respondents:* 5.

6. *The number of hours needed annually to complete the requirement or request:* 300.

7. *Abstract:* This voluntary information collection assists the NRC in determining resource and budget needs as well as aligning the proper allocation and utilization of resources to support applicant submittals, future construction-related activities, and other anticipated Part 50 and/or Part 52 of Title 10 of the *Code of Federal Regulations* (10 CFR) licensing and design certification rulemaking actions. In addition, information provided to the NRC staff is intended to promote early communications between the NRC and the respective addressees about potential 10 CFR Part 50 and/or Part 52 licensing actions and related activities, submission dates, and plans for construction and inspection activities. The overarching goal of this information collection is to assist the NRC staff more effectively and efficiently plan, schedule, and implement activities and reviews in a timely manner.

Submit, by November 17, 2014, comments that address the following questions:

1. *Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?*

2. *Is the burden estimate accurate?*

3. *Is there a way to enhance the quality, utility, and clarity of the information to be collected?*

4. *How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?*

The public may examine and have copied for a fee publicly-available documents, including the draft supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. The OMB clearance requests are available at the NRC's Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/.* The document will be available on the

NRC's home page site for 60 days after the signature date of this notice.

Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC–2014–0196. You may submit your comments by any of the following methods: Electronic comments go to: *http://www.regulations.gov* and search for Docket No. NRC–2014–0196. Mail comments to the NRC Clearance Officer, Tremaine Donnell (T–5 F42), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Questions about the information collection requirements may be directed to the NRC Clearance Officer, Tremaine Donnell (T–5 F42), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6258, or by email to *INFOCOLLECTS.Resource@NRC.GOV.*

Dated at Rockville, Maryland, this 11th day of September, 2014.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2014–22136 Filed 9–16–14; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2013–0230]

Fiscal Years 2014–2018 Strategic Plan

AGENCY: Nuclear Regulatory Commission.

ACTION: NUREG; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is announcing the availability of NUREG–1614, Volume 6, ''U.S. Nuclear Regulatory Commission Fiscal Years (FY) 2014–2018 Strategic Plan,'' dated August 2014. The agency's mission and strategic goals remain unchanged. The NRC's priority continues to be protection of public health and safety, promote the common defense and security, and protect the environment.

DATES: The strategic plan will be available on September 17, 2014.

ADDRESSES: Please refer to Docket ID NRC–2013–0230 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0230. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. The FY 2014–2018 Strategic Plan is available in ADAMS under Accession No. ML14246A439.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- *NRC's Public Web site:* The FY 2014–2018 Strategic Plan may be viewed online on the NRC's Public Web site at *http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1614/.*

FOR FURTHER INFORMATION CONTACT: James E. Coyle, Office of the Chief Financial Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6087; email: *James.Coyle@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Discussion

The Government Performance and Results Modernization Act of 2010 requires that an agency's strategic plan be updated for submission to the Congress and the President every 4 years. The NRC has developed a strategic plan for FY 2014–2018.

The agency's mission and strategic goals remain essentially unchanged in the NRC's FY 2014–2018 Strategic Plan. The NRC's priority continues to be, as always, to regulate the civilian use of radioactive materials to protect public health and safety, promote the common defense and security, and protect the environment. The safety goal is to ensure the safe use of radioactive materials. The security goal is to ensure the secure use of radioactive materials. The challenges that the agency faces include being prepared to review applications involving new technologies such as small modular reactors, medical isotope production facilities, and rapidly evolving digital instrumentation and control systems. The globalization of nuclear technology and the nuclear supply chain requires increased international engagement on the safe and secure use of radioactive material. The need for new oversight approaches will also present challenges to the NRC.

The Strategic Plan also describes the agency's cross-cutting strategies for regulatory effectiveness and openness and the management objectives for human capital and information management and information technology. The plan establishes the agency's long-term strategic direction and intended outcomes and provides a foundation to guide the NRC's work and to allocate the NRC's resources.

II. Public Comment Analysis

The draft strategic plan for FY 2014–2018 was published in the **Federal Register** for public comment on March 5, 2014 (79 FR 12531). All comments were reviewed and considered by the NRC's Senior Management in updating the strategic plan. We received 80 comments from individual members of the public and from various organizations. Staff agreed with the comments that pertained to the strategies contained in the draft plan. Staff disagreed with comments that either suggested changes in the agency's statutory mission or involved too much detail for a strategic plan. A comment resolution matrix reflecting the disposition of public comments is available in ADAMS under Accession No. ML14160A891.

Dated at Rockville, Maryland, this 9th day of September, 2014.

For the Nuclear Regulatory Commission.

David Holley,

Chief, Internal Control and Planning Branch, Division of Planning and Budget, Office of the Chief Financial Officer.

[FR Doc. 2014–22197 Filed 9–16–14; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2014–0173]

Acute Uranium Standards for Integrated Safety Analyses

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft interim staff guidance; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is soliciting public comment on its draft Interim Staff Guidance (ISG) Acute Uranium Exposure Standards. Fuel cycle facilities are required to submit Integrated Safety Analysis (ISA) summaries which include ''proposed quantitative standards.'' These standards are used to determine when acute chemical exposure events analyzed in the ISA result in high or intermediate consequences. The NRC has developed an ISG document that identifies uranium intake quantities the staff finds acceptable for classifying uranium exposure events analyzed in ISAs.

DATES: Submit comments by December 1, 2014. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received before this date.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2014–0173. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Cindy Bladey, Office of Administration, Mail Stop: 3WFN–06–44M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on accessing information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: James Hammelman, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–287–9108, email: *James.Hammelman@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information.

Please refer to Docket ID NRC–2014–0173 when contacting the NRC about the availability of information for this action. You may obtain information related to this action, which the NRC possesses and is publicly available, by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2014–0173.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents''* and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The draft ISG for Acute Uranium Standards is available in ADAMS under Accession No. ML14148A403.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments.

Please include Docket ID NRC–2014–0173 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS, and the NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background.

Fuel cycle facilities regulated under Part 70 of Title 10 of the *Code of Federal Regulations* (10 CFR), Subpart H, are required to submit ISA summaries which include ''proposed quantitative standards'' as required by 10 CFR 70.65(b)(7). These standards are used to determine when acute chemical exposure events analyzed in the ISA result in high or intermediate consequences as defined in 10 CFR 70.61.

In ISAs that the NRC staff reviewed prior to 2008, the staff evaluated licensee-proposed standards identifying high and intermediate acute uranium exposure events. Some licensees proposed 40 milligram (mg) uranium intake for defining high consequence events based on International Commission on Radiological Protection (ICRP) methodology while other licensees proposed 75 mg uranium intake based in ICRP 68 methodology. Both were accepted by the NRC staff for use in the licensee's ISAs. All licensees proposed 30 mg uranium for defining intermediate consequence events which were accepted by the staff. In December 2008, the Nuclear Energy Institute (NEI) submitted a report on acute uranium toxicity and requested that the NRC consider the uranium toxicity information in the report and provides guidance on uranium exposure standards that can be used in facility ISAs. The NRC staff reviewed the original NEI report and a revised version submitted in 2009 and also conducted an independent technical review of information on the chemical toxicity of uranium. The NRC staff found particularly useful information on acute uranium toxicity in studies conducted by the Royal Society and the U.S. Army, and the National Research Council review of the U.S. Army study. This information provided a basis for the staff identification of uranium renal concentrations that are expected to lead to physiological effects comparable to those described as high and intermediate in 10 CFR 70.61. Based on its review of the uranium toxicity literature, including the NEI reports, NRC staff has identified acute uranium intake quantities that it considers acceptable for classifying acute worker uranium exposure events analyzed in ISAs as either high or intermediate consistent with the definitions in 10 CFR 70.61. These quantities are identified in the interim staff guidance. The information from the ISG will be incorporated into the next revision of

NUREG–1520, ''Standard Review Plan for the Review of a License Application for a Fuel Cycle Facility'' (ADAMS Accession No. ML101390110).

Dated at Rockville, Maryland, this 10th day of September, 2014.

For The Nuclear Regulatory Commission.

Marissa G. Bailey,

Director, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material and Safeguards.

[FR Doc. 2014–22230 Filed 9–16–14; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2014–0198]

Proposed Revisions to Radioactive Waste Management

AGENCY: Nuclear Regulatory Commission.

ACTION: Standard review plan-draft section revision; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is soliciting public comment on the following sections in Chapter 11, ''Radioactive Waste Management,'' of NUREG–0800, ''Standard Review Plan (SRP) for the Review of Safety Analysis Reports for Nuclear Power Plants: LWR Edition,'' Section 11.1, ''Coolant Source Terms''; Section 11.2, ''Liquid Waste Management System''; Section 11.3, ''Gaseous Waste Management System''; Section 11.4, ''Solid Waste Management System''; Section 11.5, ''Process and Effluent Radiological Monitoring Instrumentation and Sampling Systems''; Branch Technical Position 11–3, ''Design Guidance for Solid Radioactive Waste Management Systems Installed in Light-Water-Cooled Nuclear Power Reactor Plants''; Branch Technical Position 11–5, ''Postulated Radioactive Releases Due to a Waste Gas System Leak or Failure''; and Branch Technical Position 11–6, ''Postulated Radioactive Releases due to Liquid Containing Tank Failures.''

DATES: Submit comments by November 17, 2014. Comments received after this date will be considered, if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2014–0198. Address questions about NRC dockets to Carol Gallagher; telephone: 301–287–3422; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: 3WFN–06–44M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on accessing information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Jonathan DeGange, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–6992; email: *Jonathan.DeGange@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2014–0198 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2014–0198.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* For the convenience of the reader, instructions about accessing materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2014–0198 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in you comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Availability of Documents

The documents identified in the following table are available to interested persons through one or more of the following methods, as indicated.

Section	Proposed revision ADAMS accession No.	Current revision ADAMS accession No.	Redline ADAMS accession No.
11.1	Proposed Revision 4 (ML13058A173)	Current Revision 3 (ML070790010)	ML13058A231.
11.2	Proposed Revision 5 (ML13044A644)	Current Revision 4 (ML100740449)	ML13051A463.
11.3	Proposed Revision 4 (ML13065A119)	Current Revision 3 (ML070710366)	ML13070A380.
11.4	Proposed Revision 4 (ML13072A545)	Current Revision 3 (ML070710397)	ML13072A574.
11.5	Proposed Revision 6 (ML13071A494)	Current Revision 5 (ML100740509)	ML13072A136.
Branch Technical Position 11–3	Proposed Revision 4 (ML13070A352)	Current Revision 3 (ML070730202)	ML13071A160.
Branch Technical Position 11–5	Proposed Revision 4 (ML13070A322)	Current Revision 3 (ML070730056)	ML13070A465.

Section	Proposed revision ADAMS accession No.	Current revision ADAMS accession No.	Redline ADAMS accession No.
Branch Technical Position 11–6	Proposed Revision 4 (ML13051A458)	Current Revision 3 (ML070720635)	ML13051A586.

The NRC may post materials related to this document, including public comments, on the Federal rulemaking Web site at *http://www.regulations.gov* under Docket ID NRC–2014–0198. The Federal rulemaking Web site allows you to receive alerts when changes or additions occur in a docket folder. To subscribe: (1) Navigate to the docket folder (NRC–2014–0198); (2) click the ''Sign up for Email Alerts'' link; and (3) enter your email address and select how frequently you would like to receive emails (daily, weekly, or monthly).

III. Further Information

The Office of New Reactors and Office of Nuclear Reactor Regulation are revising these sections from their current revisions. Details of specific changes in the proposed revisions are included at the end of each of the proposed sections.

The changes to this SRP chapter reflect current staff review methods and practices based on lessons learned from NRC reviews of design certification and combined license applications completed since the last revision of this chapter. Among other changes, the revisions include (1) revision of the title of SRP Section 11.1 to ''Coolant Source Terms,'' (2) implementation of Interim Staff Guidance (ISG), COL/DC–ISG–013 (ADAMS Accession No. ML12191A304), and (3) the revision also harmonizes SRP Section 11.2 with BTP 11.6 regarding the guidance of COL/DC–ISG–013 for calculating doses to members of the public and identifying acceptable criteria in assessing the radiological consequences of accidental releases due to tank failures.

IV. Backfitting and Finality Provisions

Issuance of these draft SRP sections, if finalized, would not constitute backfitting as defined in § 50.109 of Title 10 of the *Code of Federal Regulations* (10 CFR), (the Backfit Rule) or otherwise be inconsistent with the issue finality provisions in 10 CFR part 52. The NRC's position is based upon the following considerations.

1. *The draft SRP positions, if finalized, would not constitute backfitting, inasmuch as the SRP is internal guidance to NRC staff.*

The SRP provides internal guidance to the NRC staff on how to review an application for NRC regulatory approval in the form of licensing. Changes in internal staff guidance are not matters for which either nuclear power plant applicants or licensees are protected under either the Backfit Rule or the issue finality provisions of 10 CFR part 52.

2. *The NRC staff has no intention to impose the SRP positions on existing licensees either now or in the future.*

The NRC staff does not intend to impose or apply the positions described in the draft SRP to existing licenses and regulatory approvals. Hence, the issuance of a final SRP—even if considered guidance within the purview of the issue finality provisions in 10 CFR part 52—would not need to be evaluated as if it were a backfit or as being inconsistent with issue finality provisions. If, in the future, the NRC staff seeks to impose a position in the SRP on holders of already issued licenses in a manner that does not provide issue finality as described in the applicable issue finality provision, then the staff must make the showing as set forth in the Backfit Rule or address the criteria for avoiding issue finality as described in the applicable issue finality provision.

3. Backfitting and issue finality do not—with limited exceptions not applicable here—protect current or future applicants.

Applicants and potential applicants are not, with certain exceptions, protected by either the Backfit Rule or any issue finality provisions under 10 CFR part 52. Neither the Backfit Rule nor the issue finality provisions under 10 CFR part 52—with certain exclusions—were intended to apply to every NRC action that substantially changes the expectations of current and future applicants. The exceptions to the general principle are applicable whenever an applicant references a 10 CFR part 52 license (e.g., an early site permit) and/or NRC regulatory approval (e.g., a design certification rule) with specified issue finality provisions. The NRC staff does not, at this time, intend to impose the positions represented in the draft SRP in a manner that is inconsistent with any issue finality provisions. If, in the future, the staff seeks to impose a position in the draft SRP in a manner that does not provide issue finality as described in the applicable issue finality provision, then the staff must address the criteria for avoiding issue finality as described in the applicable issue finality provision.

The NRC staff is issuing this notice to solicit public comments on the proposed SRP Sections and BTPs in Chapter 11. After the NRC staff considers any public comments, it will make a determination regarding the proposed SRP Sections and BTPs in Chapter 11. The SRP is guidance for the NRC staff. The SRP is not a substitute for the NRC regulations, and compliance with the SRP is not required.

Dated at Rockville, Maryland, this 4th day of September, 2014.

For the Nuclear Regulatory Commission.

Joseph Colaccino,

Chief, New Reactor Rulemaking and Guidance Branch, Division of Advanced Reactors and Rulemaking, Office of New Reactors.

[FR Doc. 2014–22199 Filed 9–16–14; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Verification of Full-Time School Attendance, RI 25–49, 3206–0215

AGENCY: Office of Personnel Management.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on an extension, without change, of a currently approved information collection request (ICR) 3206–0215, Verification of Full-Time School Attendance. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The information collection was previously published in the **Federal Register** on May 25, 2014 at Volume 79 FR 23020 allowing for a 60-day public comment period. No comments were received for this information collection. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until October 17, 2014. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent by email to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent by email to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

RI 25–49 is used to verify that adult student annuitants are entitled to payment. The Office of Personnel Management must confirm that a full-time enrollment has been maintained.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Verification of Full-Time School Attendance.

OMB Number: 3206–0215.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 10,000.

Estimated Time per Respondent: 60 minutes.

Total Burden Hours: 10,000 hours.

U.S. Office of Personnel Management.

Katherine Archuleta,

Director.

[FR Doc. 2014–22111 Filed 9–16–14; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Financial Resources Questionnaire, RI 34–1, RI 34–17/Notice of Amount Due Because of Annuity Overpayment, RI 34–3, RI 34–19, 3206–0167

AGENCY: U.S. Office of Personnel Management.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on an extension, without change, of a currently approved information collection request (ICR) 3206–0167, Financial Resources Questionnaire and Notice of Debt Due Because of Annuity Overpayment. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection.

DATES: Comments are encouraged and will be accepted until November 17, 2014. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Retirement Services, Operations Support, Office of Personnel Management, Union Square Room 370, 1900 E Street NW., Washington, DC 20415, Attention: Alberta Butler, or sent by email to *Alberta.Butler@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW., Room 3316–AC, Washington, DC 20503, Attention: Cyrus S. Benson or sent by email to *Cyrus.Benson@opm.gov*.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Financial Resources Questionnaire (RI 34–1), Financial Resources Questionnaire—Federal Employees' Group Life Insurance Premiums Underpaid (RI 34–17), collects detailed financial information for use by OPM to determine whether to agree to a waiver, compromise, or adjustment of the collection of erroneous payments from the Civil Service Retirement and Disability Fund. Notice of Amount Due Because of Annuity Overpayment (RI 34–3) and Notice of Amount Due Because of FEGLI Premium Underpayment (RI 34–19), informs the annuitant about the overpayment and collects information from the annuitant about how repayment will be made.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Financial Resources Questionnaire/Notice of Debt Due Because of Annuity Overpayment.

OMB Number: 3206–0167.

Frequency: On occasion.

Affected Public: Individuals and Households.

Number of Respondents: 2,081.

Estimated Time per Respondent: 60 minutes.

Total Burden Hours: 2,081 hours.

U.S. Office of Personnel Management.

Katherine Archuleta,

Director.

[FR Doc. 2014–22112 Filed 9–16–14; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Evidence To Prove Dependency of a Child, RI 25–37, 3206–0206

AGENCY: Office of Personnel Management.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on an extension, without change, of a currently approved information collection request (ICR) 3206–0206, Evidence to Prove Dependency of a Child. As required by the Paperwork Reduction Act of 1995, (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The information collection was previously published in the **Federal Register** on February 24, 2014 at Volume FR 10203 allowing for a 60-day public comment period. No comments were received for this information collection. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until October 17, 2014. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent by email to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent by email to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

RI 25–37 is designed to collect sufficient information for the Office of Personnel Management to determine whether the surviving child of a deceased federal employee is eligible to receive benefits as a dependent child.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Evidence to Prove Dependency of a Child.

OMB Number: 3206–0206.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 250.

Estimated Time per Respondent: 1 hour.

Total Burden Hours: 250 hours.

U.S. Office of Personnel Management.

Katherine Archuleta,

Director.

[FR Doc. 2014–22109 Filed 9–16–14; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service; July 2014

AGENCY: U.S. Office of Personnel Management (OPM).

ACTION: Notice.

SUMMARY: This notice identifies Schedule A, B, and C appointing authorities applicable to a single agency that were established or revoked from July 1, 2014, to July 31, 2014.

FOR FURTHER INFORMATION CONTACT: Senior Executive Resources Services, Senior Executive Services and Performance Management, Employee Services, 202–606–2246.

SUPPLEMENTARY INFORMATION: In accordance with 5 CFR 213.103, Schedule A, B, and C appointing authorities available for use by all agencies are codified in the Code of Federal Regulations (CFR). Schedule A, B, and C appointing authorities applicable to a single agency are not codified in the CFR, but the Office of Personnel Management (OPM) publishes a notice of agency-specific authorities established or revoked each month in the **Federal Register** at *www.gpo.gov/fdsys/*. OPM also publishes an annual notice of the consolidated listing of all Schedule A, B, and C appointing authorities, current as of June 30, in the **Federal Register**.

Schedule A

No Schedule A authorities to report during July 2014.

Schedule B

No Schedule B authorities to report during July 2014.

Schedule C

The following Schedule C appointing authorities were approved during July 2014.

Agency name	Organization name	Position title	Authorization number	Effective date
APPALACHIAN REGIONAL COMMISSION.	Appalachian Regional Commission ..	Policy Advisor	AP140001	7/23/2014
DEPARTMENT OF COMMERCE	Office of the Assistant Secretary for Economic Development.	Confidential Assistant	DC140128	7/1/2014
	Office of White House Liaison	Deputy Director, Office of White House Liaison.	DC140129	7/1/2014
	Immediate Office	Special Assistant	DC140135	7/16/2014
	Office of Under Secretary	Special Advisor	DC140137	7/16/2014
	Office of Policy and Strategic Planning.	Confidential Assistant	DC140138	7/17/2014
	Office of the Assistant Secretary for Communications and Information.	Senior Advisor	DC140131	7/24/2014
	Office of the Chief of Staff	Scheduling Assistant	DC140142	7/24/2014

Agency name	Organization name	Position title	Authorization number	Effective date
	Office of Business Liaison	Deputy Director, Office of Business Liaison.	DC140143	7/24/2014
	Office of the Deputy Assistant Secretary for Administration.	Special Assistant	DC140126	7/29/2014
CONSUMER PRODUCT SAFETY COMMISSION.	Office of Commissioners	Special Assistant (Legal)	PS140007	7/25/2014
		Special Assistant	PS140009	7/31/2014
DEPARTMENT OF DEFENSE	Office of the Secretary	Special Assistant	DD140113	7/7/2014
	Washington Headquarters Services	Defense Fellow (3)	DD140114	7/7/2014
			DD140115	7/7/2014
			DD140119	7/23/2014
	Office of the Under Secretary of Defense (Policy).	Special Assistant Office of the Under Secretary of Defense for Policy.	DD140120	7/10/2014
	Office of Assistant Secretary of Defense (Legislative Affairs).	Special Assistant	DD140117	7/11/2014
	Office of the Assistant Secretary of Defense (Asian and Pacific Security Affairs).	Principal Director Afghanistan, Pakistan and Central Asia.	DD140122	7/15/2014
	Assistant To the Secretary of Defense for Nuclear and Chemical and Biological Defense Programs.	Senior Advisor(Nuclear, Chemical and Biological Defense Programs).	DD140121	7/22/2014
	Office of Principal Deputy Under Secretary for Policy.	Special Assistant	DD140101	7/24/2014
		Special Assistant, Plans	DD140125	7/25/2014
DEPARTMENT OF THE NAVY	Office of the Assistant Secretary of Navy (Manpower and Reserve Affairs).	Special Assistant	DN140032	7/17/2014
DEPARTMENT OF EDUCATION	Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students.	Deputy Director for Office of English Language and Acquisition.	DB140085	7/2/2014
	Office of the Secretary	Special Assistant	DB140090	7/2/2014
	Office of Career Technical and Adult Education.	Special Assistant	DB140089	7/2/2014
	Office of Elementary and Secondary Education.	Confidential Assistant	DB140091	7/10/2014
	Office of Legislation and Congressional Affairs.	Special Assistant	DB140094	7/14/2014
	Office of Communications and Outreach.	Special Assistant	DB140095	7/14/2014
	Office of the Under Secretary	Special Assistant	DB140096	7/25/2014
DEPARTMENT OF ENERGY	Office of the Secretary of Energy Advisory Board.	Deputy Director	DE140081	7/1/2014
	Assistant Secretary for Congressional and Intergovernmental Affairs.	Legislative Affairs Specialist	DE140085	7/15/2014
	Office of Public Affairs	Press Assistant	DE140084	7/18/2014
	Office of General Counsel	Senior Legal Advisor	DE140088	7/18/2014
	Office of Energy Policy and Systems Analysis.	Chief of Staff/Associate Director	DE140093	7/28/2014
EXECUTIVE OFFICE OF THE PRESIDENT.	Council on Environmental Quality (EOP).	Special Assistant (Legislative Affairs)	OP140002	7/11/2014
EXPORT–IMPORT BANK	Office of the Chief of Staff	Senior Vice President and Chief of Staff.	EB140009	7/1/2014
	Office of the Chairman	Special Assistant	EB140010	7/23/2014
GENERAL SERVICES ADMINISTRATION.	Office of Communications and Marketing.	Senior Communications Advisor	GS140048	7/25/2014
DEPARTMENT OF HEALTH AND HUMAN SERVICES.	Office of the Assistant Secretary for Public Affairs.	Confidential Assistant	DH140103	7/2/2014
		Press Secretary	DH140107	7/3/2014
	Office of the Secretary	Confidential Assistant	DH140113	7/23/2014
	Office of the Assistant Secretary for Children and Families.	Confidential Assistant	DH140114	7/25/2014
DEPARTMENT OF HOMELAND SECURITY.	Office of the Under Secretary for Management.	Deputy Chief of Staff	DM140187	7/1/2014
	Office of the Assistant Secretary for Public Affairs.	Strategic Planning and Coordination Advisor.	DM140193	7/7/2014
	Office of the General Counsel	Attorney-Advisor	DM140194	7/7/2014
	United States Customs and Border Protection.	Deputy Chief of Staff, Policy	DM140198	7/11/2014
		Special Assistant	DM140205	7/17/2014
		Advisor	DM140213	7/23/2014

Agency name	Organization name	Position title	Authorization number	Effective date
	Office of the Secretary	Deputy Secretary Briefing Book Coordinator.	DM140206	7/22/2014
	Federal Emergency Management Agency.	Special Assistant (2)	DM140207	7/22/2014
			DM140208	7/22/2014
		Director of Intergovernmental Affairs	DM140210	7/22/2014
	Office of the Under Secretary for National Protection and Programs Directorate.	Special Advisor for Infrastructure Protection.	DM140212	7/23/2014
		Cyber Security Strategist	DM140216	7/30/2014
	Office of the Assistant Secretary for Policy.	Advisor for Global Law Enforcement Partnerships.	DM140214	7/23/2014
		Advisor	DM140219	7/30/2014
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.	Office of Housing	Special Policy Advisor	DU140031	7/7/2014
	Office of Fair Housing and Equal Opportunity.	Special Policy Advisor	DU140032	7/7/2014
	Office of the Secretary	Senior Advisor	DU140034	7/18/2014
		White House Liaison	DU140035	7/18/2014
		Deputy Chief of Staff	DU140037	7/18/2014
		Executive Assistant	DU140038	7/18/2014
DEPARTMENT OF THE INTERIOR	Assistant Secretary—Policy, Management and Budget.	Advisor	DI140038	7/1/2014
	United States Geological Survey	Confidential Assistant (2)	DI140050	7/10/2014
			DI140051	7/18/2014
	Secretary's Immediate Office	Special Assistant for Advance	DI140053	7/10/2014
	Office of the Deputy Secretary	Special Assistant	DI140065	7/17/2014
	Office of Congressional and Legislative Affairs.	Senior Counsel	DI140049	7/25/2014
		Special Assistant, Office of Congressional and Legislative Affairs.	DI140063	7/25/2014
DEPARTMENT OF JUSTICE	Civil Division	Chief of Staff	DJ140087	7/14/2014
	Office of the Attorney General	Special Assistant	DJ140088	7/14/2014
		Director of Advance	DJ140094	7/18/2014
	Civil Rights Division	Senior Counsel	DJ140089	7/14/2014
DEPARTMENT OF LABOR	Office of Public Affairs	Special Assistant	DL140076	7/11/2014
	Office of the Assistant Secretary for Policy.	Senior Policy Advisor	DL140081	7/28/2014
	Office of the Secretary	Deputy White House Liaison	DL140083	7/29/2014
OFFICE OF GOVERNMENT ETHICS.	Office of Government Ethics	Confidential Assistant	GG140002	7/17/2014
OFFICE OF MANAGEMENT AND BUDGET.	Office of the Director	Assistant	BO140024	7/7/2014
		Advisor and Assistant	BO140029	7/18/2014
OFFICE OF NATIONAL DRUG CONTROL POLICY.	Office of National Drug Control Policy.	Associate Director for Intergovernmental Public Affairs.	QQ140004	7/16/2014
	Office of the Director	Policy Advisor	QQ140005	7/25/2014
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE.	Office of the Ambassador	Assistant United States Trade Representative for Intergovernmental Affairs and Public Engagement.	TN140007	7/24/2014
OVERSEAS PRIVATE INVESTMENT CORPORATION.	Overseas Private Investment Corporation.	Senior Advisor (2)	PQ140008	7/10/2014
			PQ140010	7/10/2014
SMALL BUSINESS ADMINISTRATION.	Office of Government Contracting and Business Development.	Senior Advisor	SB140029	7/10/2014
	Office of Communications and Public Liaison.	Special Advisor for Stakeholder Outreach.	SB140030	7/10/2014
	Office of the Administrator	Policy Advisor	SB140031	7/15/2014
		Director of Scheduling, Operations, and Advance.	SB140033	7/23/2014
	Office of Congressional and Legislative Affairs.	Deputy Associate Administrator for Congressional and Legislative Affairs.	SB140034	7/23/2014
DEPARTMENT OF STATE	Foreign Policy Planning Staff	Senior Advisor	DS140112	7/8/2014
	Office of the Global Women's Issues	Staff Assistant	DS140115	7/18/2014
	Office of the United States Aids Coordinator.	Staff Assistant	DS140105	7/24/2014
		Senior Advisor	DS140114	7/31/2014
	Bureau of Western Hemisphere Affairs.	Senior Advisor	DS140117	7/29/2014
	Bureau of Legislative Affairs	Legislative Management Officer	DS140118	7/29/2014
	Office of Faith Based Community Initiatives.	Staff Assistant	DS140119	7/31/2014

Agency name	Organization name	Position title	Authorization number	Effective date
TRADE AND DEVELOPMENT AGENCY.	Office of the Director	Public Affairs Specialist	TD140002	7/15/2014
DEPARTMENT OF TRANSPORTATION.	Assistant Secretary for Budget and Programs.	Special Assistant	DT140039	7/3/2014
	Office of the Secretary	Director of Scheduling and Advance	DT140041	7/3/2014
	Office of Administrator	Director of Communications and Public Affairs.	DT140045	7/22/2014
		Director for Governmental Affairs	DT140046	7/22/2014
	Assistant Secretary for Governmental Affairs.	Special Assistant	DT140049	7/24/2014
DEPARTMENT OF THE TREASURY.	Office of the Secretary	Associate Director	DY140099	7/10/2014
		Senior Advisor	DY140100	7/10/2014
		Counselor	DY140104	7/15/2014
		Deputy Executive Secretary	DY140109	7/25/2014
UNITED STATES INTERNATIONAL TRADE COMMISSION.	Office of the Chairman	Staff Assistant (Economics)	TC140015	7/29/2014

The following Schedule C appointing authorities were revoked during July 2014.

Agency	Organization name	Position title	Authorization number	Vacate date
DEPARTMENT OF AGRICULTURE	Natural Resources Conservation Service.	Special Assistant	DA090189	7/12/2014
	Office of Communications	Deputy Director	DA130220	7/18/2014
DEPARTMENT OF COMMERCE	National Telecommunications and Information Administration.	Chief of Staff for National Telecommunications and Information Administration.	DC090130	7/26/2014
	National Oceanic and Atmospheric Administration.	Special Assistant	DC120029	7/26/2014
	Office of Under Secretary	Senior Advisor to the Under Secretary for Oceans and Atmosphere and the Principal Deputy Under Secretary.	DC120127	7/26/2014
DEPARTMENT OF EDUCATION	Office for Civil Rights	Deputy Assistant Secretary for Policy.	DB120095	7/12/2014
	Office of the Secretary	Confidential Assistant	DB120035	7/13/2014
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION.	Office of the Chairman	Confidential Assistant	FR100001	7/1/2014
DEPARTMENT OF HEALTH AND HUMAN SERVICES.	Office of Intergovernmental and External Affairs.	Regional Director, New York, New York, Region II.	DH100113	7/18/2014
	Office of the Deputy Secretary	Regional Director, San Francisco, California, Region IX.	DH100019	7/18/2014
DEPARTMENT OF HOMELAND SECURITY.	Office of the Secretary	Special Assistant	DM140019	7/7/2014
	Office of the Chief of Staff	Advance Representative	DM120025	7/11/2014
	Office of the Under Secretary for Management.	Assistant for Special Projects	DM090410	7/12/2014
	Office of the Assistant Secretary for Intergovernmental Affairs.	Local Affairs Coordinator	DM120073	7/15/2014
	Office of the Under Secretary for Intelligence and Analysis.	Liaison for Community Partnership and Strategic Engagement.	DM120013	7/26/2014
	Office of Assistant Secretary for Legislative Affairs.	Chief of Staff	DM120181	7/26/2014
	Office of the Under Secretary for Intelligence and Analysis.	Special Advisor	DM140043	7/26/2014
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.	Office of the Secretary	White House Liaison	DU110022	7/20/2014
	Office of Public Affairs	Assistant Press Secretary	DU120043	7/26/2014
DEPARTMENT OF THE INTERIOR	Office of Congressional and Legislative Affairs.	Senior Counsel	DI130031	7/19/2014
DEPARTMENT OF JUSTICE	Civil Division	Counsel (2)	DJ120095	7/13/2014
			DJ120102	7/26/2014
	Office of Public Affairs	Deputy Press Secretary	DJ140011	7/24/2014
DEPARTMENT OF LABOR	Office of the Secretary	Deputy Director of Public Engagement.	DL140016	7/5/2014
DEPARTMENT OF THE NAVY	Office of the Under Secretary of the Navy.	Special Assistant	DN110041	7/26/2014

Agency	Organization name	Position title	Authorization number	Vacate date
OFFICE OF NATIONAL DRUG CONTROL POLICY.	Office of Public Affairs	Associate Director for Public Affairs.	QQ100015	7/13/2014
SMALL BUSINESS ADMINISTRATION.	Office of the Administrator	Senior Advisor to the Chief Operating Officer.	SB120028	7/5/2014
		Director of Scheduling and Operations.	SB110043	7/26/2014
	Office of Communications and Public Liaison.	Deputy Assistant Administrator for Office of Communications and Public Liaison.	SB130019	7/5/2014
	Office of Government Contracting and Business Development.	Special Advisor to the Associate Administrator for Government Contracting and Business Development.	SB120022	7/12/2014
	Office of Congressional and Legislative Affairs.	Deputy Assistant Administrator for Congressional and Legislative Affairs.	SB110040	7/26/2014
DEPARTMENT OF TRANSPORTATION.	Office of the Secretary	Associate Director for Scheduling and Advance.	DT140013	7/12/2014
	Office of the Administrator	Director of Communications	DT130020	7/26/2014
DEPARTMENT OF THE TREASURY.	Office of the Secretary	Special Assistant	DY130027	7/19/2014

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp., p. 218.

U.S. Office of Personnel Management.

Katherine Archuleta,

Director.

[FR Doc. 2014–22106 Filed 9–16–14; 8:45 am]

BILLING CODE 6325–39–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 31249; 812–14291]

SSgA MasterTrust and SSgA Funds Management, Inc.; Notice of Application

September 11, 2014.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from rule 12d1–2(a) under the Act.

SUMMARY: *Summary of Application:* Applicants request an order to permit open-end management investment companies relying on rule 12d1–2 under the Act to invest in certain financial instruments.

Applicants: SSgA Master Trust (''SSMT'') and SSgA Funds Management, Inc. (''SSFMI'').

DATES: *Filing Dates:* The application was filed on March 14, 2014, and amended on June 13, 2014 and August 18, 2014.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on October 6, 2014, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants: State Street Global Advisors, One Lincoln Street, Boston, Massachusetts, 02111.

FOR FURTHER INFORMATION CONTACT: Laura J. Riegel, Senior Counsel, at (202) 551–6873, or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. SSMT is organized as Massachusetts business trust and is registered under the Act as an open-end management investment company. SSMT is a series trust which currently consists of eight series, each of which operates as a master fund in a master-feeder structure. SSFMI is a Massachusetts corporation and is registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act''). SSFMI currently serves as the investment adviser to each series of SSMT.

2. Applicants request an exemption to the extent necessary to permit any existing or future series of SSMT and any other registered open-end management investment company or series thereof that: (a) Is advised by SSFMI or any investment adviser controlling, controlled by, or under common control with SSFMI (any such adviser or SSFMI, the ''Adviser''); [1] (b) is in the same group of investment companies as defined in section 12(d)(1)(G) of the Act as SSMT; (c) invests in other registered open-end management investment companies (''Underlying Funds'') in reliance on section 12(d)(1)(G) of the Act; and (d) also is eligible to invest in securities (as defined in section 2(a)(36) of the Act) in reliance on rule 12d1–2 under the Act (each a ''Fund of Funds''), also to invest, to the extent consistent with its investment objectives, policies, strategies and limitations, in financial instruments that may not be securities within the meaning of section 2(a)(36) of the Act (''Other Investments'').[2]

3. Consistent with its fiduciary obligations under the Act, each Fund of Funds' board of trustees will review the advisory fees charged by the Fund of

[1] Each Adviser will be registered as an investment adviser under the Advisers Act.

[2] Every existing entity that currently intends to rely on the requested order is named as an applicant. Any entity that relies on the order in the future will do so only in accordance with the terms and condition in the application.

Funds' Adviser to ensure that they are based on services provided that are in addition to, rather than duplicative of, services provided pursuant to the advisory agreement of any investment company in which the Fund of Funds may invest.

Applicants' Legal Analysis

1. Section 12(d)(1)(A) of the Act provides that no registered investment company (''acquiring company'') may acquire securities of another investment company (''acquired company'') if such securities represent more than 3% of the acquired company's outstanding voting stock or more than 5% of the acquiring company's total assets, or if such securities, together with the securities of other investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or cause more than 10% of the acquired company's voting stock to be owned by investment companies and companies controlled by them.

2. Section 12(d)(1)(G) of the Act provides, in part, that section 12(d)(1) will not apply to securities of an acquired company purchased by an acquiring company if: (i) The acquired company and acquiring company are part of the same group of investment companies; (ii) the acquiring company holds only securities of acquired companies that are part of the same group of investment companies, Government securities, and short-term paper; (iii) the aggregate sales loads and distribution-related fees of the acquiring company and the acquired company are not excessive under rules adopted pursuant to section 22(b) or section 22(c) of the Act by a securities association registered under section 15A of the Securities Exchange Act of 1934 or by the Commission; and (iv) the acquired company has a policy that prohibits it from acquiring securities of registered open-end investment companies or registered unit investment trusts in reliance on section 12(d)(1)(F) or (G) of the Act.

3. Rule 12d1–2 under the Act permits a registered open-end investment company or a registered unit investment trust that relies on section 12(d)(1)(G) of the Act to acquire, in addition to securities issued by another registered investment company in the same group of investment companies, Government securities, and short-term paper: (i) Securities issued by an investment company that is not in the same group of investment companies, when the acquisition is in reliance on section 12(d)(1)(A) or 12(d)(1)(F) of the Act; (ii) securities (other than securities issued by an investment company); and (iii) securities issued by a money market fund, when the investment is in reliance on rule 12d1–1 under the Act. For the purposes of rule 12d1–2, ''securities'' means any security as defined in section 2(a)(36) of the Act.

4. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction from any provision of the Act, or from any rule under the Act, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act. Applicants submit that their request for relief meets this standard.

5. Applicants request an order under section 6(c) of the Act for an exemption from rule 12d1–2(a) to allow the Funds of Funds to invest in Other Investments while investing in Underlying Funds. Applicants state that the Funds of Funds will comply with rule 12d1–2 under the Act, but for the fact that the Funds of Funds may invest a portion of their assets in Other Investments. Applicants assert that permitting the Funds of Funds to invest in Other Investments as described in the application would not raise any of the concerns that the requirements of section 12(d)(1) were designed to address.

Applicants' Condition

Applicants agree that any order granting the requested relief will be subject to the following condition:

Applicants will comply with all provisions of rule 12d1–2 under the Act, except for paragraph (a)(2) to the extent that it restricts any Fund of Funds from investing in Other Investments as described in the application.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–22119 Filed 9–16–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73079; File No. SR–BYX–2014–020]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of BATS Y-Exchange, Inc.

September 11, 2014.

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 August 29, 2014, BATS Y-Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members[5] and non-members of the Exchange pursuant to BYX Rules 15.1(a) and (c). Changes to the fee schedule pursuant to this proposal are effective upon filing.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify the ''Equities Pricing'' section of its fee schedule effective September 2, 2014, in order to amend the fees for certain routing strategies based on a change of fees at the New York Stock Exchange LLC (''NYSE'').

The Exchange has previously provided a discounted fee for Destination Specific Orders routed to certain of the largest market centers measured by volume (NYSE, NYSE Arca and NASDAQ), which, in each instance has been $0.0001 less per share for orders routed to such market centers by the Exchange than such market centers currently charge for removing liquidity (referred to by the Exchange as ''One Under'' [sic] pricing). NYSE is implementing certain pricing changes effective September 2, 2014, including modification from a fee to remove liquidity of $0.0026 per share to a fee of $0.0027 per share.[6] Based on the changes in pricing at NYSE, BYX is proposing to increase its fee for Destination Specific Orders [7] executed at NYSE so that the fee remains $0.0001 less per share for orders routed to NYSE. Specifically, the Exchange proposes to increase the fee charged for BYX + NYSE Destination Specific Orders executed at NYSE from $0.0025 per share to $0.0026 per share.

In addition, the Exchange offers a variety of routing strategies, including ''SLIM'' and ''TRIM,'' each of which has a specific fee for an execution that occurs at NYSE.[8] Consistent with its One Under [sic] pricing model, the Exchange currently charges $0.0025 per share for executions that occur at NYSE through SLIM and TRIM. Based on the increased fee at NYSE, the Exchange proposes to increase the fee charged for SLIM and TRIM orders executed at NYSE from $0.0025 per share to $0.0026 per share.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[9] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[10] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that the proposed changes to certain of the Exchange's non-standard routing fees and strategies are equitably allocated, fair and reasonable, and non-discriminatory in that they are equally applicable to all Members and are designed to provide a reduced fee for orders routed to NYSE through Exchange routing strategies as compared to applicable fees for executions if such routed orders were instead executed directly by the Member at NYSE.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Because the market for order execution is extremely competitive, Members may readily opt to disfavor the Exchange's routing services if they believe that alternatives offer them better value. For an order routed through the Exchange and executed at NYSE through the applicable routing strategies, the proposed fee change is designed to maintain a slight discount compared to the fee the Member would have paid if such routed order was instead executed directly by a Member at NYSE.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received.

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 [11] and paragraph (f) of Rule 19b–4 thereunder.[12] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BYX–2014–020 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BYX–2014–020. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for

[6] *See* NYSE Trader Update dated August 21, 2014, *http://www1.nyse.com/pdfs/NYSE_Client_Notice_Fee_Change_09_2014.pdf*.

[7] As defined in Exchange Rule 11.9(c)(12).

[8] *See* Exchange Rule 11.13(a)(3)(G) for a description of the TRIM routing strategy and Exchange Rule 11.13(a)(3)(H) for a description of the SLIM routing strategy.

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f).

inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BYX–2014–020 and should be submitted on or before October 8, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–22115 Filed 9–16–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73082; File No. SR–NYSEArca–2014–71]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change To List and Trade Shares of the Treesdale Rising Rates ETF Under NYSE Arca Equities Rule 8.600

September 11, 2014.

On July 14, 2014, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] a proposed rule change to list and trade shares (''Shares'') of the Treesdale Rising Rates ETF (''Fund''). The proposed rule change was published for comment in the **Federal Register** on August 1, 2014.[4] No comments have been received regarding the proposed rule change. This order approves the proposed rule change.

I. Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares.[5] The Shares will be offered by AdvisorShares Trust (''Trust''), a statutory trust organized under the laws of the State of Delaware and registered with the Securities and Exchange Commission (the ''Commission'') as an open-end management investment company.[6] The investment adviser to the Fund is AdvisorShares Investments, LLC (the ''Adviser''). The sub-adviser to the Fund is Treesdale Partners, LLC (''Sub-Adviser''), which will provide day-to-day portfolio management of the Fund. Foreside Fund Services, LLC is the principal underwriter and distributor of the Fund's Shares. The Bank of New York Mellon serves as the administrator, custodian, transfer agent and fund accounting agent for the Fund.

The Exchange represents that neither the Adviser nor the Sub-Adviser is a broker-dealer or is affiliated with a broker-dealer, and that in the event (a) the Adviser or Sub-Adviser becomes, or becomes newly affiliated with, a broker-dealer, or (b) any new adviser or sub-adviser is, or becomes affiliated with, a broker-dealer, it will implement a fire wall with respect to its relevant personnel or broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.[7]

The Exchange has made the following representations and statements regarding the Fund.[8] The Fund will seek to generate current income while providing protection for investors against loss of principal in a rising interest rate environment. The Fund will seek to achieve its investment objectives by investing, under normal circumstances,[9] at least 80% of its net assets in positions in agency interest-only collateralized mortgage obligations (''CMOs''),[10] interest-only swaps (''IOS'') that reference interest only cash flows from agency mortgage-backed securities (''MBS'') pools with certain coupons and specified origination periods (''Agency MBS IOS''), interest rate swaps,[11] U.S. Treasury obligations, including U.S. Treasury zero-coupon bonds, and U.S. Treasury futures.[12] Under normal circumstances, the Sub-Adviser will seek to generate enhanced returns in an environment of rising interest rates by investing in agency interest-only CMOs and Agency MBS IOS to maintain a negative portfolio duration with a generally positive

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 72679 (July 28, 2014), 79 FR 44878 (''Notice'').

[5] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act'') organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[6] The Trust is registered under the 1940 Act. On September 4, 2013, the Trust filed with the Commission an amendment to its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a) and under the 1940 Act relating to the Fund (File Nos. 333–157876 and 811–22110) (''Registration Statement''). The Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812–13677).

[7] *See* Notice, *supra* note 4, 79 FR at 44879.

[8] Additional information regarding the Trust, the Fund, and the Shares, investment strategies, investment restrictions, risks, net asset value (''NAV'') calculation, creation and redemption procedures, fees, portfolio holdings, disclosure policies, distributions, and taxes, among other information, is included in the Notice and the Registration Statement, as applicable. *See* Notice and Registration Statement, *supra* notes 4 and 6, respectively.

[9] The term ''under normal circumstances'' includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the equity markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. In the absence of normal circumstances the Fund may invest 100% of its total assets, without limitation, in debt securities and money market instruments, either directly or through exchange traded funds (''ETFs''). Debt securities and money market instruments include shares of other mutual funds, commercial paper, U.S. government securities, repurchase agreements and bonds that are rated BBB or higher. The Fund may be invested in this manner for extended periods, depending on the Sub-Adviser's assessment of market conditions. While the Fund is in a defensive position, the opportunity to achieve its investment objectives will be limited. Furthermore, to the extent that the Fund invests in money market mutual funds the Fund would bear its pro rata portion of each such money market fund's advisory fees and operational expenses.

[10] The agency interest-only CMOs that the Fund may invest in include agency stripped mortgage-backed securities (''SMBS''), which are derivative multi-class mortgage securities.

[11] The Fund's obligations under a swap agreement will be accrued daily (offset against any amounts owing to the Fund) and any accrued but unpaid net amounts owed to a swap counterparty will be covered by segregating assets determined to be liquid. The Fund will not enter into any swap agreement unless the Adviser believes that the other party to the transaction is creditworthy. The Fund will seek, where possible, to use counterparties, as applicable, whose financial status is such that the risk of default is reduced. The Adviser's Execution Committee will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Adviser's analysts will evaluate each approved counterparty using various methods of analysis, including the counterparty's liquidity in the event of default, the broker-dealer's reputation, the Adviser's past experience with the broker-dealer, the Financial Industry Regulatory Authority's (''FINRA'') BrokerCheck and disciplinary history and its share of market participation.

[12] The Fund will only use futures contracts that have U.S. Treasury securities and interest rate swaps as their underlying reference assets.

current yield. Under normal circumstances, the Fund will utilize the U.S. Treasury obligations, U.S. Treasury futures and interest rate swaps, which are liquid interest rate products, to manage duration risks. Aside from Treasury futures, which will be exchange traded,[13] all the Fund's principal investments will be U.S. dollar-denominated and traded over the counter (''OTC''). The overall duration of the Fund's portfolio will generally range from −5 to −15 years.[14]

Other Investments

Under normal circumstances, the Fund may invest the balance of its assets in the investments described below.

The Fund may invest in other mortgage-related securities in addition to the agency interest-only CMOs described above. More specifically, the Fund may hold: MBS; mortgage dollar rolls; [15] CMO residuals; [16] and equity or debt securities issued by agencies or instrumentalities of the U.S. government or by private originators of, or investors in, mortgage loans, including savings and loan associations homebuilders, mortgage banks, commercial banks, investment banks, partnerships, trusts, and special purpose entities of the foregoing.

In addition to the agency interest-only CMOs described above, the MBS that the Fund will invest in are other agency CMOs, non-agency CMOs (including non-agency SMBS) and Adjustable Rate Mortgage Backed Securities. The Fund also may invest in asset-backed securities (''ABSs''), which are bonds backed by pools of loans or other receivables.[17] The Fund will limit investments in ABS and MBS that are issued or guaranteed by non-government entities to 15% of the Fund's net assets.[18]

Other mortgage-related securities that the Fund may hold include privately issued mortgage-related securities, where issuers create pass-through pools of conventional residential mortgage loans.

The Fund may enter into other types of swap agreements (in addition to interest-only swaps and interest rate swaps, which are primary investments). These swap agreements will have MBS as reference assets, including CMOs.

The Fund may invest directly and indirectly in foreign currencies. The Fund may conduct foreign currency transactions on a spot (*i.e.,* cash) or forward basis (*i.e.,* by entering into forward contracts to purchase or sell foreign currencies).

The Fund may invest in equity securities. Specifically, the Exchange states that the Fund may invest in common stock, preferred stock, warrants, convertible securities, master limited partnerships, rights, and shares of exchange traded real estate investment trusts. The Fund may invest in: American Depositary Receipts (''ADRs''); Global Depositary Receipts (''GDRs''); European Depositary Receipts (''EDRs''); International Depository Receipts (''IDRs''); ''ordinary shares;'' ''New York shares'' issued and traded in the U.S.; [19] and exchange traded products (''ETPs''), including exchange-traded notes (''ETNs'').[20] The Fund may invest in the securities of other investment companies, including mutual funds, ETFs, closed-end funds, and business development companies.

In addition to the U.S. Treasury debt securities described above, the Fund intends to invest in other fixed income securities. The fixed income securities the Fund may invest in are: Variable and floating rate instruments; bank obligations, including certificates of deposit, bankers' acceptances, and fixed time deposits; commercial paper; [21] U.S. government securities other than U.S. Treasuries; municipal securities; repurchase agreements; reverse repurchase agreements; corporate debt securities; convertible securities; and MBS (as mentioned above). The Fund may invest assets in obligations of foreign banks which meet certain conditions.

The Fund may enter into repurchase agreements with financial institutions, which may be deemed to be loans.[22]

The Fund intends to invest in derivatives (other than the U.S. Treasury Futures, Agency MBS IOS and interest rate swaps discussed above). The derivatives in which the Fund may invest are: Other futures contracts; [23] forward contracts; [24] options, including options on futures; [25] other swaps; hybrid instruments; [26] and structured notes.

The Fund may purchase securities on a when-issued, delayed-delivery or forward commitment basis (*i.e.,* delivery and payment can take place between a month and 120 days after the date of the transaction).[27]

All of the Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage.

[13] The futures in which the Fund may invest will trade on markets that are members of the Intermarket Surveillance Group (''ISG'') or that have entered into a comprehensive surveillance agreement with the Exchange.

[14] Duration is a measure used to determine the sensitivity of a security's price to changes in interest rates. The longer a security's duration, the more sensitive it will be to changes in interest rates. A portfolio with negative duration generally incurs a loss when interest rates and yields fall.

[15] Dollar rolls are a type of repurchase transaction in the mortgage pass-through securities market in which the buy side trade counterparty of a ''to be announced'' (''TBA'') trade agrees to sell off the same TBA trade in the current month and to buy back the same trade in a future month at a lower price, constituting a forward contract.

[16] CMO residuals are mortgage securities issued by agencies or instrumentalities of the U.S. government or by private originators of, or investors in, mortgage loans. The cash flow generated by the mortgage assets underlying a series of CMOs is applied first to make required payments of principal and interest on the CMOs and second to pay the related administrative expenses and any management fee of the issuer. The residual in a CMO structure generally represents the interest in any excess cash flow remaining after making the foregoing payments.

[17] ABSs are created from many types of assets, including auto loans, credit card receivables, home equity loans, and student loans. Collateralized bond obligations (''CBOs''), collateralized loan obligations (''CLOs''), and other collateralized debt obligations (''CDOs'') are types of ABS. Normally, CBOs, CLOs and other CDOs are privately offered and sold, and thus, are not registered under the securities laws.

[18] *See* Notice, *supra* note 4, 79 FR at 44881.

[19] With the exception of ADRs traded OTC, which will comprise no more than 10% of the Fund's net assets, all equity securities, including, without limitation, exchange-traded ADRs, GDRs, EDRs, IDRs, New York shares and ordinary shares, that the Fund may invest in will trade on markets that are members of the ISG or that have entered into a comprehensive surveillance agreement with the Exchange. *See id.* at 44882, n.23.

[20] It is expected that the ETN issuer's credit rating will be investment grade at the time of investment. *See id.* at 44882.

[21] The Fund will only invest in commercial paper rated A–1 or A–2 by S&P or Prime-1 or Prime-2 by Moody's. *See id.*

[22] The Fund will effect repurchase transactions only with large, well-capitalized and well-established financial institutions whose condition will be continually monitored by the Sub-Adviser. *See id.*

[23] The Fund will only enter into futures contracts that are traded on a national futures exchange regulated by the Commodities Futures Trading Commission (''CFTC'') and whose principal market is a member of ISG or is a market with which the Exchange has a comprehensive surveillance sharing agreement. The Fund will only use futures contracts that have U.S. Treasury securities and interest rate swaps as their underlying reference assets.

[24] Specifically, in addition to the forward currency exchange contracts discussed above, the Fund may invest in mortgage dollar rolls, which constitute forward contracts.

[25] Not more than 10% of the net assets of the Fund in the aggregate shall consist of options whose principal market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. *See id.* The Fund may trade put and call options on securities, securities indices and currencies.

[26] The Fund will only invest in commodity-linked hybrid instruments that qualify, under applicable rules of the CFTC, for an exemption from the provisions of the CEA. *See id.* at 44883.

[27] The Fund will not purchase securities on a when-issued, delayed-delivery or forward commitment basis if, as a result, more than 15% of the Fund's net assets would be so invested. *See id.*

II. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act [28] and the rules and regulations thereunder applicable to a national securities exchange.[29] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[30] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that the Fund and the Shares must comply with the requirements of NYSE Arca Equities Rule 8.600 for the Shares to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[31] which sets forth Congress's finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. According to the Exchange, quotation and last sale information for the Shares and the underlying U.S. exchange-traded equity securities will be available via the Consolidated Tape Association (''CTA'') high-speed line, and from the national securities exchange on which they are listed.[32] Quotation and last-sale information for such U.S. exchange-listed securities will be available from the exchange on which they are listed.[33] Quotation and last-sale information for exchange-listed options will be available via the Options Price Reporting Authority.[34] Price information regarding the futures contracts, exchange-traded options, options on futures, equity securities (including ETPs such as exchange-listed ADRs, GDRs, EDRs, IDRs, ordinary shares and New York shares as well as ETNs, and ETFs), and exchange-traded REITs, held by the Fund will be available from the U.S. and non-U.S. exchanges trading such assets.[35] Additionally, quotation information from brokers and dealers or pricing services will be available for ADRs traded OTC; investment company securities other than ETFs; non-exchange-traded derivatives, including forward contracts, IOS and other swaps, options traded OTC, options on futures, hybrid instruments and structured notes; fixed income securities, including CMOs (including agency interest-only CMOs), CMO residuals, mortgage dollar rolls, U.S. Treasury securities, other obligations issued or guaranteed by U.S. government agencies and instrumentalities, bonds, bank obligations, ABS, MBS, shares of other mutual funds, commercial paper, repurchase agreements, reverse repurchase agreements, corporate debt securities, municipal securities, convertible securities, certificates of deposit and bankers' acceptances.[36] Pricing information regarding each asset class in which the Fund will invest generally is available through nationally recognized data service providers through subscription agreements.[37]

In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated at least every 15 seconds during the Core Trading Session by one or more major market data vendors.[38] On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio, as defined in NYSE Arca Equities Rule 8.600(c)(2), that would form the basis for the Fund's calculation of NAV at the end of the business day.[39] The NAV of the Fund will be determined once daily Monday through Friday, generally as of the regularly scheduled close of business of the New York Stock Exchange (normally 4:00 p.m. Eastern Time) on each day the New York Stock Exchange is open for trading. Information regarding market price and trading volume of the Shares would be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares would be published daily in the financial section of newspapers. The Web site for the Fund will include a form of the prospectus and additional data relating to NAV and other applicable quantitative information.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share of the Fund will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.[40] In addition, trading in the Shares would be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which trading in the Shares may be halted. The Exchange may halt trading in the Shares if trading is not occurring in the securities or financial instruments constituting the Disclosed Portfolio of the Fund, or if other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.[41] Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio of the Fund must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.[42] In addition, the Exchange may obtain

[28] 15 U.S.C. 78f.

[29] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[30] 15 U.S.C. 78f(b)(5).

[31] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[32] *See* Notice, *supra* note 4, 79 FR at 44886.

[33] *See id.*

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] *See id.*

[38] The Exchange states that several major market data vendors display or make widely available Portfolio Indicative Values taken from the CTA or other data feeds. *See id.* at 44886, n.34.

[39] On a daily basis, the Adviser, on behalf of the Fund, will disclose on the Fund's Web site the following information regarding each portfolio holding of the Fund, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding, such as the type of swap); the identity of the security, commodity, index, or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holding in the Fund's portfolio. *See id.* at 44888.

[40] *See* NYSE Arca Equities Rule 8.600(d)(1)(B).

[41] *See* NYSE Arca Equities Rule 8.600(d)(2)(C) (providing additional considerations for the suspension of trading in or removal from listing of Managed Fund Shares on the Exchange). With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading in Shares will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

[42] *See* NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

information regarding trading in the Shares, exchange-listed equity securities, futures contracts and exchange-listed options contracts from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. The Commission also notes that FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's Trade Reporting and Compliance Engine.[43] The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees.[44] The Exchange represents that neither the Adviser or the Sub-Adviser is a broker-dealer and are not affiliated with a broker-dealer, and that in the event (a) the Adviser or Sub-Adviser becomes, or becomes newly affiliated with, a broker-dealer, or (b) any new adviser or sub-adviser is, or becomes affiliated with, a broker-dealer, it will implement a fire wall with respect to its relevant personnel or broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.[45]

The Exchange represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities.

In support of this proposal, the Exchange has made the following representations:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) Trading in the Shares will be subject to the existing surveillance procedures administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws, and these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

(4) Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its Equity Trading Permit Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (d) how information regarding the Portfolio Indicative Value is disseminated; (e) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) For initial and continued listing, the Fund will be in compliance with Rule 10A–3 under the Exchange Act,[46] as provided by NYSE Arca Equities Rule 5.3.

(6) The Fund may hold up to an aggregate amount of 15% of its net assets (calculated at the time of investment) in assets deemed illiquid by the Adviser, consistent with Commission guidance.

(7) A minimum of 100,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange.

(8) Not more than 10% of the net assets of the Fund in the aggregate shall consist of options whose principal market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

(9) The Fund will limit investments in ABS and MBS that are issued or guaranteed by non-government entities to 15% of the Fund's net assets.

(10) ADRs traded OTC will comprise no more than 10% of the Fund's net assets,

(11) All equity securities except for ADRs traded OTC will trade on markets that are members of the ISG or that have entered into a comprehensive surveillance agreement with the Exchange.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act[47] and the rules and regulations thereunder applicable to a national securities exchange.

III. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[48] that the proposed rule change (SR–NYSEArca–2014–71) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[49]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–22117 Filed 9–16–14; 8:45 am]

BILLING CODE 8011–01–P

[43] *See* Notice, *supra* note 4, 79 FR at 44887.

[44] *See id.*

[45] *See* text accompanying note 7, *supra.* An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[46] 17 CFR 240.10A–3.

[47] 15 U.S.C. 78f(b)(5).

[48] 15 U.S.C. 78s(b)(2).

[49] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73075; File No. SR–ICEEU–2014–12]

Self-Regulatory Organizations; ICE Clear Europe Limited; Order Granting Approval of Proposed Rule Change to Liquidity Policies Relating to EMIR

September 11, 2014.

I. Introduction

On July 25, 2014, ICE Clear Europe Limited (''ICE Clear Europe'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–ICEEU–2014–12 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder.[2] The proposed rule change was

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

published for comment in the **Federal Register** on August 11, 2014.[3] The Commission received no comment letters regarding the proposed change. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description of the Proposed Rule Change

ICE Clear Europe is proposing this change to revise and formalize certain ICE Clear Europe liquidity policies and procedures, and to facilitate compliance with requirements under the European Market Infrastructure Regulation (including regulations thereunder, ''EMIR'')[4] that will apply to ICE Clear Europe as an authorized central counterparty.

ICE Clear Europe proposes to revise its existing Liquidity Risk Management Framework (''LRMF'') and to adopt a separate Liquidity Plan that formalizes certain procedures and internal processes relating to liquidity objectives and monitoring, testing and decision-making relating to sufficiency of liquidity resources. In ICE Clear Europe's view, the creation of the Liquidity Plan does not materially change existing procedures and processes but is intended to formalize them, in order to be consistent with requirements under EMIR.

ICE Clear Europe states that the Liquidity Plan has been drafted in accordance with Article 32 of the Regulatory Technical Standards implementing EMIR.[5] ICE Clear Europe represents that, consistent with Article 32, the stated objectives of the Liquidity Plan are to: (i) Identify sources of liquidity risk; (ii) manage and monitor liquidity needs across a range of stressed market scenarios; (iii) maintain sufficient and distinct financial resources to cover liquidity needs; (iv) assess and value the liquid assets available to the clearing house and its liquidity needs; (v) assess timescales over which liquid financial resources should be available; (vi) manage a liquidity shortfall event; (vi) replace financial resources used in a liquidity shortfall event; and (vii) assess potential liquidity needs stemming from Clearing Members ability to swap cash for non-cash collateral. ICE Clear Europe also states that the Liquidity Plan reflects requirements and guidance of the Bank of England.

ICE Clear Europe states that the Liquidity Plan contains details about its liquidity monitoring, stress testing, reporting and management procedures. ICE Clear Europe represents that, with respect to monitoring, it uses various systems and processes to ascertain the status of settlements at the start of the day, intra-day and at the end of day, as well as the status of related investment activity during the day. ICE Clear Europe contends that any deviation from established tolerance levels will be escalated in accordance with the Liquidity Plan. ICE Clear Europe also states that the Liquidity Plan uses certain ''Key Risk & Performance Indicators'' to ensure compliance with the investment policies in light of ICE Clear Europe's credit and liquidity requirements, based on a number of investment categories and tenor categories.

ICE Clear Europe states that its Liquidity Plan identifies various sources of liquidity risks, including exposure to settlement banks, custodian banks, liquidity providers, investment counterparties, payment systems, clearing members and other service providers, and provides for regular stress testing based on those risks. According to ICE Clear Europe, the Liquidity Plan also addresses liquidity risk tolerances and appetite limits established by its Board in connection with stress testing. ICE Clear Europe also states that stress testing is conducted using a range of scenarios, including both historical scenarios and forward-looking scenarios involving extreme but plausible market events and conditions and that both types of scenarios simulate extreme but plausible losses arising from the default of the clearing members with the two largest liquidity exposures, consistent with EMIR requirements. ICE Clear Europe also claims that the scenarios address the required level of liquidity resources in a range of other conditions in the relevant currencies used by ICE Clear Europe, including defaults of investment counterparties, settlement banks, Nostro agents, intraday liquidity providers and other service providers, market infrastructure failures and other systemic events (and combinations thereof). According to ICE Clear Europe, historical scenarios are run on a single day, and a historical trend is kept, while forward-looking scenarios project these cash flows over the coming eight-day period.

According to ICE Clear Europe, its Liquidity Plan also specifies procedures for liquidity management in cases of potential liquidity stress. ICE Clear Europe states that it has defined a series of liquidity events and stress situations, ordered by severity, which trigger a notification to the relevant level of management and, if further escalation is required, the Board. ICE Clear Europe also states that the Liquidity Plan outlines actions that may be taken in each situation to address the liquidity event or stress.

ICE Clear Europe contends that the Liquidity Plan provides for daily, weekly and monthly reporting requirements to relevant levels of clearing house management, Board risk committee, the Board and regulators, as appropriate. In addition, ICE Clear Europe states that the Liquidity Plan establishes a protocol for breaches and liquidity events, which includes reporting and escalation based on the severity of the event, mitigating actions and replenishment of liquidity and that the Liquidity Plan also provides for periodic testing of liquidity resources to ensure that they are ''highly reliable'' within the meaning of Article 44 of EMIR.

ICE Clear Europe states that, as part of the specified governance process, the Liquidity Plan will be reviewed by management and must be approved by the Board annually following consultation with the Board risk committee, and that deviations and interim changes similarly require Board approval following consultation with the Board risk committee.

According to ICE Clear Europe, it has also revised its LRMF to reflect the adoption of the new, separate Liquidity Plan (and the two documents together are intended to reflect the clearing house's approach to liquidity management). ICE Clear Europe states that various sections of the LRMF have been modified to improve clarity and readability. ICE Clear Europe further states that, as revised, the LRMF specifies the objectives of liquidity management, and references relevant policies, including investment policies, collateral management and haircut policies, stress testing policies and operational risk management policies. ICE Clear Europe also states that the LRMF also addresses the policies for establishing liquidity risk tolerances and appetites, the range of relevant stress scenarios (which are derived from the CPSS–IOSCO Principles for Financial Market Infrastructures and Regulatory Technical Standards Article

[3] Securities Exchange Act Release No. 34–72761 (August 5, 2014), 79 FR 46894 (August 11, 2014) (SR–ICEEU–2014–12).

[4] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

[5] Commission Delegated Regulation (EU) No. 153/2013 of 9 December 2012 Supplementing Regulation (EU) No. 648/2012 of the European Parliament and of the Council with regard to Regulatory Technical Standards on Requirements for Central Counterparties (the ''Regulatory Technical Standards'').

32.4), reverse stress testing requirements in accordance with Regulatory Technical Standards Article 49, and the resources the clearing house will treat as available for liquidity management purposes. ICE Clear Europe also contends that the LRMF specifies further procedures concerning liquidity shortfalls and replenishment, complementing the provisions set forth in the Liquidity Plan and specifies procedures for internal review and governance over the liquidity policies, as well as procedures for exceptions and breaches of risk tolerance or risk appetite levels.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act [6] directs the Commission to approve a proposed rule change of a self-regulatory organization if the Commission finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such self-regulatory organization. Section 17A(b)(3)(F) of the Act [7] requires, among other things, that the rules of a clearing agency are designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible and, in general, to protect investors and the public interest.

The Commission finds that the proposed rule change is consistent with Section 17A of the Act [8] and the rules thereunder applicable to ICE Clear Europe. The revised policies address the liquidity resources and procedures for testing the adequacy of those resources in a range of scenarios, including scenarios involving extreme but plausible market conditions. Furthermore, the revised policies would provide further clarity as to the steps ICE Clear Europe may take when confronted with a potential liquidity shortfall or similar event. The proposed revisions are thereby reasonably designed to enhance the ability of the clearing house to assess potential liquidity events that may impact its ability to conduct settlements for cleared transactions and its ability to avoid or manage such events and continue clearing house operations. As such, the Commission believes that the changes will promote the prompt and accurate settlement of securities and derivatives transactions, and therefore are consistent with the requirements of the Act and the rules and regulations thereunder applicable to ICE Clear Europe, in particular, to Section 17(A)(b)(3)(F).

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act [9] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (File No. SR–ICEEU–2014–12) be, and hereby is, approved.[11]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–22113 Filed 9–16–14; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78s(b)(2)(C).

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 15 U.S.C. 78q–1.

[9] 15 U.S.C. 78q–1.

[10] 15 U.S.C. 78s(b)(2).

[11] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73083; File No. SR–EDGX–2014–18]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change Relating To Include Additional Specificity Within Rule 1.5 and Chapter XI Regarding Current System Functionality Including the Operation of Order Types and Order Instructions

September 11, 2014.

On July 16, 2014, EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Rule 1.5 and Chapter XI of its rule book to include additional specificity regarding the current functionality of the Exchange's System,[3] including the operation of its order types and order instructions, and to describe certain new system functionality. The proposed rule change was published for comment in the **Federal Register** on July 31, 2014.[4] The Commission received one comment letter.[5]

Section 19(b)(2) of the Act [6] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether these proposed rule changes should be disapproved. The 45th day for this filing is September 14, 2014.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider and take action on the Exchange's proposed rule change.

Accordingly, pursuant to Section 19(b)(2)(A)(ii)(I) of the Act [7] and for the reasons stated above, the Commission designates October 29, 2014, as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–EDGX–2014–18).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–22118 Filed 9–16–14; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Exchange Rule 1.5(cc) defines ''System'' as ''the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away.''

[4] *See* Securities Exchange Act Release No. 72676 (July 25, 2014), 79 FR 44520.

[5] *See* Letter from Suzanne H. Shatto, dated August 19, 2014.

[6] 15 U.S.C. 78s(b)(2).

[7] 15 U.S.C. 78s(b)(2)(A)(ii)(I).

[8] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73078; File No. SR–NASDAQ–2014–80]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing and Trading of the Shares of the PowerShares DB Optimum Yield Diversified Commodity Strategy Portfolio, PowerShares Agriculture Commodity Strategy Portfolio, PowerShares Precious Metals Commodity Strategy Portfolio, PowerShares Energy Commodity Strategy Portfolio, PowerShares Base Metals Commodity Strategy Portfolio and PowerShares Bloomberg Commodity Strategy Portfolio, Each a Series of PowerShares Actively Managed Exchange-Traded Commodity Fund Trust

September 11, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 29, 2014, The NASDAQ Stock Market LLC (''Nasdaq'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. On September 8, 2014, the Exchange filed Amendment No. 1 to the proposal.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1 thereto, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

Nasdaq proposes to list and trade the shares of the PowerShares DB Optimum Yield Diversified Commodity Strategy Portfolio, PowerShares Agriculture Commodity Strategy Portfolio, PowerShares Precious Metals Commodity Strategy Portfolio, PowerShares Energy Commodity Strategy Portfolio, PowerShares Base Metals Commodity Strategy Portfolio and PowerShares Bloomberg Commodity Strategy Portfolio (each, a ''Fund,'' and collectively, the ''Funds''), each a series of PowerShares Actively Managed Exchange-Traded Commodity Fund Trust (the ''Trust''). The shares of each Fund are referred to herein as the ''Shares.''

The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com/,* at Nasdaq's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the Shares of each Fund under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares[4] on the Exchange.[5] Each Fund will be an actively managed exchange-traded fund (''ETF''). Each Fund's Shares will be offered by the Trust, which was established as a Delaware statutory trust on December 23, 2013.[6] The Trust is registered with the Commission as an investment company and has filed a registration statement on Form N–1A (''Registration Statement'') with the Commission.[7] Each Fund is a series of the Trust. As part of its investment strategy, each Fund will invest in its own wholly-owned subsidiary controlled by such Fund and organized under the laws of the Cayman Islands (each, a ''Subsidiary,'' and collectively, the ''Subsidiaries''). All of the exchange-traded securities held by a Fund will be traded in a principal trading market that is a member of the Intermarket Surveillance Group (''ISG'') or a market with which the Exchange has a comprehensive surveillance sharing agreement. With respect to futures contracts held indirectly through a Subsidiary, not more than 10% of the weight of such futures contracts in the aggregate shall consist of instruments whose principal trading market is not a member of the ISG or a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

Invesco PowerShares Capital Management LLC will be the investment adviser (''Adviser'') to the Funds. Invesco Distributors, Inc. (''Distributor'') will be the principal underwriter and distributor of each Fund's Shares. The Bank of New York Mellon (''BNYM'') will act as the administrator, accounting agent, custodian (''Custodian'') and transfer agent to the Funds.

Paragraph (g) of Rule 5735 provides that if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a ''fire wall'' between the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 changes the name of the ''PowerShares Diversified Commodity Strategy Portfolio'' to the new name ''PowerShares DB Optimum Yield Diversified Commodity Strategy Portfolio,'' and changes the name of the ''PowerShares Balanced Commodity Strategy Portfolio'' to the new name ''PowerShares Bloomberg Commodity Strategy Portfolio.''

[4] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (the ''1940 Act'') organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Index Fund Shares, listed and traded on the Exchange under Nasdaq Rule 5705, seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[5] The Commission approved Nasdaq Rule 5735 in Securities Exchange Act Release No. 57962 (June 13, 2008), 73 FR 35175 (June 20, 2008) (SR–NASDAQ–2008–039). The Funds would not be the first actively-managed funds listed on the Exchange; *see* Securities Exchange Act Release No. 66489 (February 29, 2012), 77 FR 13379 (March 6, 2012) (SR–NASDAQ–2012–004) (order approving listing and trading of WisdomTree Emerging Markets Corporate Bond Fund). Moreover, the Commission also previously approved the listing and trading of other actively managed funds within the PowerShares family of ETFs. *See, e.g.,* Securities Exchange Act Release Nos. 68158 (November 5, 2012), 77 FR 67412 (November 9, 2012) (SR–NYSEArca–2012–101) (order approving listing of PowerShares S&P 500® Downside Hedged Portfolio ETF); and 69915 (July 2, 2013) (SR–NYSEArca–2013–56) (order approving listing of PowerShares China A-Share Portfolio ETF). The Exchange believes the proposed rule change raises no significant issues not previously addressed in those prior Commission orders.

[6] The Commission has issued an order granting certain exemptive relief to affiliates of the Trust, and which extends to the Trust, under the 1940 Act (the ''Exemptive Order''). *See* Investment Company Act Release No. 30029 (April 10, 2012) (File No. 812–13795). In compliance with Nasdaq Rule 5735(b)(5), which applies to Managed Fund Shares based on an international or global portfolio, the application for exemptive relief under the 1940 Act states that the Funds will comply with the federal securities laws in accepting securities for deposits and satisfying redemptions with redemption securities, including that the securities accepted for deposits and the securities used to satisfy redemption requests are sold in transactions that would be exempt from registration under the Securities Act of 1933 (15 U.S.C. 77a).

[7] *See* Registration Statement on Form N–1A for the Trust, dated May 20, 2014 (File Nos. 333–193135 and 811–22927). The descriptions of the Funds and the Shares contained herein are based, in part, on information in the Registration Statement.

investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio.[8] In addition, paragraph (g) further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the open-end fund's portfolio. The Adviser is not a broker-dealer, although it is affiliated with the Distributor, a broker-dealer. The Adviser has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to a Fund's (including a Subsidiary's) portfolio. In the event (a) the Adviser registers as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, it will implement a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, if applicable, regarding access to information concerning the composition and/or changes to the portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio. The Funds do not currently intend to use a sub-adviser.

Principal Investment Strategies Applicable to Each Fund

Each Fund's investment objective will be to seek long term capital appreciation. Each Fund will be an actively managed ETF that will seek to achieve its investment objective by investing, under normal circumstances,[9] in a combination of securities and futures contracts either directly or through its respective Subsidiary as follows. Each Fund will invest in: (i) its respective Subsidiary, (ii) exchange-traded products or exchange-traded commodity pools;[10] and (iii) U.S. Treasury Securities,[11] money market mutual funds, high quality commercial paper and similar instruments, as described more fully below. Each respective Subsidiary will invest in exchange-traded commodity futures contracts (''Commodities''). The Commodities generally will be components of certain benchmark indices, as set forth below for each Fund, but each Subsidiary also may invest in Commodities that are outside of those benchmark indices.[12]

Although each Fund's Subsidiary generally will hold many of the Commodities that are components of that Fund's respective benchmark index (each, respectively, a ''Benchmark''), each Subsidiary (and its respective parent Fund) will be actively managed by the Adviser and will not be obligated to invest in all of (or limit its investments solely to) the component Commodities within its respective Benchmark. Each Subsidiary (and its respective parent Fund) also will not be obligated to invest in the same amount or proportion as its respective Benchmark, or be obligated to track the performance of a Benchmark or of any index. Rather, the Adviser will determine the weightings of these investments by using a rules-based approach that is designed to ensure that the relative weight of each investment within a Fund's Subsidiary reflects the Adviser's view of the economic significance and market liquidity of the corresponding, underlying physical commodities.

Each Fund's investments will include investments directly in other ETFs,[13] to the extent permitted under the 1940 Act,[14] or ETNs that provide exposure to the relevant Commodities.

Each Fund also may invest in a Commodity Pool that is designed to track the performance of the applicable Benchmark through investments in Commodities.

No Fund will invest directly in Commodities. However, each Fund expects to gain significant exposure to Commodities indirectly by investing directly in the applicable Subsidiary. Each Fund's investment in a Subsidiary may not exceed 25% of the Fund's total assets. In addition, no Fund or Subsidiary will invest directly in physical commodities. The remainder of a Fund's assets that are not invested in ETFs, ETNs, Commodity Pools, or its Subsidiary will be invested in U.S. government securities,[15] money market instruments,[16] cash and cash equivalents (*e.g.,* corporate commercial

[8] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the ''Advisers Act''). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[9] The term ''under normal circumstances'' includes, but is not limited to, the absence of extreme volatility or trading halts in the equity, commodities and futures markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

[10] Specifically, the Funds will invest in: (1) ETFs that provide exposure to commodities as would be listed under Nasdaq Rules 5705 and 5735; (2) exchange-traded notes (''ETNs'') that provide exposure to commodities as would be listed under Nasdaq Rule 5710; or (3) exchange-traded pooled investment vehicles that invest primarily in commodities and commodity-linked instruments as would be listed under Nasdaq Rules 5711(b), (d), (f), (g), (h), (i) and (j) (''Commodity Pool'' or ''Commodity Pools'').

[11] U.S. Treasury obligations are backed by the ''full faith and credit'' of the U.S. government.

[12] In addition, each Subsidiary may, for administrative convenience, also invest in U.S. Treasury Securities, money market mutual funds, high quality commercial paper and similar instruments, as described more fully below, for purposes of collateralizing investments in Commodities.

[13] An ETF is an investment company registered under the 1940 Act that holds a portfolio of securities. Many ETFs are designed to track the performance of a securities index, including industry, sector, country and region indexes. ETFs included in a Fund will be listed and traded in the U.S. on registered exchanges. Each Fund may invest in the securities of other ETFs in excess of the limits imposed under the 1940 Act pursuant to exemptive relief obtained by an affiliate of the Trust that also applies to the Trust. The ETFs in which a Fund may invest include Index Fund Shares (as described in Nasdaq Rule 5705), Portfolio Depositary Receipts (as described in Nasdaq Rule 5705), and Managed Fund Shares (as described in Nasdaq Rule 5735).

[14] The shares of ETFs in which a Fund may invest will be limited to securities that trade in markets that are members of the ISG, which includes all U.S. national securities exchanges, or are parties to a comprehensive surveillance sharing agreement with the Exchange.

[15] Such securities will include securities that are issued or guaranteed by the U.S. Treasury, by various agencies of the U.S. government, or by various instrumentalities, which have been established or sponsored by the U.S. government. U.S. Treasury obligations are backed by the ''full faith and credit'' of the U.S. government. Securities issued or guaranteed by federal agencies and U.S. government-sponsored instrumentalities may or may not be backed by the full faith and credit of the U.S. government.

[16] For a Fund's purposes, money market instruments will include: Short-term, high- quality securities issued or guaranteed by non-U.S. governments, agencies and instrumentalities; non-convertible corporate debt securities with remaining maturities of not more than 397 days that satisfy ratings requirements under Rule 2a–7 of the 1940 Act; money market mutual funds; and deposits and other obligations of U.S. and non-U.S. banks and financial institutions.

paper).[17] Each Fund will use these assets to provide liquidity and to collateralize the Subsidiary's investments in the applicable Commodities.

Principal Investments for Each Fund

PowerShares DB Optimum Yield Diversified Commodity Strategy Portfolio

The Fund will seek to achieve its investment objective through indirect investments that provide exposure to a diverse group of the most heavily traded physical commodities in the world. The Fund's indirect investments in commodities primarily will include futures contracts contained in DBIQ Optimum Yield Diversified Commodity Index Excess Return (which is the Fund's Benchmark), an index composed of futures contracts on 14 heavily traded commodities in the energy, precious metals, industrial metals and agriculture sectors.

PowerShares Agriculture Strategy Portfolio

The Fund will seek to achieve its investment objective through indirect investments that provide exposure to physical commodities within the agriculture sector. The Fund's indirect investments in commodities primarily will include futures contracts contained in DBIQ Diversified Agriculture Index Excess Return (which is the Fund's Benchmark), an index composed of futures contracts on 11 of the most liquid and widely traded agricultural commodities, including corn, soybeans, wheat, Kansas City wheat, sugar, cocoa, coffee, cotton, live cattle, feeder cattle and lean hogs.

PowerShares Precious Metals Strategy Portfolio

The Fund will seek to achieve its investment objective through indirect investments that provide exposure to two of the most important precious metals—gold and silver. The Fund's indirect investments in commodities primarily will include futures contracts contained in DBIQ Optimum Yield Precious Metals Index Excess Return (which is the Fund's Benchmark), an index composed of futures contracts on gold and silver.

PowerShares Energy Strategy Portfolio

The Fund will seek to achieve its investment objective through indirect investments that provide exposure to physical commodities within the energy sector. The Fund's indirect investments in commodities primarily will include futures contracts contained in DBIQ Optimum Yield Energy Index Excess Return (which is the Fund's Benchmark), an index composed of futures contracts on heavily traded energy commodities, including light sweet crude oil (WTI), heating oil, Brent crude oil, RBOB gasoline and natural gas.

PowerShares Base Metals Strategy Portfolio

The Fund will seek to achieve its investment objective through indirect investments that provide exposure to the most widely used physical commodities within the base metals sector. The Fund's indirect investments in commodities primarily will include futures contracts contained in DBIQ Optimum Yield Industrial Metals Index Excess Return (which is the Fund's Benchmark), an index composed of futures contracts on physical commodities in the base metals sector, including aluminum, zinc and Grade A copper.

PowerShares Bloomberg Commodity Strategy Portfolio

The Fund will seek to achieve its investment objective through indirect investments that provide exposure to a broadly diversified representation of the commodity markets. The Fund's indirect investments in commodities primarily will include futures contracts contained in the Bloomberg Commodity Total Return Index (which is the Fund's Benchmark), a diversified index composed of futures contracts on various physical commodities across seven industry sectors. Historically, the Benchmark has included futures contracts on the following: Aluminum, Brent Crude oil, coffee, copper, corn, cotton, gold, heating oil, Kansas wheat, lean hogs, live cattle, natural gas, nickel, silver, soybeans, soybean meal, soybean oil, sugar, unleaded gasoline, wheat, West Texas Intermediate crude oil and zinc.

The Subsidiaries

Each Fund will seek to gain exposure to the market for commodities through investments in its respective Subsidiary. Each Subsidiary will be wholly-owned and controlled by the applicable Fund, and its investments will be consolidated into such Fund's financial statements.

A Fund's investment in its Subsidiary may not exceed 25% of that Fund's total assets at each quarter end of the Fund's fiscal year. A Fund's investment in its Subsidiary will be designed to help such Fund achieve exposure to Commodities returns in a manner consistent with the federal tax requirements applicable to regulated investment companies, such as the Funds, which limit the ability of investment companies to invest directly in the derivative instruments.

Each Subsidiary will invest in Commodities. The remainder of a Subsidiary's assets, if any, may be invested (like its respective Fund's assets) in U.S. government securities, money market instruments, cash and cash equivalents intended to serve as margin or collateral or otherwise support the Subsidiary's positions in Commodities. Each respective Subsidiary, accordingly, will be subject to the same general investment policies and restrictions as the applicable Fund, except that unlike such Fund, which must invest in assets in compliance with the requirements of Subchapter M of the Internal Revenue Code, a Subsidiary may invest without limitation in Commodities. References to the investment strategies and risks of each Fund include the investment strategies and risks of the applicable Subsidiary.

Each Subsidiary will be advised by the Adviser.[18] The Subsidiaries will not be registered under the 1940 Act. As an investor in a Subsidiary, a Fund, as that Subsidiary's sole shareholder, will not have the protections offered to investors in registered investment companies. However, because each Fund will wholly own and control its respective Subsidiary, and the Fund and the Subsidiary will be managed by the Adviser, the Subsidiary will not take action contrary to the interests of the Fund or the Fund's shareholders. The Board of Trustees of the Trust (the ''Board'') has oversight responsibility for the investment activities of each Fund, including its expected investments in its Subsidiary, and that Fund's role as the sole shareholder of such Subsidiary. The Adviser will receive no additional compensation for managing the assets of each Subsidiary. Also, in managing a Subsidiary's portfolio, the Adviser will be subject to the same investment restrictions and operational guidelines that apply to the management of a Fund. Changes in the laws of the United States, under which each Fund is organized, or of the Cayman Islands, under which each Subsidiary is organized, could result in the inability of a Fund or a Subsidiary to operate as

[17] The remainder of a Subsidiary's assets, if any, may be invested (like its respective Fund's assets) in these assets to serve as margin or collateral or otherwise support the Subsidiary's positions in Commodities.

[18] Each Subsidiary also will enter into separate contracts for the provision of custody, transfer agency, and accounting agent services with the same or with affiliates of the same service providers that provide those services to the applicable Fund.

described in this filing or in the Registration Statement and could negatively affect such Fund and its shareholders.

Commodities Regulation

The Commodity Futures Trading Commission (''CFTC'') has adopted substantial amendments to CFTC Rule 4.5 relating to the permissible exemptions and conditions for reliance on exemptions from registration as a commodity pool operator. As a result of the instruments that each Fund will hold indirectly, the Funds and the Subsidiaries are subject to regulation by the CFTC and the National Futures Association (''NFA''), as well as additional disclosure, reporting and recordkeeping rules imposed upon commodity pools. The Adviser previously registered as a commodity pool operator[19] and is also a member of the NFA.

Other Investments

Each Fund may invest (either directly or through its Subsidiary) in U.S. government securities, money market instruments, cash and cash equivalents (*e.g.,* corporate commercial paper) to provide liquidity and to collateralize the Subsidiary's investments in Commodities. The instruments in which each Fund, or its respective Subsidiary, can invest include any one or more of the following: (i) Short-term obligations issued by the U.S. government;[20] (ii) short term negotiable obligations of commercial banks, fixed time deposits and bankers' acceptances of U.S. banks and similar institutions;[21] (iii) commercial paper rated at the date of purchase ''Prime-1'' by Moody's Investors Service, Inc. or ''A–1+'' or ''A–1'' by Standard & Poor's or, if unrated, of comparable quality, as the Adviser of the Fund determines; and (iv) money market mutual funds, including affiliated money market mutual funds.

In addition, each Fund's investment in securities of other investment companies (including money market funds) may exceed the limits permitted under the 1940 Act, in accordance with certain terms and conditions set forth in a Commission exemptive order issued to an affiliate of the Trust (which applies equally to the Trust) pursuant to Section 12(d)(1)(J) of the 1940 Act.[22] No Fund, or its respective Subsidiary, anticipates investing in options, swaps or forwards.

Investment Restrictions

Each Fund may not concentrate its investments (*i.e.,* invest more than 25% of the value of its net assets) in securities of issuers in any one industry or group of industries. This restriction will not apply to obligations issued or guaranteed by the U.S. government, its agencies or instrumentalities.[23]

Each Subsidiary's shares will be offered only to the applicable Fund and such Fund will not sell shares of that Subsidiary to other investors. Each Fund and the applicable Subsidiary will not invest in any non-U.S. equity securities (other than shares of the Subsidiary).

Each Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities and other illiquid assets (calculated at the time of investment). Each Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of a Fund's net assets are held in illiquid securities or other illiquid assets. Illiquid securities and other illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.[24]

Each Fund intends to qualify for and to elect to be treated as a separate regulated investment company under Subchapter M of the Internal Revenue Code.[25]

Each Fund's and its respective Subsidiary's investments will be consistent with that Fund's investment objective. In pursuing its investment objective, a Fund may utilize instruments that have a leveraging effect on that Fund. This effective leverage occurs when a Fund's market exposure exceeds the amounts actually invested. Any instance of effective leverage will be covered in accordance with guidance promulgated by the Commission and its staff. [26] Each Fund does not presently intend to engage in any form of borrowing for investment purposes, and will not be operated as ''leveraged ETFs'', *i.e.,* it will not be operated in a manner designed to seek a multiple of the performance of an underlying reference index.

Net Asset Value

The Funds' administrator will calculate each Fund's net asset value (''NAV'') per Share as of the close of regular trading (normally 4:00 p.m., Eastern time (''E.T.'')) on each day Nasdaq is open for business. NAV per Share will be calculated for a Fund by taking the market price of the Fund's total assets, including interest or dividends accrued but not yet collected, less all liabilities, and dividing such amount by the total number of Shares outstanding. The result, rounded to the nearest cent, will be the NAV per Share (although creations and redemptions will be processed using a price denominated to the fifth decimal point, meaning that rounding to the nearest cent may result in different prices in certain circumstances). All valuations will be subject to review by the Board or its delegate.

In determining NAV, expenses will be accrued and applied daily and securities and other assets for which market quotations are readily available will be valued at market value. Securities listed or traded on an exchange generally will be valued at the last sales price or official closing price that day as of the close of the exchange where the security primarily is traded. Commodities will be valued at the closing price in the market where such contracts are

[19] As defined in Section 1a(11) of the Commodity Exchange Act.

[20] Each Fund may invest in U.S. government obligations. Obligations issued or guaranteed by the U.S. government, its agencies and instrumentalities include bills, notes and bonds issued by the U.S. Treasury, as well as ''stripped'' or ''zero coupon'' U.S. Treasury obligations representing future interest or principal payments on U.S. Treasury notes or bonds.

[21] Time deposits are non-negotiable deposits maintained in banking institutions for specified periods of time at stated interest rates. Banker's acceptances are time drafts drawn on commercial banks by borrowers, usually in connection with international transactions.

[22] Investment Company Act Release No. 30238 (October 23, 2012) (File No. 812–13820).

[23] *See* Form N–1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. *See, e.g.,* Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975).

[24] The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), FN 34. *See also* Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding ''Restricted Securities''); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act of 1933).

[25] 26 U.S.C. 851.

[26] *In re* Securities Trading Practices of Investment Companies, SEC Rel. No. IC–10666 (April 27, 1979).

principally traded. Investment company shares will be valued at net asset value, unless the shares are exchange-traded, in which case they will be valued at the last sale or official closing price on the market on which they primarily trade. ETNs will be valued at the last sale or official closing price on the market on which they primarily trade. Commodity Pools will be valued at the last sale or official closing price on the market on which they primarily trade. U.S. government securities will be valued at the mean price provided by a third party vendor for U.S. government securities. Short term money market instruments, cash and cash equivalents (including corporate commercial paper, negotiable obligations of commercial banks, fixed time deposits, bankers acceptances and similar securities) will be valued in accordance with the Trust's valuation policies and procedures approved by the Trust's Board. A Fund's investment in its Subsidiary will be valued by aggregating the value of the Subsidiary's underlying holdings, and they, in turn, will be valued as discussed above. The NAV for each Fund will be calculated and disseminated daily. If an asset's market price is not readily available, the asset will be valued using pricing provided from independent pricing services or by another method that the Adviser, in its judgment, believes will better reflect the asset's fair value in accordance with the Trust's valuation policies and procedures approved by the Trust's Board and with the 1940 Act.

Creation and Redemption of Shares

The Trust will issue and redeem Shares of each Fund at NAV only with authorized participants (''APs'' or ''Authorized Participants'') and only in aggregations of 50,000 Shares (each, a ''Creation Unit''), on a continuous basis through the Distributor, without a sales load, at the NAV next determined after receipt, on any business day, of an order in proper form.

The consideration for purchase (''Creation Amount'') of Creation Unit aggregations of a Fund will consist of cash. The consideration for redemption (Redemption Amount) of Creation Unit aggregations of a Fund will consist of cash. The Creation Amount and the Redemption Amount will be calculated based on the NAV per Share, multiplied by the number of Shares representing a Creation Unit, plus a fixed and/or variable transaction fee.

To be eligible to place orders with respect to creations and redemptions of Creation Units, an AP must be (i) a ''Participating Party,'' *i.e.,* a broker-dealer or other participant in the clearing process through the continuous net settlement system of the NSCC or (ii) a Depository Trust Company (''DTC'') Participant (a ''DTC Participant''). In addition, each AP must execute an agreement that has been agreed to by the Distributor and the Custodian with respect to purchases and redemptions of Creation Units.

All orders to create Creation Unit aggregations must be received by the transfer agent no later than the closing time of the regular trading session on Nasdaq (ordinarily 4:00 p.m., E.T.) in each case on the date such order is placed in order for creations of Creation Unit aggregations to be effected based on the NAV of Shares of the applicable Fund as next determined on such date after receipt of the order in proper form.

In order to redeem Creation Units of a Fund, an AP must submit an order to redeem for one or more Creation Units. All such orders must be received by the Fund's transfer agent in proper form no later than the close of regular trading on Nasdaq (ordinarily 4:00 p.m. E.T.) in order to receive that day's closing NAV per Share.

Availability of Information

The Funds' Web site (*www.invescopowershares.com*), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for each Fund that may be downloaded. The Web site will include the Share's ticker, CUSIP and exchange information along with additional quantitative information updated on a daily basis, including, for each Fund: (1) Daily trading volume, the prior business day's reported NAV and closing price, mid-point of the bid/ask spread at the time of calculation of such NAV (the ''Bid/Ask Price'') [27] and a calculation of the premium and discount of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Regular Market Session [28] on the Exchange, each Fund will disclose on its Web site the identities and quantities of its portfolio of securities and other assets (the ''Disclosed Portfolio'' as defined in Nasdaq Rule 5735(c)(2)) held by such Fund and its Subsidiary, that will form the basis for each Fund's calculation of NAV at the end of the business day.[29] The Disclosed Portfolio will include, as applicable, the names, quantity, percentage weighting and market value of securities and other assets held by a Fund and the Subsidiary and the characteristics of such assets. The Web site and information will be publicly available at no charge.

In addition, for each Fund, an estimated value, defined in Rule 5735(c)(3) as the ''Intraday Indicative Value,'' that reflects an estimated intraday value of such Fund's portfolio (including the Subsidiary's portfolio), will be disseminated. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service,[30] will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Regular Market Session.

The dissemination of the Intraday Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of each Fund on a daily basis and will provide a close estimate of that value throughout the trading day.

Intra-day, executable price quotations on the securities and other assets held by each Fund and its applicable Subsidiary, as well as closing price information, will be available from major broker-dealer firms or on the exchange on which they are traded, as applicable. Intra-day and closing price information will also be available through subscription services, such as Bloomberg, Markit and Thomson Reuters, which can be accessed by APs and other investors.

[27] The Bid/Ask Price of a Fund will be determined using the midpoint of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the applicable Fund and its service providers.

[28] *See* Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4 a.m. to 9:30 a.m. E.T.; (2) Regular Market Session from 9:30 a.m. to 4 p.m. or 4:15 p.m. E.T.; and (3) Post-Market Session from 4 p.m. or 4:15 p.m. to 8 p.m. E.T.).

[29] Under accounting procedures to be followed by the Funds, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T + 1''). Notwithstanding the foregoing, portfolio trades that are executed prior to the opening of the Exchange on any business day may be booked and reflected in NAV on such business day. Accordingly, each Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[30] Currently, the NASDAQ OMX Global Index Data Service (''GIDS'') is the NASDAQ OMX global index data feed service, offering real-time updates, daily summary messages, and access to widely followed indexes and Intraday Indicative Values for ETFs. GIDS provides investment professionals with the daily information needed to track or trade NASDAQ OMX indexes, listed ETFs, or third-party partner indexes and ETFs.

Investors also will be able to obtain each Fund's Statement of Additional Information (''SAI''), as well as each Fund's shareholder report, Form N–CSR and Form N–SAR, which are filed twice a year, except the SAI, which is filed at least annually. Each Fund's SAI and shareholder reports will be available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's Web site at *www.sec.gov.* Information regarding market price and volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume for the Shares will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association plans for the Shares. Quotation and last sale information for any underlying exchange-traded instruments (including ETFs, ETNs and Commodity Pools) will also be available via the quote and trade service of their respective primary exchanges, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association plans. Quotation and last sale information for any underlying Commodities will be available via the quote and trade service of their respective primary exchanges. Pricing information related to U.S. government securities, money market mutual funds, commercial paper, and other short-term investments held by a Fund or its Subsidiary will be available through publicly available quotation services, such as Bloomberg, Markit and Thomson Reuters.

Additional information regarding each Fund and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions and taxes, will be included in the Registration Statement.

Initial and Continued Listing

The Shares will conform to the initial and continued listing criteria applicable to Managed Fund Shares, as set forth under Rule 5735. For initial and/or continued listing, each Fund and its respective Subsidiary must be in compliance with Rule 10A–3 [31] under the Act. A minimum of 100,000 Shares of each Fund will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of a Fund. Nasdaq will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including the trading pauses under Nasdaq Rules 4120(a)(11) and (12). Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in a Fund's Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities and other assets constituting the Disclosed Portfolio of a Fund and the applicable Subsidiary; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of a Fund may be halted.

Trading Rules

Nasdaq deems the Shares to be equity securities, thus rendering trading in the Shares subject to Nasdaq's existing rules governing the trading of equity securities. Nasdaq will allow trading in the Shares from 4:00 a.m. until 8:00 p.m. E.T. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in Nasdaq Rule 5735(b)(3), the minimum price variation for quoting and entry of orders in Managed Fund Shares traded on the Exchange is $0.01.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also the Financial Industry Regulatory Authority (''FINRA''), on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[32] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. In addition, the Exchange may obtain information from the Trade Reporting and Compliance Engine (''TRACE''), which is the FINRA-developed vehicle that facilitates mandatory reporting of over-the-counter secondary market transactions in eligible fixed income securities.[33] FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, Commodities, ETFs, ETNs and Commodity Pools held by a Fund or a Fund's Subsidiary, as applicable, with other markets and other entities that are members of the ISG,[34] and FINRA may obtain trading information regarding trading in the Shares, Commodities, ETFs, ETNs and Commodity Pool held by such Fund, or its Subsidiary, as applicable, from such markets and other entities.

In addition, the Exchange may obtain information regarding trading in the Shares, Commodities, ETFs, ETNs and Commodity Pools held by a Fund or its respective Subsidiary from markets and other entities that are members of ISG, which includes securities and futures exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. With respect to Commodities held indirectly through a Subsidiary, not more than 10% of the weight of such Commodities, in the aggregate, shall consist of instruments whose principal trading market is not a member of ISG or a market with which the Exchange does not have a comprehensive surveillance sharing agreement. FINRA, on behalf of the Exchange, is also able to access, as needed, trade information for certain fixed income securities held by a Fund reported to FINRA's TRACE. The Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

[31] *See* 17 CFR 240.10A–3.

[32] FINRA surveils trading on the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[33] All broker/dealers who are FINRA member firms have an obligation to report transactions in corporate bonds to TRACE.

[34] For a list of the current members of ISG, *see www.isgportal.org.* The Exchange notes that not all components of the Disclosed Portfolio may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how and by whom information regarding the Intraday Indicative Value and the Disclosed Portfolio is disseminated, including how it is made available and by who; (4) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Information Circular will advise members, prior to the commencement of trading, of the prospectus delivery requirements applicable to each Fund. Members purchasing Shares from a Fund for resale to investors will deliver a prospectus to such investors. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

Additionally, the Information Circular will reference that a Fund is subject to various fees and expenses described in the Registration Statement. The Information Circular will also disclose the trading hours of the Shares of each Fund and the applicable NAV calculation time for the Shares. The Information Circular will disclose that information about the Shares of a Fund will be publicly available on the Fund's Web site.

2. Statutory Basis

Nasdaq believes that the proposal is consistent with Section 6(b) of the Act in general, and Section 6(b)(5) of the Act in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in Nasdaq Rule 5735. The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and FINRA, on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws and are adequate to properly monitor trading in the Shares in all trading sessions. The Adviser is affiliated with a broker-dealer and has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to each Fund's portfolio. In addition, paragraph (g) of Nasdaq Rule 5735 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding the open-end fund's portfolio. Each Fund's and its Subsidiary's investments will be consistent with such Fund's investment objective. In pursuing its investment objective, each Fund may utilize instruments that have a leveraging effect on the Fund. This effective leverage occurs when a Fund's market exposure exceeds the amounts actually invested. Any instance of effective leverage will be covered in accordance with guidance promulgated by the Commission and its staff.[35] Each Fund does not presently intend to engage in any form of borrowing for investment purposes, and will not be operated as a ''leveraged ETF,'' *i.e.,* it will not be operated in a manner designed to seek a multiple of the performance of an underlying reference index.

FINRA may obtain information via ISG from other exchanges that are members of ISG. In addition, the Exchange may obtain information regarding trading in the Shares, Commodities, ETFs, ETNs, and Commodity Pools held by each Fund or its Subsidiary, as applicable, from markets and other entities that are members of ISG, which includes securities and futures exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, the Exchange may obtain information from TRACE, which is the FINRA-developed vehicle that facilitates mandatory reporting of over-the-counter secondary market transactions in eligible fixed income securities. With respect to Commodities held indirectly through a Subsidiary, not more than 10% of the weight of such Commodities, in the aggregate, shall consist of instruments whose principal trading market is not a member of ISG or a market with which the Exchange does not have a comprehensive surveillance sharing agreement. Each Fund will invest up to 25% of its total assets in the applicable Subsidiary. Each Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment).

No Fund or Subsidiary will invest directly in physical commodities, and each Fund expects to gain significant exposure to Commodities indirectly by investing in the applicable Subsidiary. Each Fund will invest in: (i) Its respective Subsidiary, (ii) exchange-traded products or Commodity Pools;[36] and (iii) U.S. Treasury Securities ,[37] money market mutual funds, high quality commercial paper and similar instruments (*i.e.,* short term negotiable obligations of commercial banks, fixed time deposits and bankers' acceptances of U.S. banks and similar institutions). Each respective Subsidiary generally will invest in Commodities that are components of a certain Benchmark, but each Subsidiary may invest in Commodities that are outside of that Benchmark.[38]

The Funds and their respective Subsidiaries will use the fixed income securities for liquidity and to collateralize the respective Subsidiary's investments in Commodities. Each Fund also may invest directly in ETFs—to the extent permitted under an exemptive order issued to an affiliate of the Trust (which applies equally to the Trust) pursuant to Section 12(d)(1)(J) of the 1940 Act—as well as ETNs and Commodity Pools that provide exposure to commodities.. [sic] The Funds and the Subsidiaries will not invest in any non-U.S. equity securities (other than shares of the applicable Subsidiary).

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the

[35] *In re* Securities Trading Practices of Investment Companies, SEC Rel. No. IC–10666 (April 27, 1979).

[36] See supra, note 10.

[37] See supra, note 11.

[38] See supra, note 12.

NAV and the Disclosed Portfolio will be made available to all market participants at the same time. In addition, a large amount of information will be publicly available regarding the Funds and the Shares, thereby promoting market transparency. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Regular Market Session. On each business day, before commencement of trading in Shares in the Regular Market Session on the Exchange, each Fund will disclose on its Web site the Disclosed Portfolio of the Fund and the Subsidiary that will form the basis for such Fund's calculation of NAV at the end of the business day. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and quotation and last sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association plans for the Shares. Quotation and last sale information for any underlying exchange-traded equity (including ETFs, ETNs and Commodity Pools) also will be available via the quote and trade service of their respective primary exchanges, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association plans. Quotation and last sale information for any underlying Commodities will be available via the quote and trade service of their respective primary exchanges. Pricing information related to U.S. government securities, money market mutual funds, commercial paper, and other short-term investments held by a Fund or its Subsidiary will be available through publicly available quotation services, such as Bloomberg, Markit and Thomson Reuters. Intra-day and closing price information will be available through subscription services, such as Bloomberg, Markit and Thomson Reuters, which can be accessed by APs and other investors.

The Funds' Web site will include a form of the prospectus for each Fund and additional data relating to NAV and other applicable quantitative information. Moreover, prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Trading in Shares of a Fund will be halted under the conditions specified in Nasdaq Rules 4120 and 4121 or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of a Fund may be halted. In addition, as noted above, investors will have ready access to information regarding each Fund's holdings, the Intraday Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of additional types of actively-managed exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace.

For the above reasons, Nasdaq believes the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change will facilitate the listing and trading of an additional type [sic] of actively-managed exchange-traded funds that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will: (a) By order approve or disapprove such proposed rule change; or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2014–80 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2014–80. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2014–80, and should be submitted on or before October 8, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[39]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–22114 Filed 9–16–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73081; File No. SR–NYSEArca–2014–20]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change, as Modified by Amendment Nos. 3 and 5, Relating to the Listing and Trading of Shares of Reality Shares DIVS ETF under NYSE Arca Equities Rule 8.600

September 11, 2014.

I. Introduction

On February 25, 2014, NYSE Arca, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of Reality Shares DIVS ETF (''Fund'') under NYSE Arca Equities Rule 8.600. On March 7, 2014, the Exchange filed Amendment No. 2 to the proposed rule change, which amended and replaced the proposed rule change in its entirety.[3] The proposed rule change, as modified by Amendment No. 2, was published for comment in the **Federal Register** on March 17, 2014.[4] The Commission received no comments on the proposal. On April 23, 2014, pursuant to Section 19(b)(2) of the Act,[5] the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[6] On May 27, 2014, the Exchange submitted Amendment No. 3 to the proposed rule change.[7] On June 5, 2014, the Exchange filed Amendment No. 5 to the proposed rule change.[8] On June 9, 2014, the Commission published notice of Amendment Nos. 3 and 5 and instituted proceedings to determine whether to approve or disapprove the proposed rule change, as modified by Amendment Nos. 3 and 5.[9] The Commission received no comments on the proposal, as modified by Amendment Nos. 3 and 5. This order grants approval of the proposed rule change, as modified by Amendment Nos. 3 and 5.

II. Description of the Proposed Rule Change

The Exchange has made the following representations and statements in describing the Fund and its investment strategies, including other portfolio holdings and investment restrictions.[10]

General

The Fund will be an actively-managed exchange-traded fund (''ETF''). The Shares of the Fund will be offered by the Reality Shares ETF Trust (formerly, the ERNY Financial ETF Trust) (''Trust''). The Trust will be registered with the Commission as an open-end management investment company.[11] Reality Shares Advisors, LLC (formerly, ERNY Financial Advisors, LLC) will serve as the investment adviser to the Fund (''Adviser'').[12] ALPS Distributors, Inc. will be the principal underwriter and distributor of the Fund's Shares. The Bank of New York Mellon will serve as administrator, custodian, and transfer agent for the Fund.

Investment Strategies

The Fund is actively managed by the Adviser and seeks long-term capital appreciation by using proprietary trading strategies designed to isolate and capture the growth in the level of dividends expected to be paid on a portfolio of large-capitalization equity securities listed for trading in the U.S., Europe, and Japan,[13] while attempting to minimize the Fund's exposure to the price fluctuations associated with such securities.[14] The Adviser believes that, over time, the level of expected dividends reflected in the Fund's portfolio will be highly correlated to the level of actual dividends paid on such large capitalization securities.

Under normal market conditions,[15] and as further described below, the

[39] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 was filed on March 6, 2014 and withdrawn on March 7, 2014.

[4] *See* Securities Exchange Act Release No. 71686 (March 11, 2014), 79 FR 14761.

[5] 15 U.S.C. 78s(b)(2).

[6] Securities Exchange Act Release No. 72000 (April 23, 2014), 79 FR 24032 (April 29, 2014). The Commission determined that it was appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission designated June 13, 2014 as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

[7] Amendment No. 3 replaced SR–NYSEArca–2014–20, as previously amended by Amendment No. 2, and superseded such filing in its entirety.

[8] Amendment No. 5 was technical in nature and changed the name of the Fund, and all related references in the filing, from ''Reality Shares Isolated Dividend Growth ETF'' to ''Reality Shares DIVS ETF.'' Amendment No. 4 was filed by the Exchange on June 4, 2014 and withdrawn on June 5, 2014.

[9] *See* Securities Exchange Act Release No. 72347, 79 FR 33964 (June 13, 2014) (''Notice and Order'').

[10] The Commission notes that additional information regarding the Trust, the Fund, and the Shares, including investment strategies, risks, net asset value (''NAV'') calculation, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions, and taxes, among other information, is included in the Notice and the Registration Statement, as applicable. *See* Notice and Order and Registration Statement, *supra* note 9 and *infra* note 11, respectively.

[11] The Trust will be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act''). According to the Exchange, on November 12, 2013, the Trust filed a registration statement on Form N–1A under the Securities Act of 1933 (''1933 Act'') (15 U.S.C. 77a), and under the 1940 Act relating to the Fund, as amended by Pre-Effective Amendment Number 1, filed with the Commission on February 6, 2014 (File Nos. 333–192288 and 811–22911) and Pre-Effective Amendment Number 2, filed with the Commission on May 1, 2014 (File Nos. 333–192288 and 811–22911) (''Registration Statement''). According to the Exchange, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. Investment Company Act Release No. 30552 (June 10, 2013) (''Exemptive Order''). According to the Exchange, the Trust filed an Application for an Order under Section 6(c) of the 1940 Act for exemptions from various provisions of the 1940 Act and rules thereunder (File No. 812–14146), on April 5, 2013, as amended on May 10, 2013 (''Exemptive Application''). The Exchange represents that investments made by the Fund will comply with the conditions set forth in the Exemptive Application and the Exemptive Order.

[12] The Exchange states that the Adviser is not registered as a broker-dealer and is not affiliated with any broker-dealers. In addition, the Exchange states that in the event (a) the Adviser or any sub-adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer, such adviser or sub-adviser will implement a fire wall with respect to its relevant personnel or broker-dealer affiliate regarding access to information concerning the composition and changes to the portfolio, and such adviser or sub-adviser will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolio.

[13] The Exchange states that the Adviser considers U.S. large capitalization companies to be those with market capitalizations within the range of market capitalizations of the companies included in the S&P 500 Index. The Adviser considers European large capitalization companies to be those with market capitalizations within the range of market capitalizations of the companies included in the Euro Stoxx 50 Index. The Adviser considers Japanese large capitalization companies to be those with market capitalizations within the range of market capitalizations of the companies included in the Nikkei 225 Index.

[14] The Exchange states that there is no guarantee that either the level of overall dividends paid by such companies will grow over time, or that the Fund's investment strategies will capture such growth. The Exchange represents that the Fund will include appropriate risk disclosure in its offering documents disclosing both of these risks.

[15] The term ''under normal market conditions'' includes, but is not limited to, the absence of

Continued

Fund will invest substantially all of its assets in (i) a combination of exchange-listed options contracts on large capitalization equity indexes and exchange-listed options contracts on exchange traded funds (''ETFs'') [16] designed to track the performance of large capitalization equity securities listed for trading in the U.S., Europe, or Japan, as well as (ii) derivatives, including swaps, exchange-listed futures contracts, and forward contracts, designed to capture the growth of the level of dividends expected to be paid on large capitalization equity securities listed for trading in the U.S., Europe, and Japan. In addition to the investments described above, the Fund may also buy and sell over-the counter (''OTC'') options on indexes of large-capitalization U.S., European, and Japanese equity securities listed for trading in the U.S., Europe, and Japan, such as the S&P 500 Index, the Euro Stoxx 50 Index, and the Nikkei 225 Index, and listed and OTC options on the securities, or any group of securities, issued by large capitalization U.S., European, and Japanese companies.[17]

The Fund will buy (*i.e.,* hold a ''long'' position in) and sell (*i.e.,* hold a ''short'' position in) put and call options.[18] The Fund will invest in a combination of put and call options designed to allow the Fund to isolate its exposure to the growth of the level of dividends expected to be paid on a portfolio of securities issued by large capitalization companies listed for trading in the United States, Europe, and Japan, while minimizing the Fund's exposure to changes in the trading price of such securities. The Fund may invest up to 80% of its assets through options transactions.

The prices of index and ETF options reflect the market trading prices of the securities included in the applicable index or securities held by the applicable ETF, as well as market expectations regarding the level of dividends to be paid on such indexes or ETFs during the term of the option. A significant portion of the Fund's portfolio holdings will consist of multiple corresponding near-term and long-term put and call option combinations on the same reference assets (*e.g.,* options on the S&P 500 Index or options on S&P 500 ETFs) with the same strike price. Because option prices reflect both stock price and dividend expectations, they can be used in combination to isolate either price exposure or dividend expectations. The use of near-term and long-term put and call option combinations on the same reference asset with the same strike price, but with different maturities, is designed to gain exposure to the level of dividends expected to be paid on a portfolio of large-capitalization equity securities listed for trading in the U.S., Europe, and Japan, while attempting to minimize the Fund's exposure to the price fluctuations associated with these securities.

Once established, this portfolio construction of option combinations will accomplish two goals. First, the use of corresponding buy or sell positions on near and long-term options at the same strike price is designed to neutralize underlying stock price movements. In other words, the corresponding ''buy'' and ''sell'' positions on the same reference asset are designed to net against each other and eliminate the impact that changes to the stock price of the reference asset would otherwise have on the value of the Fund Shares. Second, by minimizing the impact of price fluctuations through the construct of the near- and long-term contract combinations, the strategy is designed to isolate market expectations for dividends implied between expiration dates of the near-term and long-term option contracts.

The Fund may invest in exchange-listed futures contracts and forward contracts based on indexes of large-capitalization U.S., European, and Japanese equity securities listed for trading in the U.S., Europe, or Japan, such as the S&P 500 Index, the Euro Stoxx 50 Index, and the Nikkei 225 Index, and the securities, or any group of securities, issued by large capitalization U.S., European, and Japanese companies.[19] The Fund's use of listed futures contracts and forward contracts will be designed to allow the Fund to isolate its exposure to the growth of the level of the dividends expected to be paid on a portfolio of securities of large capitalization U.S., European, and Japanese companies, while minimizing the Fund's exposure to changes in the trading price of such securities. As with option contracts, the prices of equity index futures contracts and forward contracts reflect the market trading prices of the securities included in the applicable index, as well as market expectations regarding the level of dividends to be paid on such indexes during the term of such futures or forward contract. Therefore, as with option contracts, long and short positions in near-dated and far-dated futures and forward contracts can be used in combination to isolate either price exposure or dividend expectations. For example, as with option contracts, the use of long and short positions in near-dated and far-dated futures and forward contracts can be used to gain exposure to the level of dividends expected to be paid on a portfolio of securities, while attempting to minimize the Fund's exposure to the price fluctuations associated with such securities. In addition, the Fund may invest in listed dividend futures contracts. Listed dividend futures contracts are available for certain indices (such as EURO STOXX 50 Index Dividend Futures and Nikkei 225 Dividend Index Futures). These futures contracts provide direct exposure to the level of implied dividends in the designated index, without exposure to the price of the securities included in the index. The Fund also may invest in Eurodollar futures contracts to manage or hedge exposure to interest rate fluctuations. The Fund may invest up to 80% of its assets through futures contracts and forward transactions.

The Fund may enter into dividend and total return swap transactions (including equity swap transactions) based on indexes of large-capitalization U.S., European, and Japanese equity securities listed for trading in the U.S., Europe, and Japan, such as the S & P 500 Index, the Euro Stoxx 50 Index, and the Nikkei 225 Index, and securities, or any group of securities, issued by large

extreme volatility or trading halts in the equity markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance.

[16] For purposes of this proposed rule change, ETFs include Investment Company Units (as described in NYSE Arca Equities Rule 5.2(j)(3)), Portfolio Depositary Receipts as described in NYSE Arca Equities Rule 8.100, and Managed Fund Shares (as described in NYSE Arca Equities Rule 8.600). The ETFs all will be listed and traded in the U.S. on registered exchanges. While the Fund may invest in inverse ETFs, it may not invest in leveraged or inverse leveraged (*e.g.,* 2X, –2X, 3X or –3X) ETFs.

[17] The Fund will transact only with OTC options dealers that have in place an International Swaps and Derivatives Association (''ISDA'') agreement with the Fund.

[18] A put option gives the purchaser of the option the right to sell, and the issuer of the option the obligation to buy, the underlying security or instrument on a specified date or during a specified period of time. A call option on a security gives the purchaser of the option the right to buy, and the writer of the option the obligation to sell, the underlying security or instrument on a specified date or during a specified period of time.

[19] A listed futures contract is a standardized contract traded on a recognized exchange in which two parties agree to exchange either a specified financial asset or the cash equivalent of said asset at a specified future date and price. A forward contract involves the obligation to purchase or sell either a specified financial asset or the cash equivalent of said asset at a future date at a price set at the time of the contract.

capitalization U.S., European, and Japanese companies.[20] In a typical swap transaction, one party agrees to make periodic payments to another party (''counterparty'') based on the change in market value or level of a specified rate, index, or asset. In return, the counterparty agrees to make periodic payments to the first party based on the return of a different specified rate, index, or asset. Swap transactions are usually done on a net basis, the Fund receiving or paying only the net amount of the two payments. In a typical dividend swap transaction, the Fund would pay the swap counterparty a premium and would be entitled to receive the value of the actual dividends paid on the subject index during the term of the swap contract. In a typical total return swap, the Fund might exchange long or short exposures to the return of the underlying securities or an underlying index to isolate the value of the dividends paid on the underlying securities or index constituents. The Fund also may engage in interest rate swap transactions. In a typical interest rate swap transaction one stream of future interest payments is exchanged for another. Such transactions often take the form of an exchange of a fixed payment for a variable payment based on a future interest rate. The Fund intends to use interest rate swap transactions to manage or hedge exposure to interest rate fluctuations. The Fund may invest up to 80% of its assets through swap transactions.[21]

The Fund will attempt to limit counterparty risk by entering into non-cleared swap, forward, and option contracts only with counterparties the Adviser believes are creditworthy and by limiting the Fund's exposure to each counterparty. The Adviser will monitor the creditworthiness of each counterparty and the Fund's exposure to each counterparty on an ongoing basis.[22]

The Fund's investments in swaps, futures contracts, forward contracts, and options will be consistent with the Fund's investment objective and with the requirements of the 1940 Act.[23]

Other Investments and Investment Restrictions

In addition to the investments described above, the Fund may invest up to 20% of its net assets in high-quality, short-term debt securities and money market instruments.[24] Debt securities and money market instruments include shares of fixed income or money market mutual funds, commercial paper, certificates of deposit, bankers' acceptances, U.S. Government securities (including securities issued or guaranteed by the U.S. government or its authorities, agencies, or instrumentalities), repurchase agreements[25] and bonds that are rated BBB or higher.

The Fund will not purchase the securities of issuers conducting their principal business activity in the same industry if, immediately after the purchase and as a result thereof, the value of the Fund's investments in that industry would equal or exceed 25% of the current value of the Fund's total assets, provided that this restriction does not limit the Fund's: (i) Investments in securities of other investment companies, (ii) investments in securities issued or guaranteed by the U.S. government, its agencies or instrumentalities, or (iii) investments in repurchase agreements collateralized by U.S. Government securities.

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser, consistent with Commission guidance.[26] The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

The Fund may buy and sell individual large-capitalization equity securities listed for trading in the U.S., Europe, and Japan.

The Fund may invest in the securities of other investment companies (including money market funds) to the extent permitted under the 1940 Act.

The Fund's investments will be consistent with its investment objective and will not be used to provide multiple returns of a benchmark or to produce leveraged returns. The Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.,* 2Xs and 3Xs) of the Fund's primary broad-based securities benchmark index (as defined in Form N–1A).[27]

The Trust's Exemptive Order does not place any limit on the amount of derivatives in which the Fund can invest (other than adherence to the requirements of the 1940 Act and the rules thereunder).

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment Nos. 3 and 5,

[20] The Fund will transact only with swap dealers that have in place an ISDA agreement with the Fund.

[21] Where practicable, the Fund intends to invest in swaps cleared through a central clearing house (''Cleared Swaps''). Currently, only certain of the interest rate swaps in which the Fund intends to invest are Cleared Swaps, while the dividend and total return swaps (including equity swaps) in which the Fund may invest are currently not Cleared Swaps.

[22] The Fund will seek, where possible, to use counterparties, as applicable, whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. The Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Adviser will evaluate each approved counterparty using various methods of analysis, such as, for example, the counterparty's liquidity in the event of default, the counterparty's reputation, the Adviser's past experience with the counterparty, and the counterparty's share of market participation.

[23] To limit the potential risk associated with such transactions, the Fund will segregate or ''earmark'' assets determined to be liquid by the Adviser in accordance with procedures established by the Trust's Board of Trustees and in accordance with the 1940 Act (or, as permitted by applicable regulation, enter into certain offsetting positions) to cover its obligations arising from such transactions. These procedures have been adopted consistent with Section 18 of the 1940 Act and related Commission guidance. In addition, the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk. Leveraging risk is the risk that certain transactions of the Fund, including the Fund's use of derivatives, may give rise to leverage, causing the Fund to be more volatile than if it had not been leveraged. To mitigate leveraging risk, the Adviser will segregate or ''earmark'' liquid assets or otherwise cover the transactions that may give rise to such risk.

[24] The Fund may invest in shares of money market mutual funds to the extent permitted by the 1940 Act.

[25] The Fund may enter into repurchase agreements with banks and broker-dealers. A repurchase agreement is an agreement under which securities are acquired by a fund from a securities dealer or bank subject to resale at an agreed upon price on a later date. The acquiring fund bears a risk of loss in the event that the other party to a repurchase agreement defaults on its obligations and the fund is delayed or prevented from exercising its rights to dispose of the collateral securities.

[26] In reaching liquidity decisions, the Adviser may consider the following factors: The frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and the nature of the marketplace in which it trades (*e.g.,* the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer).

[27] The Fund's broad-based securities benchmark index will be identified in a future amendment to the Registration Statement following the Fund's first full calendar year of performance.

is consistent with the requirements of Section 6 of the Act [28] and the rules and regulations thereunder applicable to a national securities exchange.[29] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[30] which requires, among other things, that the Exchange's rules be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission notes that the Fund and the Shares must comply with the initial and continued listing requirements of NYSE Arca Equities Rule 8.600 to be listed and traded on the Exchange.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[31] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line. In addition, the Portfolio Indicative Value (''PIV''), as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated at least every 15 seconds during the Core Trading Session by one or more major market data vendors.[32] On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio (as such term is defined in NYSE Arca Equities Rule 8.600(c)(2)) that will form the basis for the Fund's calculation of NAV at the end of the business day.[33] In addition, a portfolio composition file, which includes the security names and share quantities required to be delivered in exchange for a Creation Unit of the Fund, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the New York Stock Exchange, LLC (''NYSE'') via the National Securities Clearing Corporation. The NAV of the Fund will be calculated once each business day as of the regularly scheduled close of trading on the NYSE (normally, 4:00 p.m., Eastern Time).[34] Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. The intra-day, closing, and settlement prices of the portfolio securities and other Fund investments, including ETFs, futures, and exchange-traded equities and options, will be readily available from the national securities exchanges trading such securities, automated quotation systems, published or other public sources, and, with respect to OTC options, swaps, and forwards, from third party pricing sources, or on-line information services such as Bloomberg or Reuters. Price information regarding investment company securities other than ETFs will be available from on-line information services and from the Web site for the applicable investment company security. The intra-day, closing, and settlement prices of debt securities and money market instruments will be readily available from published and other public sources or on-line information services. The Fund's Web site will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time. Trading in Shares of a Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable,[35] and trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth additional circumstances under which trading in the Shares of a Fund may be halted. The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. Consistent with NYSE Arca Equities Rule 8.600(d)(2)(B)(ii), the Reporting Authority must implement and maintain, or be subject to, procedures

[28] 15 U.S.C. 78f.

[29] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[30] 15 U.S.C. 78f(b)(5).

[31] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[32] According to the Exchange, several major market data vendors display or make widely available Portfolio Indicative Values published on CTA or other data feeds.

[33] On a daily basis, the Fund will disclose on the Fund's Web site the following information regarding each portfolio holding, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding, such as the type of swap); the identity of the security, commodity, index or other asset or instrument underlying the holding, if any; for options, the option strike price; quantity held (as measured by, for example, par value, notional value or number of shares, contracts or units); maturity date, if any; coupon rate, if any; effective date, if any; market value of the holding; and the percentage weighting of the holding in the Fund's portfolio. The Web site information will be publicly available at no charge.

[34] The Fund will calculate its NAV by: (i) Taking the current market value of its total assets; (ii) subtracting any liabilities; and (iii) dividing that amount by the total number of Shares outstanding. According to the Exchange, the Trust will generally value exchange-listed equity securities (which include common stocks and ETFs) and exchange-listed options on such securities at market closing prices. Market closing price is generally determined on the basis of last reported sales prices, or if no sales are reported, based on the midpoint between the last reported bid and ask. The Trust will generally value listed futures at the settlement price determined by the applicable exchange. Non-exchange-traded derivatives, such as forwards, OTC options, and swap transactions, will normally be valued on the basis of quotations or equivalent indication of value supplied by an independent pricing service or major market makers or dealers. Investment company securities (other than ETFs) will be valued at NAV. Debt securities and money market instruments generally will be valued based on prices provided by independent pricing services, which may use valuation models or matrix pricing to determine current value. The Trust generally will use amortized cost to value debt securities and money market instruments that have a remaining maturity of 60 days or less. In the event that current market valuations are not readily available or the Trust or Adviser believes such valuations do not reflect current market value, the Trust's procedures require that a security's fair value be determined. In determining such value the Trust or the Adviser may consider, among other things, (i) price comparisons among multiple sources, (ii) a review of corporate actions and news events, and (iii) a review of relevant financial indicators (*e.g.,* movement in interest rates, market indices, and prices from the Fund's index providers). In these cases, the Fund's NAV may reflect certain portfolio securities' fair values rather than their market prices. Fair value pricing involves subjective judgments and it is possible that the fair value determination for a security is materially different than the value that could be realized upon the sale of the security.

[35] These reasons may include: (1) The extent to which trading is not occurring in the securities and/or the financial instruments composing the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.

designed to prevent the use and dissemination of material, non-public information regarding the actual components of the Fund's portfolio. In addition, the Exchange states that the Adviser is not registered as a broker-dealer and is not affiliated with a broker-dealer.[36] The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by the Financial Industry Regulatory Authority (''FINRA'') on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[37] The Exchange further represents that these procedures are adequate to properly monitor Exchange-trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange. Moreover, prior to the commencement of trading, the Exchange states that it will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares.

The Exchange represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including the following:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600, which governs Managed Fund Shares.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares, exchange-listed equity securities, ETFs, futures contracts, and exchange-traded options contracts with other markets and other entities that are members of the Intermarket Surveillance Group (''ISG''), and FINRA, on behalf of the Exchange, may obtain trading information regarding trading in the Shares, exchange-listed equity securities, ETFs, futures contracts, and exchange-traded options contracts from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, exchange-listed equity securities, ETFs, futures contracts, and exchange-traded options contracts from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's Trade Reporting and Compliance Engine (''TRACE'').

(4) Prior to the commencement of trading, the Exchange will inform its members in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares in creation unit aggregations (and that Shares are not individually redeemable); (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated (d) how information regarding the PIV is disseminated; (e) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) For initial and continued listing, the Fund will be in compliance with Rule 10A–3 under the Act,[38] as provided by NYSE Arca Equities Rule 5.3.

(6) The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser, consistent with Commission guidance. The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets.

(7) Not more than 10% of the assets of the Fund in the aggregate invested in exchange-traded equity securities shall consist of equity securities whose principal market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement. In addition, not more than 10% of the net assets of the Fund in the aggregate invested in futures contracts or exchange-traded options shall consist of futures contracts or options whose principal market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

(8) Where practicable, the Fund intends to invest in Cleared Swaps.

(9) The Fund will attempt to limit counterparty risk by entering into non-cleared swap, forward, and option contracts only with counterparties the Adviser believes are creditworthy and by limiting the Fund's exposure to each counterparty. The Adviser will monitor the creditworthiness of each counterparty and the Fund's exposure to each counterparty on an ongoing basis. The Fund will seek, where possible, to use counterparties, as applicable, whose financial status is such that the risk of default is reduced; however, the risk of losses resulting from default is still possible. The Adviser will evaluate the creditworthiness of counterparties on an ongoing basis. In addition to information provided by credit agencies, the Adviser will evaluate each approved counterparty using various methods of analysis, such as, for example, the counterparty's liquidity in the event of default, the counterparty's reputation, the Adviser's past experience with the counterparty, and the counterparty's share of market participation.

(10) The Fund's investments in swaps, futures contracts, forward contracts, and options will be consistent with the Fund's investment objective

[36] *See supra* note 12. The Exchange states that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and its related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[37] The Exchange states that FINRA surveils trading on the Exchange pursuant to a regulatory services agreement and that the Exchange is responsible for FINRA's performance under this regulatory services agreement.

[38] 17 CFR 240.10A–3.

and with the requirements of the 1940 Act. To limit the potential risk associated with such transactions, the Fund will segregate or ''earmark'' assets determined to be liquid by the Adviser in accordance with procedures established by the Trust's Board of Trustees and in accordance with the 1940 Act (or, as permitted by applicable regulation, enter into certain offsetting positions) to cover its obligations arising from such transactions. These procedures have been adopted consistent with Section 18 of the 1940 Act and related Commission guidance. In addition, the Fund will include appropriate risk disclosure in its offering documents, including leveraging risk. Leveraging risk is the risk that certain transactions of the Fund, including the Fund's use of derivatives, may give rise to leverage, causing the Fund to be more volatile than if it had not been leveraged. To mitigate leveraging risk, the Adviser will segregate or ''earmark'' liquid assets or otherwise cover the transactions that may give rise to such risk.

(11) The Fund's investments will be consistent with its investment objective and will not be used to provide multiple returns of a benchmark or to produce leveraged returns. The Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.,* 2Xs and 3Xs) of the Fund's primary broad-based securities benchmark index (as defined in Form N–1A).

(12) A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange.

This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice and Order, and the Exchange's description of the Fund.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment Nos. 3 and 5, is consistent with Section 6(b)(5) of the Act [39] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[40] that the proposed rule change (SR–NYSEArca-2014–20), as modified by Amendment Nos. 3 and 5, be, and it hereby is, approved.

[39] 15 U.S.C. 78f(b)(5).

[40] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–22163 Filed 9–16–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73080; File No. SR–BATS–2014–039]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

September 11, 2014.

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 August 28, 2014, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members [5] and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). Changes to the fee schedule pursuant to this proposal are effective upon filing.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[41] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is defined as ''any registered broker or dealer that has been admitted to membership in the Exchange.'' *See* Exchange Rule 1.5(n).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify its fee schedule applicable to use of the Exchange's equities trading platform (''BATS Equities'') in order to: (i) Add two additional ''Cross-Asset Step-Up Tiers'' for purposes of tiered pricing applicable to BATS Equities; and (ii) modify fees applicable to orders routed to and executed at the New York Stock Exchange LLC (''NYSE'').

Additional Step-Up Tiers

Currently, with respect to BATS Equities, the Exchange determines the liquidity adding rebate that it will provide to Members using the Exchange's tiered pricing structure, which is based on the Member meeting certain volume tiers based on their ADAV [6] as a percentage of TCV [7] or ADV [8] as a percentage of TCV. Under

[6] As provided in the fee schedule, for purposes of BATS Equities pricing, ''ADAV'' means average daily added volume calculated as the number of shares added per day on a monthly basis; the Exchange excludes from the ADAV calculation routed shares as well as shares added on any day that the Exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours (''Exchange System Disruption''), on any day with a scheduled early market close and on the last Friday in June (the ''Russell Reconstitution Day'').

[7] As provided in the fee schedule, for purposes of BATS Equities pricing, ''TCV'' means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption, on any with a scheduled early market close and the Russell Reconstitution Day.

[8] As provided in the fee schedule, for purposes of BATS Equities pricing, ''ADV'' means average daily volume calculated as the number of shares added or removed, combined, per day on a monthly basis; the Exchange excludes from the ADV calculation routed shares, and shares added on any day that the Exchange's system experiences an Exchange System

such pricing structure, a Member will receive an adding rebate of anywhere between $0.0020 and $0.0032 per share executed, depending on the volume tier for which such Member qualifies. The Exchange also maintains two additional types of tiers in addition to the volume tiers described above: Step-Up Tiers and a Cross-Asset Step-Up Tier. The Step-Up Tier and Cross-Asset Step-Up Tier provide Members with additional ways to qualify for enhanced rebates. The Cross-Asset Step-Up Tier includes pricing based on a Member's participation on the Exchange's equity options platform (''BATS Options''). As proposed, the existing volume tiers, including the Step-Up Tiers and Cross-Asset Step Up Tier will remain the same. However, the Exchange proposes to add two new Cross-Asset Step Up Tiers to its fee schedule as Tier 1 and Tier 2, and to re-number the existing Cross-Asset Step Up Tier as Tier 3.

The existing Cross-Asset Step-Up Tier is designed to incentivize Members to both increase their participation on the Exchange in terms of their ADAV and their ADAV on BATS Options (''Options ADAV'') [9] compared to their January 2014 ADAV and Options ADAV. The existing Cross-Asset Step-Up Tier provides a rebate of $0.0032 per share where the Member's Step-Up Add TCV [10] is equal to or greater than 0.30% and the Member's Options Step-Up Add TCV, as described below, is greater than 0.40%. The Cross-Asset Step-Up Tier is similar to cross asset tiers employed by NYSE Arca, Inc. and the Nasdaq Stock Market, LLC.[11] The new proposed Cross-Asset Step-Up Tiers are similar to the Exchange's existing Cross-Asset Step-Up Tier in that they are designed to incentivize liquidity provision on the Exchange by providing an enhanced rebate while also incentivizing increased participation on BATS Options.

The proposed Cross-Asset Step Up Tier 1 would provide a rebate of $0.0027 per share where the Member's Options Step-Up Add TCV is equal to or greater than 0.30%. The proposed Cross-Asset Step Up Tier 2 would provide a rebate of $0.0028 per share where the Member's Options Step-Up Add TCV is equal to or greater than 0.40%.

A Member's Options Step-Up Add TCV is calculated as the increase in the Member's current Options ADAV as a percentage of options TCV (''Options TCV'') [12] (''Current Options ADAV'') over the Member's Options ADAV as a percentage of Options TCV from January 2014 (''Baseline Options ADAV''). By way of example, where a Member's Baseline Options ADAV is 0.04%, the Member would need to achieve a Current Options ADAV of 0.34% in order to qualify for Cross-Asset Step-Up Tier 1 and its $0.0027 per share rebate or 0.44% in order to qualify for Cross-Asset Step-Up Tier 2 and its $0.0028 per share rebate.

As is currently the case pursuant to the fee schedule, a Member will receive the higher of the volume rebates, step-up rebates, or cross-asset step-up rebates for which they qualify.

Orders Routed to and Executed at NYSE

The Exchange proposes to modify the ''Equities Pricing'' section of its fee schedule effective September 2, 2014, in order to amend the fees for certain routing strategies based on a change of fees at the NYSE.

The Exchange has previously provided a discounted fee for Destination Specific Orders routed to certain of the largest market centers measured by volume (NYSE, NYSE Arca and NASDAQ), which, in each instance has been $0.0001 less per share for orders routed to such market centers by the Exchange than such market centers currently charge for removing liquidity (referred to by the Exchange as ''One Under'' pricing). NYSE is implementing certain pricing changes effective September 2, 2014, including modification from a fee to remove liquidity of $0.0026 per share to a fee of $0.0027 per share.[13] Based on the changes in pricing at NYSE, BATS is proposing to increase its fee for Destination Specific Orders [14] executed at NYSE so that the fee remains $0.0001 less per share for orders routed to NYSE. Specifically, the Exchange proposes to increase the fee charged for BATS + NYSE Destination Specific Orders executed at NYSE from $0.0025 per share to $0.0026 per share.

In addition, the Exchange offers a variety of routing strategies, including ''SLIM'' and ''TRIM,'' each of which has a specific fee for an execution that occurs at NYSE.[15] Consistent with its One Under pricing model, the Exchange currently charges $0.0025 per share for executions that occur at NYSE through SLIM and TRIM. Based on the increased fee at NYSE, the Exchange proposes to increase the fee charged for SLIM and TRIM orders executed at NYSE from $0.0025 per share to $0.0026 per share.

Implementation Date

The Exchange proposes to implement these amendments to its fee schedule on September 2, 2014.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6 of the Act.[16] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[17] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive.

The Exchange believes that providing additional financial incentives on BATS Equities to Members that demonstrate an increase over their Options Baseline ADAV through the new proposed Cross-Asset Step-Up Tiers offer additional, flexible ways to achieve financial incentives from the Exchange and encourage Members to add liquidity to both BATS Equities and BATS Options. The Exchange believes that these incentives are reasonable, fair and equitable because the liquidity from each of these proposals also benefits all investors by deepening the BATS Equities and BATS Options liquidity pools, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market

Disruption, on any day with a scheduled early market close and on the Russell Reconstitution Day.

[9] Similar to the definition of ADAV for BATS Equities, the BATS Options definition of ADAV is average daily added volume calculated as the number of contracts added.

[10] A Member's Step-Up Add TCV is based on participation on BATS Equities and defined as a percentage of TCV in January 2014 subtracted from current ADAV as a percentage of TCV.

[11] *See* Exchange Act Release No. 67424 (July 18, 2012), 77 FR 42347 (July 12, 2012) (SR–NYSEArca–2012–70); Nasdaq Rule 7018(a)(1).

[12] As provided in the fee schedule, for purposes of BATS Options pricing, ''TCV'' means total consolidated volume calculated as the volume reported by all exchanges to the consolidated transaction reporting plan for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption.

[13] *See* NYSE Trader Update dated August 21, 2014, *http://www1.nyse.com/pdfs/NYSE_Client_Notice_Fee_Change_09_2014.pdf.*

[14] As defined in Exchange Rule 11.9(c)(12).

[15] *See* Exchange Rule 11.13(a)(3)(G) for a description of the TRIM routing strategy and Exchange Rule 11.13(a)(3)(H) for a description of the SLIM routing strategy.

[16] 15 U.S.C. 78f.

[17] 15 U.S.C. 78f(b)(4).

transparency and improving investor protection. Such pricing programs thereby reward a Member's growth pattern and such increased volume increase potential revenue to the Exchange, and will allow the Exchange to continue to provide and potentially expand the incentive programs operated by the Exchange. These pricing programs are also fair and equitable in that they are available to all Members and will result in Members receiving either the same or an increased rebate than they would currently receive. The Exchange also notes that the proposed step-up tier are similar to pricing tiers currently available on Arca and Nasdaq.[18]

Volume-based rebates and fees such as the ones maintained on BATS Equities, including the Cross-Asset Step-Up Tiers proposed herein, have been widely adopted by equities and options exchanges and are equitable because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns, and introduction of higher volumes of orders into the price and volume discovery processes. Further, the Exchange believes that the Cross-Asset Step-Up Tiers will provide such enhancements in market quality on both BATS Equities and BATS Options by incentivizing participation on both platforms. Although the new tiers to not require a certain amount of growth on BATS Equities in order to qualify for the enhanced rebate, the enhanced rebate is intended to incentivize enhanced participation on BATS Equities while both incentivizing and rewarding Members for additional participation on BATS Options. The Exchange notes that it is not proposing to modify any existing tiers (other than to re-number the Equities Cross-Asset Step-Up Tier), but rather to add new tiers that will provide Members with additional ways to receive higher rebates. Accordingly, under the proposal a Member will receive either the same or a higher rebate than they would receive today. Accordingly, the Exchange believes that the proposed additions to the Exchange's tiered pricing structure and incentives are not unfairly discriminatory because they will apply uniformly to all Members and are consistent with the overall goals of enhancing market quality on both BATS Equities and BATS Options.

Finally, the Exchange believes that the proposed changes to certain of the Exchange's non-standard routing fees and strategies are equitably allocated, fair and reasonable, and non-discriminatory in that they are equally applicable to all Members and are designed to provide a reduced fee for orders routed to NYSE through Exchange routing strategies as compared to applicable fees for executions if such routed orders were instead executed directly by the Member at NYSE.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. With respect to the proposed new tiered rebates, the Exchange does not believe that any such changes burden competition, but instead, enhance competition, as they are intended to increase the competitiveness of and draw additional volume to both BATS Equities and BATS Options. The Exchange also believes the proposed step-up tiers would enhance competition because they are similar to pricing tiers currently available on Arca and Nasdaq.[19] As stated above, the Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if the deem fee structures to be unreasonable or excessive. Finally, because the market for order execution is extremely competitive, Members may readily opt to disfavor the Exchange's routing services if they believe that alternatives offer them better value. For an order routed through the Exchange and executed at NYSE through the applicable routing strategies, the proposed fee change is designed to maintain a slight discount compared to the fee the Member would have paid if such routed order was instead executed directly by a Member at NYSE.[20]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[21] and paragraph (f) of Rule 19b–4 thereunder.[22] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BATS–2014–039 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BATS–2014–039. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official

[18] *See supra* note 11.

[19] *See supra* note 11.

[20] *See* BATS Rule 21.1(d)(8) (describing ''BATS Only'' orders for BATS Options) and BATS Rule 21.9(a)(1) (describing the BATS Options routing process, which requires orders to be designated as available for routing).

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 240.19b–4(f).

business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BATS–2014–039 and should be submitted on or before October 8, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–22116 Filed 9–16–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Adarna Energy Corporation, Brampton Crest International, Inc., Covenant Group of China Inc., Mobile Area Networks, Inc., Netco Investments, Inc., OneTravel Holdings, Inc., and PDG Environmental, Inc., Order of Suspension of Trading

September 15, 2014.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Adarna Energy Corporation because it has not filed any periodic reports since the period ended September 30, 2012.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Brampton Crest International, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Covenant Group of China Inc. because it has not filed any periodic reports since the period ended December 31, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Mobile Area Networks, Inc. because it has not filed any periodic reports since the period ended March 31, 2012.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Netco Investments, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of OneTravel Holdings, Inc. because it has not filed any periodic reports since the period ended March 31, 2005.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of PDG Environmental, Inc. because it has not filed any periodic reports since the period ended October 31, 2009.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. E.D.T. on September 15, 2014, through 11:59 p.m. E.D.T. on September 26, 2014.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2014–22261 Filed 9–15–14; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Asian Dragon Group, Inc., Atlas Minerals, Inc. (n/k/a Atlas Corporation), Bluesky Systems Holdings, Inc. (f/k/a Bluesky Systems Corp.), CPC of America, Inc., Mezabay International, Inc., and Power3 Medical Products, Inc. (a/k/a Power 3 Medical Products, Inc.), Order of Suspension of Trading

September 15, 2014.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Asian Dragon Group, Inc. because it has not filed any periodic reports since the period ended May 31, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Atlas Minerals, Inc. (n/k/a Atlas Corporation) because it has not filed any periodic reports since the period ended December 31, 2003.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Bluesky Systems Holdings, Inc. (f/k/a Bluesky Systems Corp.) because it has not filed any periodic reports since the period ended September 30, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of CPC of America, Inc. because it has not filed any periodic reports since the period ended September 30, 2011.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Mezabay International, Inc. because it has not filed any periodic reports since the period ended June 30, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Power3 Medical Products, Inc. (a/k/a Power 3 Medical Products, Inc.) because it has not filed any periodic reports since the period ended September 30, 2011.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed companies. Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed companies is suspended for the period from 9:30 a.m. E.D.T. on September 15, 2014, through 11:59 p.m. E.D.T. on September 26, 2014.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2014–22262 Filed 9–15–14; 4:15 pm]

BILLING CODE 8011–01–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (formerly Subpart Q) during the Week Ending August 30, 2014

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 302.201 *et. seq.*). The due date for Answers, Conforming Applications, or Motions to

[23] 17 CFR 200.30–3(a)(12).

Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2014–0145.

Date Filed: August 25, 2014.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: September 15, 2014.

Description: Application of Harris Aircraft Services, Inc. requesting a certificate of public convenience and necessity to authorize it to provide scheduled interstate air transportation of persons, property and mail utilizing small aircraft.

Barbara J. Hairston,

Supervisory Dockets Officer, Docket Operations, Federal Register Liaison.

[FR Doc. 2014–22142 Filed 9–16–14; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Industry Meeting

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of public meeting.

SUMMARY: The Federal Aviation Administration (FAA) is hosting an industry day to introduce the Mini Global II project to the aviation community. The FAA will demonstrate that operational benefits to aviation stakeholders can be realized sooner, while also potentially identifying new synergistic technologies and capabilities.

DATES: The public meeting will be held on October 7, 2014, from 8:30 a.m. to 3:00 p.m.

ADDRESSES: The public meeting will be held at the FAA's Florida NextGen Testbed (FTB), 557 Innovation Way, Daytona Beach, FL 32114.

FOR FURTHER INFORMATION CONTACT: Thien Ngo, Mini Global Project Manager, Technology Development & Prototyping Division ANG–C5, Federal Aviation Administration, 800 Independence Ave. SW., Washington, DC 20591; telephone (202) 267–9447; cell (202) 384–6484; email: *thien.ngo@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

Mini Global I is an open communications infrastructure that allows Air Navigation Service Providers (ANSPs), airlines, and other stakeholders to exchange flight, weather, and aeronautical information using the following open standards: Flight Information Exchange Model (FIXM), Aeronautical Information Exchange Model (AIXM), and Weather Information Exchange Model (WXXM).

Mini Global II will focus on the connectivity and data sharing between multiple Enterprise Messaging Services (EMSs). It will identify global policies, protocols, security, and business sensitivity requirements, mediate between diverse EMSs, and provide an infrastructure for future applications/services to benefit Global Air Traffic Management (ATM). It will extend the list of international partnerships and aviation stakeholders to support the validation of FIXM/AIXM/WXXM standards by using additional datasets in supporting complex use cases. The goal of Mini Global II is to further advance the technology and demonstrate future applications by exploiting the capabilities of this infrastructure.

Registration

Attendance at the facility is limited and is on a first come first serve basis. However, a webcast will be provided for those that cannot attend in person. To attend the Industry Day (in person or via webcast), participants must register via the following link: *https://www.eventbrite.com/e/mini-global-industry-day-tickets-2298597166.*

Issued in Washington, DC, on September 11, 2014.

Andras Kovacs,

Manager, Operational Improvements Portfolio Branch (ANG–C53), NextGen Technology Development & Prototyping Division.

[FR Doc. 2014–22103 Filed 9–16–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2014–78]

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 October 7, 2014.

ADDRESSES: You may send comments identified by Docket Number FAA–2013–1053 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: Sandra K Long, ARM–201, Federal Aviation Administration, Office of Rulemaking, 800 Independence Ave. SW., Washington, DC 20591; email *Sandra.long@faa.gov* (202) 267–4714.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on September 10, 2014.

Brenda D. Courtney,

Acting Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2013–1053.

Petitioner: Embry-Riddle Aeronautical University.

Section of 14 CFR Affected: 14 CFR Part: 61.160(d), 61.160(b)(3)(ii).

Description of Relief Sought: Embry-Riddle Aeronautical University (ERAU) is requesting relief that would allow ERAU to certify graduates, who have received training from another training provider and subsequently received credit from ERAU in accordance with 14 CFR 141.77, as eligible for an airline transport pilot certificate with restricted privileges.

[FR Doc. 2014–22105 Filed 9–16–14; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in California

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by the California Department of Transportation (Caltrans), pursuant to 23 U.S.C. 327.

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans, that are final within the meaning of 23 U.S.C. 139(*l*)(1). The actions relate to a proposed highway project, replacement of the 5th Street Bridge (No. 18C–0012) over the Feather River and improvement of approach roadways to the bridge, in the Counties of Sutter and Yuba, State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(*l*)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before February 17, 2015. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For Caltrans: Sue Bauer, Branch Chief, Caltrans Office of Environmental Management, M–1, California Department of Transportation, 703 B Street, Marysville, CA 95901.

Office Hours: 8:00 a.m.–5:00 p.m., Pacific Standard Time.

Telephone: (530) 741–4113.

Email: sue_bauer@dot.ca.gov.

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the Federal Highway Administration (FHWA) assigned, and the California Department of Transportation (Caltrans) assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that Caltrans has taken final agency actions subject to 23 U.S.C. 139(*l*)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California.

The City of Yuba City, in cooperation with the California Department of Transportation, proposes to replace the 5th Street Bridge (No. 18C–0012) over the Feather River and improve approach roadways to the bridge. The existing facility is located in Sutter and Yuba Counties and connects Bridge Street in Yuba City to 5th Street in Marysville. Project limits in the City of Marysville span from 5th and I Street to I and 3rd Street in the south, portions of Riverfront Park in the west and continuing over the Feather River into the City of Yuba City limits. Project limits within the City of Yuba City include the roadway along 2nd Street, small portions of Sutter, Yolo and Boyd Streets in the south and the western expanse of Bridge Street at the intersection with 2nd Street terminating just east of the intersection of Shasta Street. The bridge replacement is proposed to remedy two major problems. The existing bridge is rated as ''functionally obsolete'' by Caltrans under Federal Highway Administration (FHWA) prescribed inspection criteria. Additionally, widening the facility from the existing two lanes to a four-lane structure would provide needed traffic operations and capacity improvements to the transportation network between Yuba City and Marysville. The Federal ID number for the bridge replacement project is BHLS 5163 (025).

The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Assessment (FEA)/ Finding of No Significant Impact (FONSI) for the project, approved on August 27, 2014, and in other documents in the FHWA project records. The FEA, FONSI and other project records are available by contacting Caltrans at the addresses provided above. The Caltrans FEA, FONSI and other project records can be viewed and downloaded from the project Web site at *http://www.yubacity.net/city-services/public-works/5th-street-bridge-replacement-project/environmental-documents-.html.*

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including, but not limited to:

1. National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128]
2. Section 7 of the Endangered Species Act of 1973 (ESA) [16 U.S.C. 1531–1544 and Section 1536]
3. National Historic Preservation Act of 1966, as amended (16 U.S.C. 470(f) et seq.)
4. Clean Air Act [42 U.S.C. 7401–7671 (q)]
5. Clean Water Act [Section 404, Section 401, Section 319]
6. Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]
7. Section 6(f)—Land and Water Conservation Fund [LWCF] Act of 1964 as amended [16 U.S.C. 4601–4604]
8. Uniform Relocation Assistance and Real Property Acquisition Act of 1970, as amended
9. Migratory Bird Treaty Act (MBTA) of 1918, as amended
10. Invasive Species, Executive Order 13112
11. Floodplain Management, Executive Order 12898

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(*l*)(1)

Issued on: September 11, 2014.

Cesar E. Perez,

Sr. Transportation Engineer, Federal Highway Administration, Sacramento, California.

[FR Doc. 2014–22140 Filed 9–16–14; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of a Specially Designated National and Blocked Person Pursuant to Executive Order 13566

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (OFAC) is removing the name of one individual whose property and interests in property have been unblocked pursuant to Executive Order 13566 of February 25, 2011, ''Blocking Property and Prohibiting Certain Transactions Related to Libya.''

DATES: OFAC's actions described in this notice are effective September 11, 2014.

FOR FURTHER INFORMATION CONTACT: Associate Director for Global Targeting, tel.: 202/622–2420, Assistant Director for Sanctions Compliance & Evaluation, tel.: 202/622–2490, Assistant Director for Licensing, tel.: 202/622–2480, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202/622–2410, Office of the General Counsel, Department of the Treasury (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

The SDN List and additional information concerning OFAC sanctions programs are available from OFAC's Web site (*www.treasury.gov/ofac*). Certain general information pertaining to OFAC's sanctions programs is also available via facsimile through a 24-hour fax-on-demand service, tel.: 202/622–0077.

Notice of OFAC Action

On September 11, 2014, OFAC unblocked the property and interests in property of the following individual pursuant to E.O. 13566, ''Blocking Property and Prohibiting Certain Transactions Related to Libya.'' All property and interests in property of the individual that are in or hereafter come within the United States or the possession or control of United States persons are now unblocked.

Individual

1. SANDERS, Dalene; DOB 14 Dec 1970; citizen South Africa; National ID No. 7012140235084 (South Africa) (individual) [LIBYA2] (Linked To: GADDAFI, Saadi)

Dated: September 11, 2014.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2014–22155 Filed 9–16–14; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations, Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the names of three individuals and one entity whose property and interests in property have been blocked pursuant to the Foreign Narcotics Kingpin Designation Act (''Kingpin Act'') (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

DATES: The designation by the Director of OFAC of the three individuals and one entity identified in this notice pursuant to section 805(b) of the Kingpin Act is effective on September 11, 2014.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Office of Foreign Assets Control, U.S. Department of the Treasury, Washington, DC 20220, Tel: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available on OFAC's Web site at *http://www.treasury.gov/ofac* or via facsimile through a 24-hour fax-on-demand service at (202) 622–0077.

Background

The Kingpin Act became law on December 3, 1999. The Kingpin Act establishes a program targeting the activities of significant foreign narcotics traffickers and their organizations on a worldwide basis. It provides a statutory framework for the imposition of sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and the benefits of trade and transactions involving U.S. companies and individuals.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury, in consultation with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security may designate and block the property and interests in property, subject to U.S. jurisdiction, of persons who are found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; or (3) playing a significant role in international narcotics trafficking.

On September 11, 2014, the Director of OFAC designated the following three individuals and one entity whose property and interests in property are blocked pursuant to section 805(b) of the Kingpin Act.

Individuals:

1. AVINA BRIBIESCA, Jose, Avenida Santa Margarita numero 4950–86, Zapopan, Jalisco, Mexico; Loma del Infante Casa 25, Col. Lomas de Atemajac, Zapopan, Jalisco CP 45178, Mexico; DOB 23 Apr 1977; POB Distrito Federal, Mexico; R.F.C. AIBJ770423NG1 (Mexico); C.U.R.P. AIBJ770423HDFVRS07 (Mexico) (individual) [SDNTK] (Linked To: BONA–HABITAT, S.A. DE C.V.).

2. GONZALEZ HERNANDEZ, Ignacio, Paseo San Arturo numero 2051, Fraccionamiento Valle Real, Zapopan, Jalisco, Mexico; Morelos No. 2223, Arcos Vallarta, Guadalajara, Jalisco 44130, Mexico; DOB 16 Nov 1974; POB Guadalajara, Jalisco, Mexico; Passport 3116072917339 (Mexico); R.F.C. GOHI–741116 (Mexico); C.U.R.P. GOHI741116HJCNRG02 (Mexico) (individual) [SDNTK] (Linked To: BONA–HABITAT, S.A. DE C.V.; Linked To: URBANIZADORA NUEVA ITALIA, S.A. DE C.V.).

3. GONZALEZ LINARES, Janette Iliana, Primavera 3172, Col. Loma Bonita, Guadalajara, Jalisco CP 44980, Mexico; DOB 28 Aug 1985; POB Zapopan, Jalisco, Mexico; C.U.R.P. GOLJ850828MJCNNN02 (Mexico) (individual) [SDNTK] (Linked To: BONA–HABITAT, S.A. DE C.V.).

Entity:

4. BONA–HABITAT, S.A. DE C.V. (a.k.a. ''BONA HABITAT''), Morelos 2223, Col. Arcos Vallarta, Guadalajara, Jalisco, Mexico; Folio Mercantil No. 44338–1 (Mexico) [SDNTK].

Dated: September 11, 2014.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2014–22152 Filed 9–16–14; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

Voluntary Service National Advisory Committee; Notice of Meetings

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Executive Committee of the VA Voluntary Service (VAVS) National Advisory Committee (NAC) will meet October 22–23, 2014, at the Department of Veterans Affairs, Board of Veterans Appeals Conference Room, 425 I Street NW., 4th Floor, Room 4E.400, Washington, DC. The sessions will begin at 8:30 a.m. each day and end at 4:30 p.m. on October 22, and at noon on October 23, 2014. The meeting is open to the public.

The Committee, comprised of 54 national voluntary organizations, advises the Secretary, through the Under Secretary for Health, on the coordination and promotion of volunteer activities within VA health care facilities. The Executive Committee consists of 20 representatives from the NAC member organizations.

On October 22, agenda topics will include: NAC goals and objectives; review of minutes from the March 2014, NAC annual meeting; VAVS update on the Voluntary Service program's activities; Parke Board update; evaluations of the 2014 NAC annual meeting; review of membership criteria and process; and plans for 2015 NAC annual meeting (to include workshops and plenary sessions).

On October 23, agenda topics will include: subcommittee reports; review of standard operating procedures; review of Fiscal Year 2014 organization data; 2016 NAC annual meeting plans; and any new business.

No time will be allocated at this meeting for receiving oral presentations from the public. However, the public may submit written statements for the Committee's review to Mrs. Sabrina C. Clark, Designated Federal Officer, Voluntary Service Office (10B2A), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, or email at *Sabrina.Clark@VA.gov*. Any member of the public wishing to attend the meeting or seeking additional information should contact Mrs. Clark at (202) 461–7300.

Dated: September 12, 2014.

Jelessa Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2014–22160 Filed 9–16–14; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 79 Wednesday,

No. 180 September 17, 2014

Part II

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule To Remove the Valley Elderberry Longhorn Beetle From the Federal List of Endangered and Threatened Wildlife; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2011–0063; FXES11130900000C2–123–FF09E32000]

RIN 1018–AV29

Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule To Remove the Valley Elderberry Longhorn Beetle From the Federal List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; withdrawal.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), withdraw the proposed rule to remove the valley elderberry longhorn beetle (*Desmocerus californicus dimorphus*) from the Federal List of Endangered and Threatened Wildlife under the Endangered Species Act of 1973 (Act), as amended. This withdrawal is based on our determination that the proposed rule did not fully analyze the best available information. We find the best scientific and commercial data available indicate that the threats to the species and its habitat have not been reduced to the point where the species no longer meets the statutory definition of an endangered or threatened species.

DATES: The Service is withdrawing the proposed rule published October 2, 2012 (77 FR 60238) as of September 17, 2014.

ADDRESSES: The withdrawal of our proposed rule, comments and materials we received, and supplementary documents are available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2011–0063. All comments, materials, and supporting documentation that we considered in this final agency action are available by appointment, during normal business hours, at: U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Suite W–2605, Sacramento, California 95825; telephone 916–414–6600; or facsimile 916–414–6713.

FOR FURTHER INFORMATION CONTACT: Jennifer Norris, Field Supervisor, Sacramento Fish and Wildlife Office (see **ADDRESSES** section). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish this document. Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for revising the Federal Lists of Endangered and Threatened Wildlife and Plants. Rulemaking is required to remove a species from the Federal Lists of Endangered and Threatened Wildlife and Plants, accordingly, we issued a proposed rule and 12-month petition finding on October 2, 2012 (77 FR 60238) to remove the valley elderberry longhorn beetle as a threatened species from the List of Endangered and Threatened Wildlife and to remove the designation of critical habitat for the subspecies. Based upon our review of public comments, comments from various Federal, county, and local agencies, peer review comments, comments from other interested parties, and new information that became available since the publication of the proposal, we reevaluated information in our files and our proposed rule. This document withdraws the proposed rule because the best scientific and commercial data available, including our reevaluation of information related to the species' range, population distribution, and population structure, indicate that threats to the species and its habitat have not been reduced such that removal of this species from the Federal List of Endangered and Threatened Wildlife is appropriate.

The basis for our action. A species may warrant protection under the Act if it is found to be endangered or threatened throughout all or a significant portion of its range. A species may be determined to be an endangered species or threatened species because of 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. Based on our evaluation of the best scientific and commercial data available pertinent to threats currently facing the species and threats that could potentially affect it in the foreseeable future, we determine that threats have not been reduced such that the species no longer meets the statutory definition of an endangered or threatened species.

Peer review and public comment. We sought peer review comments from independent specialists to ensure that our proposed delisting designation was based on scientifically sound data, assumptions, and analyses. We invited these peer reviewers to comment on our proposal to remove the valley elderberry longhorn beetle from the Federal List of Endangered and Threatened Wildlife. We also considered all other comments and information received during the public comment periods.

Acronyms and Abbreviations Used in This Document

We use many acronyms and abbreviations throughout this proposed rule. To assist the reader, we provide a list of these here for easy reference:

Act = Endangered Species Act of 1973
AFB = Air Force Base
BDCP = Bay Delta Conservation Plan
Cal-IPC = California Invasive Plant Council
CCP = Comprehensive Conservation Plan
CDFG = California Department of Fish and Game (see below)
CDFW = California Department of Fish and Wildlife (formerly CDFG)
CDPR = California Department of Pesticide Regulation
CDWR = California Department of Water Resources
CEQA = California Environmental Quality Act
CFG = California Fish and Game
CFR = Code of Federal Regulations
CNDDB = California Natural Diversity Database
Corps = Army Corps of Engineers
CNLM = Center for Natural Lands Management
CVFPP = Central Valley Flood Protection Plan
CVRMP = Central Valley Riparian Mapping Project
CWA = Clean Water Act
CWP = California Water Plan
DOD = Department of Defense
EO = Element Occurrence
ETL = (Army Corps of Engineers) Engineering Technical Letter
EPA = Environmental Protection Agency
EWPP = Emergency Watershed Protection Program
FR = **Federal Register**
GCM = global climate model
GHG = greenhouse gas
GIC = Geographic Information Center
GIS = Geographic Information System
HCMP = Habitat Conservation Management Plan
HCP = Habitat Conservation Plan
HRMMP = Habitat Restoration, Monitoring, and Management Program
INRMP = Integrated Natural Resources Management Plan
IPCC = Intergovernmental Panel on Climate Change
LSA = Lake and Streambed Alteration
NAIP = National Agriculture Imagery Program
NEPA = National Environmental Policy Act
NCCP = Natural Community Conservation Planning
NRCS = Natural Resources Conservation Service

NWR = National Wildlife Refuge
PG&E = Pacific Gas and Electric Company
PGL = (Army Corps of Engineers) Policy Guidance Letter
PVA = Population Viability Analysis
SAMP = Special Area Management Plan
Service = U.S. Fish and Wildlife Service
SPFC = The (California) State Plan of Flood Control
USBR = U.S. Bureau of Reclamation
USDA = U.S. Department of Agriculture
USGS = U.S. Geological Survey
WRCC = Western Regional Climate Center
WRP = Wetland Reserve Program
WRRDA = Water Resources Reform and Development Act

Summary of Changes From the Proposed Rule

Based upon our review of public comments, comments from various Federal, county, and local agencies, peer review comments, comments from other interested parties, and new information that became available since the publication of the proposal (77 FR 60238; October 2, 2012), we reevaluated information in our files and our proposed rule, making changes as appropriate in this document. Where appropriate, we incorporated new information that became available since publishing the proposed rule, information received during the public comment periods, and in some cases provided additional discussion of information in our files that may not have been presented in adequate detail in the proposed rule. This document also provides important clarifications on the species' biology and threats to the species. Thus, this determination differs from the proposed rule as outlined below.

(1) Based on the results of the information received from peer reviewers and the public, we concluded that some species distribution information in the proposed rule was incorrectly presented. As a result, we reevaluated the quality of distribution information (occurrences) for the valley elderberry longhorn beetle that was included in our previous summaries (e.g., Valley Elderberry Longhorn Beetle Recovery Plan (Recovery Plan) (Service 1984, entire); proposed and final listing rules (43 FR 35636; August 10, 1978; 45 FR 52803; August 8, 1980); 5-year review (Service 2006a); and proposed delisting rule (77 FR 60238; October 2, 2012)). This required a reanalysis of the original data sets in our files throughout the range of the species.

(2) As a result of (1) above and our review of additional sources of information received during the open public comment periods, we reexamined existing information in our files. In this document, we provide either clarifications where necessary, additional or revised discussions where appropriate (e.g., *Population Distribution* and *Current Distribution* sections under Background), or incorporate and discuss new information received (e.g., Climate Change and Pesticide discussion under *Factor E,* preliminary survey results using aggregation pheromones under *Population Structure* in Background).

(3) As a result of (1) and (2) above, as well as information received after the proposed rule published, we reevaluated and revised our description of the valley elderberry longhorn beetle's life history, and its population distribution, range, and occupancy. Our revised discussions are provided throughout the Background section.

(4) We revised the Summary of Factors Affecting the Species section, incorporating new or revised information, where appropriate, in our assessments for these factors. The substantial changes to the Background section required us to complete a detailed examination of the five-factor analysis information presented in the proposed rule for each threat to determine whether the discussions were still valid or required revisions. Thus, our threats analysis and associated summaries may differ, where appropriate, from that presented in the proposed rule.

The primary changes to this document as compared to the proposed rule are the result of our reanalysis of occurrence and distribution information of the valley elderberry longhorn beetle. Specifically, we restructured the five-factor analysis from our proposed rule to reflect our reanalysis of threats, including additional and more detailed information (e.g., invasive plants in *Factor A* and pesticides under *Factor E*). We provide a more extensive discussion of effects related to climate change in *Factor A,* and incorporate predictions from several regional climate models for the Central Valley region. We also incorporate detailed results of several studies (e.g., metapopulation analysis) and use this information to evaluate the current threats to the species. Finally, threats related to the effects of pruning (briefly mentioned in our proposed rule under a *Factor E* threat (Human Use) (77 FR 60263; October 2, 2012)) are discussed in this withdrawal under *Factor A.*

(5) Based on our reanalysis and the changes described above under (1) through (4), and primarily as a result of the revised occurrence and distribution information that affects our evaluation of the factors impacting the species, we determined that the current and future threats are of sufficient imminence, intensity, or magnitude to indicate that the valley elderberry longhorn beetle is likely to become endangered within the foreseeable future throughout all of its range. Therefore, the valley elderberry longhorn beetle currently meets the definition of a threatened species, and we are withdrawing the proposed rule to delist the valley elderberry longhorn beetle.

Background

Previous Federal Actions

Please refer to the *Previous Federal Actions* section of the valley elderberry longhorn beetle proposed delisting rule (77 FR 60238, October 2, 2012) for a detailed description of the previous Federal actions concerning this species. On October 2, 2012, we proposed to remove the designation of the valley elderberry longhorn beetle as a threatened species under the Act (77 FR 60238). We opened a 60-day public comment period on the proposed rule that closed on December 3, 2012. On January 23, 2013 (78 FR 4812), we announced a 30-day reopening of the public comment period for our October 2, 2012, proposed delisting rule for the species.

Taxonomy and Species Description

The valley elderberry longhorn beetle, *Desmocerus californicus dimorphus,* is a member of the family Cerambycidae, subfamily Lepturinae, and genus *Desmocerus* (Chemsak 2005, pp. 6–7); adults are approximately 0.5 to 0.8 inches (in) (13 to 21 millimeters (mm)) long (Chemsak 2005, p. 6). In North America, the genus *Desmocerus* includes three species (*D. palliatus, D. californicus, D. aureipennis*) and six subspecies (*D. c. californicus, D. c. dimorphus, D. a. aureipennis, D. a. cribripennis, D. a. piperi, D. a. lacustris*) in the United States and Canada (Chemsak 2005, pp. 4–12). Members of the genus *Desmocerus* are brightly colored and sexually dichromatic with antennal tubules that are not prominently produced at the apex (Chemsak 2005, pp. 2–3). The protonum (upper surface of the prothorax segment; the midsection (Evans and Hogue 2006, p. 293)) of the two *Desmocerus californicus* subspecies differ from the other two North American species (*D. palliatus, D. aureipennis*) with a disk that is densely, confluently punctate (with small depressions on the disk that flow or run together), but without large, irregular, and transverse rugae (ridges) that are about twice as long as broad (Chemsak 2005, p. 3).

Along the foothills of the eastern edge of the California coast range and in the southern San Joaquin Valley, the valley elderberry longhorn beetle range may overlap or abut portions of its range with the similar-looking California elderberry longhorn beetle (*Desmocerus californicus californicus*) (Talley *et al.* 2006a, p. 5). Prior to 1972, the valley elderberry longhorn beetle was considered a separate and valid species (Halstead and Oldham 2000, p. 74). The two elderberry longhorn beetles are now considered two subspecies (Linsley and Chemsak 1972, pp. 7–8; Chemsak 2005, pp. 5–6). Valley elderberry longhorn beetle experts indicate that the small number of available specimens limits the ability to distinguish between the two types based on characteristics such as body length, elytra length and width, and antennal hair color (Talley *et al.* 2006a, p. 5). Thus, the two subspecies can be identified with certainty only by the adult male coloration, such that valley elderberry longhorn beetle males have predominantly red elytra (wing cases) with four dark spots, while California elderberry longhorn beetle males have dark metallic green to black elytra with a red border; females of the two subspecies are similar in appearance (Talley *et al.* 2006a, p. 4). Atypically colored (mostly dark) male elderberry longhorn beetles have been observed in both the center and eastern edge of the valley elderberry longhorn beetle's range (Talley *et al.* 2006a, p. 5). Talley *et al.* (2006a, p. 7) recommend a systematic geographic morphological and genetic study to determine the degree of overlap and interbreeding between the two subspecies.

The obligate larval host plants for both elderberry longhorn beetles have been described as blue elderberry (*Sambucus mexicana*) and, to a lesser extent for the valley elderberry longhorn beetle, red elderberry (*Sambucus racemosa*) (Collinge *et al.* 2001, p. 104; Holyoak 2010, p. 1). However, the current treatment of *Sambucus* in California (Family Adoxaceae) describes three taxa: Blue elderberry (*S. nigra* subsp. *caerulea*), black elderberry (*S. racemosa* var. *melanocarpa*), and red elderberry (*S. racemosa* var. *racemosa*) (Bell 2012, p. 160). As noted previously by others (e.g., Talley *et al.* 2006a, p. 15), the taxonomic status of *Sambucus* is imprecise, and blue elderberry is currently described as ''variable'' and in need of further study (Bell 2012, p. 160). In this rule, we use the more general term, elderberry, to describe the host plant for the valley elderberry longhorn beetle since many of the elderberry surveys and their reported results do not distinguish, or do not identify, the two taxa known to be occupied by the valley elderberry longhorn beetle (i.e., blue elderberry and red elderberry). Local climate differences between the more coastal region occupied by the California elderberry longhorn beetle and the California Central Valley occupied by the valley elderberry longhorn beetle may promote different phenologies (e.g., flowering time) of the host plant and, therefore, differences in time of emergence for the two subspecies (Talley *et al.* 2006a, p. 6).

Life History

Similar to other beetles, the valley elderberry longhorn beetle goes through several developmental stages. These include an egg, four larval stages (known as ''instars,'' with each instar separated by molting), pupa, and adult (Greenberg 2009, p. 2).

As reported by Arnold (1984, p. 4), females lay eggs singly on elderberry leaves and at the junction of leaf stalks and main stems, with all eggs laid on new growth at the outer tips of elderberry branches. Based on observations of *Desmocerus californicus* females along the Kings River, Halstead and Oldham (1990, p. 24) stated that females laid eggs at locations on the elderberry branch where the probing ovipositor (i.e., the female's egg-laying organ) could be inserted. In a laboratory setting, Barr (1991, p. 46) found that the majority of eggs laid by a female valley elderberry longhorn beetle were attached to leaves and stems of foliage (provided as food), with a preference for leaf petiole-stem junctions, leaf veins, and other areas containing crevices and depressions. Eggs are approximately 0.09 to 0.12 in (2.3 to 3.0 mm) long and reddish-brown in color with longitudinal ridges (Barr 1991, p. 4). Eggs are initially white to bright yellow (Talley *et al.* 2006a, p. 8) and then darken to brownish white and reddish brown (Burke 1921, p. 451). Results of captive studies of *Desmocerus californicus* indicate the number of eggs produced per female vary, ranging from 8 to 110 (Burke 1921, p. 25; Arnold 1984, p. 4; Barr 1991, p. 51). Talley (2003, pp. 153–157) recorded a total of 136 larvae (and an additional 44 eggs that did not hatch) from one captive female valley elderberry longhorn beetle collected in 2002. Hatching success has been estimated at 50 to 67 percent of eggs laid, but survival rates of larvae are unknown (Talley *et al.* 2006a, p. 7).

In a laboratory setting eggs hatched within a few days of oviposition (Talley 2003, p. 145), but in the natural setting, the time to eclosing (development from egg to first instar larvae) is unknown (Barr 1991, pp. 4–5). Based on laboratory observations, the first instar larvae may bore immediately into the green tissue of the elderberry stem at or near the egg site, or larvae may persist on the shrub surface for several hours (Halstead and Oldham 1990, p. 26). Previous studies of both subspecies of *Desmocerus californicus* (Burke 1921, p. 450; Linsley and Chemsak 1972, p. 4) estimated that the larval development rate inside the plant is 2 years, but laboratory observations have indicated that a 1-year cycle is possible (Halstead and Oldham 1990, p. 26). The boring of the larva creates a feeding gallery (set of tunnels) in the pith at the stem center (Burke 1921, p. 450; Barr 1991, pp. 4–5). While only one larva is found in each feeding gallery, multiple larvae can occur in one stem if the stem is large enough to accommodate multiple galleries (Talley *et al.* 2006a, p. 8). Prior to pupation, the final (fifth) instar larva chews a larger pupal cavity in the pith of the stem and creates an exit burrow through the hardwood just below the surface of the bark of the plant, creating an exit hole (Halstead and Oldham 1990, p. 23), but then returns inside the plant stem, plugging the hole with wood shavings (also known as frass) (Talley *et al.* 2006a, p. 8). These larvae move back down the feeding gallery to the enlarged pupal chamber packed with frass, where they metamorphose into pupae between January and April (Burke 1921, p. 452). Approximately 1 month later, they metamorphose into an adult, although the adult form may remain in the cavity for several weeks (Burke 1921, p. 452). The adults chew through the outer bark and emerge in the spring or early summer through the exit hole, generally coinciding with the flowering season of the elderberry (Burke 1921, p. 450; Halstead and Oldham 1990, p. 23).

Several studies or surveys have documented the presence of potential predators (e.g., earwigs, native and nonnative ants) of valley elderberry longhorn beetle larvae on elderberry shrubs or within stems (Barr 1991, p. 44; Huxel 2000, pp. 83–84; Holyoak and Graves 2010, pp. 16–17). The Argentine ant (*Linepithema humile*) is an invasive, nonnative species that has successfully colonized many areas of California (Vega and Rust 2001, p. 5), including permanent stream systems in parts of the Central Valley (Ward 1987, pp. 7–8; Huxel 2000, p. 84; Klasson *et al.* 2005, pp. 7–8). Nectar and honeydew are important food sources for Argentine ants, but studies of feeding behavior have found that Argentine ants are opportunistic feeders that readily forage on protein sources such as insect larvae

or pupae, when available (Rust *et al.* 2000, p. 209). For example, Way *et al.* (1992, pp. 428–431) found that Argentine ants easily located and removed exposed eggs laid by another arboreal insect borer (*Phoracantha semipunctata* (Coleoptera: Cerambycidae)) in studies conducted in eucalyptus stands in Portugal. See Summary of Factors Affecting the Species section below for additional discussion of predation threats to the valley elderberry longhorn beetle.

Collection records indicate that adult valley elderberry longhorn beetles can be observed from mid-March until early-June, though most records are from late-April to mid-May (Service 1984, p. 7). However, the adult stage is rare, both in space and time (Talley *et al.* 2006b, p. 649); adults likely die within 3 months (Halstead and Oldham 1990, p. 22). In a laboratory setting, Arnold (1984, p. 4) recorded females living up to 3 weeks, but males lived no more than 4 or 5 days. Similarly, Barr (1991, p. 46) described a life span of 17 days for a captive male and 25 days for two captive females. Halstead and Oldham (1990, p. 25) recorded caged adults living from 4 to 66 days in their experimental studies.

The exit holes created in elderberry stems by the emerging adult eventually heal, but distinct scars remain on the plant stem (Talley *et al.* 2006a, p. 9). Although the presence of exit holes is used to survey and estimate population size for the valley elderberry longhorn beetle (Talley *et al.* 2006a, p. 10) (see additional discussion in *Population Distribution* section), this survey technique can be problematic as an estimate of occupancy for several reasons. First, the exit holes of both the valley elderberry longhorn beetle and the California elderberry longhorn beetle are reported to be identical and both beetles use the same elderberry taxa as their host plants (Arnold 2014b, pers. comm.), making it difficult to determine occupancy of the two subspecies in areas where their ranges may overlap. Second, surveys may have included observations of exit holes in dead stems, rather than only those found in live elderberry stems even though the species uses only live host plants. Third, once an elderberry stem is abandoned by the valley elderberry longhorn beetle, other species can occupy the holes and fill them with frass, making it difficult to confirm that the feeding chamber was created by the valley elderberry longhorn beetle (Talley *et al.* 2006a, p. 10). Finally, birds may also enlarge or rework valley elderberry longhorn beetle exit holes making them difficult to identify as such (Jones and Stokes Associates 1987, p. 38).

Adult Behavior and Ecology

Because of the species' rarity, its short-lived adult form, and difficulty in observing adults in the field, few studies document the behavior of adult valley elderberry longhorn beetles. Where observed, adults have been described as feeding on the nectar, flowers, and leaves of the elderberry plant (Arnold 1984, p. 4; Collinge *et al.* 2001, p. 105), or flying between trees (Service 1984, p. 7). Mating likely begins fairly quickly upon emergence. In field studies conducted in the north Sacramento area, Arnold (1984, p. 4) noted that male adult valley elderberry longhorn beetles appear more active than female adults, and males were observed taking short flights both within elderberry shrubs or to another shrub.

Dispersal distances for the valley elderberry longhorn beetle are unknown. Based on site occupancy and patterns of colonization and extinction from 1991 to 1997, Collinge *et al.* (2001, p. 111) concluded that the valley elderberry longhorn beetle has limited dispersal ability. In this and following sections (i.e., *Adult Behavior and Ecolo*gy, *Population Structure,* and *Summary* under Background), the term ''extinction'' refers to the observations defined and described in the original citations (e.g., Collinge *et al.* 2001, entire, and Zisook 2007, entire), and does not refer to extinction of the valley elderberry longhorn beetle. Talley *et al.* (2007, p. 28) concluded the abundance of exit holes was spatially clustered over distances of 33 to 164 feet (ft) (10 to 50 meters (m)) in alluvial plain, riparian corridors, and upper riparian terrace habitats along portions of the American River Basin. In this same study, the average distance between the nearest neighboring (recent) exit hole was estimated at 141 ft (43 m); however, there was a wide range in the distances measured (plus or minus 144 ft (44 m)) (Talley *et al.* 2007, p. 28), making it difficult to draw definitive conclusions for this spatial relationship. Based on these data, Talley *et al.* (2007, p. 28) estimated the dispersal distance of an adult valley elderberry longhorn beetle from its emergent site to be 164 ft (50 m) or less (Talley *et al.* 2007, p. 28). However, Arnold (2014a, pers. comm.) has observed males flying at least 1 mile (mi) (1.6 kilometers (km)) in areas of good habitat. Given the varying results of these studies (i.e., Collinge *et al.* 2001; Talley *et al.* 2007; Arnold 2014a, pers. comm.) and lack of comprehensive studies of adult behaviors (e.g., mark and recapture studies), we are not able to accurately define a precise dispersal distance or assess how dispersal or other behaviors affect population persistence for this species. However, we believe that the dispersal ability for this species range is fairly limited.

Habitat

The valley elderberry longhorn beetle occupies portions of the Central Valley of California (also known as the Great Valley of California). The Central Valley is bounded by the Cascade Range to the north, the Sierra Nevada to the east, the Tehachapi Mountains to the south, and the coastal ranges and San Francisco Bay to the west. The valley is a large agricultural region drained by the Sacramento and San Joaquin Rivers and represents one of the more notable structural depressions in the world with much of the valley close to sea level in elevation with very low land surface relief, though elevations are higher along the valley margins (U.S. Geological Survey (USGS) 2013a). The climate in the Sacramento Valley and the San Joaquin Basin, which comprise the northern two-thirds of the Central Valley, can be characterized by cool, rainy winters and hot, dry summers (USGS 2013a). The average annual rainfall for the Central Valley ranges from 5 inches (12.7 centimeters (cm)) at the southern end to over 30 inches (76.2 cm) at the northern end (U.S. Bureau of Reclamation (USBR) 2014). With more than three-quarters of this rain coming during a 5-month period (December through April), seasonal floods are common in the valley due to heavy winter and spring runoffs. This precipitation pattern often creates water shortages in the summer and fall when rain is most needed for irrigation purposes; in low rainfall years, drought conditions are often observed in the valley (USBR 2014).

In addition to rain falling within the valley itself, snowpack in the Sierra Nevada Mountains to the east historically provided flows from numerous rivers and streams into both the Sacramento Valley and the San Joaquin Valley through late spring (Katibah 1984, p. 24). These river systems have been altered by artificial levees, river channelization, dam construction, and water diversions (Katibah 1984, p. 28).

The primary host plant of the valley elderberry longhorn beetle, blue elderberry, is an important component of riparian ecosystems in California (Vaghti *et al.* 2009, p. 28). As part of the remnant riparian forests in the Central Valley, elderberry provides wintering, foraging, and nesting habitat for birds (Gaines 1974, entire; Gaines 1980,

entire) and supporting habitat for other boring insects and spiders (Barr 1991, p. 44). Its berries, leaves, and flowers provide food for wildlife, particularly during dry summer months (Vaghti *et al.* 2009, pp. 28–29). Elderberry seeds are likely dispersed by vertebrates, particularly birds (Talley 2005, p. 57). Elderberry seedlings have shallow roots, and high rates of mortality have been observed in the field (Talley 2005, p. 57). Lower seedling mortality rates (about 25 percent in the first year of planting) have been reported from areas where elderberry plants have been transplanted or where new elderberry seedlings have been planted (i.e., mitigation sites) where site conditions are managed (Holyoak *et al.* 2010, p. 48).

A 1991 survey for the valley elderberry longhorn beetle between the Central Valley and adjacent foothills recorded elderberry plants (i.e., both red and blue elderberry) in habitats ranging from lowland riparian forest to foothill oak woodland, with elevation ranges from 60 to 2,260 ft (18.3 to 689 m) (Barr 1991, p. 37). Historically, the riparian forests in the Central Valley consisted of several canopy layers with a dense undergrowth and included Fremont cottonwood (*Populus fremontii*), California sycamore (*Platanus racemosa*), willows (*Salix* sp.), valley oak (*Quercus lobata*), box elder (*Acer negundo* var. *californicum*), Oregon ash (*Fraxinus latifolia*), and several species of vines (e.g., California grape (*Vitis californica*) and poison oak (*Toxicodendron diversilobum*)) (Service 1984, p. 6). These plant communities encompass several remaining natural and semi-natural floristic vegetation alliances and associations within the Great Valley Ecoregion of California (see Buck-Diaz *et al.* 2012, pp. 12–23). The 1991 survey conducted by Barr noted that elderberry was found most frequently in mixed plant communities, and in several types of habitat, including non-riparian locations, as both an understory and overstory plant (Barr 1991, pp. 40–41) with adults and exit holes created by the valley elderberry longhorn beetle found most commonly in riparian woodlands and savannas (Barr 1991, p. 41). Based on surveys completed along the Sacramento River, Gilbart (2009, p. 51) concluded that the valley elderberry longhorn beetle shows a preference for moderate amounts of cover, but that its occupancy is reduced with some canopy-producing plants, such as box elders, cottonwoods, and willows.

Nonnative plants observed in vegetation communities containing elderberry include giant reed (*Arundo donax*), brome (*Bromus* spp.), and bur chervil (*Anthriscus caucalis*) (Vaghti *et al.* 2009, pp. 33–35). Black locust (*Robinia pseudoacacia*) and black walnut (*Juglans hindsii*) have been identified as important invasive species that can displace native plants in riparian floodplains in the Central Valley (Hunter 2000, p. 275; Vaghti *et al.* 2009, pp. 33–35) (see Summary of Factors Affecting the Species section below).

Talley *et al.* (2006a, p. 10) stated that the valley elderberry longhorn beetle is found most frequently and most abundantly in areas that support significant riparian zones (see also Talley *et al.* 2007, discussed below). In a study to evaluate the occupancy of the valley elderberry longhorn beetle (based on exit hole observations) in roadside habitats in the northern Central Valley (2006–2008), Talley and Holyoak (2009, p. 8) found that site occupancy rates and rates of elderberry shrub occupancy within occupied sites were higher in riparian vegetation compared with non-riparian vegetation. Hydrological processes, specifically inundation duration and frequency, when measured by relative elevation above a river or creek floodplain, were found to significantly influence the distribution of elderberry in the lower alluvial reaches of the American River, Cache Creek, Cosumnes River, and Putah Creek (Talley 2005, pp. 52, 55, 66). The highest frequency of elderberry shrubs was found within an intermediate relative elevation gradient, that is, between areas influenced by flooding processes (low elevations) and water availability (higher elevations) (Talley 2005, pp. 45, 66). Talley (2005, pp. 56–58) also noted that the differences in relationships between elderberry abundance (number of shrubs within each elderberry patch), lateral size (shrub diameter), and stress level (proportion of dead stems per shrub) within the four river systems studied were attributed to stochastic (random) processes related to seed dispersal patterns and seedling mortality.

Several studies have evaluated specific elderberry plant characteristics (e.g., size of stems, density of stems, and height above ground) relative to the valley elderberry longhorn beetle's life-history requirements and its abundance or presence (Jones and Stokes Associates 1987, pp. 27–32; Barr 1991, pp. 37–42; Collinge *et al.* 2001, pp. 107–109; Talley 2005, pp. 14–15, 17–19; Talley *et al.* 2007, entire; Holyoak and Koch-Munz 2008, entire). A detailed analysis of habitat and habitat quality for the valley elderberry longhorn beetle was completed based on surveys from 2002 to 2004 within one section of the American River Basin (American River Parkway) (Talley *et al.* 2007, entire). The study identified several predictors of habitat occupancy in the area surveyed and found that, in general, density of elderberry shrubs and shrub size, number of stems, and range of branch sizes were the most influential predictor variables (Talley *et al.* 2007, p. 30). Valley elderberry longhorn beetle exit holes were observed most frequently in elderberry stems or branches with a diameter of 0.8 to 2.76 inch (2 to 7 cm) and at a height of 0 to 3.28 ft (0 to 1 m) above ground, which may be the result of the size of the main stems of elderberry shrubs (Talley *et al.* 2007, p. 30). Of the four types of habitats evaluated within the study area, riparian cover types contained the greater quality of habitat, specifically upper riparian terrace and lower alluvial plain habitats (Talley *et al.* 2007, p. 30).

There are limited studies on the relationship of the valley elderberry longhorn beetle's life-history features and those of its host plants, and the significance of this relationship to the ecology of riparian or other native plant communities where the species is found. Based on comprehensive surveys of elderberry taxa surveyed within the Central Valley in 1991, Barr (1991, p. 50) concluded that the presence of the valley elderberry longhorn beetle was not a factor in the health of elderberry host plants, nor were unhealthy host plants a factor determining the presence of the beetle. Gilbart (2009, entire) evaluated the relationship between the occupancy of the valley elderberry longhorn beetle and the health of blue elderberry planted at restoration sites along the Sacramento River (within the Sacramento River National Wildlife Refuge (NWR)). Results from this study found a correlation between occupancy and dead biomass (versus between occupancy and age), which supports results from other studies regarding the valley elderberry longhorn beetle's preference for plants with partial bark damage or that are otherwise stressed (e.g., low to moderate levels of damaged stems from pruning or burning), or for shrubs with, on average, 25 to 50 percent dead stems (Arnold 1984, p. 4; Holyoak and Koch-Munz 2008, pp. 447–448).

Gilbart (2009, p. 54) stated that valley elderberry longhorn beetles likely use olfaction to locate host plants and mates, and volatiles released from the stressed tissue in elderberry shrubs are likely to be the initial cue used for host plant and mate location. This analysis also found that, although the exit holes

created by the valley elderberry longhorn beetle may increase the dead biomass of elderberry shrubs, an increase in plant cover has a greater effect on dead biomass and is independent of the occupancy of the beetle (Gilbart 2009, pp. 53–54). Additional studies are needed to determine the relationships between the valley elderberry longhorn beetle's occupancy and: (1) The regenerative ability and timing of elderberry stem growth; (2) the beetle's observed preference for elderberry stems of a certain minimum diameter relative to the host plants' life history; and (3) other factors related to the ecological role of elderberry found in the species' range in the Central Valley.

In an unpublished evaluation of environmental factors important to the valley elderberry longhorn beetle, Zisook (2007, entire) evaluated colonization and extinction events based on survey data from the Talley *et al.* (2007, entire) study along the American River Parkway. Zisook (2007, p. 5) found that colonization events were more likely to occur on shrubs located on north-facing slopes and on relatively large and previously occupied shrubs. Extinction events were more likely to be associated with relatively small elderberry shrubs, shrubs with stem damage, and in areas with larger floodplain widths (Zisook 2007, p. 5). In their evaluation of elderberry characteristics at mitigation sites compared with natural sites, Holyoak and Koch-Munz (2008, pp. 449–450) noted that, within mitigation sites, the abundance of the valley elderberry longhorn beetle *per elderberry shrub* was positively related to the size and age of the mitigation site, and the species was more likely to be present in elderberry shrubs with low levels of damage (e.g., partial bark damage) at these sites (see also discussion in *Adult Behavior and Ecology* section above). Relatedly, Talley *et al.* (2007, p. 28) found that the presence of recent exit holes was correlated with previous occupancy (that is, 73 percent of elderberry shrubs with recent holes also had old holes). A similar result was found in a 2010 survey effort, in which all but one watershed sampled had both new holes and old holes (in both dead and live wood) (Holyoak and Graves 2010, p. 12). Additional habitat characteristics relative to spatial relationships of elderberry shrubs and occupancy of the valley elderberry longhorn beetle are summarized in our metapopulation structure discussion (see *Population Distribution* section below).

Population Distribution

There are few recorded observations of adult valley elderberry longhorn beetles; many of the locations for this species in various references, including previous Service documents, are based exclusively on observations of exit holes. The population distribution of the valley elderberry longhorn beetle described in our proposed delisting rule (77 FR 60238; October 2, 2012) relied heavily on the records provided in the California Natural Diversity Database (CNDDB) as Element Occurrences (EOs). The CNDDB, maintained by the California Department of Fish and Wildlife (CDFW; formerly known as California Department of Fish and Game (CDFG)), is an ongoing effort to include observations and survey reports for separate EOs of all of the species and subspecies tracked by the database. However, because contribution to the database is not mandatory, some observations or surveys as well as negative survey results for plants and animals (including the valley elderberry longhorn beetle) are not included in the database; therefore, the CNDDB should not be considered an exhaustive or comprehensive inventory of all rare species in California (CDFW 2014c). For animals with limited mobility, which includes most invertebrates, an EO is defined as a location where a specimen was collected or observed, and is assumed to represent a sample of a breeding population (CDFG 2007, p. 1). Sequential surveys are accumulated in EO reports for each location of a species.

There are important limitations to consider when using the CNDDB records to examine the population distribution and abundance of the valley elderberry longhorn beetle. First, despite the date (year) of the observations, CNDDB considers all occurrences of the valley elderberry longhorn beetle as presumed extant, even though many of these records are more than 20 years old. Second, the occurrence rank (a measure of the condition and viability of a particular occurrence that takes into account population size, viability, habitat quality, and disturbance) used by CNDDB (based on NatureServe definitions; NatureServe 2014) for many of the valley elderberry longhorn beetle EOs are considered ''poor'' (occurrence has a high risk of extirpation) or ''unknown'' (rank not assigned due to lack of sufficient information on the occurrence). In addition, many of the records described in the CNDDB report represent only observations of exit holes. As noted above in *Life History* section, these observations may represent: (1) Old exit holes created by the valley elderberry longhorn beetle; (2) exit holes created by the California elderberry longhorn beetle within areas where their ranges overlap; or (3) holes created by other species.

Our review of the 2013 CNDDB EO report for the valley elderberry longhorn beetle found that 72 percent (142 of 196) of the EOs represent observations of only exit holes, and 23 percent (46 of 201) of the EOs are described as adult beetles (male, female, or unknown sex) (CNDDB 2013, entire; Arnold 2014a, pers. comm.). Only 12 percent (24 of 201) of the EOs identify observations of adult males (CNDDB 2013, entire; Arnold 2014a, pers. comm.), and four of these records (within Tulare County) are likely to be observations of the California elderberry longhorn beetle since no typically colored male specimens have been observed or collected from this County (Talley *et al.* 2006a, p. 5).

Presumed Historical Range

Prompted by comments received from peer reviewers, local agencies, the public, and other interested parties during our two open comment periods on the proposed delisting rule (77 FR 60238; October 2, 2012: 78 FR 4812; January 23, 2013), and our reassessment of the CNDDB occurrences (CNDDB 2013, entire), and other references (e.g., elderberry mitigation or conservation banks, biological opinions prepared by the Service, and other unpublished reports), we are defining in this withdrawal notice the presumed historical range of the valley elderberry longhorn beetle based on:

(1) A georeferenced version (Service 2014, Geographic Information System (GIS) analysis) of the distribution map illustrated in Chemsak (2005, p. 7).

(2) The distribution defined in Talley *et al.* (2006a, pp. 4–6), which was based on museum specimens and sightings of adult males.

(3) The distribution map (also georeferenced) of museum and other specimens depicted in Halstead and Oldham (1990, p. 51 (Figure 22)).

(4) Locations of observations of adult male valley elderberry longhorn beetles described in the CNDDB report (CNDDDB 2013, entire) or in other survey results not recorded in CNDDB (River Partners 2010, entire; Arnold and Woollett 2004, p. 8; Arnold 2014a, pers. comm.).

We did not use the locations presented in Halstead and Oldham (2000, p. 75) to develop this presumed historical range since their publication did not distinguish between the two subspecies.

The presumed historical range of the valley elderberry longhorn beetle represents a patchy distribution from Tehama County to Fresno County, as shown in Figure 1 below (Service 2014, GIS analysis). Observations of adult beetles have been reported from Shasta County in 2008 and 2009 (CNDDB EO 218), as well as exit holes in 1991 and 2007 through 2012 (CNDDB EO 218; Holyoak and Graves 2010, p. 23), and an unconfirmed adult male valley elderberry longhorn beetle in 2013 (Souza 2014, pers. comm.). We did not include Shasta County within our presumed historical range because of the difficulty in distinguishing female valley elderberry longhorn beetle from female California elderberry longhorn beetle, the unconfirmed observation of an adult male valley elderberry longhorn beetle, and the absence of museum specimens from this area. However, we acknowledge that the recent observations of exit holes in portions of Shasta County (along the Sacramento River) may represent an expansion of the historic range of the valley elderberry longhorn beetle to this location. With regard to recorded CNDDB observations of valley elderberry longhorn beetle in Tulare County, it is important to note that there is significant uncertainty as to whether the male and female adult beetles observed in that area represent observations of the valley elderberry longhorn beetle or the California elderberry longhorn beetle (CNDDB EOs 63, 66, 128, 154). Based on the distribution map prepared by Chemsak (2005, pp. 6–7) and the discussion (and map) presented in Talley *et al.* (2006a, pp. 5–6), it is reasonable to conclude that the Tulare County observations likely represent the California elderberry longhorn beetle.

BILLING CODE 4310–55–P

Figure 1. Presumed historical range of the valley elderberry longhorn beetle, California. Sources: Halstead and Oldham 1990, Chemsak 2005, Talley *et al*. 2006a, River Partners 2010, CNDDB 2013, Arnold 2014a.

BILLING CODE 4310–55–C

Current Distribution (Since 1997)

The most recent, comprehensive rangewide survey by observers known to be qualified to detect occupancy of the valley elderberry longhorn beetle was conducted in 1997 (see Collinge *et al.* 2001, entire). Collinge *et al.* (2001, entire) resampled 65 of 79 sites surveyed by Barr in 1991 and 7 additional sites within the Central Valley in 1997.

Within the last 10 years, surveys in the Central Valley for the valley

elderberry longhorn beetle have included the following:

(1) Examining 4,536 elderberry shrubs in the Lower American River (14.9 mi) (24 km) and Putah Creek (28 km (17.4 mi)) (Talley 2005, entire).

(2) Conducting exit hole surveys in 2010 of both elderberry shrubs (441) and stems (4,247) in 10 watersheds from Shasta to Tulare Counties (34 sites) (Holyoak and Graves 2010, entire).

(3) Conducting surveys of potential and occupied valley elderberry longhorn beetle habitat within riparian areas along the Stanislaus River (59 mi (95 km)) and San Joaquin River (12 mi (19.3 km)) in 2006 (River Partners 2007, entire).

It should be noted that some of the surveys described above were conducted within areas located adjacent to public roads or within accessible areas such as public parks (i.e., ''convenience'' sampling) in order to more easily access and examine shrubs for exit holes, or to better observe adults. Therefore, survey results should not be considered as a complete representation of the entire population distribution (or occupancy) of the valley elderberry longhorn beetle at the time of the particular survey.

In this withdrawal, we provide a reevaluation of the valley elderberry longhorn beetle occurrence records described in our proposed rule, and we also incorporate new information received since the proposed delisting rule was published on October 2, 2012 (77 FR 60238). This reanalysis now provides the most accurate assessment of the presumed extant occurrences of the valley elderberry longhorn beetle (based on the best available commercial and scientific information) as compared to what was presented in the proposed rule. Specifically, we started with identifying CNDDB EOs (adults or exit holes, any age) observed since 1997 (past 16 years), as this was the year in which the most recent, comprehensive rangewide survey by observers known to be qualified to detect occupancy of the species was conducted (Collinge *et al.* 2001). Next, a subset of these CNDDB EO records were used if they had an Occurrence Rank of ''fair'' (occurrence characteristics are non-optimal, and occurrence persistence is uncertain in current conditions), ''good'' (occurrence has favorable characteristics and is likely to persist for the foreseeable future (20–30 years), if current conditions prevail) or ''excellent'' (occurrence has optimal or exceptionally favorable characteristics and is very likely to persist in foreseeable future (20–30 years), if current conditions prevail) (NatureServe 2014).

In addition, we incorporated into our reanalysis records from:

(1) Observations of exit holes (recent holes only based on level of detail available) from surveys conducted in 1997 (Collinge *et al.* 2001, entire; Collinge 2014 pers. comm.).

(2) Exit hole (any age) and adult beetle locations in four watersheds (Lower American River, Putah Creek, Cache Creek, Cosumnes River) from 2002–2005 surveys (Talley 2014a, pers. comm.).

(3) Exit hole (any age) locations from 10 watersheds as described in Holyoak and Graves (2010, entire).

(4) Exit hole (any age) locations along the Stanislaus and San Joaquin Rivers from River Partners (2007, entire).

(5) Adult beetle observations along the Feather and Sacramento Rivers from River Partners (2010 and 2011; entire).

(6) Exit hole (any age based on detailed information available from recent data sets) locations recorded at Beale Air Force Base (Department of Defense (DOD 2014, unpublished GIS data)).

Of the currently described 201 CNNDB records (CNDDB 2013, entire) for the valley elderberry longhorn beetle, 142 EOs represent observations of only exit holes, 52 EOs represent observations from 1997 to 2013, and 25 EOs represent observations from 1997 to 2013 with an Occurrence Rank of ''fair,'' ''good,'' or ''excellent.''

We then selected the locations of observations (exit holes or adults) found within our defined presumed historical range (as shown in Figure 1) for the valley elderberry longhorn beetle. These locations (which represent 17 EOs) are summarized in Table 1 by their geographical location (e.g., hydrological feature) and illustrated in Figure 2. Of note, we could not locate (using GIS software (Service 2014, GIS analysis) with an acceptable level of accuracy the six mitigation site survey locations (2005 and 2006) from Holyoak and Koch-Munz (2008, Appendix A1); thus, these six locations were not included in Table 1 or Figure 2. However, many, if not all, of these six mitigation site locations are within watersheds where occupancy (exit holes) of the valley elderberry longhorn beetle has been observed within the last 16 years, or are locations that were reported in the CNDDB EO report (CNDDB 2013, entire).

TABLE 1—GEOGRAPHICAL LOCATIONS OF VALLEY ELDERBERRY LONGHORN BEETLE OCCURRENCES SINCE 1997 IN CALIFORNIA, GROUPED BY HYDROLOGIC UNIT. BASED ON OBSERVATIONS (ADULTS OR EXIT HOLES), INCLUDING CNDDB EOS WITH AN OCCURRENCE RANK OF ''FAIR, GOOD, OR EXCELLENT,'' AND OTHER SURVEY RESULTS WITHIN THE VALLEY ELDERBERRY LONGHORN BEETLE'S PRESUMED HISTORICAL RANGE

[See Figure 1]

[Sources: Collinge *et al.* 2001; Holyoak and Graves 2010; River Partners 2007, 2010, 2011; CNDDB 2013; Collinge 2014, pers. comm.; Talley 2014a, pers. comm.; DOD 2014.]

Hydrologic unit *Geographical location*	Type of observation (adult,[1] exit holes)	Year last observed
Thomes Creek-Sacramento River:		
Millrace Creek	Adult (unknown), Exit Holes	2001
Salt Creek	Adult (both), Exit Holes	2001
Sacramento River (SSE of Red Bluff)	Adult (both), Exit Holes	2001
Big Chico Creek-Sacramento River:		
Sacramento River (E of Corning)	Exit Holes	2010
Sacramento River (Glenn-Colusa Irrigation District Mitigation Site)	Adult (male)	2002
Sacramento River Mitigation Area (aggregation of shrubs, many exit holes[2])	Exit Holes	2003
Big Chico Creek (two locations)	Exit Holes	1997
Sacramento-Stone Corral:		
Sacramento River (N of Colusa)	Exit Holes	2010
Honcut Headwaters-Lower Feather:		
Feather River (SW of Oroville) (three locations)	Exit Holes	2010
Feather River (Feather River Elderberry Transplant Area)	Adult (both)	2010

TABLE 1—GEOGRAPHICAL LOCATIONS OF VALLEY ELDERBERRY LONGHORN BEETLE OCCURRENCES SINCE 1997 IN CALIFORNIA, GROUPED BY HYDROLOGIC UNIT. BASED ON OBSERVATIONS (ADULTS OR EXIT HOLES), INCLUDING CNDDB EOS WITH AN OCCURRENCE RANK OF "FAIR, GOOD, OR EXCELLENT," AND OTHER SURVEY RESULTS WITHIN THE VALLEY ELDERBERRY LONGHORN BEETLE'S PRESUMED HISTORICAL RANGE—Continued

[See Figure 1]

[Sources: Collinge *et al.* 2001; Holyoak and Graves 2010; River Partners 2007, 2010, 2011; CNDDB 2013; Collinge 2014, pers. comm.; Talley 2014a, pers. comm.; DOD 2014.]

Hydrologic unit *Geographical location*	Type of observation (adult,[1] exit holes)	Year last observed
Feather River (5 mi N of Marysville)	Exit Holes	1997
Feather River (Star Bend Elderberry Mitigation Site) (two locations)	Adult (both)	2010
Feather River (10 mi SW of Wheatland) (two locations)	Exit Holes	2010
Reeds Creek (Beale AFB)	Exit Holes	2012
Upper Bear:		
Bear River (SSE of Wheatland)	Adult (unknown), Exit Holes	2003
Bear River (4 mi SW of Wheatland) (three locations)	Exit Holes	2010
Best Slough/Dry Creek (Beale AFB)	Exit Holes	2005
North Fork American:		
Folsom Lake (NW Shore)	Exit Holes	1997
Folsom Lake	Exit Holes	2010
Lower American:		
Miners Ravine (tributary of Dry Creek)	Exit Holes	1997
American River Parkway (aggregation of shrubs, many exit holes)	Adult (female), Exit Holes	2010
Upper Cache:		
Cache Creek (many locations)	Exit Holes	2003
Lower Sacramento:		
Willow Slough (SW of Esparto)	Adult (male), Exit Holes	2001
RD–900 Canal (W of Sacramento River)	Adult (both)	2006
Sacramento River (SW of Sacramento)	Adult (male)	2005
Upper Putah:		
Putah Creek (aggregation of shrubs, many exit holes)	Adult (unknown), Exit Holes	2010
Upper Cosumnes:		
Cosumnes River (24 locations)	Exit Holes	2003
Upper Mokelumne:		
South of Mokelumne River	Exit Holes	2006
Upper Calaveras:		
Calaveras River	Exit Holes	2000
Upper Stanislaus:		
Stanislaus River (N of Modesto) (two locations, several areas)	Exit Holes	2010
Bear Creek (tributary of Stanislaus River)	Adult (female)	2002
South of Mountain Pass Creek (S of Yosemite Jct.; tributary of Stanislaus River).	Adult (female)	2007
Upper Tuolumne:		
Tuolumne River	Exit Holes	1999
Algerine Creek (tributary of Tuolumne River)	Exit Holes	2007
Upper Merced:		
Merced River (S of Modesto)	Exit Holes	2010
Tulare Lake Bed:		
Kings River (E of Centerville)	Adult (both), Exit Holes	1998

[1] Some adult valley elderberry longhorn beetle observations were not identified as either male or female, and some observations were identified to include both males and females.

[2] The term "many" in this table is defined as a value greater than 50.

BILLING CODE 4310–55–P

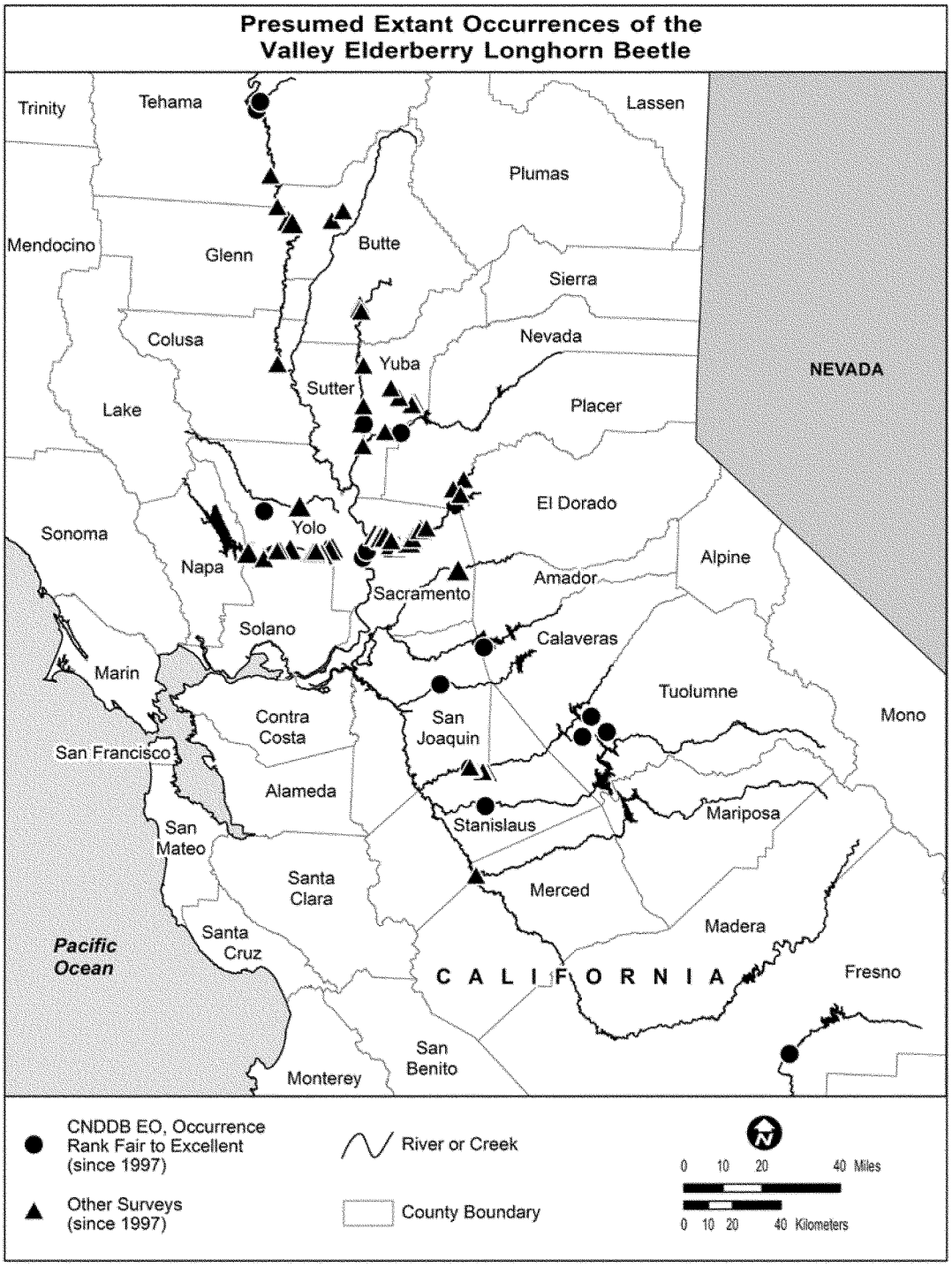


Figure 2. Presumed extant occurrences of the valley elderberry longhorn beetle, California. Based on observations (adult beetles and exit holes) since 1997 within its presumed historical range; CNDDB occurrence rank of "fair, good, or excellent." Sources: Collinge *et al*. 2001; River Partners 2007, 2010, 2011; Holyoak and Graves 2010; CNDDB 2013; Collinge 2014, pers. comm.; Talley, 2014, pers. comm.; DOD 2014.

BILLING CODE 4310–55–C

Table 1 represents a reevaluation of the 26 ''locations'' listed in the proposed rule (77 FR 60242–60243 (Table 1); October 2, 2012) based on our assessment of observations since 1997, while incorporating our current description of the presumed historical range of the valley elderberry longhorn beetle (see *Presumed Historical Range* section above). This revision of presumed extant occurrences (as

compared to Table 1 in the proposed delisting rule) is based on: (1) A review of the quality of the CNDDB EOs (type of observation, the year of last observation, and occurrence rank); (2) additional data sets (as discussed above and represented in Figure 2); (3) comments received from the peer reviewers, Federal, County, and local agencies, the public, and other interested parties relative to occupancy; and (4) a new grouping of geographical locations based on hydrologic units defined by a national watershed boundary dataset (USGS 2013b). Since some observations did not distinguish between old and recent exit holes, we include observations of both old (greater than 1 year old) and recent (i.e., greater than or equal to 1 year) exit holes for most survey results.

Taken together, these data (presented in Table 1 and Figure 2) describe an uncommon or rare, but locally clustered, occupancy of the valley elderberry longhorn beetle within the presumed historical range over the past 16 years within approximately 18 hydrologic units (USGS 2013b) and 36 geographical locations within the Central Valley. The 36 geographical locations are considered to be discrete from each other based on a presumed maximum dispersal distance of approximately 1 mi (1.6 km) based on observations of male beetles from Arnold (2014a, pers. comm.), but in some areas (e.g., Putah Creek) they include several areas of elderberry habitat within that location. As shown in Table 1, 61 percent (22 of 36) of the geographical locations are areas where only exit holes have been used to define occupancy, which is the result of both the survey methods used and the difficulty in observing adult valley elderberry longhorn beetles. Twenty-five percent (9 of 36) of the geographical locations within 4 hydrologic units represent observations of adult males recorded since 1997.

Restoration and Mitigation Sites

A large amount of monetary resources has been invested in floodplain restoration along sections of the Sacramento River for the purpose of restoring riparian areas that serve as habitats for native plants and wildlife, including the valley elderberry longhorn beetle (Golet *et al.* 2008, p. 2; Golet *et al.* 2013, entire). Holyoak *et al.* (2010, p. 50) estimated that an average of 2.5 mitigation sites were initiated per year, with more than 1,000 elderberry and 6,000 native plants planted per year for the 1989–1999 time period. Our proposed rule described a number of conservation easements or banks, mitigation and restoration sites, and other conserved areas that have been established within the current range of the valley elderberry longhorn beetle, which we estimated to be approximately 21,536 ac (8,715 ha) (77 FR 60256–60258; October 2, 2012).

Mitigation for the valley elderberry longhorn beetle generally consists of planting elderberry seedlings and associated native plants and transplanting mature elderberry shrubs from impacted sites to mitigation sites (Holyoak *et al.* 2010, pp. 44, 46). In our proposed rule, we provided an estimate (642 to 1,900 ac (260 to 769 ha)) of valley elderberry longhorn beetle habitat protected through measures associated with section 7 consultations or through conservation or mitigation measures established through Habitat Conservation Plans permitted under section 10 of the Act (see *Factor D* discussion below) (77 FR 60258; October 2, 2012). We also identified another large riparian area (4,600 ac (1,862 ha)) along the American River (the American River Parkway) that contains critical habitat for the valley elderberry longhorn beetle, but the amount of occupied elderberry habitat is not known (77 FR 60258; October 2, 2012). However, we indicated in the proposed rule that an unknown proportion within these areas (i.e., conservation easements, mitigation sites, restoration sites, etc.) actually contain elderberry shrubs and only a proportion of that (unknown) estimate contains habitat occupied by the valley elderberry longhorn beetle.

By mid-2013, approximately 2,698 elderberry shrubs (covering 1,000 ac (405 ha)) were expected to be planted by Pacific Gas and Electric Company (PG&E) in conservation areas located near or adjacent to existing elderberry populations in the Central Valley (Ross-Leech 2012, pers. comm.). Valley elderberry longhorn beetle exit holes have been recorded at five locations where PG&E is conducting biannual monitoring (Ross-Leech 2012, pers. comm.). PG&E has established mitigation sites in several counties to compensate for project-specific effects to the valley elderberry longhorn beetle. Fifteen sites are located in Tehama and Yolo Counties, with approximately 1,228 elderberries successfully established (as of 2002), and occupancy of the valley elderberry longhorn beetle (adults or exit holes) has been observed at 11 of the 15 sites (Ross-Leech 2012, pers. comm.).

The Center for Natural Lands Management (CNLM) manages four preserves in the Central Valley where naturally occurring or planted elderberry are found; CNLM owns three and holds a conservation easement on the other (Rogers 2012, pers. comm.). Management practices being implemented at these sites appear to be consistent with maintaining elderberry habitat; however, the protection and stabilization of the valley elderberry longhorn beetle is not the primary management objective for the preserves, and funding is limited for management activities to specifically support valley elderberry longhorn beetle conservation (Rogers 2012, pers. comm.) Two of these preserves (Pace and Keeney in San Joaquin and Butte Counties, respectively) have recorded valley elderberry longhorn beetle exit holes within the past 3 to 10 years; however, no monitoring for the species has been conducted within the other two preserves (Oxbow in San Joaquin County and Dublin Ranch in Alameda County) or within the Mehrton conservation bank (Sacramento County) that CNLM neither owns nor manages (Rogers 2012, pers. comm.). We describe restoration efforts of elderberry habitat located within National Wildlife Refuges in the Central Valley below, under *Factor D,* Other Conservation Programs.

Transplanted elderberry shrubs appear to be important in the colonization of mitigation sites by the valley elderberry longhorn beetle. For those sites where there was no potential introduction of the species via transplanted shrubs, one study found a 13.4 percent colonization rate for transplanted areas as compared to 2.3 percent for seedlings (Holyoak *et al.* 2010, p. 49). As noted in this study, it can take approximately 7 years for elderberry shrubs to grow large enough to support the life-history requirements of the valley elderberry longhorn beetle, but monitoring is generally required only for 10–15 years (Holyoak *et al.* 2010, p. 51). Thus, the observed low colonization rates are not unexpected, and the authors suggest that prescribed monitoring periods may not be of long enough duration for the species to find and use its host plant (Holyoak *et al.* 2010, p. 51). The study found that the occupancy for the valley elderberry longhorn beetle was 43 percent for all sites through either introduction associated with transplanted elderberry shrubs or through colonization (Holyoak *et al.* 2010, pp. 49–50). Overall, the conclusions from this study suggest that transplantation of elderberry is important for the species because the transplanted shrubs can contain the larval stage of the valley elderberry longhorn beetle or the shrubs are large

enough for the species to be able to recolonize areas within its range.

Small mitigation sites may not be of sufficient size to support recolonization of the valley elderberry longhorn beetle. The mitigation study conducted by Holyoak and Koch-Munz (2008, entire) highlighted the size differential between mitigation sites established for the valley elderberry longhorn beetle (mean 1.83 ac (1.74 ha) versus natural areas (mean 7.5 ac (3 ha)), and the authors concluded that the smaller sites established for mitigation are contributing to the habitat fragmentation for this species (Holyoak and Koch-Munz 2008, p. 452). The mitigation review by Holyoak *et al.* (2010, p. 51) also emphasized the importance of using transplants in reproducing populations of the valley elderberry longhorn beetle, and they recommended shrubs be transplanted to older mitigation sites that already contain elderberry plants of sufficient size such that the valley elderberry longhorn beetle species does not have to rely solely on transplanted shrubs for its survival. Holyoak *et al.* (2010, p. 49) reported that the valley elderberry longhorn beetle most frequently entered mitigation sites within elderberry shrubs that were transplanted from the site that was impacted. Their study found that the valley elderberry longhorn beetle was found at 28 percent of all mitigation sites, but at 88 percent of mitigation sites to which elderberry shrubs potentially containing valley elderberry longhorn beetles were transplanted; thus, only 16 percent of sites were colonized by the valley elderberry longhorn beetle on their own (Holyoak *et al.* 2010, p. 51). In addition, Holyoak *et al.* (2010, p. 51) suggested using transplanted elderberry shrubs within (not between) watersheds to avoid disruption of potential genetic population structures. However, we are unaware of studies that have investigated valley elderberry longhorn beetle genetics between populations.

Perhaps more importantly, in addition to incorporating appropriate measures of size and appropriate elderberry characteristics in achieving successful occupancy of the valley elderberry longhorn beetle at restoration and mitigation sites, restoring natural riverine processes is also necessary to achieve functional restoration of remnant riparian ecosystems (e.g., Golet *et al.* 2013, entire). Restoring riverine processes typically requires maintaining a hydrologic connection of floodplain areas with river systems and managing a flow regime for both ecological and human needs (Golet *et al.* 2008, p. 20). The continued planting of seedlings or transplantation of shrubs at unsuitable mitigation or restoration sites is not only costly in resources, but represents a strategy that will likely not successfully achieve an elderberry shrub age class that provides a viable conservation value for the valley elderberry longhorn beetle and other wildlife.

Population Structure

The concepts of metapopulations, metapopulation theory, and the modeling of metapopulations have become increasingly useful tools for applying principles of landscape ecology to biological conservation. Metapopulations are defined as a system of discrete subpopulations that may exchange individuals through dispersal, migration, or human-mediated movement (Breininger *et al.* 2002, p. 405; Nagelkerke *et al.* 2002, p. 330). Metapopulation models can provide a way to analyze and predict the response of individual species to habitat fragmentation and other landscape elements (Beissinger *et al.* 2006, p. 15).

The effects of spatial diversity (heterogeneity) on the distribution of the valley elderberry longhorn beetle were assessed using survey data collected at Central Valley study sites over 2 years (2002–2004) by Talley (2007, entire) that integrated patch (fine scale), gradient (broad scale), and hierarchical (mosaic of discrete multi-scale patches) spatial frameworks. The analysis revealed that a hierarchical spatial framework explained the most variance in the occupancy of the valley elderberry longhorn beetle (for the three river systems in which a spatial framework for the species was identified) (Talley 2007, p. 1484). However, an integrative approach of all three spatial frameworks (patch, gradient, and hierarchical) best defined a population structure for the valley elderberry longhorn beetle (Talley 2007, p. 1486). This population structure can be characterized as patchy-dynamic, with regional distributions made up of local aggregations of populations (Talley 2007, p. 1486). These localized populations are defined by both broad-scale or continuous factors associated with elderberry shrubs (e.g., shrub age or densities) and environmental variables associated with riparian ecosystems (e.g., elevation, associated trees) that themselves have patch, gradient, and hierarchical structures (Talley 2007, p. 1486).

Based on surveys conducted from 2002–2004, Talley (2005, pp. 25–26) concluded that the valley elderberry longhorn beetle vulnerable developmental stages (i.e., exposure of eggs and larvae) and its rarity (i.e., low local numbers, low occupancy) are important elements of the observed metapopulation structure of the species. Talley (2005, pp. 25–26) further concluded that large-scale catastrophic events and local changes in random processes or events (i.e., environmental stochasticity) have the potential to negatively affect riparian systems and, therefore, the species' vulnerability. Results from several other surveys of exit holes support the rarity traits such as low local numbers and low site-occupancy exhibited by the valley elderberry longhorn beetle:

(1) Estimates of occupancy, as measured by recent (new) exit hole observations *per elderberry groups* (or site), in the Central Valley were reported by Collinge *et al.* (2001, p. 105), based on surveys conducted in 1991 and 1997 (see Barr 1991, entire; Collinge *et al.* 2001, entire). From these two surveys, Collinge *et al.* (2001, p. 105) estimated an occupancy rate of approximately 20 percent for both 1991 and 1997.

(2) A 2003 survey of planted elderberry shrubs (planted from 1993 to 2001) within restoration sites on the Sacramento River NWR found 0.6 to 7.9 percent shrubs contained exit holes (average per refuge unit) (River Partners 2004, pp. 2–3).

(3) A 2007–2008 survey of restoration sites within eight units of the Sacramento River NWR reported 21 percent occupancy based on observations of new exit holes (Gilbart 2009, p. 40).

(4) A 2010 survey of valley elderberry longhorn beetle exit holes within both elderberry shrubs and stems at 34 sites in 10 watersheds (American River to Tule River) determined the following occupancy (abundance) estimate information (Holyoak and Graves, 2010, entire; Holyoak and Graves 2010, Appendix 1):

- Forty-seven percent, or 16 of 34 sites, had new exit holes in elderberry shrubs.
- Ninety percent of the watersheds surveyed had new exit holes (elderberry stem or shrub).
- Sixteen percent, or a total of 71 new holes, were found out of a total of 441 elderberry shrubs surveyed (all sites).

(5) A June 2002 to September 2004 survey of a 14.9-mi (24-km) riparian corridor along the American River (lower American River Basin) estimated occupancy rates of the valley elderberry longhorn beetle ranging from 11.2 percent in lower alluvial plain, to 10.5 percent in mid-elevation riparian, to 8.7 percent in upper riparian terrace, to 2.9 percent in non-riparian scrub habitat (Talley *et al.* 2007, pp. 25–26).

Although the surveys outlined above are not identical in their survey sites and sampling methods, the 16 percent abundance estimate from 2010 (new exit holes for all sites surveyed) and the 21 percent occupancy estimate from 2007 to 2008 (new exit holes from restoration sites at the Sacramento River NWR) (Gilbart 2009, p. 40) align closely with the 20 percent occupancy estimates for 1991 and 1997 presented in Collinge *et al.* (2001, p. 105).

Based on a spatial analysis of valley elderberry longhorn beetle populations in the Central Valley, Talley (2007, p. 1487) concluded that the several hundred meter (hundreds of feet) distances observed between local aggregations of the species supports a limited migration distance for this species, as noted above (see *Adult Behavior and Ecology* section). Talley (2007, p. 1487) further concluded that the clustering of valley elderberry longhorn beetle populations at smaller scales, tens of meters (tens of yards), is likely due to aggregation behaviors of this species, and is not the result of: (1) Environmental variables that occur at larger scales (less than 328 ft (less than 100 m), such as detection of elderberry plants (via plant volatiles); or (2) distances relevant to mate attraction, which occur at even smaller scales (few inches (centimeters)). However, additional studies of movement patterns are needed in order to better describe these observations of clustering and how these patterns relate to habitat availability (see *Adult Behavior and Ecology* section above).

Further support for the clustering or aggregations pattern of valley elderberry longhorn beetle populations can be found in colonization and extinction rates developed by Collinge *et al.* (2001, pp. 107–109) and Zisook (2007, p. 5). Collinge *et al.* (2001, p. 107) found in a comparison of 1991 and 1997 surveys of both old and recent exit holes in 14 drainages (65 sites, 111 groups of elderberry shrubs), that two sites (6.5 percent) had *long-term* extinctions (i.e., no holes found in 1997 and exit holes of any age observed in 1991) and four sites (12.9 percent) had *long-term* colonizations (i.e., recent exit holes observed in 1997, but no exit holes of any age found in 1991). The comparative study also described short-term events (extinctions and colonizations) based only on observations of recent exit holes for both survey years. Nine sites (29 percent) exhibited *short-term* extinctions and six sites (19.4 percent) had *short-term* colonizations (Collinge *et al.* 2001, p. 108). One area (near Black Butte Lake; Stony Creek drainage) that was occupied in 1991 was found to be unoccupied in the 1997 survey (Collinge *et al.* 2001, p. 108). The study concluded, based on observations of only recent exit holes, that 77 percent of the sites had the same occupancy status for the 2 years, with 23 percent of sites showing some turnover between the two surveys (Collinge *et al.* 2001, p. 108). Zisook (2007, entire) presented an unpublished analysis of extinction and colonization rates for the valley elderberry longhorn beetle based on elderberry shrub sampling along a 14.9-mi (24-km) section of the Lower American River. The analysis compares the 2000 to 2004 surveys to re-sampling efforts in 2005. In this study, extinction was defined when no new (recent) holes were found on the same shrub in 2005 but where any age holes were recorded in 2000–2004; a colonization event was recorded when there were no new holes found on a shrub in 2000–2004, but a recent hole was found on the same shrub in 2005 (Zisook 2007, p. 4). The analysis estimated an extinction rate of about 57 percent and a colonization rate of 19.1 percent for the population sampled (Zisook 2007, p. 3).

These evaluations suggest that occupied sites of the valley elderberry longhorn beetle tend to remain occupied (i.e., 77 percent), but also exhibit variable long-term extinction rates (between 6.5 to 57 percent), and slightly higher short-term extinction rates. These occupancy patterns result in a local clustering or aggregations of regional, but patchy, populations within its range. We caution that these extinction evaluations/results are from short-term studies at different locations; therefore, these rates may not be suitable to illustrate past or current conditions, especially for areas that have not been recently surveyed for occupancy or colonization.

Rangewide surveys that utilize recent (new) exit holes as a measure of valley elderberry longhorn beetle occupancy continue to be challenging, given the species' low population densities and wide, but discontinuous distribution. Monitoring methods for valley elderberry longhorn beetle sites were evaluated from surveys conducted in 2010 at 10 watersheds (34 sites), from Shasta County to Kern County (Holyoak and Graves 2010, entire). The study determined that an occupancy rate of 1.5 percent of elderberry stems and a sample size of at least 600 elderberry stems for each watershed was needed to detect large (50 to 80 percent) declines in populations of the valley elderberry longhorn beetle, a condition not met in many areas of the Central Valley (Holyoak and Graves 2010, p. 2). However, using a sampling rate of 500 elderberry stems and 50 elderberry shrubs per watershed, the study found that a good estimate of population density (based on the number of new exit holes present) could be determined for 4 of the 10 watersheds surveyed (or 23 of 34 sites) (Holyoak and Graves 2010, p. 2). The authors recommended that a monitoring program for the valley elderberry longhorn beetle in the Central Valley include a core group of sites with the necessary number of elderberry stems to determine occupancy, in combination with sampling other watershed locations for presence or absence of new exit holes rather than abundance (Holyoak and Graves 2010, p. 20).

Pheromone traps using aggregation pheromones (male-produced sex attractants) (see, for example, Lacey *et al.* 2004, entire) may provide an important survey tool for future distribution or taxonomic studies. In April 2013, after the proposed rule published, field trials were conducted at a riparian forest restoration site within the Sacramento River NWR to test the efficacy of synthesized female valley elderberry longhorn beetle sex pheromone (Arnold 2013, entire). Male valley elderberry longhorn beetles were attracted almost exclusively to traps baited with the (*R*)-desmolactone sex pheromone (33 of 34 males captured); no female adult beetles were found in the traps (Arnold 2013, p. 4). This pheromone has also been found (under laboratory conditions and in the field) to be an attractant for male California elderberry longhorn beetles in San Bernardino County (Ray *et al.* 2012, pp. 163–164). In both studies, no other cerambycid species were caught in traps baited with either (*R*)- or (*S*)-desmolactone, which suggests that (*R*)-desmolactone may be a pheromone specific to only these two subspecies (Ray *et al.* 2012, p. 166; Arnold 2013, p. 4). Observations of male beetles (confirmed through their sexually dimorphic characteristics) attracted to these traps could also be used to confirm the taxonomic identity of the valley elderberry longhorn beetle where the two subspecies may co-occur (Arnold 2013, p. 4).

Vulnerability Factors

Collinge *et al.* (2001, p. 111) described the observed distribution and abundance pattern of the valley elderberry longhorn beetle as an unusual type of rarity, with small and localized populations where it occurs within its presumed historical range. Rare species are generally considered more vulnerable to extinction than

common species (Sodhi *et al.* 2009, p. 517). In general, three criteria of rarity can be used to evaluate a species' vulnerability to extinction risk when applied to its entire geographic range or to its distribution and abundance in a specific area: (1) Narrow geographic range; (2) specific habitat requirements; and (3) small population size, although within a limited geographical range, a rare species may be locally abundant (Primack 2006, pp. 155–156).

There is not always a consistent relationship between rarity and extinction risk resulting from human influences, since the risk of extinction is a function of more complex interrelationships between the ecology of a species, its life history, and human activities (Pullin 2002, pp. 199–200). Nevertheless, vulnerability measures (e.g., Kattan index (Kattan 1992, entire)) have been shown to be good proxies for extinction risk, as observed for a study of beetles in an Italian region of the Mediterranean (Fattorini 2013, p. 174).

The valley elderberry longhorn beetle exhibits several life-history traits that may limit its distribution and population growth, which can provide an extinction vulnerability profile. These attributes include:

(1) Restriction of the species to specific host plant taxa within the Central Valley of California (i.e., specialized niche).

(2) Dependence on riparian ecosystems that have been reduced in size and modified by human activities.

(3) Locally clustered populations with limited dispersal ability that can be affected by natural and human disturbances.

All of these attributes, but particularly habitat specificity, represent vulnerabilities for the valley elderberry longhorn beetle. Vulnerability to extinction can be further complicated by the effects of a changing climate. Numerous traits associated with climate change vulnerability have been identified and consolidated into trait sets by Foden *et al.* (2013, entire), based on a global assessment of bird, amphibian, and coral species. Although the trait sets were not specific to insect taxa, they are similar to variables considered in climate change vulnerability assessment indices for vertebrate species (Bagne *et al.* 2011, entire) and for plant and animal species (Glick *et al.* 2011, pp. 40–43, 48–50; Young *et al.* 2011, entire). The trait sets are as follows: specialized habitat and/or microhabitat specialization; narrow environmental tolerances; potential for disruption of environmental triggers if they are important aspects in the life cycle; disruption of important interspecific interactions; rarity; poor dispersal potential due to low inherent dispersal ability and/or extrinsic barriers to dispersal; and poor micro-evolutionary potential due to low genetic diversity, long generation lengths and/or low reproductive output (Foden *et al.* 2013, e65427). In addition to the effect of any one trait, interactions between life history and spatial traits also can influence extinction risk due to climate change (Pearson *et al.* 2014, entire; Guisan 2014, entire).

Vulnerabilities may separately, or together, exacerbate the risk of the threats described below in the Summary of Factors Affecting the Species section.

Population Viability Analysis

Greenberg (2009, entire) developed a population viability analysis (PVA) for the valley elderberry longhorn beetle using, in part, demographic information provided from personal communications from previous researchers. A metapopulation model was constructed to examine how the spatial arrangement of habitat, dispersal range of adults, and regulation of local populations (density dependence) based on age structure affect the persistence of the valley elderberry longhorn beetle. The results of this PVA model provide useful insights into how the number and configuration of patches affect population persistence and highlight the need to better understand migration distance between patches (Greenberg 2009, p. 55). However, the predictions of population persistence probabilities for this limited PVA analysis should be used with caution given the incomplete empirical information and choice of parameter values used in constructing this particular model. In addition, this model did not incorporate potential effects related to climate change. Thus, in this withdrawal, we do not provide additional discussion of this PVA (and note this analysis has not been peer reviewed); however, we anticipate using this modeling tool to help direct future management options.

Summary

When we consider the low estimates of occupancy (Talley *et al.* 2007, pp. 25–26) and observed extinction and colonization patterns (Collinge *et al.,* 2001, pp. 107–108; Zisook 2007, p. 5), combined with our re-evaluation of available data sets describing the distribution of observations over the past 16 years (since 1997) (see Table 1, Figure 2), it is apparent that the distribution and abundance of the valley elderberry longhorn beetle is clustered in regional aggregations and locally uncommon or rare, which is consistent with our understanding of its rare, patchy distribution pattern across its presumed historical range in the Central Valley. Although evidence of occupancy (primarily observations of exit holes) for the species has been documented in additional locations to those recorded at the time of listing in 1980, the best available data indicate this is a result of limited data available at the time of listing and the subsequent surveys conducted in: (1) The late 1980s (Jones and Stokes 1987, entire); (2) 1991 (Barr 1991, entire); (3) 1997 (Collinge *et al.* 2001, entire); (4) 2002–2005 (Talley 2014a, pers. comm.); and (5) 2010 (Holyoak and Graves 2010, entire). These surveys have better defined the presumed historical range of both elderberry longhorn beetles found in California (see also Chemsak 2005, pp. 6–7; Figure 1, above). Additional comprehensive surveys within the Central Valley, particularly locations of adult male beetles, and the development of long-term population data sets for this species are needed in order to provide a more complete assessment of current population size and distribution.

As noted above, the valley elderberry longhorn beetle exhibits several attributes that may limit its distribution and population size. These include small numbers in localized populations, low estimates of occupancy within its range (see *Population Structure* discussion), limited dispersal, and dependence on two host plants for its entire life cycle that are currently found within ecological communities that have been reduced, fragmented, or otherwise degraded through human-caused alterations. These attributes, particularly habitat specificity (i.e., increased specialization), represent important vulnerabilities for the valley elderberry longhorn beetle, that separately, or together, may exacerbate any of the threats described below in our five-factor analysis. Furthermore, environmental factors (e.g., additional habitat loss, unfavorable hydrological conditions) or other types of stressors (e.g., predation) are likely to significantly influence the species' vulnerability to extinction (see Summary of Factors Affecting the Species discussions below).

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR part 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 species

or threatened species because of 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.

The five factors listed under section 4(a)(1) of the Act and their analysis in relation to the valley elderberry longhorn beetle are presented below. This analysis of threats requires an evaluation of both the threats currently facing the species and the threats that could potentially affect it in the foreseeable future. The Act defines an endangered species as a species that is in danger of extinction throughout all or a significant portion of its range (16 U.S.C. 1632(6)). A threatened species is one that is likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1632(20)).

In considering what factors might constitute threats, we must look beyond the exposure of the species to a particular factor to evaluate whether the species may respond to the factor in a way that causes actual impacts to the species. If there is exposure to a factor and the species responds negatively, the factor may be a threat, and during the status review, we attempt to determine how significant a threat it is. The threat is significant if it drives or contributes to the risk of extinction of the species, such that the species warrants listing as endangered or threatened as those terms are defined by the Act. However, the identification of factors that could impact a species negatively may not be sufficient to compel a finding that the species warrants listing. The information must include evidence sufficient to suggest that the potential threat is likely to materialize and that it has the capacity (i.e., it should be of sufficient magnitude and extent) to affect the species' status such that it meets the definition of endangered or threatened under the Act.

The information presented in the five-factor analysis in this withdrawal differs from that presented in the proposed rule. Specifically, we restructured the five-factor analysis from our proposed rule (77 FR 60238; October 2, 2012) to reflect our reanalysis of threats, including additional and more detailed information (e.g., invasive plants in *Factor A* and pesticides under *Factor E*). We provide a more extensive discussion of effects related to climate change in our analysis of threats (under *Factors A* and *E*), including incorporation of predictions from several regional climate models for the Central Valley region. We also incorporate detailed results of several studies (e.g., metapopulation analysis) and use this information to evaluate the current threats to the species. We also reiterate our discussion contained in the proposed rule of small population size under *Factor E,* but do not include in this withdrawal an evaluation of loss of populations resulting from habitat fragmentation because we find that additional data are needed to adequately or appropriately assess this threat. Threats related to the effects of pruning, briefly mentioned in our proposed rule under a *Factor E* threat (Human Use) (77 FR 60263; October 2, 2012), are discussed in this withdrawal under *Factor A.*

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

Historical Loss of Riparian Ecosystems

In our final rule listing the valley elderberry longhorn beetle as threatened and designating critical habitat (45 FR 52803; August 8, 1980), we identified loss of habitat as a significant impact to the valley elderberry longhorn beetle due to the threats of agriculture conversion, levee construction, and stream channelization within its ''former'' range. In our proposed rule to delist the valley elderberry longhorn beetle (77 FR 60250; October 2, 2012), we reviewed the impacts, or potential impacts, of agricultural and urban development to the species, primarily in the context of the loss of riparian vegetation in the Central Valley, as well as impacts, or potential impacts, related to the effects of levee construction and other flood protection measures, and road maintenance and dust. In this withdrawal, we provide a revised description of the impact of habitat loss to the valley elderberry longhorn beetle based on our analysis of recently mapped elderberry habitat within the Central Valley (Service 2014, GIS analysis), in conjunction with new discussion related to the success of restoration and mitigation sites intended to provide habitat for the species. Similar to the proposed rule (77 FR 60250–60258; October 2, 2012), we also include separate discussions for *Factor A* threats that may result in the destruction or modification of habitat (i.e., levee and flood protection infrastructure, road and trail use and maintenance, pruning, effects of climate change, and invasive plants). Additionally, we note that pruning was only briefly discussed in the proposed rule under *Factor E*—Human Use; we have expanded that discussion and are now including it under *Factor A* because we consider pruning activities to be a potential threat related to destruction or modification of habitat.

Loss of habitat is the leading cause of species extinction (Pimm and Raven 2000, p. 843). Insects that are considered specialized plant-feeders or those restricted to one (monophagous) or a few (oligophagous) plant taxa are especially vulnerable to habitat loss, as their survival may depend on their ability to make improbable or impossible host plant shifts (Fonseca 2009, p. 1508). The valley elderberry longhorn beetle can be considered an oligophage, and is dependent exclusively on two elderberry taxa (see Habitat section) for all aspects of its life history.

Prior to settlement by Anglo-Americans, the Central Valley contained extensive riparian plant communities along unaltered river systems, including riparian forests comprised primarily of sycamore, cottonwood, willow, and oak trees and a thick understory of shrubs, including elderberry (Roberts *et al.* 1980, pp. 7, 10). A detailed summary of historical observations (circa 1800s) of riparian forests along the Sacramento River is presented in Thompson (1961, pp. 301–307). The majority of this ''timber belt'' was cut as early as 1868 (Tehama County) to supply fuel and timber (e.g., fencing) as the valley was settled (Thompson 1961, p. 311). In addition to supplying lumber to a largely treeless valley, the trees that comprised the historic riparian forests of the Sacramento Valley (and likely other parts of the Central Valley) provided reinforcement to river banks and greater stability to stream channels (Thompson 1961, p. 315). These forests also served as windbreaks, reducing the effects of wind and evapotranspiration, while providing important wildlife habitat (Thompson 1961, p. 315).

Much of the historically occurring riparian forests were lost in the Central Valley prior to the listing of the valley elderberry longhorn beetle (see summary for the Sacramento Valley by Thompson 1961, pp. 310–315). Katibah (1984, pp. 27–28) estimated approximately 102,000 ac (41,300 ha) of riparian forest remained in the Central Valley in 1984, a reduction of about 89 percent from an estimated total of 921,600 ac (373,100 ha) of pre-

settlement riparian forest area. A Central Valley mapping effort, initiated in 1978 with legislation that provided funding to study the riparian resources of the Central Valley and desert (Riparian Mapping Team 1979, p. 1), presented an initial evaluation of the condition of riparian vegetation using remote sensing methods in 1981 (Katibah *et al.* 1981, entire; see also Katibah *et al.* 1984, entire), or 1 year after the listing of the valley elderberry longhorn beetle as threatened (45 FR 52803; August 8, 1980). This assessment used a qualitative condition index for each sample site and concluded that the conditions of riparian systems at that time were either disturbed, degraded, or severely degraded (85 percent), with 15 percent considered to be in good or ''apparently unaltered'' condition (Katibah *et al.* 1981, p. 245). About 34 percent of riparian systems were considered to be recovering or stable (Katibah *et al.* 1981, p. 245). Adjacent land uses (primarily agriculture), stream channelization, and livestock grazing were reported as important negative influences on riparian systems (Katibah *et al.* 1981, p. 244). Specifically, artificial levees, river channelization, dams, and water diversions were identified as factors in reducing the original riparian forests to the remnant habitat described at that time for the Central Valley (Katibah 1984, p. 28).

Since that initial assessment, the Central Valley Historic Mapping Project has refined their estimates of historic natural vegetation for the Central Valley and has developed an accessible GIS-based analysis of vegetation changes over the past 100 years (Geographical Information Center (GIC) 2003, entire). Four maps (pre-1900, 1945, 1960, 1995) were created to illustrate eras in which significant land use changes occurred in the Central Valley, such as Anglo-American settlement and water diversion projects (GIC 2003, p. 3). Using a variety of methods and sources, this analysis estimated that 1,021,584 ac (413,420 ha) of riparian vegetation were found within the valley pre-1900, and about 132,586 ac (53,656 ha) of riparian vegetation remained in the Greater Central Valley in 2000, a reduction of 87 percent (GIC 2003, p. 14).

Based on results from a 2003 survey of 16 waterways (47 plots) in the Sacramento Valley (i.e., upper portion of the extant occurrences observed for the valley elderberry longhorn beetle), Hunter *et al.* (2003, p. 41) described the riparian vegetation along these waterways as ''relatively narrow bands with an open, discontinuous canopy.'' This survey described many of these riparian zones as disturbed, with evidence of channel incision, overbank flows, and dumping of trimmed/cut tree branches, and they frequently contained some type of infrastructure (Hunter *et al.* 2003, p. 41). Surrounding land use (within 820 ft (250 m)) was characterized as 43 percent natural, 38 percent agricultural, and 18 percent developed; only 17 percent of the plots were surrounded entirely by natural vegetation (Hunter *et al.* 2003, p. 41).

The Sacramento River represents one river system in the Central Valley within the northern range of the valley elderberry longhorn beetle that has been severely degraded through channelization, bank protection (e.g., levees and riprap), and effects related to the construction of the Shasta Dam and other foothill storage reservoirs (Golet *et al.* 2013, p. 3). Natural, but fragmented, habitats (e.g., riparian, grasslands, sloughs, and valley oak woodlands) remain along the Sacramento River (Golet *et al.* 2013, p. 5). The middle section of the river (Red Bluff to Colusa) has been the focus of restoration efforts following the passage of State legislation in 1986 (Senate Bill 1086), which mandated the development of a management plan to protect, restore, and enhance riparian vegetation along the river (Sacramento River Conservation Area Forum 2003, p. v). A comprehensive evaluation of the success of these efforts indicated that, while progress has been made in achieving goals related to plant species and communities (including an increase in elderberry shrubs) and some wildlife taxa, progress towards restoring stream flows and natural floodplain and flood processes has been poor (Golet *et al.* 2013, pp. 19–21). In addition, this evaluation found that the status of natural riverine habitats in this portion of the Sacramento River was, in general, poor and declining, which was attributed to continued human alterations that constrain the river's hydrologic and geomorphic processes (Golet *et al.* 2013, p. 22). One of the major factors identified as responsible for the continued degradation of riverine habitats was the installation of riprap, which the study indicated has been steadily increasing along the Sacramento River since the 1930s (Golet *et al.* 2013, p. 22).

Assessment of Current Elderberry Habitat Relative to Metapopulation Structure of the Valley Elderberry Longhorn Beetle

As part of the Central Valley Flood protection efforts, Chico State University, the GIC, and CDFW's Vegetation Classification and Mapping Program have developed both a medium-scale and fine-scale dataset for riparian vegetation in the Central Valley (CDWR 2012b, pp. 5–1—5–9). The medium-scale map illustrates the extent of riparian vegetation using about 20 general vegetation classes (see CDFW 2014a and Central Valley Riparian Mapping Project (CVRMP) 2014 for Web site addresses). The fine-scale version provides a more detailed plant community resolution such that vegetation associations and alliances containing a range of probability of elderberry shrub occurrence within those associations and alliances can be identified; this map is nearly complete for the entire Central Valley. Both maps were created using imagery from the U.S. Department of Agriculture (USDA) National Agriculture Imagery Program (NAIP) from 2009 and current field sampling (USDA NAIP 2014).

In our proposed rule, we presented an estimate of 46,936 ac (18,994 ha) of protected riparian vegetation, which we stated may or may not contain elderberry shrubs (77 FR 60256, October 2, 2012). Rather than infer the amount of elderberry habitat from this gross estimate of riparian vegetation (which is what was presented in the proposed rule), we instead use the mapped *Sambucus nigra* Alliances (described as blue elderberry) defined in the 2009 Central Valley fine-scale riparian vegetation data set (CDFW and GIC 2013) to better define the current extent of elderberry habitat in the Central Valley. We also assess the size of the defined polygons of elderberry and their location in the Central Valley relative to the presumed metapopulation structure identified for the valley elderberry longhorn beetle (Talley *et al.* 2006a, pp. 10–11). We acknowledge that elderberry shrubs likely occur in varying degrees of cover and constancy within other mapped vegetation alliances, but we are unable to accurately determine the extent and location of these areas based on the spatial information in these data sets and descriptions provided in Buck-Diaz *et al.* (2012, Appendix 4) for these other plant alliances; thus, our estimate of elderberry habitat is likely to be conservative.

The CDFW/GIC data set contains 39 blue elderberry polygons (124 ac (50 ha)) located within our presumed historical range for the valley elderberry longhorn beetle (see Figure 1). Using the metapopulation spatial parameters presented in Talley *et al.* (2006a, p. 11) (i.e., extent of 1,968–2,625 ft (600–800 m) defined as a cluster), we identified potential metapopulation clusters in our data set. We first determined which of the mapped elderberry polygons were less than 1,968 ft (600 m) from their

nearest neighbor (16 of the 39 polygons), and merged these together to redefine these larger polygons. This resulted in 16 polygons merging into 4, for a new total of 27 mapped elderberry polygons. We then conducted a ''bounding containers'' GIS analysis (Service 2014, GIS analysis) for these 27 polygons to identify those (now rectangular) polygons where the diagonal was at least 1,968 ft (600 m), as this is the minimum distance (i.e., 1,968–2,625 ft (600–800 m)) to meet Talley *et al.*'s (2006a, p. 11) criteria as a metapopulation cluster.

Based on this analysis, 3 of the 27 polygons had a longest length (i.e., diagonal) greater than 1,968 ft (600 m) and, therefore, could be considered as metapopulation clusters supporting a regional population of the valley elderberry longhorn beetle (Talley *et al.* 2006a, p. 11). These three elderberry clusters were located: (1) Along the Cosumnes River; (2) south of Marysville at the southern end of Clark's Slough; and (3) near an unnamed tributary of the Yuba River. All other mapped elderberry polygons were less than 1,968 ft (600 m) in extent.

We then evaluated the location of exit holes or beetle observations from 1997 to 2012 (Figure 2) relative to all 39 elderberry polygons. Based on the level of precision of the mapped locations, we find that 38 survey points out of a total of 1,422 (or less than 3 percent) were located within the 39 elderberry polygons.

These results could be interpreted in several ways (or in combination): (1) Relatively few stands of elderberry habitat remain within the Central Valley and their small size (average of 2.9 ac (1.17 ha)) and spatial arrangement may be insufficient to support the metapopulation structure defined for the valley elderberry longhorn beetle (Talley *et al.* 2006a, p. 11); (2) areas within the species' range have not been adequately surveyed; (3) the mapping methods used did not identify all areas of elderberry habitat; or (4) the parameters that define the presumed metapopulation structure or the life-history requirements for the species need to be reevaluated. Occupancy surveys within the mapped elderberry polygons are needed to assess these or other possibilities.

Occupancy of Restoration and Mitigation Sites

As noted in our proposed rule (77 FR 60256–60258; October 2, 2012), efforts to establish areas of riparian vegetation (though not necessarily elderberry habitat) through restoration projects or mitigation requirements under the Act have been conducted in order to provide additional areas of habitat for the species. Rather than present rough estimates of the number of acres of protected riparian vegetation, as was done in the proposed rule, we are instead providing in this document a review of assessments of these areas conducted in the past 10 years. We modified this discussion from what was presented in the proposed rule based on comments received, as well as evaluated the success of some of these restoration and mitigation sites based on estimates of occupancy of the valley elderberry longhorn beetle.

An evaluation of restoration of riparian vegetation along 106 river km (66 river mi) of the Sacramento River included an assessment of valley elderberry longhorn beetle occupancy (exit holes) at five restoration sites (surveys conducted in 2003) (Golet *et al.* 2008, pp. 7–8). Older restoration sites (greater than 8 years) had a larger percentage (approximately 10 to 21 percent) of shrubs with exit holes (River Partners 2004, p. 3), likely due to the size class differential and observed preferences of the valley elderberry longhorn beetle for larger stem sizes.

A limited evaluation of (blue) elderberry and other riparian planting efforts at 30 mitigation sites over approximately 485 ac (196 ha) in the Central Valley (from Tehama County to Madera County) was undertaken in 2005 and 2006 to evaluate their success in establishing occupancy of the valley elderberry longhorn beetles (Holyoak and Koch-Munz 2008, entire). A spatial analysis of exit holes of all ages determined that the valley elderberry longhorn beetle was present at 16 of the 30 mitigation sites (53 percent) (Holyoak and Koch-Munz 2008, p. 447). As noted above, the abundance of the valley elderberry longhorn beetle per elderberry shrub and per stem in this study was also found to be positively related to the age of the mitigation site (Holyoak and Koch-Munz 2008, p. 449).

Holyoak *et al.* (2010, entire) reviewed publicly available mitigation monitoring reports (total of 60) to evaluate the success of mitigation sites in conserving the valley elderberry longhorn beetle, as measured by the survival of elderberry plants and how frequently the species colonized mitigation sites. Although this review noted that many expected mitigation reports were missing and thus highlighted the need for better data management practices, they found that the survival of both elderberry seedlings and transplants was highly variable and declined over time after planting (Holyoak *et al.* 2010, p. 48). Specifically, by year seven, 57 to 64 percent of transplanted elderberry survived, with 71 percent survival of seedlings (Holyoak *et al.* 2010, pp. 48–49). The study also found that the mitigation site (e.g., location, age) accounted for 25 percent of the variability in proportion of seedlings that survived, which suggested that the mitigation site choice can have an important effect on the ability to establish elderberry plants (Holyoak *et al.* 2010, p. 49).

Summary of Available Habitat

There has been a significant loss and degradation of riparian and other natural habitats in the presumed historical range of the valley elderberry longhorn beetle, much of which occurred prior to the listing of the species. In our proposed rule, we noted that we could not accurately determine the potential lost historical range of valley elderberry longhorn beetle habitat, and that coarse estimates have been attempted based on historical losses of riparian vegetation (77 FR 60241; October 2, 2012). Rather than infer lost elderberry habitat from estimates of lost riparian forests, we include here a summary of current elderberry habitat (based on 2009 imagery) mapped within the Central Valley, and assess how these mapped areas conform to the metapopulation structure of the valley elderberry longhorn beetle as defined by species' experts. This preliminary assessment indicates that elderberry habitat remains limited in extent within the Central Valley and may not support the spatial requirements of sustainable metapopulations presumed for the valley elderberry longhorn beetle. We note that the results of this assessment do not allow us to draw definitive conclusions on the valley elderberry longhorn beetle metapopulation given the limitations of these data.

Occupancy rates of valley elderberry longhorn beetle in riparian vegetation at some mitigation sites provide some indication that the species has been successful in colonizing these areas; however, monitoring is incomplete in both these areas and within restoration sites. Given the life-history traits defined for the valley elderberry longhorn beetle, as discussed in the Background section (i.e., habitat specialist, with limited mobility and a short adult life span, and low local numbers within a population structure), and the limited and fragmented habitat within its current range, we reaffirm our conclusion in the proposed rule that loss of habitat continues to remain a threat to the species. For this withdrawal, we reevaluated this threat in combination with the other threats

described below and determined threats to the species and its habitat have not been reduced such that delisting is appropriate.

Levee and Flood Protection Infrastructure

As described in our proposed rule, the Central Valley contains an extensive flood protection system, much of which predates the listing of the valley elderberry longhorn beetle (77 FR 60251; October 2, 2012). The (California) State Plan of Flood Control (SPFC) represents a portion of the Central Valley flood management system for which the State has special responsibilities, as described in the California Water Code Section 9110(f) (CDWR 2011, pp. 1–7). The SPFC Descriptive Document provides a detailed inventory and description of the levees (approximately 1,600 mi (2,575 km)), weirs, bypass channels, pumps, dams, and other structures included in the SPFC (CDWR 2010, entire). This flood protection system comprises federally and State-authorized projects for which the Central Valley Flood Protection Board or the California Department of Water Resources (CDWR) has provided assurances of cooperation to the Federal Government. Other flood protection facilities in the Sacramento River and San Joaquin River watersheds that are not covered by these assurances are not part of this State-Federal system (CDWR 2010, p. Guide–1). Thus, the SPFC represents a portion of the larger system that provides flood protection for the Central Valley (CDWR 2010, p. Guide–1).

As noted in the proposed rule, ongoing and future maintenance of these flood protection elements may result in losses of riparian vegetation and elderberry shrubs in addition to what has been historically lost; however, we stated that we had no estimate of the acreage of riparian vegetation (or elderberry shrubs within these areas) on the flood protection levees or lands that provide additional flood facilities (77 FR 60252; October 2, 2012).

We also described in our proposed rule new flood control system maintenance requirements being implemented by the U.S. Army Corps of Engineers (Corps), specifically, the 2009 *Guidelines for Landscape Planting and Vegetation Management at Levees, Floodwalls, Embankment Dams, and Appurtenant Structures* (Engineering Technical Letter (ETL) 1110–2–571) (Corps 2009, entire). In general, this ETL establishes a vegetation-free zone for the top of all levees and levee slopes, and 15 ft (4.5 m) on both the water and land sides of levees (Corps 2009, pp. 2–1—2–2, 6–1—6–2), which are practices that could eliminate occupied or unoccupied elderberry shrubs. On April 30, 2014, the Corps issued a new *Guidelines for Landscape Planting and Vegetation Management at Levees, Floodwalls, Embankment Dams, and Appurtenant Structures* (ETL) 1110–2–583), superseding the 2009 ETL (Corps 2014, entire). The 2014 guidelines maintains the previous ETL guidelines of a vegetation-free zone for the top of all levees and levee slopes, and 15 ft (4.5 m) on both the water and land sides of levees (Corps 2014, pp. 2–1—2–3, A2–A3).

At the time of our proposed rule, we indicated that the final policy guidance for the issuance of variances from the ETL vegetation standards for levees and floodwalls had not been released; therefore, we were unable to determine if this variance process would have an effect on levee segments containing woody vegetation (77 FR 60253; October 2, 2012). In this document, we provide an update to our discussion of this threat and include additional information relative to policies being implemented by CDWR to address levee vegetation management.

On February 17, 2012 (77 FR 9637), the Corps issued a notice for a Policy Guidance Letter (PGL) outlining the process for requesting this variance. The PGL applies to levees within the Corps' Levee Safety Program including those operated or maintained by the Corps, those that are federally authorized and locally operated and maintained, and those locally constructed and locally operated and maintained, but associated with the Corps' Rehabilitation and Inspection Program (77 FR 9637; February 17, 2012). However, in practice, the variance process has been described as time intensive and costly, even for just a few miles of levee (Qualley 2014, pers. comm.). Therefore, securing variances for the protection of elderberry shrubs or other riparian vegetation found on levees under the Corps' jurisdiction may not be a practical option at this time.

The CDWR's Central Valley Flood Protection Plan (CVFPP) includes a Levee Vegetation Management Strategy to address the vegetation-free guidelines set out within the Corps' ETL (CDWR 2011, pp. 4–13—4–16). The approach states that it ''reflects a flexible and adaptive management strategy that meets public safety goals, and protects and enhances sensitive habitats in the Central Valley'' (CDWR 2012a, p. 1). Specifically, new levees would be constructed and managed consistent with the new policy, however, those levees with ''legacy'' trees would be managed to allow existing large trees and other woody vegetation to continue their normal life cycle unless they were considered to be an unacceptable threat to levee integrity (CDWR 2012a, p. 1). The CVFPP strategy also allows for the retention of waterside vegetation below the vegetation management zone (generally beyond the 20-ft (6.1-m) slope length from the levee crown) (CDWR 2011, p. 4–14). This CVFPP strategy is likely to provide, at least in the short term, a more protective mechanism for riparian vegetation, including elderberry shrubs, than the variance process outlined in the PGL (which as stated above is intensive, costly, and likely not practical).

The potential for the Corps to issue variances under the ETL guidance along with CDWR's strategy to address levee vegetation management do not change CDWR's obligation to meet Federal and State law with regard to valley elderberry longhorn beetle habitat and riparian vegetation (see *Factor D*) (Qualley 2014, pers. comm.).

The Water Resources Reform and Development Act (WRRDA) of 2014 (Pub. L. 113–121) contains a vegetation management policy provision (Title III, Subtitle B–Levee Safety, Section 3013) that requires the Corps to conduct a comprehensive review of its policy guidelines (i.e., ETL 1110–2–583 and PGL for requesting variances, as noted above) for management of vegetation on levees in consultation with other applicable Federal agencies, representatives of State, regional, local, and tribal governments, appropriate nongovernmental organizations, and the public. This may allow for more appropriate regional variances from the single national ETL standard currently outlined in the Corps' vegetation management policies. The WRRDA 2014 vegetation management policy provision also includes a requirement for the Corps to solicit and consider the views of independent experts on the engineering, environmental, and institutional considerations underlying the guidelines.

In summary, as we concluded in our proposed rule (77 FR 60254; October 2, 2012) and reaffirm in this document, levee vegetation management actions are expected to continue to impact elderberry shrubs within the range of the valley elderberry longhorn beetle. Threats related to removal of elderberry vegetation may be reduced in the future in some locations within the Central Valley based on revisions to the Corps' vegetation management policies as outlined in the 2014 WRRDA. Long-

term impacts of levee vegetation management actions may be offset with implementation of mitigation (e.g., establishment of mitigation sites or restrictions on pruning); however, as described above and in our Background section, the success of mitigation sites in establishing occupancy of the valley elderberry longhorn beetle has not been fully evaluated, so its success is currently indeterminable.

Road and Trail Use and Their Maintenance

Road and trail use and their maintenance and the effects of dust related to these activities are identified in our Recovery Plan and in Biological Opinions as threats to the quality of valley elderberry longhorn beetle habitat (Service 1984, p. 41; Service 2002, p. 3). As described in our proposed rule, machinery used in road maintenance activities can crush adjacent elderberry shrubs, or cause indirect stress to plants (e.g., leaf shading, blocked stomata) through the raising of dust (77 FR 60254; October 2, 2012). Similarly, dust can originate from access roads and recreational trails within riparian corridors where elderberry habitat is often found (Talley *et al.* 2006b, p. 648). Dust could also affect the survival and behavior of the valley elderberry longhorn beetle by smothering adults or larvae, disrupting chemical cues important for mating and detecting host plants, or creating unpalatable leaves or flowers (Talley *et al.* 2006b, p. 649).

As noted in our proposed rule (77 FR 60254, October 2, 2012), a rangewide study on the effects of dust to the valley elderberry longhorn beetle or its host plant has not been conducted. To better address this topic, we provide a summary of a study that evaluated dust effects that was not described in the proposed rule.

A study to test the effects of dust from dirt trails relative to paved trails was conducted along the American River Parkway in 2003 (Talley *et al.* 2006b, entire). The study found similar dust settlement rates and leaf dust accumulation along dirt and paved trails, but when data from all sites were pooled, elderberry plants tended to be more stressed (e.g., shorter plants, lower percent leaf water content, thicker leaves, higher percentage of dead stems) near dirt trails than paved surfaces (Talley *et al.* 2006b, p. 651), a result the authors attributed to factors other than dust (Talley *et al.* 2006b, p. 653). Talley *et al.* (2006b, p. 653) concluded the difference in elderberry characteristics near dirt trails was likely due to reduced water availability (less surface runoff than near paved surfaces) and less soil water (further distances from water sources). The authors also suggested that the effects of dust may be more significant over larger spatial scales given the variability of dust levels among and between the sites studied (Talley *et al.* 2006b, p. 653).

The study also looked at the relationships between the presence or absence of valley elderberry longhorn beetle and distances from dirt and paved surfaces. The authors found that the presence of new and 1-year-old valley elderberry longhorn beetle exit holes was independent of both trail location and surface type (Talley *et al.* 2006b, p. 654). Further, the study noted that valley elderberry longhorn beetle exit holes were found at all sites despite higher dust levels at some study sites, and concluded that levels of dust from dirt trails, paved trails, and access roads did not have a negative association with the presence of the species, despite the variability in condition of elderberry plants (Talley *et al.* 2006b, pp. 654–655).

In another study, Talley and Holyoak (2009, entire) evaluated how the proximity to highways and highway construction activities affects the occupancy of the valley elderberry longhorn beetle and condition of elderberry shrubs. Field surveys from 2006 to 2008 were used to evaluate the effects of particulates, pollutants, and noise along portions of several highways in the northern Central Valley of California (Talley and Holyoak 2009, pp. 2–3). The study included a laboratory analysis of effects to elderberry leaves (i.e., dust levels, leaf area, carbon to nitrogen ratios, and exhaust elements) and an evaluation of statistical relationships between the distances from either a construction site or highway edge and both dust accumulation rates and elderberry characteristics (Talley and Holyoak 2009, p. 4). The study found no effect of the proximity of highways on dust accumulations and few effects related to potentially toxic elements in elderberry leaves (Talley and Holyoak 2009, p. 9). Noise levels were found to decrease with distance from highways; however, noise levels were similar at sites located immediately adjacent to highways, despite differences in traffic volume (Talley and Holyoak 2009, p. 6).

The researchers determined that the type of habitat and availability of elderberry shrubs were the primary factors influencing the likelihood of the presence of either recent or total (recent and old) valley elderberry longhorn beetle exit holes; no relationships were observed between distance from highways and distribution of exit holes (Talley and Holyoak 2009, p. 6). However, the *amount* of available elderberry habitat was found to be significantly lower along roadsides, and elderberry stem densities were smaller in sites immediately adjacent to highways when compared to riparian or control sites, or compared to remnant riparian and non-riparian scrub areas (Talley and Holyoak 2009, pp. 8–9). This was attributed to right-of-way management activities (e.g., mowing, pruning) rather than a direct stress effect of being located adjacent to highways (Talley and Holyoak 2009, p. 9).

These findings reinforce results of other studies in which a range of both elderberry quality and quantity characteristics have been found to influence the presence and abundance of the valley elderberry longhorn beetle (Talley and Holyoak 2009, p. 8; see *Habitat* discussion above in Background section). The authors of the highway study noted the need for additional larger scale studies as well as controlled experimental studies to test specific effects on valley elderberry longhorn beetle survival (e.g., an evaluation of whether roadside patches act as population sinks that attract individuals into areas that are not able to sustain populations (Pulliam 1988, pp. 658–660)) (Talley and Holyoak 2009, p. 11).

In summary, threats related to road and trail uses, and the effects of dust, do not represent significant impacts to the valley elderberry longhorn beetle. However, removal of elderberry shrubs along the roadways (for right-of-way management activities) is a more important factor and is discussed in more detail below (see discussion under *Pruning*).

Pruning

In our proposed rule, we briefly discussed pruning as part of a *Factor E* threat, termed Human Use (77 FR 60263; October 2, 2012). Because we consider pruning activities to be a potential threat related to destruction or modification of habitat, we discuss pruning as a separate *Factor A* threat and include results from a study that was not discussed in the proposed rule. Pruning or trimming of elderberry shrubs for highway or trail maintenance, or other purposes, is a common activity within the presumed extant occurrences of the valley elderberry longhorn beetle. Talley and Holyoak (2009, entire) conducted an experimental study to measure the effects of pruning of elderberry shrubs on the valley elderberry longhorn beetle and its host plant. Two experimental techniques (pruning and topping) were used within elderberry habitat found along portions

of the American River Parkway (Talley and Holyoak 2009, p. 29). The pruning experiment was designed to mimic the trimming (i.e., 50 percent of all branches 1 in (2.5 cm) or less in diameter) of elderberry shrubs that overhang roads and trails, while the topping experiment was designed to evaluate the removal of the top 3.28 ft (1 m) of a shrub or group of shrubs that often occurs beneath power lines and overhead obstructions (Talley and Holyoak 2009, p. 30). The experiments used measures of elderberry survival, growth, and condition as well as the presence and abundance of new valley elderberry longhorn beetle exit holes (Talley and Holyoak 2009, p. 30). The study found no ''short-term'' (2–4 weeks) changes in the survival, growth, or condition in response to the two experiments (Talley and Holyoak 2009, p. 32).

In addition, laboratory analyses to evaluate nutrient and defense chemical content indicated that neither experimental treatment had detectable effects on elderberry nutrition (Talley and Holyoak 2009, p. 32). The study also found that neither colonization nor loss of valley elderberry longhorn beetles from elderberry shrubs was affected by pruning or topping experiments; that is, the declines and increases in occupied shrubs was independent of trimming, and, if anything, was likely related to the initial presence of the species (Talley and Holyoak 2009, p. 31). The only negative effect reported from this experimental study was a temporary loss of habitat from the removal of stems, but these stems regrew, on average, within 3 to 4 years (Talley and Holyoak 2009, p. 33).

Based on the potential impacts from pruning described in the proposed rule, the pruning of elderberry shrubs, when conducted in accordance with the findings of experimental studies presented by Talley and Holyoak (2009, pp. 29–33), will likely have temporary impacts to the valley elderberry longhorn beetle. Additional experimental studies of the effects of pruning (e.g., at mitigation or restoration sites) would provide a more complete evaluation of the magnitude of this threat to the species.

Effects Related to Climate Change

In our proposed rule, we discussed the effects of climate change under *Factors A* and *E* (77 FR 60254–60255, 60262; October 2, 2012). We stated that we did not have information that would allow us to make meaningful predictions of the effects of changes in temperature and precipitation patterns relative to potential changes in elderberry habitat (77 FR 60255; October 2, 2012). We concluded in *Factor E* that climate change was not a significant factor affecting the persistence of the valley elderberry longhorn beetle (77 FR 60262; October 2, 2012).

In this withdrawal, we discuss threats related to the effects of climate change in *Factors A* and *E.* In *Factor A,* we provide a more robust discussion of both observed and predicted effects to hydrological patterns related to climate change effects for the Central Valley based on state-wide and regional probabilistic estimates of temperature and precipitation changes for California (using downscaled data from both global circulation models and nested regional climate models), and also present results of climate assessment tools to illustrate these predicted effects. In *Factor E,* we discuss the effects of climate change related to the survivorship and reproductive success of the valley elderberry longhorn beetle.

Our analyses under the Act include consideration of observed or likely environmental changes resulting from ongoing and projected changes in climate. As defined by the Intergovernmental Panel on Climate Change (IPCC), the term ''climate'' refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2013a, p. 1450). The term ''climate change'' thus refers to a change in the mean or the variability of relevant properties, which persists for an extended period, typically decades or longer, due to natural conditions (e.g., solar cycles) or human-caused changes in the composition of atmosphere or in land use (IPCC 2013a, p. 1450).

Scientific measurements spanning several decades demonstrate that changes in climate are occurring. In particular, warming of the climate system is unequivocal and many of the observed changes in the last 60 years are unprecedented over decades to millennia (IPCC 2013b, p. 4). The current rate of climate change may be as fast as any extended warming period over the past 65 million years and is projected to accelerate in the next 30 to 80 years (National Research Council 2013, p. 5). Thus, rapid climate change is adding to other sources of extinction pressures, such as land use and invasive species, which will likely place extinction rates in this era among just a handful of the severe biodiversity crises observed in Earth's geological record (American Association for the Advancement of Sciences (AAAS) 2014, p. 17).

Examples of various other observed and projected changes in climate and associated effects and risks, and the bases for them, are provided for global and regional scales in recent reports issued by the IPCC (2013c, 2014), and similar types of information for the United States and regions within it can be found in the National Climate Assessment (Melillo *et al.* 2014, entire).

Results of scientific analyses presented by the IPCC show that most of the observed increase in global average temperature since the mid-20th century cannot be explained by natural variability in climate and is ''extremely likely'' (defined by the IPCC as 95 to 100 percent likelihood) due to the observed increase in greenhouse gas (GHG) concentrations in the atmosphere as a result of human activities, particularly carbon dioxide emissions from fossil fuel use (IPCC 2013b, p. 17 and related citations).

Scientists use a variety of climate models, which include consideration of natural processes and variability, as well as various scenarios of potential levels and timing of GHG emissions, to evaluate the causes of changes already observed and to project future changes in temperature and other climate conditions. Model results yield very similar projections of average global warming until about 2030, and thereafter the magnitude and rate of warming vary through the end of the Century depending on the assumptions about population levels, emissions of GHGs, and other factors that influence climate change. Thus, absent extremely rapid stabilization of GHGs at a global level, there is strong scientific support for projections that warming will continue through the 21st century, and that the magnitude and rate of change will be influenced substantially by human actions regarding GHG emissions (IPCC 2013b, 2014; entire).

Global climate projections are informative, and, in some cases, the only or the best scientific information available for us to use. However, projected changes in climate and related impacts can vary substantially across and within different regions of the world (e.g., IPCC 2013c, 2014; entire) and within the United States (Melillo *et al.* 2014; entire). Therefore, we use ''downscaled'' projections when they are available and have been developed through appropriate scientific procedures, because such projections provide higher resolution information that is more relevant to spatial scales used for analyses of a given species (see Glick *et al.* 2011, pp. 58–61, for a discussion of downscaling).

Various changes in climate may have direct or indirect effects on species. These may be positive, neutral, or negative, and they may change over time, depending on the species and other relevant considerations, such as interactions of climate with other variables such as habitat fragmentation (for examples, see Franco *et al.* 2006; Forister *et al.* 2010; Galbraith *et al.* 2010; Chen *et al.* 2011; Bertelsmeier *et al.* 2013, entire). In addition to considering individual species, scientists are evaluating potential climate change-related impacts to, and responses of, ecological systems, habitat conditions, and groups of species (e.g., Deutsch *et al.* 2008; Berg *et al.* 2010; Euskirchen *et al.* 2009; McKechnie and Wolf 2010; Sinervo *et al.* 2010; Beaumont *et al.* 2011; McKelvey *et al.* 2011; Rogers and Schindler 2011; Bellard *et al.* 2012).

As an example, Hickling *et al.* (2006, entire) analyzed the changes in distributions of groups of vertebrates and invertebrates, including longhorn beetles, in Great Britain to determine whether range shifts (both in latitude and elevation) have occurred over an approximately 25-year time span. For 11 species of longhorn beetles, the study found that, for grid squares (6.2 mi (10 km)) considered to be well-recorded (i.e., those that had at least 10 percent of that group recorded present in both study time periods), there was an average shift northward of 27 mi (43 km) and an average elevational shift of 86 ft (26 m) from 1960–1970 to 1985–1995 (Hickling *et al.* 2006, pp. 451–453). The authors stressed the importance of recognizing that observed distribution shifts due to climate change are occurring concurrently with changes in land use and other environmental factors (Hickling *et al.* 2006, p. 454).

Effects from climate change in California, with its watersheds dominated by snowmelt hydrology, are expected to have important impacts to hydrological processes that will cascade into human and ecological systems at many scales (Kiparsky *et al.* 2014, p. 1). Likely effects include a reduction in snowpack and stream flow as well as changes in stream flow patterns, all of which present significant challenges in a State in which water, energy, agricultural, and ecological systems are linked together (Barnett *et al.* 2008, p. 1082). These effects have recently been summarized by hydrologic region in the California Department of Water Resources Public Review Draft of the *California Water Plan* (CWP) *Update 2013* (CDWR 2013). The CWP describes future actions that are intended to move California toward a more sustainable management of water resources and more resilient water management systems, and identifies objectives to support environmental stewardship (CDWR 2013, p. ES–1). Two hydrologic regions—the Sacramento River and the San Joaquin River—defined in the CWP encompass nearly all of our presumed extant occurrences (Figure 2) of the valley elderberry longhorn beetle (Fresno County not included). A summary of climate change effects projected for these two regions is described in the paragraphs below.

Regional temperature observations for assessing climate change are often used as an indicator of how climate is changing, and the Western Regional Climate Center (WRCC) has defined 11 climate regions for evaluating various climate trends in California (Abatzoglou *et al.* 2009, p. 1535). These climate regions have different boundaries for California than the CWP hydrologic regions, but are considered to be more representative of California's diverse climatic regimes than standard climate divisions (Pierce *et al.* 2013, p. 843). The relevant WRCC climate regions for the distribution of the valley elderberry longhorn beetle are the Sacramento–Delta and the San Joaquin Valley regions.

Two indicators of temperature, the increase in mean temperature and the increase in maximum temperature, are important for evaluating trends in climate change in California. For the Sacramento–Delta climate region, linear trends (evaluated over a 100-year time period) indicate an increase in mean temperatures (Jan–Dec) of approximately 1.96 °F (1.09 °C) since 1895, and 3.0 °F (1.67 °C) since 1949 (WRCC 2014a). For the San Joaquin Valley climate region, the 100-year trend in mean temperature (Jan–Dec) indicates an increase of approximately 1.4 °F (0.78 °C) since 1895, and 2.62 °F (1.45 °C) since 1949 (WRCC 2014c). Similarly, the maximum temperature 100-year trend for the Sacramento–Delta region shows an increase of about 1.42 °F (0.8 °C) since 1895, and 1.92 °F (1.07 °C) since 1949 (WRCC 2014b). The maximum temperature 100-year trend for the San Joaquin Valley climate region shows an increase of about 0.38 °F (0.21 °C) since 1895, and 1.09 °F (0.60 °C) since 1949 (WRCC 2014d). It is logical to assume the rate of temperature increase for both regions is higher for the second time period (since 1949) than for the first time period (since 1895) due to the increased use of fossil fuels in the 20th century.

Although these observed trends provide information relative to how climate has changed in the past, climate science models are used to simulate and develop future climate projections (CDWR 2013, p. SR–76). Pierce *et al.* (2013, entire) presented both state-wide and regional probabilistic estimates of temperature and precipitation changes for California (by the 2060s) using downscaled data from 16 global circulation models and 3 nested regional climate models. The study looked at a historical (1985–1994) and a future (2060–2069) time period using the IPCC Special Report on Emission Scenarios A2 (Pierce *et al.* 2013, p. 841), which is an IPCC-defined scenario used for the IPCC's Third and Fourth Assessment reports, and is based on a global population growth scenario and economic conditions that result in a relatively high level of atmospheric GHGs by 2100 (IPCC 2000, pp. 4–5; see Stocker *et al.* 2013, pp. 60–68, and Walsh *et al.* 2014, pp. 25–28, for discussions and comparisons of the prior and current IPCC approaches and outcomes). Importantly, the projections included daily distributions and natural internal climate variability (Pierce *et al.* 2013, pp. 852–853).

Simulations using these downscaling methods project an increase in yearly temperature for the Sacramento–Delta climate region ranging from 1.9 °C (3.42 °F) to 2.8 °C (5.04 °F) by the 2060s time period (Pierce *et al.* 2013, p. 844), compared to 1985–1994. For the San Joaquin Valley climate region, the simulations show an increase in average yearly temperature ranging from 3.6 °F (2.0 °C) to 5.04 °F (2.8 °C) by the 2060s (Pierce *et al.* 2013, p. 844). The simulations indicated an upper temperature increase of 4.14 °F (2.3 °C) from 1985–1994 to 2060–2069 (averaged across models) for both the Sacramento–Delta and San Joaquin Valley regions (Pierce *et al.* 2013, p. 842).

We also reviewed projections from Cal-Adapt, a web-based, climate adaptation planning tool that synthesizes existing downscaled climate change scenarios and climate impact research, and presents the predictions in an interactive, graphical layout (California Energy Commission 2011). Projections of changes in annual averages in temperature for the Central Valley using the Cal-Adapt Climate tool indicate an increase in temperature ranging from about 3.4–3.8 °F (2.0–2.1 °C) under the IPCC low emissions scenario (B1), to an increase in temperature ranging from 6.0–6.6 °F (3.4–3.7 °C) under the IPCC higher emissions scenario (A2) (Cal-Adapt 2014a). Both of these scenarios represent comparisons between the baseline period (1961–1990) and the end-of-century period (2070–2090). The

Cal-Adapt projection of an increase of about 2.0 °C (3.4 °F) in annual average temperature is very similar to the lower end of the range of yearly temperature simulations presented by Pierce *et al.* (2013, entire) for both regions with the A2 emissions scenario.

Precipitation patterns for California are quite variable year to year. Based on paleoclimatic data (e.g., tree-ring reconstructions of streamflow and precipitation), hydrologic conditions in California (and the west) are naturally widely varying, and include a pattern of recurring and extended droughts (CDWR 2008, p. 3). However, the 100-year trends for the Sacramento–Delta and San Joaquin Valley regions indicate a large change in the rate of increase (or, in some cases, a decrease) in precipitation over the winter months (December–February), which is generally when the Central Valley receives the bulk of its rainfall for the year. For the Sacramento–Delta region, rainfall data from WRCC show a 100-year linear trend in winter of an increase in precipitation of 2.26 in (5.74 cm) from 1895 to present (February 2014), but an increase of only 0.53 in (1.35 cm) from 1975 to present (WRCC 2014e). Similar precipitation patterns are found in the San Joaquin Valley region; that is, in winter months, there is an increase in precipitation of 0.52 in (1.35 cm) for the 100-year trend beginning in 1895 to present, but a 1.05 in (2.67 cm) decrease for the 100-year trend beginning in 1975 to present (WRCC 2014f). The 100-year trends beginning in 1975 and ending at present (February 2014) for both regions show great variability, which is likely due, in part, to the shorter time period being evaluated. However, observed changes in hydrologic patterns (i.e., low-frequency changes in the hydrological cycle such as river flow, temperature, and snowpack) over the western United States from 1950 to 1999 have been found to be partially attributed to the effects of climate change (Barnett *et al.* 2008, p. 1080).

Downscaled probabilistic climate models were also used by Pierce *et al.* (2013, pp. 848–852) to evaluate changes in precipitation patterns for California resulting from the effects of climate change. Annual averages show different patterns in precipitation changes than those by season; that is, model results indicate increases in winter (December–February) precipitation for the Sacramento–Delta and San Joaquin Valley climate regions of 5 percent and 1 percent, respectively (averaged across all models, comparing the mean over the 1985–1994 time period to the mean over 2060–2069) (Pierce *et al.* 2013, p. 849). However, these wetter conditions in winter are largely offset by drier conditions predicted for the remainder of the year (e.g., 4 to 20 percent decrease in precipitation for the Sacramento–Delta region) (Pierce *et al.* 2013, p. 849). Model results for the yearly change in precipitation indicate a 3 percent decrease in precipitation for the Sacramento–Delta, and a 6 percent decrease for the San Joaquin Valley region (averaged across all models, using mean changes over the 1985–1994 time period compared to 2060–2069) (Pierce *et al.* 2013, pp. 848–849).

Changing precipitation patterns and resultant changes in hydrologic conditions are already being observed for California. In the last century, the average early spring snowpack in the Sierra Nevada decreased by about 10 percent, which represents a loss of 1.5 million acre-feet of snowpack storage (CDWR 2008, p. 3). We reviewed Cal-Adapt projections for snowpack for the western Sierra Nevada region of California, which supplies water to many of the river systems within the eastern portion of the Central Valley. Projected changes in April snow water equivalence across the western Sierra Nevada region (eastern edge of the Central Valley) indicate about an 80 percent reduction in snow moisture under a low emissions scenario (B1); and about a 90 percent reduction in snow moisture under a high emissions scenario (A2), between a baseline time period (1961 to 1990) and an end-of-century period (2070 to 2090) (Cal-Adapt 2014b).

A downscaled simulation of the potential impacts of climate warming on hydrology and water supply operations was developed expressly for the Tuolumne and Merced River basins in California (Kiparsky *et al.* 2014, entire), which includes the southeastern portion of the valley elderberry longhorn beetle's current range. Although the simulation model (based on a Water Evaluation and Planning model) was developed primarily to evaluate water supply concerns for urban, agricultural, and environmental uses, the results are important as they relate to predicted effects to streamflow and timing of hydrological events in this portion of the Central Valley. In response to climate warming scenarios (2 °C, 4 °C, and 6 °C increases), the simulation indicated a shift in timing and magnitude of seasonal flows for these two basins; that is, earlier snowmelt and a subsequent 3-month earlier shift in the water year for peak flows (Kiparsky *et al.* 2014, p. 10).

Finally, Huang *et al.* (2012, entire) conducted a hydrologic and sensitivity analysis specifically for a portion of the Sacramento River climate region, the Upper Feather River watershed, which represents another snow-dominated watershed in California. Using six global climate models (GCMs) with two IPCC emissions scenarios (A2 and B1), the results of a model based on a Precipitation–Runoff Modeling System indicate significant changes in streamflow timing and increases in both frequency and magnitude of extreme flows (Huang *et al.* 2012, p. 138). Although the authors stress the uncertainty in the model results, the simulation found, for example, that with a 4 °C (7.2 °F) warming, there was an 11 percent increase in the 100-year annual maximum daily flow and a 35 percent decrease in the 10-year minimum 7-day flow (i.e., drought condition) (Huang *et al.* 2012, p. 147). The increase in annual peak flow was attributed to the combined effect of more rainfall and less snowmelt with climate warming during winter months (January–March) (Huang *et al.* 2012, p. 147).

As described above, the survival and reproduction of the valley elderberry longhorn beetle, is dependent on two elderberry taxa, which in turn are dependent upon ecological processes supported by climatic conditions (precipitation and temperature) and other environmental factors (e.g., elevation). Effects from climate change on the riparian ecosystems upon which the valley elderberry longhorn beetle depends are expected to include an increase in the intensity of both wet and dry periods due to changes in hydrologic conditions within those California watersheds driven by snowmelt, which is likely to alter streamflow patterns for the riverine systems that occupy the Sacramento–Delta and San Joaquin Valley regions (CDWR 2013, pp. SJR–73–SJR–75, SR–76–SR–78 and references cited therein). Altered flow regimes (both volume and timing) will influence the mechanisms that support riparian plant communities, including elderberry habitat. Shifts in location and species composition of riparian vegetation can occur due to changes in groundwater and surface water levels (Kløve *et al.* 2013, p. 3).

The effects of climate change are also expected to result in increased temperatures for the Central Valley, and, when combined with current trends and future changes in hydrologic patterns (e.g., timing of snowmelt and peak flows), will result in an increase in the frequency and duration of drought conditions in California. Hanson *et al.* (2012, entire) presented a supply and demand modeling framework to

simulate and analyze potential climate change effects on conjunctive uses of water resources within California's Central Valley from 2000–2100. This simulation and analysis (linking downscaled GCM simulation results, the A2 or rapidly increasing GHG emissions scenario, with regional hydrologic models) includes the demands, uses, and movements of water for irrigation and natural vegetation, runoff from local mountains, and the responses of supply from groundwater and streamflow (Hanson *et al.* 2012, p. 3).

Results from the simulation include intermittent climatic droughts from 2000–2050 and sustained droughts in 2050–2100 due to reduced precipitation (Hanson *et al.* 2012, p. 11). The drought events were found to have significant effects on surface water and groundwater deliveries and are likely to produce secondary effects, including a reduction in water for riparian vegetation and surface water deliveries (Hanson *et al.* 2012, pp. 11, 19). The simulated changes also produce large declines in flows draining into the Central Valley from the surrounding mountain watersheds, with a decline of over 45 percent of potential total basin discharge by 2100 (Hanson *et al.* 2012, p. 11). Reductions in streamflow diversions in this scenario are, therefore, expected for riparian vegetation and irrigation uses, including the Tuolumne River, the San Joaquin Basin, and Bear River in the Sacramento Valley Tulare Basin (Hanson *et al.* 2012, p. 12). Additionally, the reduction in surface water diversions increases the demand for groundwater pumping, negatively affecting groundwater levels (Hanson *et al.* 2012, p. 12) and further reducing water levels within riparian systems, and likely causing significant land subsidence along the southeastern San Joaquin and Sacramento Valleys (Hanson *et al.* 2012, p. 20).

Other predictions of riparian vegetation changes related to climate-driven hydrological changes have found reductions in species-rich riparian forests (boreal river system in northern Sweden) (Ström *et al.* 2012, pp. 54–56) or shifts in successional phases of riparian vegetation (Mediterranean rivers) (Rivaes *et al.* 2013, entire).

Predicted effects on both surface and groundwater availability are likely to negatively affect the regeneration and sustainability of riparian vegetation, including elderberry shrubs, though we are unaware of any comprehensive evaluation of specific responses of this host plant. The predicted changes in hydrologic conditions are also likely to favor the spread of invasive plants.

In summary, the best available data indicate that climate change effects will add to the destruction and modification of habitat for the valley elderberry longhorn beetle both currently and in the future. Although, we are unable to assess in specific quantitative terms the magnitude of the impact due to the uncertainty relative to climate change effects that will occur and the degree to which hydrology and water diversions will be affected, the best available data indicate long-term climate change effects will continue to have an overall negative effect on the available habitat throughout the range of the valley elderberry longhorn beetle.

Invasive Plants

Competition for resources between elderberry plants and invasive plants and effects to elderberry habitat from invasive plants were not included as potential threats in our 2006 5-year review (Service 2006a, entire) or in our proposed rule, though we concluded in the proposed rule that these threats were not well-studied and had not been identified as widespread threats to the species or its habitat (77 FR 60250, October 2, 2012). However, the natural plant communities of the Central Valley have been altered by removal of native trees, as described above, and by the rapid spread of invasive plants following the influx of immigrants and livestock into the area during the gold rush era (Mack 1989, p. 165). As an example, the replacement of native plants, particularly within grassland communities, by nonnative annual grasses was nearly complete by 1880 (Mack 1989, p. 166). Based on comments received from peer reviewers and additional information not assessed in the proposed rule, we include here an updated and more detailed discussion of effects to the valley elderberry longhorn beetle from invasive plants to better assess this potential threat.

The Central Valley, as with other parts of California, continues to experience new invasions (e.g., California Invasive Plant Council Symposium 2003, entire). The California Invasive Plant Council (Cal–IPC) has developed an interactive Web site (CalWeedMapper 2014) that illustrates invasive plant distributions based on occurrence data and suitable range modeling using climate data. CalWeedMapper was designed as a strategic tool to identify management opportunities for control and eradication of invasive plants. County and regional species maps and associated reports can be created for individual invasive species that describe their abundance, trends, and spatial distribution. Although the information may contain errors (i.e., misidentifications or imprecise location information), the maps provide useful information on current distributions and trends of invasive plants in California.

Talley (2005, p. 18) observed a short-term positive effect to the valley elderberry longhorn beetle from the invasive black locust (*Robinia pseudoacacia*) (a nitrogen-fixing tree); however, this plant has the potential to displace native plants in riparian communities (Hunter 2000, p. 275), which can negatively affect the long-term survival of elderberry plants (Talley 2005, p. 33). Using CalWeedMapper, we were able to create a regional (Central Valley) report and map for black locust (Cal–IPC 2014b). Within the presumed extant occurrences of the valley elderberry longhorn beetle, there is a spreading trend for this invasive plant in Butte County (Cal–IPC 2014b). This invasive plant is also considered to be ''medium'' in abundance in parts of Sacramento County and is ''low'' in several other areas within the northern portion of the Central Valley where the valley elderberry longhorn beetle has been observed (Cal–IPC 2014a). Black locust is also illustrated as ''spreading'' in several areas of California outside of the Central Valley (Cal–IPC 2014b).

The spread of invasive plant species is expected to become more severe in association with future changes in climate, such as drought (e.g., Bradley *et al.* 2010, entire). For example, the black locust is described as being drought tolerant, and as propagating easily from seeds and having seeds that spread easily (Benesperi *et al.* 2012, p. 3556; see also Temperate Climate Permaculture 2014). In studies elsewhere, forest plant diversity has been shown to decrease in areas where the black locust has spread Benesperi *et al.* 2012, pp. 3560–3561), and a recent experimental study concluded that its nitrogen-fixing ability appears to give this species a competitive advantage under drought conditions (Wurzburger and Miniat 2013, pp. 1120–1125). A commercial horticulture Web site describes black locust as a species that is suitable for use in times of climate change due to its adaptability to heat and water stress (SilvaSelect 2014). As noted above, the CalWeedMapper provides maps with general information on current distributions and trends of invasive plants in California; the maps do not, however, include projections of future distribution in relation to climate change projections. Based on the available scientific information about the black locust, we expect that its range

will continue to expand in response to increased temperatures and drought projected for the range of the valley elderberry longhorn beetle (see above for climate change projections).

Black walnut (*Juglans hindsii*), an invasive plant found on riparian floodplains along the Sacramento River, is strongly associated with elderberry and may also be invading formerly open elderberry habitat (Vaghti *et al.* 2009, pp. 33–35). Black walnut is also considered a nonnative woody plant in the Sacramento Valley, having become established in riparian zones since its introduction into the valley in the latter 19th and early 20th centuries as an ornamental plant or as root stock for English walnut (*Juglans regia*) (Hunter *et al.* 2003, p. 41). As such, black walnut has been described as the most widespread nonnative in the Sacramento Valley, based on 47 plots surveyed along 16 streams in the valley and adjacent foothills in 2003 (Hunter *et al.* 2003, pp. 39–46), including many areas where the valley elderberry longhorn beetle has been observed (e.g., Feather River, American River, Butte Creek, Big Chico Creek).

Chinese tallowtree (*Triadica sebifera,* formerly *Sapium sebiferum*) is a deciduous tree native to east Asia that has become a major invasive species in the southeastern United States and, since its introduction as a shade tree in urban areas of California, has now begun to spread in riparian areas of California (Cal–IPC 2014c). This invasive plant has been difficult to eradicate once established (Bower *et al.* 2009, p. 393). Bower *et al.* (2009, entire) evaluated the invasion potential of Chinese tallowtree in California's Central Valley. This study found that this invasive species can colonize areas that are immediately adjacent to water sources; though drought-intolerant seedlings appear to restrict colonization in drier (higher elevation) areas (Bower *et al.* 2009, pp. 387, 393). CalWeedMapper illustrates a spreading trend of Chinese tallowtree for areas within Butte, Yuba, Sutter, and Sacramento Counties (Cal–IPC 2014c). Bower *et al.* (2009, p. 387) reported naturalizing populations of this invasive species along the Sacramento, San Joaquin, and American Rivers.

Hunter *et al.* (2003, pp. 42, 45) also described a patchy distribution of a large number of other woody nonnative plants (i.e., not including black walnut) in these riparian zones, but with relatively low abundance (less than 1 to 15 percent mean cover). However, the study indicated that some species (e.g., tree-of-heaven (*Ailanthus altissima*), Chinese tallowtree, scarlet wisteria (*Sesbania punicea*), tamarisk (*Tamarix* sp.)) are likely expanding their ranges and increasing in abundance in the Central Valley (Hunter *et al.* 2003, p. 42). In addition, this study also noted that the nonnative Himalayan blackberry (*Rubus discolor*) was the typical dominant plant in the well-developed shrub layer of the riparian zones surveyed (34 percent mean cover, where present; observed in 70 percent of the plots surveyed) (Hunter *et al.* 2003, p. 42). Finally, Golet *et al.* (2013, pp. 14, 17) found that the areal extent of several nonnative, invasive plants had increased in riparian zones along one section of the Sacramento River (Red Bluff to Colusa) from 1999 to 2007, including an increase in black walnut within restoration and remnant riparian sites.

Vegetation type conversion or other shifts in native plant communities due to invasive plants represents environmental changes that are likely to have a negative effect on the metapopulation dynamics of the valley elderberry longhorn beetle. Although there are reported trends of expansions of invasive and nonnative plants (e.g., black locust, black walnut) within the presumed extant occurrences of the valley elderberry longhorn beetle, we are not aware of comprehensive studies evaluating their range-wide effects on occupied or suitable habitat of the valley elderberry longhorn beetle.

In summary, at this time, the best available scientific and commercial information indicates potential impacts from invasive nonnative plants (i.e., competition of resources to the host plant) to the valley elderberry longhorn beetle and its habitat. Although additional studies are needed to better characterize the magnitude or impact of this threat to the species both in localized areas as well as across the species' range, the best available data indicates that without control of invasive nonnative plants, their spread is anticipated to increase and will result in further degradation of habitat and loss of host plants for the valley elderberry longhorn beetle.

Summary of Factor A

We identified in the proposed rule and reaffirm in this document that there has been significant loss and degradation of riparian and other natural habitats in the presumed historical range of the valley elderberry longhorn beetle, much of which occurred prior to the listing of the species. Based on the best available information, occupancy estimates of the valley elderberry longhorn beetle range between 16 and 21 percent within its historical range, within fragmented riparian vegetation (see Background section). Our preliminary analysis of mapped elderberry habitat presented in this document indicates that limited areas of elderberry plant communities remain in the Central Valley and their spatial arrangement may not support valley elderberry longhorn beetles' presumed metapopulation structure. Restoration and mitigation sites have contributed to available habitat, with one evaluation indicating a long-term mitigation trend for survival of elderberry plants of 57 to 71 percent and an occupancy rate of the valley elderberry longhorn beetle (based on observations of exit holes only) of 43 to 53 percent (see also discussion in Background section). However, comprehensive surveys have not been completed at all conservation areas, including restoration sites and preserves. Colonization rates, where measured, are relatively low at many of these sites. Our new assessment of habitat (occupied or unoccupied) presented in this document, when considered in the context of the limited occurrence records (based on our reevaluation of occurrence information presented in the proposed rule and described in the Background section above), confirms a rare, patchy distribution pattern of the valley elderberry longhorn beetle across its presumed historical range in the Central Valley.

Threats to the valley elderberry longhorn beetle's host plant due to effects related to levee vegetation management are likely to continue given the Corps levee vegetation management guidance and the difficulty in obtaining a variance for this policy. A levee vegetation strategy defined by CDWR for some facilities in the Central Valley may, in the short term, result in fewer impacts to elderberry shrubs found on flood control levees. However, we are uncertain if this strategy will be effective in providing protection to elderberry shrubs found within these areas of the Central Valley.

Impacts related to road and trail uses, and the effects of dust from roads, trails, or highways adjacent to host plants or beetles are not considered to be threats to the species or its habitat, but loss of habitat at locations adjacent to roads, trails, and associated infrastructure remains a threat. Pruning activities, if conducted appropriately, can result in a temporary loss of the host plant of the valley elderberry longhorn beetle and monitoring of these activities is necessary to ensure that elderberry characteristics important to the life history of the beetle are preserved.

Invasive nonnative plants may be impacting the species through modification or loss of habitat due to competition for space and resources with its host plant, but additional information is needed to evaluate the magnitude of this threat.

Climate models developed for evaluating climate change effects in California, including the Central Valley, indicate increased temperatures and significant changes to hydrologic conditions as a result of the effects of climate change. These changes are expected to affect riparian systems and other habitats where the presence of the valley elderberry longhorn beetle has been observed in the Central Valley, and will be compounded by water supply needs for urban and agricultural uses. Drought conditions are also likely to become more common in California and will affect the survival of elderberry. At this time, the best available data indicate that climate change effects include the threatened destruction or modification of habitat through at least the 2060s for the valley elderberry longhorn beetle.

In summary, the loss or modification of additional habitat represents a continued threat to this population structure (see Cumulative Effects below for additional discussion). Therefore, the best scientific and commercial information available indicates that the destruction, modification, or curtailment of the valley elderberry longhorn beetle's habitat or range is likely to continue to be a threat to the species now and in the future.

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

We did not identify collecting or overutilization for any purpose as a threat to the valley elderberry longhorn beetle in our final listing rule (45 FR 52805; August 8, 1980) or in our proposed rule to delist the species (77 FR 60259; October 2, 2012). Based on our review of the available scientific and commercial information, we believe that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to the valley elderberry longhorn beetle at the present time nor do we anticipate this activity to be a threat in the future.

Factor C. Disease or Predation

At the time of listing, we did not identify disease or predation as factors affecting the status of the valley elderberry longhorn beetle (45 FR 52805; August 8, 1980). We know of no diseases that represent current threats to the valley elderberry longhorn beetle.

In our 5-year review and in the proposed delisting rule, we indicated that Argentine ants may be a potential predator of the valley elderberry longhorn beetle (Service 2006a, pp. 12–13; 77 FR 60259, October 2, 2012). In this withdrawal, we reexamine the available information regarding this potential predator as a threat to the species and include information from additional studies not evaluated in the proposed rule.

Based on sampling at sites within Putah Creek, a negative relationship was observed between the presence of Argentine ants and the valley elderberry longhorn beetle, which was attributed to: (1) Native ants were found to be positively associated with the valley elderberry longhorn beetle; and (2) native ants were found at only one site in which Argentine ants were present (Huxel 2000, pp. 83–84). Argentine ants were recorded at 14 of 15 mitigation sites along the American River Parkway during surveys in 2003 and 2004 (Klasson *et al.* 2005, p. 8); their presence was attributed to introduction of ants with elderberry seedlings supplied from nurseries and the use of irrigation at these sites, the latter of which is suspected of encouraging an increase in ant populations (Klasson *et al.* 2005, p. 8).

Argentine ants have rapidly expanded their range in California since first recorded in San Bernardino County in 1905 (Vega and Rust 2001, p. 5). Within its native Argentina, Argentine ants coexist with many ant species (Suarez *et al.* 1999, p. 51), including competitive dominants such as imported red fire ants (*Solenopsis invicta*) and black fire ants (*S. richteri*) (Holway *et al.* 2002, p. 195). However, in riparian communities in California, Argentine ant colonies are known to displace native ants (Kennedy 1998, pp. 347–348) and have the potential to displace other native insects (see review by Holway *et al.* 2002, entire). Thus, the absence of the native competitors throughout much of the introduced range of the Argentine ant is likely an important factor influencing its high abundance and expansion (Holway *et al.* 2002, p. 195). An additional concern is that climate-based modelling conducted to examine potential changes in the global distribution of the Argentine ant by mid-century shows that California will be one of the areas with the most suitable conditions for this species (Roura-Pascual *et al.* 2004, pp. 2531–2532), and additional modeling has yielded very similar results (Hartley *et al.* 2006, pp. 1073–1077; Roura-Pascual *et al.* 2011, p. 223). Although these modeling efforts cannot provide precise locations of suitability (see Menke *et al.* 2009, entire), they nevertheless provide consistent indications of the general area in central California where climate conditions will be favorable for Argentine ants. Also, in addition to climate, the establishment and spread of Argentine ants is related to human-modified habitats (Roura-Pascual *et al.* 2011, p. 223; Fitzgerald and Gordon 2012, pp. 534–536), which are prevalent within the range of the valley elderberry longhorn beetle.

In New Zealand, where the Argentine ant has been an invasive species for more than 30 years, populations of the species disappeared after 10–20 years (with persistence near the high end of this range being associated with areas having warmer temperatures) at about 40 percent of 150 surveyed sites, and populations were reduced in some other areas (Cooling *et al.* 2011, p. 431). The reasons for this change are not known, and we do not know of any data indicating something similar is occurring in California.

Argentine ants are opportunistic in their feeding behavior (Rust *et al.* 2000, p. 209). Experiments in which mealworm larvae were tethered (tied) to live elderberry stems next to traps (made from sticky tape) conducted by Klasson *et al.* (2005, pp. 7–8) along the American River Parkway area found that, when provided the opportunity, the Argentine ant will increase its mortality (predation) of vulnerable larvae. Specifically, the study found a significant correlation between both a decrease of intact larvae and an increase in partially eaten larvae with an increase in Argentine ant density (Klasson *et al.* 2005, p. 8). Field experiments have shown that, when valley elderberry longhorn beetle larvae were placed on elderberry plants, they were readily attacked by Argentine ants (Talley 2014c, pers. comm.). Argentine ants have also been observed interfering with adult behaviors of the valley elderberry longhorn beetle (Talley 2014b, pers. comm.).

Relatively high densities of Argentine ants (based on the ant traps) have been reported at mitigation sites (Klasson *et al.* 2005, p. 8). Elderberry plants are found in areas that are also favorable to the establishment of Argentine ants (i.e., areas with moisture), and Argentine ants can easily colonize natural riparian plant communities from adjacent residential areas (Talley 2014b, pers. comm.). Argentine ants were found on 13 percent of elderberry shrubs within 6 of 10 Central Valley watersheds surveyed in 2010 (Holyoak and Graves 2010, p. 16; Table 2). Forty-one percent of the total number of Argentine ants observed on elderberry shrubs in these

six watersheds were from sites within the Putah Creek watershed (Holyoak and Graves 2010, p. 16), similar to earlier results described for this watershed by Huxel (2000, p. 83). Huxel *et al.* (2003, p. 458) concluded that the isolation of some valley elderberry longhorn beetle mitigation sites in conjunction with the presence of Argentine ant colonies at some of these sites is contributing to a lower success rate for these areas in establishing occupancy of the valley elderberry longhorn beetle (Huxel *et al.* 2003, p. 458).

Successful treatment and control of Argentine ants in urban, agricultural, and natural landscapes has been difficult (Silverman and Brightwell 2008, pp. 234–237). Choe *et al.* (2014, entire) recently described a pheromone-assisted technique that may provide an economically viable control of Argentine ants by maximizing the efficacy of conventional insecticide sprays; however, this technique has not yet been evaluated as an option in natural environments. Given the lack of safe and effective controls, it is likely that the Argentine ant will continue to expand its range in California, including the Central Valley.

In our 2006 5-year review and in our proposed rule, we identified other potential predators of the valley elderberry longhorn beetle (Service 2006a, p. 13; 77 FR 60260; October 2, 2012). This assessment was based primarily on observations within the American River watershed (American River Parkway), as described in an unpublished report prepared by Klasson *et al.* (2005, pp. 7–8). The European earwig (*Forficula auricularia*) and the western fence lizard (*Sceloporus occidentalis*) were identified as potential predators of larval life stages of the valley elderberry longhorn beetle (Klasson *et al.* 2005, p. 8). The report suggested that high densities of Argentine ants and earwigs at mitigation sites could be subsidizing higher abundances of lizards, creating additional predation pressure on invertebrates in these areas, though this has not been formally evaluated (Klasson *et al.* 2005, p. 8). Predation of larvae by birds (woodpeckers) has been described (Halstead and Oldham 1990, p. 25), but the small prey size and the overall rarity of the species present a low chance of encounter and, therefore, a low mortality risk (Talley *et al.* 2006a, p. 36). However, as noted in our proposed rule, we have no empirical studies with which to evaluate the level of predation threat from these potential predators.

Summary of Factor C

We have no information to indicate that disease is negatively affecting the valley elderberry longhorn beetle population. Invasive Argentine ants have been confirmed at several locations occupied by the valley elderberry longhorn beetle (Holyoak and Graves 2010, p. 16; Table 2). Projections from climate change modeling indicate suitable conditions will occur for Argentine ants to continue to spread in California during the next several decades (Roura-Pascual *et al.* 2004, pp. 2531–2532; Hartley *et al.* 2006, pp. 1073–1077; Roura-Pascual *et al.* 2011, p. 223). Studies show that Argentine ants will attack and consume exposed insect larvae, including valley elderberry longhorn beetle larvae. The predation threat from Argentine ants is likely to increase in the Central Valley as colonies further expand into the species' range unless additional methods of successful control within natural settings become available (e.g., Choe *et al.* 2014, entire). Although additional studies are needed to better characterize the level of predation threat to the valley elderberry longhorn beetle from Argentine ants, the best available data indicates that this invasive species is a predation threat to the valley elderberry longhorn beetle, and it is likely to expand to additional areas within the range of the valley elderberry longhorn beetle in the foreseeable future.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

The Act requires us to examine the inadequacy of existing regulatory mechanisms with respect to extant threats that place the valley elderberry longhorn beetle in danger of becoming either an endangered or threatened species. The regulatory mechanisms affecting the species fall into two general categories: (1) State regulatory mechanisms; and (2) Federal regulatory mechanisms. In this withdrawal, we incorporate additional detail and new information pertaining to these regulatory mechanisms from what was presented in the proposed rule. We are unaware of any local regulatory mechanisms (e.g., County or City ordinances) that provide protections to the valley elderberry longhorn beetle or its habitat.

State Regulatory Mechanisms

California Endangered Species Act

The California Endangered Species Act (Division 3, Chapter 1.5, section 2050–2069 of the California Fish and Game (CFG) Code) does not provide protections to insects and therefore would not provide protection to the valley elderberry longhorn beetle.

The Natural Community Conservation Planning (NCCP) Act

The NCCP program is a cooperative effort between the State of California and numerous private and public partners with the goal of protecting habitats and species. An NCCP program identifies and provides for the regional or area-wide protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activity. The primary objective of the NCCP program is to conserve natural communities at the ecosystem scale while accommodating compatible land uses (CDFW 2014b). Regional NCCPs provide protection to federally listed species by conserving native habitats upon which the species depend. Many NCCPs are developed in conjunction with Habitat Conservation Plans (HCPs) prepared pursuant to the [Endangered Species] Act.

At present, two regional conservation plans, the San Joaquin County Multi-Species Habitat Conservation and Open Space Plan and the Natomas Basin HCP (revised), are located within the presumed extant occurrences of the valley elderberry longhorn beetle, and have been permitted by the State through the NCCP Program. Another seven regional conservation plans within this range are currently under development. The latter include: Butte County NCCP/HCP, Placer County NCCP/HCP, South Sacramento HCP, Yuba-Sutter County HCP/NCCP, Yolo County HCP/NCCP, Solano County HCP, and the Fresno County HCP. However, although Fresno County initiated planning efforts for developing an HCP in 2007, development of this HCP has been intermittent and it is uncertain whether an application will be submitted to the Service (Thomas 2014, pers. comm.). All but one of these plans (Fresno County HCP) is located in the northern portion of the species' range in the Central Valley. Site-specific or project-level conservation plans that have addressed effects to the valley elderberry longhorn beetle have also been completed within the presumed extant occurrences of the species, though these are generally low-effect HCPs and encompass much smaller areas; most of those are now completed (Thomas 2014, pers. comm.).

In summary, because the valley elderberry longhorn beetle is a covered species in existing NCCPs and anticipated to be a covered species in other NCCPs under development, the species receives protections under the plans, including obligations to continue

to implement the conservation plans in their entirety under the terms of their permits. If the valley elderberry longhorn beetle was delisted, habitat protections and coverage under existing NCCPs would remain unless they are amended to remove such protections. However, the species would likely not be included as a covered species in future NCCP/HCPs; thus, the NCCP program may not be an effective regulatory mechanism on its own.

California Environmental Quality Act (CEQA)

CEQA (California Public Resources Code 21000–21177) is the principal statute mandating environmental assessment of projects in California. The purpose of CEQA is to evaluate whether a proposed project may have an adverse effect on the environment and, if so, to determine whether that effect can be reduced or eliminated by pursuing an alternative course of action, or through mitigation. CEQA applies to certain activities of State and local public agencies; a public agency must comply with CEQA when it undertakes an activity defined under CEQA as a ''project.'' A project is defined as an activity undertaken by a public agency or a private activity that requires some discretionary approval (i.e., the agency has the authority to deny or approve the requested permit) from a government agency, and which may cause either a direct physical change in the environment or a reasonably foreseeable indirect change in the environment. Most proposals for physical development in California are subject to the provisions of CEQA, as are many governmental decisions such as adoption of a general or community plan. Development projects that require a discretionary governmental approval require some level of environmental review under CEQA, unless an exemption applies (California Environmental Resources Evaluation System (CERES) 2014). If significant effects are identified, the lead agency has the option of requiring mitigation through changes in the project or to decide that overriding considerations make mitigation infeasible (Public Resources Code 21000; CEQA Guidelines at California Code of Regulations, Title 14, Division 6, Chapter 3, sections 15000–15387).

Take of a federally listed species, including the valley elderberry longhorn beetle, is considered to be a ''significant effect'' under CEQA's implementing regulations, thereby creating either a requirement for mitigation or the identification of overriding considerations by the CEQA lead agency. While mitigation for this class of significant effect normally takes the form of an obligation on the part of the project proponent to notify the Service and to take whatever action the Service deems necessary to receive take authorization, the CEQA obligation is an additional regulatory mechanism that frequently provides enhanced protection when the species is listed. However, if the valley elderberry longhorn beetle was delisted, State lead agencies would no longer be subject to making a mandated finding of significant effect, and therefore not otherwise be obligated to provide conservation measures for the beetle through the CEQA process.

California Lake and Streambed Alteration Program

The Lake and Streambed Alteration (LSA) Program (CFG Code sections 1600–1616) provides protection of floodplains through its permitting process. Section 1602 of the CFG Code requires an entity to notify the CDFW of any proposed activity that may substantially modify a river, stream, or lake, to include: Substantially diverting or obstructing the natural flow of any river, stream, or lake; substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake; or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake. If the CDFW determines that the activity may substantially adversely affect fish and wildlife resources, an LSA Agreement (Agreement) is prepared. In practice, the conditions of the LSA Agreement are negotiated with the applicant by CDFW. Although there can be disagreement on these conditions, CDFW works with applicants to ensure that certain wildlife protections (e.g., bird surveys during nesting season before tree cutting) are included; arbitration is rarely required for this process (Kennedy 2014c, pers. comm.).

We contacted CDFW staff from the agency's North Central region to assess the level and applicability of this program to elderberry habitat within the presumed extant occurrences in this portion of the Central Valley. CDFW indicated that they receive up to 30 applications per year under the LSA program for some areas within the range of the species for activities such as construction or maintenance of bridges and culverts, or for trail improvements (Kennedy, 2014a and 2014b, pers. comm.; Sheya 2014, pers. comm.). Generally, the diameter of the vegetation and amount of riparian vegetation impacted are used to evaluate the need for an LSA agreement (Kennedy 2014b, pers. comm.). Applicants are asked and expected to contact the Service if elderberry shrubs will be affected (Sheya, 2014, pers. comm.; Kennedy 2014b, pers. comm.). Should the valley elderberry longhorn beetle be delisted, there would likely be little or no heightened concern or scrutiny under the LSA program relative to potential impacts to its habitat (i.e., elderberry shrubs).

Summary of State Regulatory Mechanisms

In summary, CEQA and the LSA Program work synergistically with the Act to provide protections to the species and its habitat. Without the protections provided to the valley elderberry longhorn beetle under the Act (that is, if the species was delisted), these State regulatory mechanisms would not provide an additional level of scrutiny in the evaluation of potential effects to the species or to its habitat from future proposed activities. Under the NCCP Program, the valley elderberry longhorn beetle receives protections under permitted plans, including obligations to continue to implement the conservation plans in their entirety under the terms of their permits. If the valley elderberry longhorn beetle was delisted, habitat protections and coverage under existing NCCPs would remain unless the conservation plans were amended to remove such protections. However, the species would likely not be included as a covered species in future NCCP/HCPs; thus, the NCCP program may not be an effective regulatory mechanism on its own.

Federal Regulatory Mechanisms

National Environmental Policy Act (NEPA)

All Federal agencies are required to adhere to the NEPA of 1970 (42 U.S.C. 4321 *et seq.*) for projects they fund, authorize, or carry out. Prior to implementation of such projects with a Federal nexus, NEPA requires the agency to analyze the project for potential impacts to the human environment, including natural resources. The Council on Environmental Quality's regulations for implementing NEPA 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 public

notice provisions of NEPA provide an opportunity for the Service and other interested parties to review proposed actions and provide recommendations to the implementing agency. NEPA does not impose substantive environmental obligations on Federal agencies—it merely prohibits an uninformed agency action. However, if an Environmental Impact Statement is prepared for an agency action, the agency must take a ''hard look'' at the consequences of this action and must consider all potentially significant environmental impacts. The effects on endangered and threatened species is an important element for determining the significance of an impact of an agency action (40 CFR 1508.27). Thus, although NEPA does not itself regulate activities that might affect the valley elderberry longhorn beetle, it does require full evaluation and disclosure of information regarding the effects of contemplated Federal actions on sensitive species and their habitats. Federal agencies may also include mitigation measures in the final Environmental Impact Statement as a result of the NEPA process that help to conserve the valley elderberry longhorn beetle and its habitat and these may include measures that are different than those required through the Act's section 7 consultation process. If the valley elderberry longhorn beetle were to be delisted, the species and its habitat would receive no more scrutiny than other plant and wildlife resources during the NEPA process and associated analyses of a project's potential impacts to the human environment.

Clean Water Act

Congress passed the Federal Water Pollution Control Act Amendments of 1972 and the CWA of 1977 to provide for the restoration and maintenance of the chemical, physical, and biological integrity of the nation's lakes, streams, and coastal waters. Primary authority for the implementation and enforcement of the CWA rests with the U.S. Environmental Protection Agency and the Corps. Section 404 of the CWA is the principal Federal program that regulates activities affecting the integrity of wetlands. Section 404 prohibits the discharge of dredged or fill material in jurisdictional waters of the United States, unless permitted by the Corps under § 404(a) (individual permits), 404(e) (general permits), or unless the discharge is exempt from regulation as designated in § 404(f). The limits of jurisdictional waters of the United States are determined by: (1) In the absence of adjacent wetlands, jurisdiction extends to the ordinary high-water mark; (2) when adjacent wetlands are present, jurisdiction extends beyond the ordinary high-water mark to the limit of the adjacent wetlands; or (3) when the water of the United States consists only of wetlands, jurisdiction extends to the limit of the wetland. The CWA may provide protections to elderberry because the taxon is found within seasonal floodplain habitat. However, a site-specific jurisdictional delineation will be required to determine whether a section 404 CWA permit from the Corps would be required for proposed discharge of fill material in these areas.

In addition to the measures authorized before 1972, the CWA implements a variety of programs, including: Federal effluent limitations and State water quality standards, permits for the discharge of pollutants and dredged and fill materials into navigable waters, and enforcement mechanisms. These programs may provide additional protections of water quality within the floodplains and riparian vegetation in which the valley elderberry longhorn beetle occurs. Without the protections afforded by the Act, if a proposed project area included the valley elderberry longhorn beetle or elderberry shrubs, there would be no additional level of scrutiny of the project's effects beyond that provided to other riparian vegetation and floodplain resources.

Clean Air Act

With respect to regulatory mechanisms that address climate change, there are no regulatory mechanisms in place at the national or international levels that directly and effectively address the ongoing or projected effects of climate change on the valley elderberry longhorn beetle. In the United States, on December 15, 2009, the Environmental Protection Agency (EPA) published in the **Federal Register** (74 FR 66496) a rule titled: ''Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act.'' In this rule, the EPA Administrator found that the current and projected concentrations of the six long-lived and directly emitted GHGs—carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride—in the atmosphere threaten the public health and welfare of current and future generations; and that the combined emissions of these GHGs from new motor vehicles and new motor vehicle engines contribute to the GHG pollution that threatens public health and welfare (74 FR 66496). In effect, the EPA has concluded that the GHGs linked to climate change are pollutants, whose emissions can now be subject to the Clean Air Act (42 U.S.C. 7401 *et seq.*) (74 FR 66496; December 15, 2009). As part of its Clean Power Plan proposal, EPA recently published proposed regulations to limit GHG emissions for power plants (79 FR 34830, June 18, 2014), with a 120-day comment period. However, these regulations have not been finalized.

Endangered Species Act of 1973, as Amended (Act)

Upon its listing as threatened, the valley elderberry longhorn beetle benefited from the protections of the Act, which include the prohibition against take and the requirement for interagency consultation for Federal actions that may affect the species. Section 9 of the Act and Federal regulations prohibit the take of endangered and threatened species without special exemption. The Act defines ''take'' as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). Our regulations define ''harm'' to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3). Our regulations also define ''harass'' as intentional or negligent actions that create the likelihood of injury to a listed species by annoying it to such an extent as to significantly disrupt normal behavior patterns, which include, but are not limited to, breeding, feeding, or sheltering (50 CFR 17.3). Section 7(a)(1) of the Act requires all Federal agencies to utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of endangered species and threatened species. Section 7(a)(2) of the Act requires Federal agencies to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat. As an example, the U.S. Forest Service consults with the Service on effects of proposed activities (e.g., vegetation management, grazing, invasive species removal, recreational trail maintenance) to elderberry habitat found within the Sierra National Forest; however, most of these activities are designed so as to avoid elderberry shrubs, and are therefore found to have no effect to the valley elderberry longhorn beetle (Moore 2012, pers. comm.).

Section 6 of the Act authorizes us to enter into cooperative conservation agreements with States and to allocate funds for conservation programs to benefit endangered or threatened species, which provides another potential benefit. Neither section 6 of the Act nor Service policy gives higher priority to endangered species over threatened species for conservation funding.

Thus, listing the valley elderberry longhorn beetle under the Act provided a variety of protections, including the prohibition against take and the conservation mandates of section 7 for all Federal agencies. Because the Service has regulations that prohibit take of all threatened wildlife species (50 CFR 17.31(a)), unless modified by a special rule issued under section 4(d) of the Act (50 CFR 17.31(c)), the regulatory protections of the Act are largely the same for wildlife species listed as endangered and as threatened; thus, the protections provided by the Act will remain in place for the duration of time that the valley elderberry longhorn beetle remains on the Federal List of Endangered or Threatened Wildlife.

National Wildlife Refuge System

The National Wildlife Refuge System Improvement Act of 1997 (Pub. L. 105–57) (which amended the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd et seq.)), expressly states that wildlife conservation is the priority of National Wildlife Refuge (NWR) System lands and that the Secretary shall ensure that the biological integrity, diversity, and environmental health of refuge lands are maintained. Each NWR is managed to fulfill the specific purposes for which the refuge was established and the NWR System mission; thus, the first priority of each refuge is to conserve, manage, and, if needed, restore fish and wildlife populations and habitats according to its purpose. This legislation requires the development of a Comprehensive Conservation Plan (CCP) for all NWR units (outside of Alaska). A CCP includes management actions that can provide conservation benefits to federally listed and non-federally listed fish and wildlife. The Sacramento River NWR, San Joaquin River NWR, the Merced NWR, and nearly all of the lands within the San Luis NWR are found within the presumed extant occurrences of the valley elderberry longhorn beetle. NWR efforts to conserve the valley elderberry longhorn beetle and its habitat are summarized in the following paragraphs.

The Sacramento River NWR was established to conserve and manage up to 18,000 ac (7,284 ha) of riparian or floodplain vegetation from Red Bluff to Colusa in Tehama, Glenn, and Colusa Counties, and contains 30 different units, each with its own specific projects and management needs (Service 2005a, p. 12). Wildlife and habitat management goals for the Sacramento River NWR include preparing and implementing restoration plans to restore riparian vegetation (including elderberry plants), and maintaining existing and restored riparian vegetation (Service 2005a, pp. 139–140; Service 2005b, p. 1, Appendix 1). The valley elderberry longhorn beetle is the only terrestrial endemic organism found on the Sacramento River NWR, and elderberry provides important habitat for other taxa found there, especially other insects, migratory birds, and the western fence lizard (Silveira 2014a, pers. comm.). Management for the valley elderberry longhorn beetle on the Sacramento River NWR is implemented through the management actions implemented for elderberry habitat found throughout the refuge in riparian forests as well as with plantings at restoration sites in mixed-riparian forest and elderberry savanna habitats (Service 2005a, p. 118).

Occurrences of valley elderberry longhorn beetle exit holes have been reported within the Sacramento River NWR in the CNDDB (CNDDB 2013, entire) and from other sources (e.g., Service 2005a, p. 92). In 2004, River Partners (2004, entire) documented the successful colonization of the valley elderberry longhorn beetle as defined by observations of exit holes in planted elderberries within five different units of the refuge. At that time, the percent of elderberry shrubs with exit holes ranged from 0.6 to 7.9 (average per refuge unit) (River Partners 2004, pp. 2–3). Since 1993, over 100,000 elderberry plants have been planted within 13 units of the Sacramento River NWR with an additional 14,270 plantings in another 9 units (since 1999) (Silveira 2014a and 2014b, pers. comm.). Mean survival rates of elderberry plants range from 42 percent to 100 percent, with a combined average for all sites of about 90 percent (Silveira 2014a and 2014b, pers. comm.). The long-term survival of elderberry at the refuge's restoration sites depends on several factors including soil type and profile characteristics, as well as the type of vegetation planted with elderberry; that is, elderberry shrubs are found to be more persistent in valley oak woodland and open savanna habitats and much less persistent in closed-canopy mixed riparian forest (Silveira 2014a, pers. comm.).

In 2007 and 2008, Gilbart (2009, entire) surveyed 432 planted elderberry shrubs within 8 units of the Sacramento River NWR for occupancy (new and old exit holes) of the valley elderberry longhorn beetle. The study found that 21 percent of all shrubs searched had new holes, but only 33 percent of shrubs with old exit holes showed sustained or current occupation (i.e., presence of new exit holes) (Gilbart 2009, p. 40). Finally, although Golet *et al.* (2013, pp. 9, 21) reported an increase in occupancy of the valley elderberry longhorn beetle through colonization at restoration sites on the refuge (see River Partners 2004, entire), they found that the ''importance value'' of elderberry, or the sum of relative density plus relative basal area, had actually declined as restoration sites matured, suggesting that long-term availability of suitable elderberry habitat at these sites is uncertain.

The Sacramento River NWR has also implemented a 100-ft (30.5-m) buffer between elderberry shrubs at its restoration sites and private orchards, levees, or roadways to reduce the potential for colonization on adjacent lands (Service 2005b, p. 34). This boundary was also designed to ensure that agricultural pesticide drift from neighboring private orchards and facility maintenance operations will not affect valley elderberry longhorn beetle habitat within restoration sites or adjacent landowner activities (Service 2005b, p. R–15, Appendix 2). Monitoring and evaluation of the use of restored habitat by targeted federally listed species, including the valley elderberry longhorn beetle, are also established objectives for the refuge (Service 2005a, p. 146; Service 2005b, p. 5, Appendix 1). End-of-season monitoring of elderberry restoration sites are conducted on the Sacramento River NWR by River Partners or The Nature Conservancy and results are provided in annual restoration reports prepared for the refuge (Silveira 2014a and 2014b, pers. comm.).

The San Joaquin River NWR is located within the San Joaquin Valley of the Central Valley of California and was established in 1987 to primarily protect and manage wintering habitat for the Aleutian Canada goose (*Branta canadensis leucopareia*), a former federally endangered species (Service 2006b, p. 2). The focus of the San Joaquin River NWR has since expanded to include other endangered or threatened species, migratory birds, wildlife dependent on wetlands and riparian floodplain habitat, and restoration of habitat and ecological

processes (Service 2006b, p. 2). The San Joaquin River NWR currently provides habitat for both wetland- and upland-dependent wildlife species of California's Central Valley (Service 2006b, p. 1).

Elderberry shrubs are relatively abundant on the San Joaquin River NWR east of the San Joaquin River, but are limited west of the river (Service 2006b, p. 171). However, there have been no comprehensive surveys to document occupancy of the valley elderberry longhorn beetle (Service 2006b, p. 51). The CNDDB (CNDDB 2013) includes one element occurrence (EO 157) where exit holes were observed in surveys in May and June of 1984; no adults were seen.

Management objectives identified in the CCP for the San Joaquin River NWR include surveys for the valley elderberry longhorn beetle and, if necessary, a management plan would be prepared for the species and its habitat (Service 2006b, p. 69). However, the San Joaquin NWR has already implemented conservation actions for the valley elderberry longhorn beetle, including planting of elderberry shrubs on the west side of the refuge. A large-scale (800-ac (324-ha)) restoration effort, including several fields of elderberry plantings, was initiated on the San Joaquin River NWR in 2002 (River Partners 2007, pp. 4, 57). In 2006, approximately 235 ac (95 ha) or 185 individual elderberry plants (planted in 2003) were surveyed, and surveyors found that many of these elderberry plants died as a result of prolonged flooding during the spring and early summer of 2006 (River Partners 2007, pp. v, 4). Subsequently, additional elderberry shrubs were planted on about 120 ac (49 ha) at a higher elevation (77 FR 60256; October 2, 2012). As reported in our proposed rule, much of the San Joaquin River NWR is at an elevation such that during a wet winter and spring, flooding can extend from 1 to 6 months over most of the refuge, which is generally too long of an inundation time for elderberry to survive (Griggs 2007, pers. comm.). However, the non-maintained areas of the levee system within the refuge are also being planted with elderberry (Griggs 2007, pers. comm.).

There are no records of exit hole observations or adult valley elderberry longhorn beetles in either the San Luis NWR or Merced NWR (CNDDB 2013, entire; Service 2014, GIS Analysis; Woolington 2014, pers. comm.). Neither the San Luis NWR nor the Merced NWR has completed a final CCP. However, a total of 1,000 elderberry plants have been planted at both refuges, and these efforts are expected to continue in the future (Woolington 2014, pers. comm.).

Natural Resources Conservation Service

As noted in our proposed rule, grants and loan programs implemented through the Natural Resources Conservation Service (NRCS) and the Service (e.g., Partners for Fish and Wildlife) can provide opportunities for habitat enhancement of valley elderberry longhorn beetle in the Central Valley. Under its Wetland Reserve Program (WRP) and Emergency Watershed Protection Program (EWPP), the NRCS reported in 2011 that 1,671 ac (676 ha) in seven counties in the Central Valley support elderberry and associated riparian plants of elderberry habitat within either WRP perpetual easements or EWPP Flood Plain easements (Moore 2011, pers. comm.). Although these programs are not regulatory mechanisms because their implementation is subject to funding availability, they are important conservation programs that benefit both the environment and agricultural producers in the Central Valley.

The NRCS also provides financial assistance to farmers and ranchers for planting elderberry plants, including hedgerow plantings. Since 2005, the NRCS has funded 220 hedgerow projects, creating 38 mi (61 km) of hedgerows; an additional 100 projects encompassing 29 mi (47 km) of hedgerows were expected to be completed by 2013 (Moore 2011, pers. comm.). However, not all of these projects provide for planting of elderberry. Only those hedgerow projects located in areas covered by valley elderberry longhorn beetle Safe Harbor Agreements (San Joaquin and Yolo Counties) are consistently planted with elderberry shrubs (Moore 2011, pers. comm.). We have no information on the occupancy of the valley elderberry longhorn beetle within WRP perpetual or EWPP Flood Plain easements or hedgerow plantings.

Sikes Act and Other Department of Defense Programs

The Sikes Act (16 U.S.C. 670a–670f, as amended) directs the Secretary of Defense, in cooperation with the Service and State fish and wildlife agencies, to carry out a program for the conservation and rehabilitation of natural resources on military installations. The Sikes Act Improvement Act of 1997 (Pub. L. 105–85) broadened the scope of military natural resources programs, integrated natural resources programs with operations and training, embraced the tenets of conservation biology, invited public review, strengthened funding for conservation activities on military lands, and required the development and implementation of an Integrated Natural Resources Management Plan (INRMP) for relevant installations, which are reviewed every 5 years.

INRMPs incorporate, to the maximum extent practicable, ecosystem management principles, provide for the management of natural resources (including fish, wildlife, and plants), allow multipurpose uses of resources, and provide public access necessary and appropriate for those uses without a net loss in the capability of an installation to support its military mission. Although INRMP implementation is technically not a regulatory mechanism because its implementation is subject to funding availability, it is an important guidance document that helps to integrate natural resource protection with military readiness and training. In addition to technical assistance that the Service provides to the military, the Service can enter into interagency agreements with installations to help implement an INRMP. These INRMP implementation projects can include wildlife and habitat assessments and surveys, fish stocking, exotic species control, and hunting and fishing program management.

Beale Air Force Base (Beale AFB) is located in Yuba County, in the northeastern part of the Sacramento Valley, approximately 13 mi (21 km) east of Marysville and 40 mi (64 km) north of Sacramento. Beale AFB is located within an ecological and geographic transition zone between the flat agricultural lands of the Sacramento Valley to the west and the foothills of the western slope of the Sierra Nevada to the east; three tributaries to the Bear River (Reeds, Hutchinson, and Dry Creeks) run through the base (DOD 2011, p. 33). Several areas of elderberry shrubs are found on Beale AFB, including shrubs planted within conservation areas for compensation and habitat restoration purposes (Capra 2011, pers. comm.).

In 2011, an updated INRMP was prepared, which underwent an annual review in 2013 by the installation in coordination with the Service and CDFW (DOD 2011, entire). The Beale AFB INRMP Work Plan includes goals and objectives to maintain or increase populations of special status species and improve their habitat conditions (DOD 2011, p. 164). Specifically, the Work Plan includes monitoring of the valley elderberry longhorn beetle in compliance with a Special Area Management Plan (SAMP) Habitat Restoration, Monitoring and Management Program (HRMMP) (DOD

2011, p. 165). The SAMP establishes a framework for habitat conservation, compensation, and watershed management and designates areas on the base that are, or will be, protected and preserved (DOD 2011, p. 23). A programmatic biological opinion was developed with the Service to establish a predictable process for federally listed species consultation and compensation on the base, and one in which future routine consultations would be shortened (DOD 2011, p. 27). In October 2012, the Service completed a formal consultation for effects to the valley elderberry longhorn beetle related to activities implemented under the SAMP (Service 2012, entire). The monitoring program established within the SAMP HRMMP includes sampling a random selection of 25 percent of mapped elderberry shrubs every 2 years and a notation of the physical condition of the monitored shrubs and the presence or absence of exit holes (DOD 2011, page A9–24).

As described in the INRMP, approximately 697 elderberry shrub locations were identified as occurring on Beale AFB, and the largest shrubs were surveyed in 2005 to determine the potential presence of valley elderberry longhorn beetle on base (DOD 2011, A2–29). Exit holes were found in 25 percent (13 of 51) of shrubs sampled in a riparian preservation area, but no adult beetles were observed (DOD 2011, pp. A2–29—A2–30). Exit holes were also found in 2012 in elderberry habitat at another location on the base (DOD 2014). Since fiscal year 1996, the base has received $73,000 to $400,000 per year for Habitat Conservation Management Plan (HCMP) implementation and monitoring (DOD 2011, p. A2–44). Based on this funding history, it is likely that HCMP projects will continue to be implemented in the future as funds are approved, and the INRMP/HCMP continues to provide a conservation benefit to the valley elderberry longhorn beetle (DOD 2011, p. A2–44). Without the protections provided to the species and its habitat under the Act (that is, if the valley elderberry longhorn beetle was delisted), there would be no regulatory incentive for the INRMP and HCMP to continue to include important provisions (e.g., monitoring) that provide conservation benefits to the species, beyond that provided under a larger integrated natural resource management strategy at Beale AFB.

Summary of Factor D

State regulatory mechanisms provide a limited amount of protection against current threats to valley elderberry longhorn beetle. The requirements of CEQA and the LSA program may provide limited protections for the valley elderberry longhorn beetle and its host plant. However, without the protections provided to the valley elderberry longhorn beetle under the Act (that is, if the species was delisted), these State regulatory mechanisms would not provide an additional level of conservation benefit to the species or to its habitat. The NCCP program can provide important protections through implementation of management actions and conservation measures when the valley elderberry longhorn beetle and its host plant are incorporated in regional or project-level conservation plans, including obligations to continue to implement the conservation plans in their entirety under the terms of their permits. If the valley elderberry longhorn beetle was delisted, habitat protections and coverage under existing NCCPs would remain unless the conservation plans were amended to remove such protections. However, the species would likely not be included as a covered species in future NCCP/HCPs; thus, the NCCP program may not be an effective regulatory mechanism on its own.

A variety of Federal regulatory mechanisms exist throughout the range of the valley elderberry longhorn beetle. NEPA does not itself regulate activities that might affect the valley elderberry longhorn beetle, but it does require full evaluation and disclosure of information regarding the effects of contemplated Federal actions on sensitive species and their habitats. The CWA may provide protections to elderberry because the taxon is found within seasonal floodplain habitat. However, a site-specific jurisdictional delineation will be required to determine whether a section 404 CWA permit from the Corps would be required for actions proposed for these areas. While the Clean Air Act gives the EPA authority to limit GHGs linked to climate change, the regulations that the EPA has proposed regarding GHG emissions from power plants have yet to be finalized and thus cannot be considered existing regulatory mechanisms. At this time, we are not aware of any regulatory mechanisms in place at the international or national levels that address the ongoing or projected effects of climate change on the valley elderberry longhorn beetle.

We expect management actions currently being implemented and, depending on funding, planned for the future for the Sacramento River NWR and San Joaquin River NWR will continue to provide important conservation benefits to the valley elderberry longhorn beetle, although occupancy (based on exit holes) for these locations has been very low. In addition, comprehensive surveys for adults or exit holes have not been conducted on refuge lands or at easements established under NRCS programs. The Department of Defense also provides some protections to valley elderberry longhorn beetle and its habitat in the Central Valley at Beale AFB through implementation of its INRMP under the Sikes Act.

Overall, although regulatory mechanisms are in place and provide some protection to the valley elderberry longhorn beetle and its habitat, absent the protections of the Act (e.g., section 7 and section 10(a)(1)(B)), these mechanisms would not provide adequate protection from the threats currently acting on the species.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Natural and manmade factors affecting the valley elderberry longhorn beetle evaluated in this section include some effects related to climate change (related to temperature changes) and pesticides that may impact the survivorship or reproductive success of the species. See additional discussion on potential effects of climate change above under *Factor A.* In the proposed rule, we presented a general discussion of pesticide use in the Central Valley, but stated that we did not have information that confirmed pesticide use was a significant threat to the valley elderberry longhorn beetle (77 FR 60262–60263; October 2, 2012). In this withdrawal, we present more recent information regarding pesticide usage trends in the Central Valley and include a detailed discussion of effects of one class of pesticides to insects relative to their potential effects to the valley elderberry longhorn beetle. Additionally, we provide an updated summary discussion of small population size as a potential threat, as was discussed in the proposed rule (77 FR 60263; October 2, 2012).

In this revised *Factor E* analysis, we do not include a discussion of loss of populations resulting from habitat fragmentation as described in the proposed rule (77 FR 60264; October 2, 2012). We indicated in the proposed rule that we were not aware of any information that would support robust conclusions regarding the extent of isolation of valley elderberry longhorn beetle populations at distances greater than a presumed recolonization distance of 25 mi (40 km) (77 FR 60264; October

2, 2012). At present, we have no population trends for the valley elderberry longhorn beetle to draw conclusions regarding loss of specific populations within the range of the species, and we are unaware of any viable tools to evaluate potential fragmentation of elderberry habitat in order for us to evaluate this potential threat.

Temperature and Other Effects of Climate Change

As described above (see *Factor A*), increased temperatures are projected for the current range of the valley elderberry longhorn beetle. At this time we do not know what temperature levels (in terms of either isolated heat spikes or extended periods of high heat) are lethal for the species, or whether and how such changes may affect survivorship or reproductive success. We also do not have information to assess the near- or long-term adaptive capacity of this species in relation to climate change effects. Specifically in the near term we do not have information about its ability to make behavioral or physiological changes that will allow individuals to persist as temperatures increase within its current range. In this regard, we also are concerned by the relatively limited dispersal ability of the species, which could limit its ability to undertake range shifts in response to changing climate conditions. The range shifts in latitude and elevation reported for some other species of longhorn beetles in Great Britain (Hickling *et al.* 2006, pp. 451–453) are of interest, but we do not know whether this is applicable to the valley elderberry longhorn beetle and the habitat fragmentation and other conditions it faces. Also, at this time we have no information on the possibility of genetic (evolutionary) adaptation that could influence population- and species-level persistence over generations in the face of changing temperatures or other physical effects of a changing climate.

Pesticides

In our 2006 5-year review and our 2012 proposed rule, we evaluated pesticide use in the Central Valley as a potential threat to the valley elderberry longhorn beetle (Service 2006a, pp. 18–19; 77 FR 60262; October 2, 2012). As noted in our proposed rule, there have been reports of potential effects to elderberry shrubs (yellowing of leaves) adjacent to cultivated fields recently treated by aerial crop dusting (Barr 1991, p. 27). We concluded in our proposed rule that we lacked information confirming that pesticide use was a significant threat to the valley elderberry longhorn beetle (77 FR 60263; October 2, 2012). In this withdrawal, we provide an updated and more detailed discussion of this potential threat based on peer reviewer comments and species' experts (e.g., Talley *et al.* (2006b, p. 44)) conclusions that pesticide impacts to the species and its habitat are likely given the level of pesticide use (both urban and agricultural uses) in parts of the Central Valley and the proximity of agriculture to riparian vegetation.

Pesticide use in California varies from year to year and is dependent on a number of factors, with weather conditions being particularly important (California Department of Pesticide Regulation (CDPR) 2014, p. 70). Short time periods (3 to 5 years) can suggest either an upward or downward trend in pesticide use; however, regression analyses of usage from 1998 to 2012 have not revealed a significant trend in either direction (CDPR 2014, p. 17). Pesticide use (pounds of active ingredient) in the lower portion of the San Joaquin Valley) are among the highest in the State (based on county reports) (CDPR 2014, pp. 12–13), though with the exception of San Joaquin County, much of this portion of the Central Valley is considered to be outside the area defined by the presumed extant occurrences of the valley elderberry longhorn beetle. However, in the northern portion of the range of the valley elderberry longhorn beetle (Tehama County south to Sacramento County), pesticide use ranks relatively high (in the top 20) for several counties (CDPR 2014, pp. 12–13). Based on the amount applied, the most-used pesticide types are combination fungicide/insecticides (mostly sulfur), fumigants, and insecticides (CDPR 2014, p. 66). Based on cumulative area treated, the most-used types are insecticides, herbicides, and fungicides (CDPR 2014, p. 66).

Neonicotinoid insecticides such as imidacloprid are used extensively for some crops in California (e.g., wine grapes; CDPR 2014, p. 76). They are also widely used as seed treatments (Goulson 2013, p. 978). The use of imidacloprid on agricultural land in the Central Valley of California was estimated at over 0.24 pounds per square mile in 2011 (USGS 2014); CDPR reported a total of 297,384 pounds of imidacloprid were applied in California in 2012, encompassing 64,209 agricultural applications (CDPR 2014, pp. 413–416).

Neonicotinoids are particularly toxic to insects in small quantities (Goulson 2013, p. 977). Experimental studies have also found important sublethal effects to Asian longhorned beetles in response to imidacloprid, including a reduction in the number of viable eggs (Ugine *et al.* 2011, p. 1948) and a decrease in food consumption (Russell *et al.* 2010, p. 308). A lack of sufficient locomotor control is suspected as the cause of some of the changed behaviors, rather than the palatability of food (Ugine *et al.* 2011, p. 1,948). Concerns regarding the environmental risks of neonicotinoid insecticides to honeybees have prompted recent efforts to provide additional control of their usage (e.g., application restrictions; EPA 2013, entire).

Studies of exposure to neonicotinoids have also shown differential effects to the behaviors and community dynamics of ants (Barbieri *et al.* 2013, entire). Interspecific aggressive behavior and colony fitness differences after exposure to imidacloprid were observed for the invasive Argentine ant and a native ant (*Monomorium antarcticum*) (Barbieri *et al.* 2013, p. 5). The study results suggest that in areas in which a native ant species has been previously exposed to neonicotinoid insecticides, the Argentine ant could have an advantage in securing food resources and overall survival (Barbieri *et al.* 2013, p. 5). Altered behaviors in ant populations due to pesticide exposure may be an important contributing factor to the predation threat of Argentine ants for those areas where occupancy of the valley elderberry longhorn beetle has been shown to co-occur with this invasive ant. However, these effects have not been formally evaluated.

The timing of pesticide applications are also likely to coincide with vulnerable life stages (adult activity, exposure of eggs and larvae) of the valley elderberry longhorn beetle (Talley *et al.* 2006b, p. 43). However, we are unaware of any specific studies of either exposure, or responses to exposure, to pesticides for the valley elderberry longhorn beetle.

We evaluated information that indicates pesticides are likely present in areas around and adjacent to valley elderberry longhorn beetle habitat, including areas occupied by the species, which creates the potential for exposure of the beetle and its habitat to harmful pesticides through unintended drift from applications, as well as potential secondary effects to insect communities in riparian vegetation that may create an advantage for potential predators (i.e., Argentine ants) of the valley elderberry longhorn beetle. Based on our evaluation presented in the proposed rule and updated information presented above, the best available scientific and

commercial information indicates potential impacts from pesticides to the valley elderberry longhorn beetle and its habitat; however, further studies are needed to characterize the magnitude or impact of pesticides to the species both in localized areas as well as across the species' range.

Small Population Size

In our proposed rule, we concluded that the best available information did not indicate small population size was a significant concern at that time or in the future (77 FR 60263; October 2, 2012). We provide in this withdrawal a reiteration of this potential threat without making inferences based on incomplete data regarding population size, locations of populations, and population trends.

Although we do not have data from which to draw conclusions regarding the population size of the valley elderberry longhorn beetle, we nonetheless consider whether rarity might pose a potential threat to the species. While small populations are generally at greater risk of extirpation from normal population fluctuations due to predation, disease, changing food supply, and stochastic (random) events such as fire, corroborating information regarding threats beyond rarity is needed to meet the information threshold indicating that the species may warrant listing. In the absence of information identifying threats to the species and linking those threats to the rarity of the species, the Service does not consider rarity alone to be a threat. Further, a species that has always had small population sizes or has always been rare, yet continues to survive (as is the case for the valley elderberry longhorn beetle; see Background section) could be well-equipped to continue to exist into the future.

Many naturally rare species have persisted for long periods within small geographic areas, and many naturally rare species exhibit traits that allow them to persist despite their small population sizes. Consequently, the fact that a species is rare or has small populations does not necessarily indicate that it may be in danger of extinction now or in the future. We need to consider specific potential threats that might be exacerbated by rarity or small population size. Although low genetic variability and reduced fitness from inbreeding could occur, at this time we have no evidence of genetic problems with the valley elderberry longhorn beetle. The valley elderberry longhorn beetle is known to be endemic to the Central Valley since at least 1921 (Fisher 1921, p. 207), and has historically survived fires, drought, and other stochastic events. We have no data to indicate that rarity or small population size, in and of themselves, pose a threat to the species at this time or in the future.

Summary of Factor E

Based on the best scientific information available, we do not know whether increased temperature and other projected effects associated with a changing climate in the coming decades (per projections for the 2060s) will exceed lethal levels or influence the survivorship and reproductive success of the valley elderberry longhorn beetle. We also do not know what adaptive capacity the species has, which will influence its response to increased temperature and other physical changes in climate.

The best available scientific information indicates potential impacts from pesticides to the valley elderberry longhorn beetle and its habitat; however, further studies are needed to characterize the magnitude or impact of pesticides to the species both in localized areas as well as across the species' range. Pesticide use in the Central Valley remains high and could increase due to climate change effects (e.g., warmer temperatures) that may enhance the pathogenicity of crop pests for agricultural fields that are commonly found adjacent to remnant riparian vegetation.

We do not believe that small population size constitutes a threat to the valley elderberry beetle throughout all or a significant portion of its range currently or in the future.

Cumulative Effects

Threats can work in concert with one another to cumulatively create conditions that will impact the valley elderberry longhorn beetle beyond the scope of each individual threat. Some of the threats discussed in the proposed rule and reevaluated in this document are expected to work in concert with one another to cumulatively create situations that are likely currently impacting and likely will impact the valley elderberry longhorn beetle or its habitat beyond the scope of the individual threats that we have already analyzed.

For some species, vulnerabilities to climate change effects have been found to be dependent on interactions between life-history traits and spatial characteristics (Pearson *et al.* 2014, p. 218), and it is likely that this is also true for other taxa, including the valley elderberry longhorn beetle. Climate change effects (e.g., warmer temperatures, increase in drought events, and changes in precipitation patterns) are likely to increase the extinction risk of the valley elderberry longhorn beetle and can also affect its host plant, e.g., by creating conditions that favor the expansion of invasive species in the Central Valley, or by outright reduction in host plants if the effects of climate change are more than elderberries can tolerate. An increase in temperature expected before the end of this century will also take place in concert with changes in land use and other environmental factors such as pesticide use, altered habitat due to invasive plant species, predation threats, and secondary effects of climate change (altered hydrologic conditions). Although distributional shifts of the valley elderberry longhorn beetle (e.g., in both elevation and latitude) might be observed in the future given the alteration of climate, especially with increases in temperature, the limited remaining fragmented habitat and relatively limited dispersal ability of the species may restrict any such range shift. Data from long-term population trends of the beetle and its habitat will be needed to evaluate these types of potential cumulative effects.

Determination

As required by the Act, we considered the five factors in assessing whether the valley elderberry longhorn beetle meets the definition of an endangered or threatened species. We examined the best scientific and commercial information available regarding the past, present, and foreseeable future threats faced by the species. Based on our review of the best available scientific and commercial information, we find that the current and future threats are of sufficient imminence, intensity, or magnitude to indicate that the valley elderberry longhorn beetle remains likely to become endangered within the foreseeable future throughout all of its range. Therefore, the valley elderberry longhorn beetle currently meets the definition of a threatened species, and we are withdrawing the proposed rule to delist the valley elderberry longhorn beetle. Our rationale for this finding is outlined below.

We presented valley elderberry longhorn beetle occurrence (adult beetle and exit hole data) and distribution information in the proposed rule (77 FR 60238; October 2, 2012) that we determined to be the best available scientific and commercial information at that time. However, based on the peer review and public comments received on the proposed rule, including new information received, we reevaluated

the beetle's biological information and the five-factor analysis prepared for the proposed rule to determine where clarifications, corrections, or revisions were necessary. In this rule, we provide a revised description of the location of observations of adult valley elderberry longhorn beetles or exit holes and present an updated distribution map based on surveys conducted since 1997. Our reanalysis of survey reports and published studies (including a reexamination of the best available data) helped us assess the relative quality of the species' occurrence (e.g., CNDDB records), location, and occupancy data presented in the proposed rule. As noted above (see Background section), the population structure for the valley elderberry longhorn beetle has been characterized as patchy-dynamic; that is, one controlled by both broad-scale factors associated with elderberry shrubs (e.g., shrub age) and riparian-associated environmental variables, which have patch, gradient, and hierarchical features (e.g., relative elevation) (Talley 2007, p. 1486). The valley elderberry longhorn beetle remains localized in its distribution, with limited dispersal ability, and we estimate it occupies less than 25 percent of the remaining elderberry habitat found within fragmented riparian areas.

Our reanalysis of information in our files and new information received during the open comment periods changed our evaluation of the threats to the species. In this withdrawal we conclude that the valley elderberry longhorn beetle continues to be threatened by habitat loss or degradation (*Factor A*) and predation (*Factor C*) throughout all of its range. Additional environmental factors (e.g., additional habitat loss) and other stressors (e.g., effects related to pesticide use, competition to its host plant from invasive species) are likely to influence the species' distribution and likelihood of extinction in the foreseeable future.

Despite the fact that we are not delisting the valley elderberry longhorn beetle, our reanalysis of information in our files and new information received has helped us better define our management actions directed at conserving the species, such as: (1) Improve our survey techniques to better define its distribution and abundance; (2) implement data management practices to better evaluate conservation measures being implemented at mitigation and restoration sites; (3) refine our evaluation of potential threats to the species (e.g., those related to climate change effects); (4) continue to promote restoration of riparian habitat; and (5) work with our partners to identify and implement key research needs to improve our understanding of the species.

The valley elderberry longhorn beetle remains likely to become an endangered species in the foreseeable future because it is a habitat specialist, with limited dispersal ability and a short adult life span, and it possesses rarity traits such as low local numbers within a population structure that has become fragmented within its historical range, and continues to be fragmented further by ongoing impacts to its habitat.

Although evidence of occupancy (primarily observations of exit holes) for the species has been documented in additional locations than those recorded at the time of listing in 1980 (as discussed in the proposed rule), we believe this is the result of limited data available at the time of listing, combined with subsequent surveys that have better defined the presumed historical range of the valley elderberry longhorn beetle. Following our reexamination of the original surveyor data sets (as described in the *Population Distribution* section above), new occurrence information received (i.e., Arnold 2014a, pers. comm., 2014; DOD 2014; River Partners 2011), an examination of the quality of valley elderberry longhorn beetle records contained in the CNDDB, and an evaluation of occupancy estimates based on several surveys (Collinge *et al.* 2001, p. 111; Talley *et al.* 2007, pp. 25–26; Gilbart 2009, p. 40; Holyoak and Graves, 2010, entire; Holyoak and Graves 2010, Appendix 1), we conclude there are extant occurrences of the valley elderberry longhorn beetle at 36 geographical locations in the Central Valley. However, these locations are based in large part on observations of exit holes, which may not be an accurate depiction of occupancy (see *Life History* discussion in Background section). When considering data of adult male occurrences (which may be a more accurate depiction of occupancy), only 25 percent (9 of the 36 locations) of these records, within 4 hydrologic units, represent observations of adult male beetles recorded since 1997. In making our determination, we also assessed the amount and spatial arrangement of mapped elderberry habitat within the Central Valley. However, we acknowledge that there are no current estimates of population size or trends in population numbers for the valley elderberry longhorn beetle.

Restoration and mitigation efforts have provided elderberry habitat for the valley elderberry longhorn beetle, but very little comprehensive monitoring has been conducted to evaluate the success of these sites, both in terms of habitat of value to the species and occupancy of these habitats. Comprehensive monitoring at restoration and mitigation sites as well as natural sites remaining in the Central Valley is needed in order to produce definitive population trends of occupancy for this species. A second year of trial surveys for the valley elderberry longhorn beetle using pheromone attractants is currently under way (Sanchez 2014, pers. comm.) to further evaluate this method to assess the status of this species within its presumed range. This survey technique could also provide valuable information on populations of both elderberry longhorn beetles (*Desmocerus californicus dimorphus, D. californicus californicus*).

As described in our *Factor D* analysis, conservation plans and programs are currently in place or planned for some portions of the valley elderberry longhorn beetle's range. State regulatory mechanisms, such as CEQA and the LSA, may provide limited protections for the species' host plant as they work synergistically with the Act to provide protections to the species and its habitat.

Although Federal regulatory mechanisms other than the Act can offer protection to the valley elderberry longhorn beetle in small areas of the species' range, we believe that the Act represents the primary regulatory mechanism for conservation of the valley elderberry longhorn beetle. If the valley elderberry longhorn beetle were to be delisted, it would not receive the substantial protections provided to the species and its habitat under the Act.

Based on our review of the best available scientific and commercial data, we conclude that the valley elderberry longhorn beetle currently meets the definition of a threatened species because current and future threats including present and continued loss or modification of its habitat, predation, and threats related to the effects of climate change are of sufficient imminence, intensity, or magnitude to indicate that the valley elderberry longhorn beetle is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.

Significant Portion of the Range

In determining whether a species is endangered or threatened in a significant portion of its range, we first identify any portions of the range of the species that warrant further consideration. The range of a species can theoretically be divided into

portions an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be both: (1) Significant, and (2) endangered or threatened. 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. In practice, a key part of this 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 are not significant, such portions will not warrant further consideration.

If we identify portions that warrant further consideration, we then determine whether the species is endangered or threatened in these portions of its range. Depending on the biology of the species, its range, and the threats it faces, the Service may address either the significance question or the status question first. Thus, if the Service considers significance first and determines that a portion of the range is not significant, the Service need not determine whether the species is endangered or threatened there. Likewise, if the Service considers status first and determines that the species is not endangered or threatened in a portion of its range, the Service need not determine if that portion is significant. However, if the Service determines that both a portion of the range of a species is significant and the species is endangered or threatened there, the Service will specify that portion of the range as endangered or threatened under section 4(c)(1) of the Act.

The primary threats to the valley elderberry longhorn beetle occur throughout the species' range and are not restricted to, or concentrated in, any particular portion of that range. The primary threats of loss or modification of habitat, invasive plants, predation, and pesticides are impacting valley elderberry longhorn beetle populations throughout the species' range. The effects of climate change are also acting on the valley elderberry longhorn beetle throughout its range. Thus, we conclude that threats impacting the valley elderberry longhorn beetle are not concentrated in certain areas, and, thus, there are no significant portions of its range where the species should be classified as an endangered species. Accordingly, this withdrawal and our determination that the valley elderberry longhorn beetle remains listed as a threatened species applies throughout the species' entire range.

Summary of Comments and Recommendations

In the proposed rule published on October 2, 2012 (77 FR 60238), we requested that all interested parties submit written comments on the proposal by December 3, 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. A newspaper notice inviting general public comment was published in the Sacramento Bee on October 12, 2012. We did not receive any requests for a public hearing. We reopened the comment period on January 23, 2013 (78 FR 4812) to allow all interested parties an additional opportunity to comment on the proposed rule and to submit information on the status of the species. The final comment period closed February 22, 2013.

During the two comment periods for the proposed rule, we received comments from 35 different entities or individuals (not including peer review comments) addressing the proposed delisting of the valley elderberry longhorn beetle. Submitted comments were both supportive of and against delisting the species. All substantive information provided during the comment periods has either been incorporated directly into this withdrawal or addressed below.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270) and the Office of Management and Budget's December 16, 2004, Final Information Quality Bulletin for Peer Review, we solicited expert opinion from four appropriate and independent specialists with scientific expertise of the life history and biology of the valley elderberry longhorn beetle and riparian systems in the Central valley of California. The peer review process was facilitated by Atkins, North America, and a final report of the peer review, including all comments, was prepared in January 2013 (Atkins 2013, entire), and made available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2011–0063.

We used the 10 questions posed to the peer reviewers as described in the final peer review report (Atkins 2013, entire) to organize and summarize the comments received from the four peer reviewers, including substantive issues and new information relevant to the valley elderberry longhorn beetle. The peer review comments are summarized and addressed in the following section based on 10 questions posed to the peer reviewers by the Service. Relevant information contained in both the summary of the peer reviewer comments and by individual peer reviewers has been incorporated into this rule, where appropriate.

Peer Review Comments

(1) Comment: All four peer reviewers identified instances in which the descriptions, analyses, and biological findings and conclusions presented in the proposed rule are not supported by the available data, and stated that further explanation is needed on the limitations of the data, assumptions, and rationale for dismissing certain topics. Two peer reviewers questioned the conclusions in the proposed rule regarding the range of the valley elderberry longhorn beetle, and all reviewers noted that the CNDDB records used to define the locations of extant locations of the species are outdated, may not be accurate, or may be misidentified for the non-listed California elderberry longhorn beetle. For example, two peer reviewers questioned the validity of the CNDDB use of exit holes in elderberry stems as a measure of the presence of the valley elderberry longhorn beetle. Three peer reviewers also commented on the lack of population size and trend estimates and the lack of available data for newer mitigation and restoration sites.

Our Response: For this rule, we reevaluated the quality and addressed the limitations of the available species occurrence information. We then developed a revised description of the location of observations of adult valley elderberry longhorn beetles or exit holes, and prepared new distribution maps based on surveys conducted since 1997 (16 years). We believe this time period represents a conservative, but reasonable period for evaluating available occurrence information as this was the year in which the most recent, comprehensive rangewide survey was conducted by observers known to be qualified to detect occupancy of the species. We included a more detailed description of our analyses including how we reevaluated the available occurrence information, including those locations that may represent observations of the other subspecies found in California (see *Population Distribution, Presumed Historical Range,* and *Current Distribution (since 1997)* sections), thus addressing the peer

reviewers concerns related to outdated, inaccurate, or misidentified CNDDB records. We also included available summaries of observations from both mitigation and restoration sites, and acknowledged the limitations with these and other data sets (e.g., see *Restoration and Mitigation Sites* section).

(2) Comment: All four peer reviewers stated that different conclusions than those presented in the proposed rule could be drawn due to limitations of available data (data gaps), and our over-simplification and over-estimation of the available data. Specifically, one peer reviewer stated that we overlooked important and well-documented uncertainties in the available data, while another stated that there may be fewer than the 26 locations identified in the proposed rule, which would affect our conclusions concerning the effects of threats. Another peer reviewer stated that many of the 26 locations should be disregarded given the lack of current information and that our characterization of habitat at some of these locations was questionable.

Our Response: To address all of these concerns (e.g., the potential to draw different conclusions, uncertainties in the best available data, the locations for the species based on occurrence records), we reevaluated all available spatial data and provided an updated historical distribution map based on Chemsak's (2005, p. 7) distributional map and observations of only adult male valley elderberry longhorn beetles (see *Current Distribution (since 1997)* section). Based on that analysis, we selected data sets (1) within this revised distribution; (2) within the past 16 years; and (3) those records from CNDDB (2013, entire) ranked fair, good, or excellent to develop a depiction of the presumed extant occurrences map for the species (see Figure 2), while acknowledging the limitations with these data. We also incorporated studies documenting the essential life-history and habitat requirements for both the host plant and the valley elderberry longhorn beetle, and described the species' distribution in the context of a metapopulation structure and fragmented habitat.

We then prepared a new summary of the valley elderberry longhorn beetle's occurrence in the Central Valley and identified the areas of presumed occupancy based on hydrologic unit as well as geographic location (see Table 1). For this reevaluation, we did not compare these areas to those identified at listing. Although evidence of occupancy (primarily observations of exit holes) for the species has been documented in additional locations than recorded at the time of listing in 1980, we believe this is the result of limited data available at the time of listing and the subsequent surveys that have better defined the presumed historical range of the valley elderberry longhorn beetle (see *Population Distribution, Presumed Historical Range,* and *Current Distribution (since 1997)* sections). We acknowledge in this withdrawal that there are no current estimates of population size or trends in population numbers for the valley elderberry longhorn beetle, but we have included and evaluated estimates of occupancy, where available, in our discussion of population distribution and in our analysis of threats.

(3) Comment: All four peer reviewers expressed concerns regarding the accuracy and balance of our review and analysis of factors relating to threats to the valley elderberry longhorn beetle. One peer reviewer stated that the proposed rule did not provide accurate and balanced reviews, and analyses of factors relating to the threats of the species, and other reviewers stated that a more thorough analysis incorporating key omissions could result in different conclusions regarding the threats to the species and population trends. Specifically, one reviewer recommended that the rule broaden the discussion of effects of climate change, while two others stated that potential threats posed by invasive plants should be discussed. One peer reviewer also stated that a discussion of potential effects of pesticides and genetic issues was incomplete and possibly misleading. Two peer reviewers stated that the discussion of threats from Argentine ants was not adequate in the proposed rule and we did not provide an accurate assessment of this threat. Finally, another reviewer stated that there were no analyses of combined threats at each location.

Our Response: In this document, we prepared a revised analysis of potential threats to the species, and have provided additional or revised discussions of potential threats related to climate change effects, as well as invasive plants, pesticides, and predatory ants (see the specific sections provided under Summary of Factors Affecting the Species above).

Currently, the best available data do not indicate that genetic issues are a potential threat to the population structure of the valley elderberry longhorn beetle, and we are unaware of studies that have investigated valley elderberry longhorn beetle genetics related to the population structure described for this species. We also note that Talley *et al.* (2006a, p. 7) recommended a systematic geographic morphological and genetic study to determine the degree of overlap and interbreeding between valley elderberry longhorn beetle and the California elderberry longhorn beetle.

(4) Comment: All peer reviewers commented on the limitations of the 30-year-old Recovery Plan (Service 1984) and, therefore, the difficulty in assessing whether those objectives had been met as discussed in our proposed rule. The peer reviewers indicated that the delisting criteria we refer to in the proposed rule (i.e., number of sites and populations necessary to delist the species) were not established in the Recovery Plan and the proposed rule does not assess quantitative data from recent (within the past 2 years) censuses and habitat evaluations to address an important (interim) recovery objective.

Our Response: We recognize that the Recovery Plan identified only interim objectives. Because we are withdrawing our proposal to delist the valley elderberry longhorn beetle, we did not address recovery objectives, implementation, and evaluation in this document. However, we will consider the information provided by the peer reviewers, results from studies and surveys that were not available at the time the Recovery Plan was written, and our reanalysis of the threats presented in this document in any revision of the Recovery Plan for the valley elderberry longhorn beetle.

(5) Comment: All peer reviewers provided examples of conclusions in the proposed rule that they believe were not supported by the best available science. Specifically, one peer reviewer stated that no published studies unambiguously support the continued existence of the valley elderberry longhorn beetle at no more than 12 locations and that our evaluation of threats to the species from the nonnative Argentine ant is contrary to published studies. Another peer reviewer noted that the conclusions in the proposed rule do not agree with the findings of Chemsak (2005) for the valley elderberry longhorn beetle, and that this important reference was not included in the proposed rule. One peer reviewer stated that we did not include more recent studies and that we overlooked the concept of habitat dynamics and effects on metapopulations. Another peer reviewer stated that we disregarded negative data or conclusions, particularly when these data were limited to a few sites.

Our Response: In this document, we reevaluated the occurrence data for the valley elderberry longhorn beetle and developed a new presumed historical

range map based on observations of adult males (see our response to Comments (1) and (2) above). We reviewed the quality and limitations of occurrence records for the past 16 years and their geographical locations, and present a revised summary of the locations of these records based on hydrologic units (see Table 1 in *Current Distribution (since 1997)* section) and presumed extant occurrences map (Figure 2). With regard to Chemsak (2005), we did not have access to this information during the preparation of the proposed rule because it was not publicly available, but we were able to locate it from the publisher and used this reference in preparing our presumed historical range map (Figure 1). We included a revised discussion of the potential threats posed to the valley elderberry longhorn beetle from predators such as the nonnative Argentine ant (see Summary of Factors Affecting the Species above). In our Background section, we included a more detailed discussion of the species' habitat and population structure, including a summary of studies identifying its metapopulation characteristics.

Following a revised analysis of the best available biological information, including new information received, and a revised five-factor analysis of the potential threats to the valley elderberry longhorn beetle, we concluded that threats related to loss or modification of additional habitat from levee and flood protection measures and the effects of climate change, predation, and cumulative effects of stressors have not been sufficiently reduced; therefore, delisting is not warranted for this species at this time.

(6) Comment: All of the peer reviewers provided examples of significant peer-reviewed scientific papers that were not included in the proposed rule and that they believed would enhance the scientific quality of our assessment. A total of 11 additional papers were provided in the peer review report, with Chemsak (2005) being the most noteworthy example of new information because of its distributional information for both the valley elderberry longhorn beetle and the California elderberry longhorn beetle.

Our Response: We were unable to obtain the Chemsak (2005) reference prior to conducting our analysis for the proposed delisting rule. The Chemsak (2005) reference is not currently in print, but we were able to obtain a copy of the relevant sections for the *Desmocerus* genus in California from the publisher (Nuckols 2013, pers. comm.). We georeferenced the distribution maps from this publication for the two elderberry longhorn beetles and used these results as the starting point for developing and preparing our presumed historical range map (Service 2014, GIS Analysis; see also the *Presumed Historical Range* section above). While preparing this rule, we also reviewed and incorporated information from relevant references and studies suggested by the peer reviewers as well as other studies or survey reports that were not included in our proposed rule. As stated previously, following a revised analysis of the best available scientific information, including the information provided by the peer reviewers, we concluded that delisting is not warranted for this species at this time (see Determination section above).

(7) Comment: Peer reviewers provided a number of responses as to whether we accurately assessed the efficacy of past and ongoing valley elderberry longhorn beetle management activities relative to its overall conservation and recovery. One peer reviewer indicated that management activities are described in detail in the proposed rule, but stated that estimates of success were based on the amount of habitat acquired, protected, or restored, rather than monitoring results. The reviewer also noted that at some of these sites, the valley elderberry longhorn beetle populations appeared to be declining. Another peer reviewer highlighted two studies where approximately 25 percent of suitable habitat was occupied and discussed the potential for incorrect interpretations in our analyses and findings presented in the proposed rule when relying on exit holes instead of adult observations. A third peer reviewer stated that our assessment of the efficacy of management activities was appropriately addressed, but a fourth peer reviewer said that we had not done so, and added that we had not adequately monitored and managed for the valley elderberry longhorn beetle, including reviewing mitigation reports to evaluate the success of those sites.

Our Response: With regard to restoration, mitigation, and management activities for valley elderberry longhorn beetle, we included specific discussions in this document, as well as the conclusions from studies that evaluated the success of these management actions (see *Restoration and Mitigation Sites* in the Background section and our *Factor D* discussion of restoration efforts at National Wildlife Refuges). We also noted there are gaps in monitoring at mitigation sites and there is a need for better data management, including locating missing monitoring reports (as described by the review presented in Holyoak *et al.* (2010, entire)) that could be important for future analyses (see Background section). To address the comment regarding occupancy and interpretation of the data sets using only exit holes, we summarized estimates of occupancy for the valley elderberry longhorn beetle (see *Population Structure* section), and as noted in our response to Comments 1, 2, 5, and 6, we reviewed the quality and limitations of occurrence records for the past 16 years and their geographical locations, and presented a revised summary of the locations of these records based on hydrologic units (see Table 1 in *Current Distribution (since 1997)* section) and presumed extant occurrences map (Figure 2).

(8) Comment: The peer reviewers indicated that, in general, the proposed rule was sufficient relative to the level of detail provided. However, one peer reviewer found the rule contained too much detail on habitat protection and restoration for sites where the valley elderberry longhorn beetle has not been reported, while another found that additional analysis was needed on the potential threat of climate change.

Our Response: We restructured much of the information presented in the proposed rule such that irrelevant details were removed and replaced with new and more relevant information. We presented a new analysis of the range of the valley elderberry longhorn beetle, while acknowledging the limitations of the available data and the need to collect additional information regarding its current abundance and distribution. We also provided an extensive discussion of climate change effects in our analysis of threats, and incorporated predictions from several regional climate models for the Central Valley region. We incorporated details of results of several studies (e.g., metapopulation analysis) and used this information to evaluate the current threats to the species.

(9) Comment: All peer reviewers found the scientific foundation of the proposed rule to be fundamentally unsound due to important omissions, old and missing data, and potentially erroneous conclusions. The peer reviewers provided several suggestions for improving the scientific foundation of our analysis prior to making a subsequent final determination. These include: providing a better evaluation of the current locations of populations, using specimen records or adult beetle observations rather than relying on exit holes and old records, and evaluating the status of the species in a way that incorporates concepts of

metapopulation dynamics or spatial ecology.

Our Response: As noted above (see responses to Comments 1, 2, 5, and 6), this document incorporated new analyses, additional information, and included a discussion on the population structure (see *Population Structure* section) that species experts have defined for the valley elderberry longhorn beetle. We reevaluated the threats to the species and concluded that the threats have not been reduced such that the protections of the Act are no longer necessary. Thus, we determined that delisting is not warranted for this species, and we are withdrawing our proposed rule.

(10) Comment: All peer reviewers highlighted several uncertainties with the data upon which we based our assessment of the current status of the valley elderberry longhorn beetle in the proposed rule, including its range and the effects of climate change on the species.

Our Response: We reanalyzed the historical and presumed extant occurrences of the valley elderberry longhorn beetle (see response to Comments 1 and 2), while acknowledging the limitations of the available data and the need to conduct additional studies in order to develop population trends for this species and its habitat (see *Population Structure* Section). As noted above (see response to Comment 8), we also included an extensive discussion of climate change effects in our analysis of threats, and incorporated predictions from several regional climate models for the Central Valley region (see Climate Change discussion under *Factor A* above).

County and Local Agency Comments

(11) Comment: Eleven different agencies submitted comments supporting the proposed rule to delist the valley elderberry longhorn beetle. The primary reasons for support include:

(a) Conclusions presented in the proposed rule that indicate that population numbers of the valley elderberry longhorn beetle have increased to the point where continued Federal protection is no longer necessary and that the species is now found in more protected locations.

(b) Monetary and time costs to flood control and other projects proposed or maintained by these agencies associated with addressing the regulatory requirements for the federally listed valley elderberry longhorn beetle, including compliance with the Service's *Conservation Guidelines for the Valley Elderberry Longhorn Beetle* (Conservation Guidelines) (Service 1999, entire), extensive surveys of individual elderberry shrubs, and mitigation requirements (*Mitigation Guidelines for the Valley Elderberry Longhorn Beetle;* Service 1996, entire). Specific comments on this issue were provided to support their position such as the need for a flexible and efficient regulatory framework to facilitate construction of utilities and other projects, and a balance between habitat conservation policies and public needs (including publicly funded projects).

(c) The Service recommended delisting the species in its 2006 5-year review (Service 2006a).

Our Response: Under the Act, we 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 regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Following our revised analysis of these factors, including the new information received during the open comment period related to occupancy estimates of the valley elderberry longhorn beetle and its occurrence records, the best available data indicate that the species remains likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Thus, we are withdrawing our proposal to delist the valley elderberry longhorn beetle. Our next 5-year review will reflect the analyses presented in this rule and any other new information we receive regarding the status of the species.

We appreciate the comments received citing the monetary and time costs in response to protections to the valley elderberry longhorn beetle under the Act. We recognize the need to update our Conservation Guidelines (Service 1996, 1999) to allow for additional flexibility as well as to incorporate new information on the species regarding presumed historical range and scientific studies completed and published since 1999 that have evaluated threats to the species and its habitat. We have initiated the process to revise these guidelines in concert with our reanalysis of our proposed rule. We also appreciate the willingness expressed by some of the commenters to consider revising these policies rather than delisting in order to ensure the recovery of the species and conservation of its habitat. We will continue to work with local governments, levee districts, and other entities with responsibilities to maintain flood control structures and other infrastructure to secure the appropriate permits and authorizations under the Act when it becomes necessary to maintain the structures.

(12) Comment: Four agencies submitted comments stating that maintaining a federally protected status (i.e., as an endangered or threatened species under the Act) for the valley elderberry longhorn beetle has created disincentives that inhibit the creation and protection of elderberry habitat. In other words, the commenters believe that more habitat would exist for the species without the protections required under the Act because floodplain management entities do not want operations and maintenance restrictions that result from having valley elderberry longhorn beetle within their areas of responsibility. Three of the agencies stated that naturally colonized elderberry shrubs (seedlings) are removed and elderberry plantings are not being included within restoration and mitigation plans. One of the commenters further stated that delisting the species would give flood management entities greater flexibility in vegetation removal, which in turn could allow for increased elderberry shrub proliferation that may benefit both flood control operation goals and conservation of the valley elderberry longhorn beetle.

Our Response: We are aware of the opinions provided by these commenters, and we will continue to work with various agencies to create or enhance partnerships (see *Factor D* above) to reduce perceived disincentives and provide solutions to these issues.

(13) Comment: A commenter stated that the Service's delay in identifying and removing the valley elderberry longhorn beetle from the Federal List of Endangered and Threatened Wildlife has eroded public confidence and support for the species and the Act. The commenter also stated that, during the development of a post-delisting monitoring plan, it is imperative that local agencies and private partners (including local landowners) have an equal voice with Federal and State agencies so that private property rights and disadvantaged communities are not unduly and adversely impacted.

Our Response: We appreciate the commenter's feedback regarding our evaluation process under section 4(a) of the Act. The Act requires us to use the best commercial and scientific information available to make determinations as to whether a species

may be considered endangered or threatened. In this document, we reevaluated the best scientific and commercial information available for the valley elderberry longhorn beetle, including peer review comments on the scientific findings in the proposed rule, agency comments, and public or other interested party comments, and new information on occurrences, distribution, and threats to the valley elderberry longhorn beetle. Our reanalysis of the five factors that determine if a species meets the definition of endangered or threatened (according to section 4(a) of the Act) that is presented in this document indicates that the valley elderberry longhorn beetle continues to meet the definition of a threatened species (i.e., it is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range). Thus, we are withdrawing our proposal to delist the species and ceasing preparation of a post-delisting monitoring plan, which is no longer appropriate at this time.

(14) Comment: We received a combined comment from two agencies stating that the removal of the species from the Federal List of Endangered and Threatened Wildlife would result in larger social and ecological benefits by enabling the use of limited Federal resources on other high-priority conservation actions. The commenters referenced the draft *Bay Delta Conservation Plan* (BDCP), which is currently under development. The commenters requested that final action on the proposed delisting be completed as soon as possible in order to avoid unnecessary commitments of resources in the development of the BDCP and with their efforts to comply with Federal and State environmental laws.

Our Response: See response to Comment 11. The Draft BDCP and associated Draft Environmental Impact Report/Environmental Impact Statement are being made available to the public for review and comment for a 228-day review period (December 13, 2013 through July 29, 2014). We will continue to work with our partners during the development and finalization of the BDCP.

(15) Comment: One commenter stated they had significant delays in consulting with the Service on the valley elderberry longhorn beetle, including performing environmental analyses and complying with conservation protocols, which they believe greatly lengthened the time to implement flood protection measures. The commenter also noted that in those cases where entities choose to mitigate impacts to the valley elderberry longhorn beetle onsite, the costs of monitoring and protecting the elderberry plants are ongoing and significant because of the species' protected status; thus, public entities have a cost incentive to instead mitigate by purchasing credits offsite. The commenter stated that this mitigation strategy results in removal of the species and elderberry from the riparian corridor, which is also a negative impact for other species that use elderberry in riparian corridors of the Central Valley. Finally, the commenter stated they have been supportive of protections for the species including their demonstrated efforts to restore and mitigate for setback levee projects.

Our Response: We appreciate the feedback regarding the consultation process and implementation of mitigation guidelines. We recognize and appreciate any past, ongoing, and future conservation efforts that may help conserve valley elderberry longhorn beetle and its habitat.

Federal Agency Comments

(16) Comment: The U.S. Forest Service, Pacific Southwest Region (Regional Office R5) indicated that, should the valley elderberry longhorn beetle be delisted, the Forest Service would retain the species as a Regional Forester's Sensitive Species (for at least 5 years), and it would, therefore, be evaluated relative to any proposed project within the range of the species or its known habitat. The agency provided location information for observations of exit holes and elderberry shrubs within the Region's National Forests (Stanislaus, El Dorado, and Sierra). The Forest Service also indicated that actions are taken and would be taken by the agency in the future that provide protection for the species and its habitat.

Our Response: We appreciate the Forest Service's commitment to assist in the conservation of the valley elderberry longhorn beetle and its habitat, regardless of whether the species is delisted. We requested and received updated (as of 2014) information on elderberry shrub locations and observations of exit holes, and have used the information in this document and added it to our GIS database. We note here that the observation of exit holes within the Sierra National Forest is outside our presumed historical range for the species (see Figure 1). Without an observation of an adult male, we cannot confirm whether this location represents the valley elderberry longhorn beetle or the California elderberry longhorn beetle.

Public Comments

(17) Comment: Four commenters supported delisting the valley elderberry longhorn beetle. Reasons for supporting the delisting included: (a) Conclusions presented in the proposed rule that indicate population numbers of the valley elderberry longhorn beetle have increased to the point where continued Federal protection is no longer necessary and that the species is now found in more protected locations, and (b) monetary and time costs to flood control and other projects, with one commenter stating that a delisting decision would result in significant monetary savings to taxpayers. Specific comments were also provided regarding the consequences of delays in levee improvements to ensure the protection of property, and the inability of property owners to make improvements to their property despite homeless camps on that same property and the use of elderberry shrubs as firewood.

Our Response: Under the Act, we 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 regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Based on our analysis of these factors, we concluded that the species continues to warrant listing as threatened (i.e., likely to become endangered in the foreseeable future within a significant portion of its range under the Act); thus, we are withdrawing our proposal to delist the species.

We have and will continue to work with local governments, levee districts, the Corps, and other entities with responsibilities to maintain flood control structures and other infrastructure to secure the appropriate permits and authorizations under the Act when it becomes necessary to maintain the structures. It is a priority for us to facilitate the safety of communities and farmland protected by levees, and when we are aware of levee or bridge projects that may impact the valley elderberry longhorn beetle and its habitat, we work with the appropriate authorities to secure the necessary permits. We are aware that homeless camps are established in certain locations in the Central Valley that contain elderberry habitat. When requested, we work proactively with

local governments to manage these complex situations and protect habitat.

(18) Comment: Five commenters stated that the valley elderberry longhorn beetle should not be delisted for the following reasons:

(a) The primary threats (e.g., habitat loss) to the valley elderberry longhorn beetle remain or have increased since listing.

(b) The species has not recovered, its status has not improved since listing and may be declining, and its range has been reduced since listing due to loss of habitat. Specifically, there is no evidence to show that the species has recovered; that is, the inferred methods to determine occupancy described in the proposed delisting rule lack the science needed to determine a successful recovery of the species and, further, the population increase described in the proposed rule is the result of a greater survey effort and not a real indication of an actual population size or trend.

(c) Additional locations where evidence of the species has been observed since listing are not protected, have not been adequately monitored, and there is evidence of extirpation from some locations due to complete loss of elderberry habitat. One commenter stated that records since listing show limited numbers of the species may currently occupy a limited number of locations, and another commenter noted that it was incorrect to assume that occurrence records represent existing populations or that those locations are currently protected.

(d) Many observations of exit holes or adult beetles are old and may not have correctly identified the species and its status, resulting in an overestimation of the presence of the species. In addition, elderberry shrubs may have also been misidentified by environmental consulting firms conducting surveys for the species or its habitat.

(e) The host plant is not rare or common, but is limited and discontinuously distributed across the species' range.

(f) The proposed rule is inconsistent with conclusions made by Talley *et al.* (2006a, entire) regarding the status of the species and threats described in that document.

(g) The proposed rule does not provide sufficient estimates of either: (1) Relative sizes of elderberry habitat areas in individual sites or regions; or (2) the populations of the beetle, within sites, or the subspecies as a whole; therefore, the number of beetles in each local population could be much smaller and, in some locations, may not be currently occupied at all.

(h) The location information presented in the proposed rule does not provide details on the extent of the geographical areas (or length of river systems) and may only represent a point location of a single elderberry plant or a few plants; large sections in these geographical locations may have no habitat.

(i) The delisting of the valley elderberry longhorn beetle would remove the limited protections provided under the Act at many locations and increase the risk of local extirpation. One commenter stated that local protections to the species' habitat can be beneficial, but they do not apply to all (or even most) areas, are uncertain or may be ineffective, and do not provide a regional approach needed to address large-scale threats (e.g., climate change) to riparian ecosystems.

(j) The proposed rule assumes that the rarity of the species is natural and this fact justifies the delisting, but rare species are more sensitive to threats. One commenter added that, because the species occurs in regional populations composed of patches of small, local populations (metapopulation of just a few individuals), their life history (and survival) is heavily influenced by chance events (see Background section above).

(k) Threats to the valley elderberry longhorn beetle and its habitat from the spread of the Argentine ant, an invasive species and potential predator; specifically, one commenter stated that the presence of elderberry shrubs does not demonstrate recovery because the Service has not monitored the presence of these types of predators. This commenter stated that other studies have shown that similarly situated beetles, such as the eucalyptus borer (*Phoracantha semipunctata*), were found to decline in numbers when present in locations alongside the Argentine ant.

(l) Threats from invasive, nonnative plants (believed to be introduced from neighboring development) to the elderberry plant, which commenters described as an important natural resource for the valley elderberry longhorn beetle and other wildlife in California's Central Valley.

(m) Other potential threats to the species including the effects of climate change, pesticide use, edge effects associated with urban and agricultural development, inadvertent pruning, and levee maintenance.

(n) An incorrect assumption in the proposed rule that the appearance of sufficient elderberry meets the habitat requirements of the valley elderberry longhorn beetle.

(o) Overall lack of scientific rigor in the document and the need for more rigorous scientific study by knowledgeable species experts to conclude the success of the Service's recovery efforts.

(p) Lack of acknowledgement of fragmentation of habitat that has reduced connectivity of habitat, as well as habitat patch size, which directly affects this species (due to its low mobility, low population size, and metapopulation structure) and many other species that rely on contiguous and larger habitat patch sizes or distances for their survival or recovery.

Our Response: We appreciate the commenters' concerns and recommendations regarding the need to determine valley elderberry longhorn beetle persistence and threats that may be impacting the species, such as activities or conditions (e.g., changes in climate) that result in habitat loss, nonnative plant invasions, or predation. In this document, we provided our best estimate of the current population distribution of the species (see *Current Distribution (since 1997)* section), but acknowledged the limitations in identifying occupancy through the amount of elderberry habitat or riparian vegetation or use of observations of exit holes as evidence of presence in order to estimate population trends. We also indicated that population studies are needed to better assess the status of the species throughout its presumed historical range.

We included in this withdrawal a revised description of the threats to the species (see Summary of Factors Affecting the Species), including revised or new discussions of the threats posed by loss of habitat, levee management, habitat destruction or modification related to climate change effects, invasive nonnative plants, predation, and pesticide use. Although literature was not submitted for studies referenced by one commenter regarding effects to the eucalyptus borer from the Argentine ant, we included in this withdrawal document relevant results of a 1992 publication (Way *et al.* 1992, entire) that evaluated predation impacts to an arboreal borer (*Phoracantha semipunctata*) from the Argentine ant (see Background section above).

As in our proposed rule, we also discuss in this withdrawal the nearly 90 percent loss of riparian vegetation in the Central Valley, and the fragmentation of this habitat that has resulted in a locally uncommon or rare and patchy distribution of the valley elderberry longhorn beetle within its remaining presumed historical range in the Central Valley (see *Historical Loss of Riparian*

Ecosystems discussion under *Factor A*). Based on our revised five-factor analysis of threats, we believe the species continues to meet the definition of a threatened species (i.e., likely to become an endangered species in the foreseeable future within a significant portion of its range), and we are withdrawing our proposal to delist the species.

(19) Comment: One commenter stated that further clarity of the definition of what constitutes an elderberry shrub in the Conservation Guidelines (Service 1999) is needed. The commenter recommended using the following definition from leading valley elderberry longhorn beetle researchers: ''*In order to be considered a shrub, an elderberry plant must have one or more stems 1 inch (2.5 cm) or greater in diameter and for purposes of counting the number of shrubs, a group of shoots that originates from the same root system or a group of shoots that occurs within a 16.4 foot (5 m) radius will be considered one shrub.*'' [no citation provided]. In addition, the commenter recommended that we reevaluate our assessment of the effects of pruning elderberry on the valley elderberry longhorn beetle, based on the results of studies presented in Talley and Holyoak (2009). Finally, the commenter recommended that we consider working with the Valley Elderberry Longhorn Beetle Collaborative, which is a group of State agencies, resource managers, researchers, and utilities whose goals are to improve the viability of the valley elderberry longhorn beetle and assist the Service in developing more effective mitigation requirements and improved the Conservation Guidelines.

Our Response: We included a discussion of the study cited in the comment letter in our *Factor A* discussion, including additional information on potential effects of pruning (see Pruning section under *Factor A*). As noted in our response to Comment 11 above, we initiated the process to revise these guidelines in concert with our reanalysis of the proposed rule. Finally, we appreciate the recommendation provided regarding the opportunity to work with our partners and the Valley Elderberry Longhorn Beetle Collaborative, and we look forward to working as a team to develop conservation measures that benefit the recovery of the species.

(20) Comment: One commenter recommended that we conduct a thorough inventory of all current and recent conservation, restoration, and mitigation activities affecting the species and its habitat within the Central Valley, as well as an analysis of likely future actions under such broad programs as the Central Valley Flood Protection Plan and the BDCP.

Our Response: We agree that the commenter's recommendations for surveys and an accounting of various conservation, restoration, and mitigation activities (including the Central Valley Flood Protection Plan and BDCP) would provide more information that would be helpful in future evaluations of the status of the species, and we will consider this information in future conservation planning efforts, including any future revisions to the species recovery plan.

(21) Comment: A natural lands management organization stated that, based on the information they have collected or reviewed pertaining to the preserves they manage in the Central Valley, uncertainty remains about the stability of the valley elderberry longhorn beetle within this part of its range. The commenter provided information on the status of the valley elderberry longhorn beetle and its habitat, based on the management and the experience of their preserve managers, and identified potential threats to elderberry habitat in these areas and the need for additional funding to support specific management activities that benefit the species.

Our Response: We appreciate the information provided by the organization regarding the preserves they manage and the status of the species in these areas. We incorporated this information in the Background section of this rule and used this information in our reanalysis described in this document, including the Summary of Factors Affecting the Species.

(22) Comment: A manager of a valley elderberry longhorn beetle conservation bank provided information on plantings of elderberry shrubs (and associated plants) stating that adult valley elderberry longhorn beetles have yet to be seen adjacent to or within the conservation bank, despite these restoration efforts. The commenter also submitted opinions regarding the approach to recovery efforts that has focused, in part, on providing elderberry habitat for the species (''build it and they will come'') rather than cultivation and disbursement of transplanted elderberry shrubs from project sites to conservation banks, especially those assumed to contain exit holes.

Our Response: We appreciate the personal observations provided regarding the occupancy of the valley elderberry longhorn beetle at this conservation bank. We will consider the commenters' recommendations regarding focusing recovery efforts on elderberry cultivation and disbursement as we revise the Conservation Guidelines (Service 1996), and revise the recovery plan for the valley elderberry longhorn beetle.

(23) Comment: One commenter stated that the peer review report (Atkins 2013, entire) did not accurately represent the science and did not adequately summarize the peer reviewer comments. The commenter also cited concerns with a recommendation by one of the peer reviewers regarding the use of pheromones as a method to evaluate the status of the species (through the attraction of adult male beetles), noting its use has not been shown to be effective on this subspecies and that conclusions drawn would not provide information on habitat loss; thus, direct observations should still be considered.

Our Response: We requested a peer review of the valley elderberry longhorn beetle proposed rule and were provided individual comments from each peer reviewer as well as a summary of the overall (collective) peer review evaluation. This withdrawal incorporated this information and addresses both the collective and individual comments provided by the peer reviewers (see response to Comments 1 through 10 above). We included in this withdrawal a summary of preliminary results from pheromone studies (e.g., Ray *et al.* 2012, entire; Arnold 2013, entire; see Background section above). In our Determination section, we note that a second year of trial surveys using pheromones is currently under way (Sanchez 2014, pers. comm.) to further evaluate the efficacy of this method in evaluating populations of the valley elderberry longhorn beetle within parts of its presumed range.

(24) Comment: One commenter expressed concerns regarding the Service's rule-making process used to prepare the proposed delisting rule, including our internal review process, pointing out discrepancies in the proposed rule with previous Service documents. The commenter concluded that the only course of action was to publish a finding that delisting was not warranted and prepare a new 5-year review, revise the current Recovery Plan, update the Conservation Guidelines (Service 1999), and consider redesignation of critical habitat to a much broader area, including both occupied and unoccupied habitat that may be important to reducing the fragmentation effect of the species' current habitat.

Our Response: Under the Act, we 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 regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Our analysis of these factors in this document shows that the species continues to meet the definition of a threatened species (i.e., likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range). Therefore, we are withdrawing our proposal to delist the species.

We recognize the need for additional actions regarding the valley elderberry longhorn beetle (e.g., revision of the Conservation Guidelines (Service 1996)). We will take into consideration various conservation-related recommendations provided by the commenter when conducting the next 5-year review and during any revision of a recovery plan for the species. In addition, we have initiated the process to revise the Conservation Guidelines concurrent with our reanalysis of the best available information presented in this document.

(25) Comment: One commenter stated that much more information, particularly with regard to population stability in multiple areas, is needed than currently exists to determine a proposed delisting for this species. The commenter noted the delisting rule repeatedly states there are minimal surveys and data uncertainties making it difficult at this time to make a determination of the species' population status; however, the delisting document simultaneously acknowledges and ignores these information gaps. The commenter stated there is no scientific evidence that the geographic range of the valley elderberry longhorn beetle has expanded nor is there evidence that populations within locations have increased since listing. The commenter further explained that, because the species is naturally rare and occurs only in small, local populations with just a few individuals within any one site, increases of individuals within sites would not necessarily be expected if recovery was occurring. The commenter indicated, while restoration efforts have created or enhanced some of the lost riparian vegetation, only a fraction of a percent of what was historically lost has been provided, and that long-term trends of the species' population structure throughout its range are still needed to determine whether its populations are persistent, resilient, resistant, and not variable.

Our Response: As noted in our response to Comments 1 and 2, in our Background section we reevaluated the occurrence records, incorporated a discussion of the metapopulation structure and limited dispersal ability of the species, and presented a discussion of the success of elderberry restoration and mitigation sites. We also revised our threats analysis (see Summary of Factors Affecting the Species) in this withdrawal, including the effects of levee maintenance, pruning, and climate change, invasive plants, and predation. Our analysis of these factors shows that the species continues to warrant listing as a threatened species, and we are withdrawing our proposal to delist the species.

(26) Comment: One commenter stated that, regardless of the final decision regarding delisting, the Service needs to revise its Conservation Guidelines (Service 1999) by incorporating new data on pruning, topping, roadside dust and noise, transplanting, and spatial relationships between the valley elderberry longhorn beetle, its habitat, and environmental stochasticity (random processes or events), which can affect its populations. The commenter suggested that the Service should then bring diverse land users together and collaboratively work with them to develop a priority list of additional research necessary to determine the status of the species.

Our Response: As noted above (see response to Comment 11), we have initiated the process to revise our Conservation and Mitigation Guidelines (Service 1996, 1999).

(27) Comment: One commenter stated that the agency's actions are contrary to law (Administrative Procedure Act) because the agency did not consider alternatives to delisting the valley elderberry longhorn beetle. The commenter believes that the Service should consider downlisting the valley elderberry longhorn beetle from endangered to threatened given the potential threats of the Argentine ant to populations of the species. The commenter stated that downlisting the beetle from endangered to threatened would allow researchers to undertake a more detailed study of the effects of the Argentine ant on beetle populations, but would still allow for protection under the Act as well as accommodate the concerns of others regarding impacts to economic activity.

Our Response: The species is currently listed as a federally threatened, not endangered, species under the Act (45 FR 52803; August 8, 1980); therefore, we do not have the option of downlisting to threatened. We issued the proposed rule (77 FR 60238; October 2, 2012) to remove the valley elderberry longhorn beetle as a threatened species from the List of Endangered and Threatened Wildlife and to remove the designation of critical habitat. This document withdraws that proposed rule because the best scientific and commercial data available, including our reevaluation of information related to the species' range, population distribution, and population structure, indicate that threats to the species and its habitat have not been reduced such that removal of this species from the Federal List of Endangered and Threatened Wildlife is appropriate.

(28) Comment: One commenter stated that the current Recovery Plan (Service 1984) does not address the steps being taken to curb predation from the Argentine ants and instead regards the absence of data as a justification for inaction. As a result, the commenter believes that the current Recovery Plan does not meet the delisting requirements of the Act.

Our Response: We acknowledge the need to update the Recovery Plan, which was prepared in 1984, and the need for the Recovery Plan to address additional threats discussed in this document, as well as new information on the species' distribution. We will consider new information and recommendations provided by commenters when we update the Recovery Plan in the future.

(29) Comment: One commenter from East Sacramento, California, stated that he has a red elderberry shrub in his backyard and that he has photographed the valley elderberry longhorn beetle on his property on several occasions (three photos were submitted with the comments). The commenter believes his observations give the appearance that the species has a more varied range than what we stated in the proposed delisting rule. The commenter stated that we should determine if his observations are of the valley elderberry longhorn beetle and thus represent a range expansion, and that, if it is found in elderberry in other backyards throughout the Sacramento Valley, then the species may not warrant protection under the Act.

Our Response: We appreciate the beetle observations provided by the commenter. Although the images submitted were slightly out of focus, we requested a species expert review the photos and confirm the identity of the insect. We believe the photos submitted are of *Podabrus pruinosus,* a common

cantharid beetle that is part of a family of beetles frequently referred to as soldier or leather winged beetles; adults of this species are commonly observed in spring and summer and are known to occur in the Central Valley (Arnold 2014c, pers. comm.).

(30) Comment: One commenter provided personal observations of elderberry habitat and its use based on the commenter's farming experience along the Tuolumne River. The commenter stated that his property was inundated with elderberry plants and he observed birds carrying berries (seeds) that were deposited along fences or buildings. The commenter also noted that elderberry roots spread extensively underground and characterized elderberry plants as weeds that interfered with structures on his property.

Our Response: We assume that the commenter provided these comments in order to provide historical information on the amount of elderberry habitat in this area and wildlife use of elderberry plants. In this document, we summarized studies of elderberry characteristics that are important to the life history of the valley elderberry longhorn beetle (see Background section). We used this information in conjunction with reported estimates of low occupancy and our estimates of current elderberry habitat within the presumed historical range of the valley elderberry longhorn beetle, and analyzed the threats to the species. We concluded, based on the best scientific available information, that the valley elderberry longhorn beetle continues to warrant listing as threatened, and we are withdrawing our proposal to delist the species.

References Cited

A complete list of all references cited in this document is available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2011–0063 or upon request from the Field Supervisor, Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

Authors

The primary authors of this document are the staff members of the Carlsbad Fish and Wildlife Office and the Pacific Southwest Regional Office.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: August 29, 2014.

Rowan W. Gould,

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

[FR Doc. 2014–21585 Filed 9–16–14; 8:45 am]

BILLING CODE 4310–55–P

FEDERAL REGISTER

Vol. 79 Wednesday,

No. 180 September 17, 2014

Part III

Environmental Protection Agency

40 CFR Part 52

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Supplemental Proposal To Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional State; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–HQ–OAR–2012–0322; FRL–9914–41–OAR]

RIN 2060–AR68

State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction; Supplemental Proposal To Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional States

AGENCY: Environmental Protection Agency (EPA).

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: In this supplemental notice of proposed rulemaking (SNPR), the Environmental Protection Agency (EPA) is supplementing and revising what it previously proposed as its response to a petition for rulemaking filed by the Sierra Club (the Petition). By notice published on February 22, 2013, the EPA proposed its response to the Petition's requests concerning treatment of excess emissions in state rules by sources during periods of startup, shutdown or malfunction (SSM). Subsequent to that proposal, a federal court ruled that the Clean Air Act (CAA or Act) precludes authority of the EPA to create affirmative defense provisions applicable to private civil suits. As a result, in this SNPR the EPA is proposing to apply its revised interpretation of the CAA, but only with respect to affirmative defense provisions in state implementation plans (SIPs). For specific affirmative defense provisions identified in the Petition, we are revising the basis for the proposed findings of substantial inadequacy and SIP calls or proposing new findings of substantial inadequacy and SIP calls. For specific provisions that the EPA has independently identified, including SIP provisions in states not included in the February 2013 proposal notice, we are proposing new findings and SIP calls.

DATES: *Comments.* Comments must be received on or before November 6, 2014.

Public Hearing. The EPA will hold a public hearing on this SNPR on October 7, 2014, in Washington, DC.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2012–0322, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* Attention Docket ID No. EPA–HQ–OAR–2012–0322, U.S. Environmental Protection Agency, EPA Docket Center, Air Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA Docket Center, William Jefferson Clinton West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2012–0322. 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–2012–0322. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any CD 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, avoid 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 additional instructions on submitting comments, go to section I.C of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, EPA Docket Center, William Jefferson Clinton West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. 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 Air Docket is (202) 566–1742.

Public Hearing: A public hearing will be held on October 7, 2014, at the William Jefferson Clinton West Building, Room 1117B, 1301 Constitution Avenue, Washington, DC 20460. The public hearing will convene at 9 a.m. (Eastern Standard Time) and continue until the earlier of 6 p.m. or 1 hour after the last registered speaker has spoken. People interested in presenting oral testimony or inquiring as to whether a hearing is to be held should contact Ms. Pamela Long, Air Quality Planning Division, Office of Air Quality Planning and Standards (C504–01), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541–0641, fax number (919) 541–5509, email address *long.pam@epa.gov,* at least 5 days in advance of the public hearing (*see* **DATES**). People interested in attending the public hearing must also call Ms. Long to verify the time, date and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views or arguments concerning the proposed action (*i.e.,* this SNPR specific to affirmative defense provisions in SIPs). The EPA will make every effort to accommodate all speakers who arrive and register. A lunch break is scheduled from 12:30 p.m. until 2 p.m. Because this hearing is being held at U.S. government facilities, individuals planning to attend the hearing should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. Please note that the REAL ID Act, passed by Congress in 2005, established

new requirements for entering federal facilities. These requirements took effect July 21, 2014. If your driver's license is issued by Alaska, American Samoa, Arizona, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Montana, New York, Oklahoma or the state of Washington, you must present an additional form of identification to enter the federal building where the public hearing will be held. Acceptable alternative forms of identification include: Federal employee badges, passports, enhanced driver's licenses, and military identification cards. In addition, you will need to obtain a property pass for any personal belongings you bring with you. Upon leaving the building, you will be required to return this property pass to the security desk. No large signs will be allowed in the building, cameras may only be used outside of the building and demonstrations will not be allowed on federal property for security reasons. The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing. Written comments on the proposed rule must be received by November 6, 2014. Commenters should notify Ms. Long if they will need specific equipment, or if there are other special needs related to providing comments at the hearing. The EPA will provide equipment for commenters to show overhead slides or make computerized slide presentations if we receive special requests in advance. Oral testimony will be limited to 5 minutes for each commenter. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email or CD) or in hard copy form. The hearing schedule, including lists of speakers, will be posted on the EPA's Web site at *http://www.epa.gov/air/urbanair/sipstatus/.* Verbatim transcripts of the hearings and written statements will be included in the docket for the rulemaking. The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearing to run either ahead of schedule or behind schedule.

FOR FURTHER INFORMATION CONTACT: Questions concerning this SNPR should be addressed to Ms. Lisa Sutton, U.S. EPA, Office of Air Quality Planning and Standards, State and Local Programs Group (C539–01), Research Triangle Park, NC 27711, telephone number (919) 541–3450, email address: *sutton.lisa@epa.gov*.

If you have questions concerning the public hearing, please contact Ms. Pamela Long, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Planning Division (C504–01), Research Triangle Park, NC 27711, telephone (919) 541–0641, fax number (919) 541–5509, email address: *long.pam@epa.gov* (preferred method for registering).

SUPPLEMENTARY INFORMATION: For questions related to a specific SIP, please contact the appropriate EPA Regional Office:

EPA Regional office	Contact for regional office (person, mailing address, telephone number)	State
I	Alison Simcox, Environmental Scientist, EPA Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109–3912, (617) 918–1684.	Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island and Vermont.
II	Paul Truchan, EPA Region 2, 290 Broadway, 25th Floor, New York, NY 10007–1866, (212) 637–3711.	New Jersey, New York, Puerto Rico and Virgin Islands.
III	Amy Johansen, EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103–2029, (215) 814–2156.	District of Columbia, Delaware, Maryland, Pennsylvania, Virginia and West Virginia.
IV	Joel Huey, EPA Region 4, Atlanta Federal Center, 61 Forsyth Street SW., Atlanta, GA 30303–8960, (404) 562–9104.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee.
V	Christos Panos, Air and Radiation Division (AR–18J), EPA Region 5, 77 West Jackson Boulevard, Chicago, IL 60604–3507, (312) 353–8328.	Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.
VI	Alan Shar (6PD–L), EPA Region 6, Fountain Place 12th Floor, Suite 1200, 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–6691.	Arkansas, Louisiana, New Mexico, Oklahoma and Texas.
VII	Lachala Kemp, EPA Region 7, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, KS 66219, (913) 551–7214. Alternate contact is Ward Burns, (913) 551–7960.	Iowa, Kansas, Missouri and Nebraska.
VIII	Adam Clark, Air Quality Planning Unit (8P–AR) Air Program, Office of Partnership and Regulatory Assistance, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202–1129, (303) 312–7104.	Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming.
IX	Lisa Tharp, EPA Region 9, Air Division, 75 Hawthorne Street (AIR–8), San Francisco, CA 94105, (415) 947–4142.	Arizona, California, Hawaii, Nevada and the Pacific Islands.
X	Donna Deneen, Environmental Engineer, Office of Air, Waste and Toxics (AWT–107), EPA Region 10, 1200 Sixth Avenue, Suite 900, Seattle, WA 98101, (206) 553–6706.	Alaska, Idaho, Oregon and Washington.

I. General Information

A. Does this action apply to me?

Entities potentially affected by this rule include states, U.S. territories, local authorities and eligible tribes that are currently administering, or may in the future administer, EPA-approved implementation plans (''air agencies'').[1]

[1] The EPA respects the unique relationship between the U.S. government and tribal authorities and acknowledges that tribal concerns are not interchangeable with state concerns. Under the CAA and the EPA regulations, a tribe may, but is not required to, apply for eligibility to have a tribal implementation plan (TIP). For convenience, we refer to ''air agencies'' in this rulemaking collectively when meaning to refer in general to states, the District of Columbia, U.S. territories, local air permitting authorities and eligible tribes that are currently administering, or may in the future administer, EPA-approved implementation plans. The EPA notes that the petition under evaluation does not identify any specific provisions related to tribal implementation plans. We therefore refer to ''state'' or ''states'' rather than ''air agency''

Continued

The EPA's action on the Petition is potentially of interest to all such entities because the EPA is evaluating issues related to basic CAA requirements for SIPs. Through this rulemaking, the EPA is both clarifying and applying its interpretation of the CAA with respect to SIP provisions applicable to excess emissions during SSM events in general. In addition, in the final action based on this supplemental proposal, the EPA may find specific SIP provisions in states identified either in the Petition or by the EPA independently to be substantially inadequate to meet CAA requirements, pursuant to CAA section 110(k)(5), and thus those states will potentially be affected by this rulemaking directly.[2] For example, if a state's existing SIP includes an affirmative defense provision that would purport to alter the jurisdiction of the federal courts to assess monetary penalties for violations of CAA requirements, then the EPA may determine that the SIP provision is substantially inadequate because the provision is inconsistent with fundamental requirements of the CAA. This rule may also be of interest to the public and to owners and operators of industrial facilities that are subject to emission limits in SIPs, because it may require changes to state rules applicable to excess emissions. When finalized, this action will embody the EPA's updated SSM Policy for all SIP provisions relevant to excess emissions during SSM events.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this SNPR will be available on the World Wide Web. Following signature by the EPA Assistant Administrator, a copy of this SNPR will be posted on the EPA's Web site, under ''State Implementation Plans to Address Emissions During Startup, Shutdown and Malfunction,'' at *http://www.epa.gov/air/urbanair/sipstatus.* In addition to this notice, other relevant documents are located in the docket, including a copy of the Petition and a copy of the February 2013 proposal notice.

C. What should I consider as I prepare my comments?

1. *Submitting CBI.* Do not submit this information to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a CD that you mail to the EPA, mark the outside of the CD as CBI and then identify electronically within the CD the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2012–0322.

2. *Tips for preparing your comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

D. How is the preamble organized?

The information presented in this preamble is organized as follows:

I. General Information
A. Does this action apply to me?
B. Where can I get a copy of this document and other related information?
C. What should I consider as I prepare my comments?
D. How is the preamble organized?
E. What is the meaning of key terms used in this notice?
II. Overview of This SNPR
A. How does this notice supplement or revise the EPA's already proposed rulemaking to respond to the Petition?
B. To which air agencies does this SNPR apply and why?
C. What is the EPA proposing for any state that receives a finding of substantial inadequacy and a SIP call?
D. What are potential impacts on affected states and sources?
III. Background for This SNPR
A. What did the Petitioner request?
B. What did the EPA previously propose in this rulemaking with respect to affirmative defense provisions in SIPs?
C. What events necessitated this SNPR?
IV. What is the EPA proposing through this SNPR in response to the Petitioner's request for rescission of the EPA policy on affirmative defense provisions?
A. Petitioner's Request
B. The EPA's Proposed Revised Response
V. Revised SSM Policy on Affirmative Defense Provisions in SIPs
VI. Legal Authority, Process and Timing for SIP Calls
VII. What is the EPA proposing through this SNPR for each of the specific affirmative defense provisions identified in the Petition or identified independently by the EPA?
A. Overview of the EPA's Evaluation of Specific Affirmative Defense SIP Provisions
B. Affected States in EPA Region III
1. District of Columbia
2. Virginia
3. West Virginia
C. Affected States in EPA Region IV
1. Georgia
2. Mississippi
3. South Carolina
D. Affected States in EPA Region V
1. Illinois
2. Indiana
3. Michigan
E. Affected States and Local Jurisdictions in EPA Region VI
1. Arkansas
2. New Mexico
3. New Mexico: Albuquerque-Bernalillo County
4. Texas
F. Affected State in EPA Region VIII: Colorado
1. Petitioner's Analysis
2. The EPA's Prior Proposal
3. The EPA's Revised Proposal
G. Affected States and Local Jurisdictions in EPA Region IX
1. Arizona
2. Arizona: Maricopa County
3. California: Eastern Kern Air Pollution Control District
4. California: Imperial County Air Pollution Control District
5. California: San Joaquin Valley Air Pollution Control District

or ''air agencies'' when meaning to refer to one, some or all of the 39 states identified in the Petition or other states identified by the EPA in this SNPR. We also use ''state'' or ''states'' rather than ''air agency'' or ''air agencies'' when quoting or paraphrasing the CAA or other document that uses that term even when the original referenced passage may have applicability to tribes as well.

[2] The specific SIPs that include affirmative defense provisions identified by the EPA independently are listed under section II.B of this SNPR (see table). Furthermore, in comments received on the February 2013 proposal notice, a commenter brought to the EPA's attention one affirmative defense provision in a SIP, that of Texas. In the rulemaking docket, the comment letter may be found at EPA–HQ–OAR–2012–0322–0621.

H. Affected States and Local Jurisdictions in EPA Region X
1. Alaska
2. Washington
3. Washington: Energy Facility Site Evaluation Council
4. Washington: Southwest Clean Air Agency
VIII. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132—Federalism
F. Executive Order 13175—Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045—Protection of Children from Environmental Health Risks and Safety Risks
H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898—Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Determination Under Section 307(d)
L. Judicial Review
IX. Statutory Authority

E. What is the meaning of key terms used in this notice?

For the purpose of this notice, the following definitions apply unless the context indicates otherwise:

The terms *Act* or *CAA* or *the statute* mean or refer to the Clean Air Act.

The term *affirmative defense* means, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding. The term *affirmative defense provision* means more specifically a state law provision in a SIP that specifies particular criteria or preconditions that, if met, would purport to preclude a court from imposing monetary penalties or other forms of relief for violations of SIP requirements in accordance with CAA section 113 or CAA section 304.

The term *Agency* means or refers to the EPA. When not capitalized, this term refers to an agency in general and not specifically to the EPA.

The terms *air agency* and *air agencies* mean or refer to states, the District of Columbia, U.S. territories, local air permitting authorities with delegated authority from the state, and tribal authorities with appropriate CAA jurisdiction.

The term *automatic exemption* means a generally applicable provision in a SIP that would provide that if certain conditions existed during a period of excess emissions, then those exceedances would not be considered violations of the applicable emission limitations.

The term *director's discretion provision* means, in general, a regulatory provision that authorizes a state regulatory official unilaterally to grant exemptions or variances from applicable emission limitations or control measures, or to excuse noncompliance with applicable emission limitations or control measures, which would be binding on EPA and the public, in spite of SIP provisions that would otherwise render such conduct by the source a violation.

The term *EPA* refers to the United States Environmental Protection Agency.

The term *excess emissions* means the emissions of air pollutants from a source that exceed any applicable SIP emission limitations.

The term *malfunction* means a sudden and unavoidable breakdown of process or control equipment.

The term *NAAQS* means national ambient air quality standard or standards. These are the national primary and secondary ambient air quality standards that the EPA establishes under CAA section 109 for criteria pollutants for purposes of protecting public health and welfare.

The term *Petition* refers to the petition for rulemaking titled, ''Petition to Find Inadequate and Correct Several State Implementation Plans under Section 110 of the Clean Air Act Due to Startup, Shutdown, Malfunction, and/or Maintenance Provisions,'' filed by the Sierra Club with the EPA Administrator on June 30, 2011.

The term *Petitioner* refers to the Sierra Club.

The term *shutdown* means, generally, the cessation of operation of a source for any reason.

The term *SIP* means or refers to a State Implementation Plan. Generally, the SIP is the collection of state statutes and regulations approved by the EPA pursuant to CAA section 110 that together provide for implementation, maintenance and enforcement of a national ambient air quality standard (or any revision thereof) promulgated under section 109 for any air pollutant in each air quality control region (or portion thereof) within a state. In some parts of this notice, statements about SIPs in general would also apply to tribal implementation plans in general even though not explicitly noted.

The term *SNPR* means or refers to this supplemental notice of proposed rulemaking.

The term *SSM* refers to startup, shutdown or malfunction at a source. It does not include periods of maintenance at such a source. An SSM event is a period of startup, shutdown or malfunction during which there are exceedances of the applicable emission limitations and thus excess emissions.

The term *SSM Policy* refers to the cumulative guidance that the EPA has issued concerning its interpretation of CAA requirements with respect to treatment of excess emissions during periods of startup, shutdown and malfunction at a source. The most comprehensive statement of the EPA's SSM Policy prior to this proposed rulemaking is embodied in a 1999 guidance document discussed in more detail in this proposal. This specific guidance document is referred to as the *1999 SSM Guidance.* When finalized, this action will embody the EPA's updated SSM Policy for all SIP provisions relevant to excess emissions during SSM events.

The term *startup* means, generally, the setting in operation of a source for any reason.

II. Overview of This SNPR

A. How does this notice supplement or revise the EPA's already proposed rulemaking to respond to the Petition?

By notice published on February 22, 2013 (78 FR 12459), we proposed to take action on a petition for rulemaking that the Sierra Club (the Petitioner) filed with the EPA Administrator on June 30, 2011 (the Petition). In that February 2013 proposal notice, we described and proposed the EPA's response to each of the Petition's three interrelated requests concerning the treatment of excess emissions from sources during periods of SSM in provisions in SIPs. Among other requests, the Petitioner requested that the EPA rescind its SSM Policy element interpreting the CAA to allow SIPs to include affirmative defense provisions for violations due to excess emissions during any type of SSM events because the Petitioner contended there is no legal basis for such provisions in SIPs.

In this SNPR, we are supplementing and revising what we earlier proposed as our response to the Petitioner's requests, but only to the extent the requests narrowly concern affirmative defense provisions in SIPs. We are not revising or seeking further comment on any other aspects of the February 2013 proposed action.

First, based on reexamination of statutory requirements in light of a recent court decision, we are revising our interpretation of the CAA concerning the issue of affirmative defense provisions in SIPs. Accordingly we propose to grant the Petitioner's overarching request that the EPA rescind its SSM Policy element that interpreted the CAA to allow affirmative defense provisions in SIPs. Our proposal to grant the Petition and to rescind our SSM Policy with respect to allowing affirmative defenses in SIPs is a revision of the position we previously proposed in the February 2013 proposal notice (*i.e.,* to grant in part and to deny in part the Petition on this request). The basis for our proposed revision of the SSM Policy with respect to affirmative defense provisions in SIPs and our revised response to the Petition on this issue is provided in more detail in section IV of this SNPR.

Second, we propose to grant the Petitioner's request that the EPA apply a revised interpretation to, and effectuate the removal of, specific existing affirmative defense provisions in SIPs identified by the Petitioner as inconsistent with the CAA. Accordingly, we propose to grant the Petition with respect to specific existing affirmative defense provisions in the SIPs of 13 states. For all 13 of these states, we have already proposed SIP calls for one or more SIP provisions in our February 2013 proposal notice, but note that we did not at that time propose SIP calls for all affirmative defense provisions in those states because some of the provisions appeared to comply with our policy at the time of the proposal. What we are proposing in this SNPR is to grant the Petition with respect to all of the identified affirmative defenses in these states.

Third, in addition to the specific affirmative defense provisions identified by the Petitioner, the EPA has independently identified other affirmative defense provisions in SIPs and is proposing in this SNPR to take action with respect to these SIP provisions as well. The newly identified affirmative defense provisions are found in six states' SIPs. For two of the states whose SIPs include newly identified affirmative defense provisions, California and Texas, we did not propose a SIP call in the February 2013 proposal notice, as those states were not identified in the Petition. For the other four states (New Mexico, South Carolina, Washington and West Virginia), we did propose a SIP call in the February 2013 proposal notice for one or more SIP provisions, but at that time we did not propose a SIP call for all affirmative defense provisions identified in the Petition or for any affirmative defense provisions that were not identified in the Petition. The EPA is now including these six states' affirmative defense provisions in order to provide comprehensive guidance to all states concerning affirmative defense provisions in SIPs and to avoid confusion that may arise due to recent court decisions relevant to such provisions under the CAA. Section VII of this SNPR presents the EPA's analysis of each of the affirmative defense SIP provisions at issue.

Fourth, for each of the states where the EPA proposes to grant the Petition concerning specific affirmative defense provisions or to take action on such provisions that EPA has independently identified, the Agency also proposes to find that the existing SIP provision at issue is substantially inadequate to meet CAA requirements and thus under CAA authority proposes to issue a ''SIP call'' with respect to that SIP provision. For those states for which the EPA promulgates a final finding of substantial inadequacy and a SIP call, the EPA has in the February 2013 notice proposed a schedule allowing the states 18 months within which to submit a corrective SIP revision. In section II.C of this SNPR, the EPA accordingly proposes that this schedule apply to all SIP provisions identified as substantially inadequate in this supplemental proposal.

What EPA proposes in this SNPR supersedes the February 2013 proposal only insofar as the SNPR supplements or revises the February 2013 proposal notice with respect to the issues related to affirmative defense provisions in SIPs. After evaluation of public comment on this SNPR, the EPA intends to complete its action on the Petition in one final action, addressing together the issues discussed in the February 2013 proposal notice and in this SNPR.

This action provides the EPA an opportunity to invite public comment on our SSM Policy specific to affirmative defenses. In this SNPR, the EPA is supplementing and revising its proposed responses to the issues in the Petition only to the extent they concern affirmative defenses in SIPs, and the EPA solicits comment on its proposed responses. We note that an opportunity to comment on the EPA's proposed responses to other issues raised in the Petition was provided earlier, in the comment period initiated by our February 2013 proposal notice. Therefore, comments received on this SNPR will be considered germane only to the extent they pertain specifically to the subject of affirmative defenses in SIPs. The EPA does not intend to consider any further comments related to other aspects of the prior proposal, as those other aspects are not being reopened in this supplemental proposal. Moreover, because the EPA's interpretation of the CAA with respect to the legal basis for affirmative defense provisions in SIPs has changed, the EPA does not intend to respond to comments previously submitted on the February 2013 proposal notice to the extent they apply to issues related to affirmative defense provisions in SIPs generally, or to issues related to specific affirmative defense provisions identified by the Petitioner, as those comments will be moot if the EPA finalizes its action as discussed in this SNPR.

Through our proposed rulemaking action, which includes the February 2013 proposal notice and this SNPR, the EPA is clarifying, restating and revising its SSM Policy. When finalized, this action will embody the EPA's updated SSM Policy for all SIP provisions relevant to excess emissions during SSM events. The final action will also clarify for the affected states how they can resolve the identified deficiencies in their SIPs, as well as provide all air agencies guidance on SSM issues as they further develop their SIPs in the future.

B. To which air agencies does this SNPR apply and why?

In general, the EPA's action on the Petition in this rulemaking may be of interest to all air agencies because the EPA is significantly clarifying, restating and revising its longstanding SSM Policy with respect to what the CAA requires concerning SIP provisions relevant to excess emissions during periods of startup, shutdown and malfunction. For example, the EPA is proposing in this SNPR to grant the Petitioner's request that the EPA rescind its interpretation of the CAA that would allow affirmative defense provisions in SIPs.

More specifically, this SNPR is directly relevant to the states for which we are now proposing SIP calls on the basis that those SIP provisions are inconsistent with CAA requirements because they include affirmative defenses. The EPA is proposing SIP calls with respect to affirmative defense SIP provisions in each of the 17 states (for provisions applicable in 23 statewide and local jurisdictions [3] and

[3] The state has the primary responsibility to implement SIP obligations, pursuant to CAA section 107(a). However, as CAA section 110(a)(2)(E) allows, a state may authorize and rely

no tribal areas) that show either ''Grant'' or ''SIP call'' as the proposed action under table 1, ''List of States With Affirmative Defense SIP Provisions for Which the EPA Proposes to Grant the Petition or to Address Such Provisions Identified by the EPA.''

TABLE 1—LIST OF STATES WITH SIP AFFIRMATIVE DEFENSE PROVISIONS FOR WHICH THE EPA PROPOSES TO GRANT THE PETITION OR TO ADDRESS SUCH PROVISIONS IDENTIFIED BY THE EPA

EPA region	State	Proposed action[a] with respect to affirmative defenses applicable	
		. . . for malfunctions?	. . . for startup, shutdown or other modes?
III	District of Columbia	Grant	Not applicable.
	Virginia	Grant	Not applicable.
	West Virginia	SIP call (new)	Not applicable.
IV	Georgia	Grant	Grant.
	Mississippi	Grant	Grant.
	South Carolina	SIP call (new)	Not applicable.
V	Illinois	Grant	Not applicable.
	Indiana	Grant	Not applicable.
	Michigan	Not applicable	Grant.
VI	Arkansas	Grant	Not applicable.
	New Mexico	Grant (for state) and SIP call (new for Albuquerque-Bernalillo County).	Grant (for state) and SIP call (new for Albuquerque-Bernalillo County).
	Texas	SIP call (new)	Not applicable.
VIII	Colorado	Grant (change from February 2013 proposal to Deny).	Grant.
IX	Arizona	Grant (for state and for Maricopa County; change from February 2013 proposal to Deny).	Grant (for state and for Maricopa County).
	California	SIP call (new for Eastern Kern APCD, new for Imperial County APCD and new for San Joaquin Valley APCD).	Not applicable.
X	Alaska	Grant	Grant.
	Washington	Grant (for state) and SIP call (new for Energy Facility Site Evaluation Council and new for Southwest Clean Air Agency).	Grant (for state) and SIP call (new for Energy Facility Site Evaluation Council and new for Southwest Clean Air Agency).

[a] The proposed action under the SNPR is the same action as proposed in February 2013 unless noted in this table to be either new or a change. The entry ''SIP call'' indicates that the affirmative defense provision was identified by the EPA independently and was not included in the Petition.

For each state for which the proposed action in this SNPR is either ''Grant'' or ''SIP call,'' the EPA proposes to find that specific affirmative defense provisions in the state's SIP are substantially inadequate to meet CAA requirements for the reason that these provisions are inconsistent with the CAA.

For each state for which the proposed action on the Petition is either ''Grant'' or ''SIP call,'' the EPA is further proposing in this SNPR to call for a SIP revision as necessary to remove the identified affirmative defense provisions from the SIP at issue. The EPA's revised proposal under this SNPR concerning affirmative defense provisions in specific states' SIPs is summarized in section VII of this SNPR.

The SIP calls proposed in this SNPR apply only to those specific provisions, and the scope of each of the SIP calls would be limited to those provisions. This SNPR proposes SIP calls specific to affirmative defense provisions in 17 states. The 17 states include two states for which we are newly proposing SIP calls: California and Texas. For the remaining 15 states, we already proposed SIP calls in the February 2013 proposal notice for one or more SSM-related provisions, although in this SNPR we are in some cases proposing SIP calls for additional affirmative defense provisions and in some cases proposing SIP calls on a basis that has changed from that of our earlier proposal.

For Jefferson County, Kentucky, the affirmative defense provisions for which we proposed in February 2013 to grant the Petition were subsequently removed from the SIP.[4] Thus, under this SNPR we are proposing instead to deny the Petition, and we are no longer proposing a SIP call with respect to affirmative defense provisions for this area because the revision has already been made by the state and approved into the SIP by the EPA. Note, however, that we already proposed a SIP call for Kentucky, for other provisions (*i.e.,* provisions not concerning affirmative defenses in Jefferson County), and this SNPR does not change what we proposed in the February 2013 proposal notice for the other Kentucky SIP provisions.

C. What is the EPA proposing for any state that receives a finding of substantial inadequacy and a SIP call?

If the EPA finalizes a finding of substantial inadequacy and issues a SIP call for any state, the EPA's final action will establish a deadline by which the state must make a SIP submission to rectify the deficiency. Pursuant to CAA section 110(k)(5), the EPA has authority to set a SIP submission deadline that does not exceed 18 months from the date the Agency notifies the state of the inadequacy. The EPA intends to disseminate notice of any final findings of substantial inadequacy and the issuance of any SIP call promptly after the Administrator signs the final notice.

The EPA has already proposed to provide the full 18-month period

on a local or regional government, agency or instrumentality to carry out the SIP or a portion of the SIP within its jurisdiction. As a result, some of the SIP provisions at issue in this rulemaking apply to specific portions of a state. Thus, in certain states, submission of a corrective SIP revision may involve rulemaking in more than one jurisdiction.

[4] *See,* Approval and Promulgation of Implementation Plans; Kentucky; Approval of Revisions to the Jefferson County Portion of the Kentucky SIP; Emissions During Startups, Shutdowns, and Malfunctions, 79 FR 33101 (June 10, 2014).

permissible by statute to give states sufficient time to make appropriate SIP revisions following their own SIP development process. Such a schedule will allow for the necessary SIP development process to correct the deficiencies yet still achieve the necessary SIP improvements as expeditiously as practicable.

Accordingly, the EPA is proposing to establish the due date for the state to respond to the SIP call to be 18 months after the date on which the Administrator signs the notice and disseminates it to the states. If, for example, the EPA's final findings are signed and disseminated in May 2015, then the SIP submission deadline for each of the states subject to the final SIP call would fall 18 months later, in November 2016. Thereafter, the EPA will review the adequacy of that new SIP submission in accordance with the CAA requirements of sections 110(a), 110(k), 110(l) and 193, including the EPA's interpretation of the CAA reflected in the SSM Policy as clarified and updated through this rulemaking, in notice-and-comment rulemaking on the individual SIP submissions.

D. What are potential impacts on affected states and sources?

The EPA's February 2013 proposal notice included an explanation of the potential impacts on states and sources of the SIP calls proposed in that notice. That explanation is repeated here, with additions to encompass and highlight the potential impacts of the proposed further revision of the SSM Policy to disallow affirmative defense provisions for malfunctions, the proposed revisions to the earlier-proposed SIP calls and the additional SIP calls proposed in this notice. The issuance of a SIP call would require an affected state to take one or more actions to revise its SIP. These actions are described below, followed by a description of how those actions by the state may, in turn, affect sources. The states that would receive a SIP call will in general have options as to exactly how to revise their SIPs. In response to a SIP call, a state retains broad discretion concerning how to revise its SIP, so long as that revision is consistent with the requirements of the CAA. The EPA's interpretation of those requirements will be embodied in the revised SSM Policy, which will be stated in the **Federal Register** notice for the final action in this rulemaking.

If the final SIP call identifies an automatic exemption provision in a SIP as contrary to the CAA, that provision would have to be removed entirely. An affected source could no longer depend on the automatic exemption to avoid all liability for excess emissions. If the final SIP call identifies an affirmative defense provision in a SIP as contrary to the CAA, that provision would have to be removed entirely. An affected source could no longer depend on the affirmative defense to shield it from monetary penalties assessed by a court for excess emissions; however, even in the absence of such affirmative defense provision in the SIP, a court may nevertheless decide not to assess monetary penalties in light of the effort by the source to avoid and/or minimize the excess emissions. Some other provisions, for example a problematic enforcement discretion provision, could be either removed entirely from the SIP or retained if revised appropriately in accordance with the EPA's interpretation of the CAA as described in the EPA's SSM Policy restatement in the **Federal Register** notice for the final rulemaking. The EPA notes that if a state removes a SIP-called provision that pertains to the exercise of enforcement discretion rather than amending the provision to remove any implication that the provision limits EPA or citizen suits, this removal would not bar the ability of the state to apply discretion in its own enforcement program but rather would make the exercise of such discretion case-by-case in nature.

In addition, affected states may choose to consider reassessing particular emission limitations, for example to determine whether those limits can be revised such that well-managed emissions during planned operations such as startup and shutdown would not exceed the revised emission limitation, while still protecting air quality. Such a revision of an emission limitation may need to be submitted as a SIP revision for EPA approval if the existing limit to be changed is already included in the SIP or if the existing SIP relies on the particular existing emission limit to meet a CAA requirement. In such instances, the EPA would review the SIP revision for consistency with all applicable CAA requirements. A state that chooses to revise particular emission limitations, in addition to removing the aspect of the existing provision that is inconsistent with CAA requirements, could include those revisions in the same SIP submission that addresses the SSM provisions identified in the SIP call, or it could submit them separately.

The implications for a regulated source in a given state, in terms of decisions it may make to change its equipment or practices in order to operate with emissions that comply with the revised SIP, will depend on the nature and frequency of the source's SSM events and how the state has chosen to revise the SIP to address excess emissions during SSM events. The EPA recognizes that after all the responsive SIP revisions are in place and are being implemented by the states, some sources may be required by the state to, or may have strong business reasons to, modify their physical equipment or operating practices. These changes could be aimed at improving the effectiveness of the emission control systems when operating as designed during startup and shutdown, increasing the durability of components to reduce the occurrence of malfunctions, and/or improving monitoring systems to detect and manage malfunctions promptly. If a state merely removes an exemption, affirmative defense provision, or impermissible enforcement discretion provision, an affected source may need to, or may rationally choose to, make changes of these types to better control emissions so as to comply with existing emission limits continuously and thereby reduce the risk of enforcement action. If the state establishes alternative emission limits for startup and shutdown operation, the source will need to meet these limits, but the required changes by the source, if any, could be less extensive and cost less.

Because of the diversity of the SIP provisions identified in our February 2013 proposal notice and in this supplemental proposal, the diversity of potentially affected sources, the unknown nature of the states' responses to the SIP calls, and the fact that because of existing automatic exemptions many instances of excess emissions have not routinely been reported to air agencies or the EPA, the EPA is unable to estimate the number, nature and overall cost of the changes that emission sources may ultimately make as an indirect result of the proposed SIP calls. To date, the EPA's review of the public comments received on the February 2013 proposal indicates that the information in those public comments is insufficient to allow the EPA to make such estimates.

This supplemental proposal concerns only affirmative defense provisions. The EPA's longstanding interpretation of the CAA as reflected in the existing SSM Policy does not allow a SIP to contain a director's discretion provision for excess emissions during SSM events including malfunctions, an automatic exemption for excess emissions during SSM events including malfunctions, or an enforcement discretion provision that purports to restrict citizen suits or federal personnel. The EPA is not

proposing to change those longstanding aspects of the SSM Policy. In our February 2013 proposal notice, we proposed to interpret the CAA to disallow affirmative defense provisions applicable to startup and shutdown, and in this SNPR we are proposing to interpret the CAA to further disallow affirmative defense provisions applicable to malfunctions. However, a state that receives a SIP call that includes a requirement to remove an affirmative defense for excess emissions would retain its ability to apply discretion in its enforcement program. Such enforcement discretion could be exercised case-by-case, or the SIP may include a provision that directs state personnel in the exercise of enforcement discretion. The criteria in an enforcement discretion provision could resemble the criteria previously recommended by the EPA for an affirmative defense provision for malfunctions. The enforcement discretion provision cannot apply to anyone other than state personnel. For example, the enforcement decisions of state personnel cannot define what is or is not a violation and cannot purport to limit or bar the exercise of enforcement discretion by the EPA or other parties pursuant to the citizen suit provision. An affected state could include an appropriate enforcement discretion provision in the same SIP submission that addresses the SSM provisions identified in the SIP call, or it could submit it separately.

Similar to the dependent nature of the potential impacts of our proposals in the aggregate as described above, the implications of the specific change being proposed in this notice—to disallow affirmative defense provisions for malfunctions—for a regulated source in a given state, in terms of whether and how the source would potentially have incentives to change its equipment or practices, will depend on the nature and frequency of the source's malfunction events and on how the state has chosen to revise the SIP to address excess emissions during malfunction events. After responsive SIP revisions are in place and are being implemented by the states, some sources may have strong incentives to take steps to increase the durability of components and monitoring systems to detect and manage malfunctions promptly, as a court may take such steps into consideration when determining a remedy should there be an enforcement action against excess emissions that have occurred during a malfunction. For the same reasons as cited above, the EPA is unable to estimate the number, nature and overall cost of the changes that emission sources may ultimately make as an indirect result of the revised and additional SIP calls proposed in this SNPR.

The EPA Regional Offices will work with states to help them understand their options and the potential consequences for sources as the states prepare their SIP revisions in response to the SIP calls.

The EPA believes that among the impacts on states and their residents of the SIP calls proposed in the February 2013 proposal notice and in this SNPR will be reduced aggregate emissions from industrial sources and improved air quality. For the same reasons that we are unable to estimate the number, nature and overall cost of the changes that sources may ultimately make as an indirect result of the proposed SIP calls, we are unable to estimate the total emission reduction that will be achieved for any particular pollutant or how those reductions will be distributed across the affected states and communities. The EPA believes that it is obligated and authorized to issue the proposed SIP calls to remove affirmative defense provisions even though the EPA is unable to estimate the number, nature, cost and resulting emission reductions that will indirectly result from the removal of such provisions from the affected SIPs.

III. Background for This SNPR

A. What did the Petitioner request?

The Petitioner submitted the Petition to the EPA on June 30, 2011. In the Petition, the Petitioner requested that the EPA address various types of alleged deficiencies in the Agency's SSM Policy. The SSM Policy provides EPA guidance to states with respect to SIP provisions that apply to excess emissions from sources that occur during SSM events. As described in the February 2013 proposal notice, the Petitioner included three interrelated overarching requests concerning the treatment in SIPs of excess emissions from sources during SSM events. In addition, the Petitioner requested that the EPA evaluate specifically identified existing provisions in the SIPs of 39 states that the Petitioner alleged are inconsistent with CAA requirements and with the EPA's interpretations of the CAA in the SSM Policy. The Petitioner identified the specific provisions and explained the basis for its belief that the provisions in question violate one or more requirements of the CAA.

First, the Petitioner argued that any SIP provision providing an affirmative defense for monetary penalties for excess emissions applicable in judicial proceedings is contrary to the CAA. The Petitioner based its overarching arguments concerning the legality of affirmative defense provisions in SIPs upon the explicit statutory provisions of CAA sections 113 and 304. Thus, the Petitioner advocated that the EPA should rescind its interpretation of the CAA expressed in the SSM Policy that allows appropriately drawn affirmative defense provisions in SIPs. The Petitioner made no distinction between affirmative defenses for excess emissions related to malfunction and affirmative defenses for excess emissions related to startup or shutdown. *See* section IV of our February 2013 proposal notice for the EPA's proposed response at that time concerning the issue of affirmative defense provisions in SIPs. As explained in section III.B of this SNPR, the EPA did make such distinction in its proposed response in the February 2013 proposal notice, then reasoning that affirmative defense provisions were appropriate for violations due to malfunction events. The issue of affirmative defense provisions in SIPs is the focus of this SNPR, and the EPA is herein proposing to revise its prior proposed action on this issue.

Second, the Petitioner argued that many existing SIPs contain impermissible provisions,[5] including automatic exemptions from applicable emission limitations during SSM events, director's discretion provisions that provide discretionary exemptions from applicable emission limitations during SSM events, enforcement discretion provisions that appear to bar enforcement by the EPA or citizens for such excess emissions, and inappropriate affirmative defense provisions that are not consistent with the CAA or the recommendations in the EPA's SSM Policy. The Petitioner identified specific provisions in SIPs of 39 states that it considered inconsistent with the CAA and explained the basis for its objections to the provisions. Among the alleged deficient provisions were many that function as affirmative defense provisions, regardless of whether that specific term is used in the state law or regulation at issue and regardless of whether the EPA

[5] The term ''impermissible provision'' as used throughout this SNPR is generally intended to refer to a SIP provision that the EPA believes to be inconsistent with requirements of the CAA. As described later in this SNPR (*see* section VII.A), the EPA is proposing to find a SIP ''substantially inadequate'' to meet CAA requirements where the EPA determines that a specific SIP provision is impermissible under the CAA.

previously explicitly evaluated the provision as an affirmative defense as described in the 1999 SSM Guidance. *See* section V and section IX of our February 2013 proposal notice for the EPA's prior proposed responses concerning the various alleged SIP deficiencies; only issues related to affirmative defense provisions are addressed in this SNPR, and the EPA is proposing to revise its prior proposed action only with respect to specific affirmative defense SIP provisions.

Third, the Petitioner argued that the EPA should not rely on interpretive letters from states to resolve any ambiguity, or perceived ambiguity, in state regulatory provisions in SIP submissions. The Petitioner reasoned that all regulatory provisions should be clear and unambiguous on their face and that any reliance on interpretive letters to alleviate facial ambiguity in SIP provisions can lead to later problems with compliance and enforcement. Extrapolating from several instances in which the basis for the original approval of a SIP provision related to excess emissions during SSM events was arguably not clear, the Petitioner contended that the EPA should never use interpretive letters to resolve such ambiguities. *See* section VI of our February 2013 proposal notice for the EPA's proposed response concerning the issue of interpretive letters; that issue is not further addressed in this SNPR and the EPA is seeking no additional comment on this issue.

Among the fundamental concerns raised by the Petitioner was the claim that the EPA's SSM Policy is inconsistent with statutory requirements because the Agency interprets the CAA to authorize states to create SIP provisions that provide an affirmative defense for qualifying sources to assert in the event of violations for excess emissions that occur during SSM events. Even though the EPA interpreted the CAA to allow narrowly drawn affirmative provisions in SIPs that are consistent with recommended criteria intended to assure that states include appropriate limitations and conditions for affirmative defenses, the Petitioner objected to any such provisions. The Petitioner argued that any affirmative defense that purports to eliminate or alter the jurisdiction of federal courts to assess monetary penalties or any other form of relief for violations of SIP emission limits is contrary to the requirements of the CAA. In other words, no matter how narrowly drawn and no matter what the limitations or conditions for the affirmative defense may be, the Petitioner argued that no such affirmative defenses are consistent with CAA requirements for SIP provisions.

In addition, the Petitioner identified specific existing provisions in the SIPs of 14 states that were structured or characterized as affirmative defenses, regardless of whether the provisions in question were consistent with the EPA's SSM Policy as explained in the 1999 SSM Guidance. The Petitioner contended that none of these identified provisions are consistent with CAA requirements because they improperly purport to shield sources from liability for violations of SIP emission limitations through various mechanisms. The Petitioner argued that such provisions are therefore inconsistent with sections 113 and 304 and the fundamental enforcement structure of the CAA created by Congress. Even if the provisions were not otherwise contrary to CAA requirements, the Petitioner argued, each of the identified affirmative defense provisions is also inconsistent in one or more ways with the EPA's own interpretation of the CAA provided in the 1999 SSM Guidance. For example, some of the identified provisions do not apply only to monetary penalties and purport to bar injunctive relief as well, some of the provisions do not require sources to qualify for an affirmative defense through criteria comparable to those recommended by the EPA, and some of the provisions appear to make state personnel the unilateral final arbiters of whether a source qualified for an affirmative defense rather than requiring that this be determined by a trier of fact in a judicial enforcement proceeding, thereby purporting to preclude enforcement by the EPA under section 113 or by others pursuant to the citizen suit authority of section 304.

B. What did the EPA previously propose in this rulemaking with respect to affirmative defense provisions in SIPs?

The EPA published its proposed response to the Petition on February 22, 2013. In that proposal, the EPA explained the claims asserted by the Petitioner, articulated its evaluation of those claims, and proposed to take actions with respect to each of the overarching and specific claims. The proposal addressed a number of interrelated issues concerning the proper treatment of excess emissions during SSM events in SIP provisions. A key component of the proposal, however, was the EPA's evaluation of the Petitioner's claims concerning affirmative defense provisions in SIPs.

With respect to the Petitioner's overarching claim that the EPA's interpretation of the CAA in the SSM Policy permitting states to have affirmative defenses in SIP provisions is in error, the EPA proposed to deny in part and to grant in part. The EPA proposed to deny the Petitioner's claim with respect to affirmative defenses applicable to malfunction events, on the theory that the CAA allows such provisions so long as they are sufficiently narrowly drawn. The EPA reasoned that such provisions are appropriate for violations due to genuine malfunction events, in order to resolve the inherent tension between the fact that the CAA requires that SIP emission limitations must apply continuously and the fact that even properly designed, maintained and operated sources may sometimes have difficulty meeting emission limitations for reasons beyond their control. By contrast, the EPA proposed to grant the Petitioner's claim with respect to affirmative defenses applicable to planned events such as startup and shutdown. This was a change from the EPA's interpretation of the CAA in the 1999 SSM Guidance, in which the EPA previously recommended that states could elect to create such affirmative defense provisions for startup and shutdown events, so long as the provisions were narrowly drawn and consistent with the recommended criteria to assure that they meet CAA requirements. The EPA's evaluation of the Petition and the statutory basis for affirmative defense provisions caused the Agency to reconsider the appropriateness of affirmative defense provisions applicable during startup and shutdown, which are ordinary modes of operation that are generally predictable and within the control of the source. As explained in more detail in the February 2013 proposal notice, the EPA's evaluation in light of then recent case law indicated that providing affirmative defenses applicable during planned events such as startup and shutdown was not consistent with the EPA's interpretation of the CAA to support such provisions for malfunctions and was tantamount to allowing sources to be shielded from monetary penalties for violations due to conduct that is predictable and within their control.[6]

[6] Some commenters on the February 2013 proposal notice focused great attention on whether startup and shutdown are modes of ''normal'' source operation. The EPA assumes that every source is designed, maintained and operated with the expectation it will at least occasionally start up and shut down, and thus these modes of source operation are ''normal'' in the sense that they are

With respect to the specific affirmative defense provisions identified by the Petitioner as deficient, the EPA evaluated each of the provisions to determine whether they were consistent with the EPA's interpretation of the CAA concerning such provisions at the time. This evaluation included examination of the specific provisions in light of the EPA's interpretations of the CAA and recommendations in the 1999 SSM Guidance, as updated in the February 2013 proposal notice (*e.g.,* the revision to the EPA's guidance concerning affirmative defenses for single sources with the potential to cause exceedances of the NAAQS). As a result, the EPA proposed to deny the Petition with respect to the claims concerning affirmative defense provisions to the extent applicable to malfunction events in three jurisdictions: (i) Arizona; (ii) Maricopa County, Arizona; and (iii) Colorado. The EPA proposed to deny the Petition with respect to these affirmative defense provisions to the extent applicable to malfunction events because at that time the EPA believed them to be consistent with the CAA and EPA guidance in the 1999 SSM Policy. The EPA proposed to grant the Petition with respect to the claims concerning affirmative defense provisions in the following jurisdictions: (i) Alaska; (ii) Arizona (affirmative defense for startup and shutdown only); (iii) Maricopa County, Arizona (affirmative defense for startup and shutdown only); (iv) Arkansas; (v) Colorado (affirmative defense for startup and shutdown only); (vi) District of Columbia; (vii) Illinois; (viii) Indiana; (ix) Jefferson County, Kentucky; [7] (x) Michigan; (xi) Mississippi; (xii) New Mexico; (xiii) Virginia; and (xiv) Washington. The EPA's evaluation of the specific provisions in these states identified a variety of deficiencies as explained in more detail in section IX of the February 2013 proposal notice. In general, the EPA considered these provisions deficient because they extended not only to monetary penalties but also to injunctive relief, because they had insufficient criteria to assure that they were sufficiently narrowly drawn, because they extended to events that were not malfunctions, or because of some combination of these concerns.

C. What events necessitated this SNPR?

Subsequent to EPA's issuance of the February 2013 proposal, a federal court ruled that CAA sections 113 and 304 preclude EPA authority to create affirmative defense provisions in the Agency's own regulations imposing emission limits on sources, because such provisions purport to alter the jurisdiction of federal courts to assess liability and impose penalties for violations of those limits in private civil enforcement cases. The U.S. Court of Appeals for the District of Columbia Circuit issued that decision in *NRDC* v. *EPA* on April 18, 2014.[8] The EPA believes that the reasoning of the court in that decision indicates that the states, like the EPA, have no authority in SIP provisions to alter the jurisdiction of federal courts to assess penalties for violations of CAA requirements through affirmative defense provisions. If states lack authority under the CAA to alter the jurisdiction of the federal courts through affirmative defense provisions in SIPs, then the EPA lacks authority to approve any such provision in a SIP.

The court's decision in *NRDC* v. *EPA* [9] pertained to a challenge to the EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations issued pursuant to CAA section 112 to regulate hazardous air pollutants from sources that manufacture Portland cement.[10] In addition to imposing specific emission limitations for the relevant pollutants from the affected sources, the EPA also created an affirmative defense that sources could assert in judicial enforcement proceedings for violations due to excess emissions that occur during qualifying malfunction events. The affirmative defense provision in the Portland cement NESHAP required the source to prove, by a preponderance of the evidence in an enforcement proceeding, that the source met specific criteria concerning the nature of the event and the source's conduct before, during and after the event. The EPA notes that these specific criteria required to establish the affirmative defense in the Portland cement NESHAP are functionally the same as the criteria that the EPA previously recommended to states for SIP provisions in the 1999 SSM Guidance and that the EPA explicitly repeated these same recommended criteria to states in the February 2013 proposal notice. In addition, the EPA provided sample regulatory text in the February 2013 proposal notice drawn from a comparable NESHAP that the EPA recently promulgated for another source category, to illustrate how states might elect to word appropriate affirmative defense provisions in SIPs.[11] In other words, the affirmative defense provision at issue in the *NRDC* v. *EPA* case was essentially equivalent to the type of provision, both conceptually and in terms of specific regulatory language, which the EPA would previously have considered consistent with CAA requirements for affirmative defense provisions for malfunction events in SIPs.

The EPA believes that the opinion of the court in *NRDC* v. *EPA* has significant impacts on the Agency's SSM Policy and on the positions that the EPA took in the February 2013 proposal notice with respect to issues related to affirmative defenses. Section IV of the February 2013 proposal notice describes in detail the EPA's prior evaluation of the Petition with respect to the overarching issue of affirmative defense provisions in SIPs. In general, the EPA proposed: (i) To deny the request to rescind the SSM Policy with respect to interpreting the CAA to allow states to elect to include appropriately tailored affirmative defense provisions for violations due to excess emissions during periods of malfunction; and (ii) to grant the request to rescind the SSM Policy with respect to affirmative defense provisions for violations due to excess emissions during periods of startup and shutdown. Consistent with this interpretation of the CAA, the EPA previously proposed to revise its SSM Policy to clarify that states could elect to create affirmative defenses in SIP provisions only for malfunction events, and so long as such provisions were narrowly drawn, as recommended in the EPA's guidance. Even these more narrowly defined affirmative defense provisions are no longer consistent with CAA requirements under the reasoning adopted by the court in *NRDC* v. *EPA.*

In addition, section IX of the February 2013 proposal notice provided the EPA's evaluation of each of the specific

to be expected. The EPA used this term in the ordinary sense of the word to distinguish between such predictable modes of source operation and genuine ''malfunctions,'' which are by definition supposed to be unpredictable and unforeseen events and which could not have been precluded by proper source design, maintenance and operation.

[7] The EPA notes that the state of Kentucky has now revised the SIP provisions applicable to Jefferson County (Louisville) and eliminated the SIP inadequacies identified in the February 2013 proposal notice. The EPA has already approved the necessary SIP revisions. *See* 79 FR 33101 (June 10, 2014). Accordingly, the EPA's final action on the Petition will not need to include a finding of substantial inadequacy and SIP call for Jefferson County, Kentucky. The recently approved revision did not create an affirmative defense provision, so there is no need to readdress this issue in this jurisdiction.

[8] *See NRDC* v. *EPA,* 749 F.3d 1055 (D.C. Cir. 2014).

[9] *Id.*

[10] The NESHAP promulgated after the 1990 CAA Amendments are also referred to as ''maximum achievable control technology'' or ''MACT'' standards.

[11] *See* February 2013 proposal notice, 78 FR 12459 at 12478–80.

SIP provisions identified by the Petitioner and proposed to take action on them, in accordance with EPA's interpretation of the CAA for such provisions at that time. These SIP provisions included affirmative defense provisions of various types, including some that the Agency had previously approved as consistent with its interpretation of the CAA in the 1999 SSM Guidance. The EPA evaluated these provisions on a case-by-case basis and proposed either to grant or to deny the Petition with respect to each provision, consistent with the EPA's then current interpretation of the CAA for such provisions.

The recent decision by the U.S. Court of Appeals for the District of Columbia Circuit in *NRDC* v. *EPA* has called into question the legal basis for affirmative defense provisions applicable to violations of CAA requirements. The reasoning used by that court, as logically extended to SIP provisions, indicates that neither states nor the EPA have authority to alter either the rights of other parties to seek relief or the jurisdiction of the federal courts to impose relief for violations of CAA requirements in SIPs, including the courts' power to restrain violations, to require compliance, and to assess monetary penalties for any violations in accordance with factors provided in CAA section 113(e)(1).

The EPA acknowledges that its SSM Policy since the 1999 SSM Guidance has interpreted the CAA in such a way that states could in effect alter the jurisdiction of federal courts to assess monetary penalties under certain conditions through creation of affirmative defenses. In other words, even though Congress explicitly empowered federal courts to assess monetary penalties for a CAA violation, an affirmative defense could, contrary to the statute, limit the ability of a court to do so. The EPA believes that the court's decision in *NRDC* v. *EPA* compels the Agency to reevaluate its interpretation of the CAA and its proposed action on the Petition concerning affirmative defense provisions in SIPs. As a result, in this SNPR we are revising what we previously proposed as our response to the Petition, but only to the extent relevant to the issue of affirmative defense provisions in SIPs. In section III.C of this SNPR, the EPA explains in detail why the court's interpretation of relevant CAA provisions indicates that states do not have authority to create, and thus the EPA does not have authority to approve, SIP provisions that include an affirmative defense that would operate to alter the jurisdiction of federal courts to assess penalties or other forms of relief authorized in sections 113 and 304. In section VII of this SNPR, the EPA explains how the decision affects the February 2013 proposal with respect to specific provisions in the SIPs of particular states. In section VII of this SNPR, the EPA also includes affirmative defense provisions found in six states' SIPs that the Agency has identified independently, and the EPA explains why each of these additional provisions fails to meet CAA requirements and thus necessitates a finding of substantial inadequacy and a SIP call as well. The EPA is including the additional provisions to assure that it provides comprehensive guidance with respect to this issue to all states and to alleviate confusion that may arise as a result of recent regulatory actions and litigation concerning affirmative defense provisions.

IV. What is the EPA proposing through this SNPR in response to the petitioner's request for rescission of the EPA policy on affirmative defense provisions?

A. Petitioner's Request

The February 2013 proposal notice explained in detail the Petitioner's claims with respect to affirmative defense provisions in SIPs, but it is helpful to repeat the full argument here in order to explain the reasons for the EPA's revised proposal in this SNPR. Understanding those specific claims in light of the court's decision in the *NRDC* v. *EPA* decision serves to illustrate the need for the EPA to reexamine the statutory basis for any affirmative defense in SIP provisions, not merely those provisions limited to malfunction events or to those for malfunction events that are sufficiently narrowly drawn to be consistent with the EPA's prior interpretation of the CAA in the 1999 SSM Guidance.

The Petitioner's first request was for the EPA to rescind its SSM Policy element interpreting the CAA to allow affirmative defense provisions in SIPs for excess emissions during SSM events.[12] The Petitioner also asked the EPA: (i) To find that SIPs containing an affirmative defense to monetary penalties for excess emissions during SSM events are substantially inadequate because they do not comply with the CAA; and (ii) to issue a SIP call pursuant to CAA section 110(k)(5) to require each such state to revise its SIP.[13] Alternatively, if the EPA denies these two related requests, the Petitioner requested the EPA: (i) To require states with SIPs that contain such affirmative defense provisions to revise them so that they are consistent with the EPA's 1999 SSM Guidance for excess emissions during SSM events; and (ii) to issue a SIP call pursuant to CAA section 110(k)(5) to states with provisions inconsistent with the EPA's interpretation of the CAA.[14] The EPA interpreted this latter request to refer to the specific SIP provisions that the Petitioner identified in a separate section of the Petition, titled, ''Analysis of Individual States' SSM Provisions,'' including specific existing affirmative defense provisions.

The Petitioner requested that the EPA rescind its SSM Policy element interpreting the CAA to allow SIPs to include affirmative defenses for violations due to excess emissions during any type of SSM events because the Petitioner contended there is no legal basis for the policy. Specifically, the Petitioner cited to two statutory grounds, CAA sections 113(b) and (e), related to the type of judicial relief available in an enforcement proceeding and to the factors relevant to the scope and availability of such relief, that the Petitioner claimed would bar the approval of any type of affirmative defense provision in SIPs.

In the Petitioner's view, the CAA ''unambiguously grants jurisdiction to the district courts to determine penalties that should be assessed in an enforcement action involving the violation of an emissions limit.'' [15] The Petitioner first argued that in any judicial enforcement action in the district court, CAA section 113(b) provides that ''such court shall have jurisdiction to restrain such violation, to require compliance, to assess such penalty, . . . and to award any other appropriate relief.'' In addition, the Petitioner cited the provisions of CAA section 304(a), which specifically pertain to citizen suit enforcement and which reiterate that the federal courts have jurisdiction to assess monetary penalties for violations as well as to impose other remedies.[16] The Petitioner reasoned that the EPA's SSM Policy is therefore fundamentally inconsistent with the CAA because it purports to remove the discretion and authority of the federal courts to assess monetary penalties for violations if a source is shielded from monetary penalties under an affirmative defense provision in the approved SIP.[17] The Petitioner

[12] Petition at 11.

[13] *Id.*

[14] Petition at 12.

[15] Petition at 10.

[16] Petition at 11.

[17] *Id.*

concluded that the EPA's interpretation of the CAA in the SSM Policy element allowing any affirmative defenses is impermissible ''because the inclusion of an affirmative defense provision in a SIP limits the courts' discretion—granted by Congress—to assess penalties for Clean Air Act violations.'' [18]

Second, in reliance on CAA section 113(e)(1), the Petitioner argued that in a judicial enforcement action in a district court, the statute explicitly specifies a list of factors that the court is to consider in assessing penalties.[19] That section provides that either the Administrator or the court:

> . . . shall take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

The Petitioner argued that the EPA's SSM Policy authorizes states to create affirmative defense provisions with criteria for monetary penalties that are inconsistent with the factors that the statute specifies and that the statute explicitly directs courts to weigh in any judicial enforcement action. In particular, the Petitioner enumerated those factors that it alleges the EPA's SSM Policy totally omits: (i) The size of the business; (ii) the economic impact of the penalty on the business; (iii) the violator's full compliance history; (iv) the economic benefit of noncompliance; and (v) the seriousness of the violation. By specifying particular factors for courts to consider, the Petitioner reasoned, Congress has already definitively spoken to the question of what factors are germane in assessing monetary penalties under the CAA for violations. The Petitioner concluded that the EPA has no authority to allow a state to include an affirmative defense provision in a SIP with different criteria to be considered in awarding monetary penalties because ''[p]reventing the district courts from considering these statutory factors is not a permissible interpretation of the Clean Air Act.'' [20] The Petitioner drew no distinction between affirmative defenses for unplanned events such as malfunctions and planned events such as startup and shutdown.

[18] *Id.*

[19] *Id.*

[20] *Id.*

B. The EPA's Proposed Revised Response

As a preliminary matter, the EPA acknowledges that its interpretation of the CAA in its SSM Policy, since issuance of the 1999 SSM Guidance, has been that states may elect to have narrowly drawn affirmative defense provisions in SIPs, so long as they meet certain requirements (*e.g.,* that they only apply to monetary penalties and not to injunctive relief). The EPA's longstanding guidance has also provided very specific recommendations to states concerning how to develop affirmative defense provisions that would be consistent with CAA requirements (*e.g.,* such provisions should require sources to prove in an enforcement proceeding that the violations are not so repetitive as to indicate that the source is improperly designed, maintained or operated). The EPA further acknowledges that it has previously approved affirmative defense provisions in SIPs or, when appropriate, promulgated affirmative defenses in federal implementation plans (FIPs). Indeed, the EPA's approval of affirmative defense provisions in SIPs or promulgation of such provisions in FIPs has been upheld by courts in several decisions.[21]

Most significantly, the EPA's November 2010 approval of an affirmative defense applicable to ''unplanned events'' (*i.e.,* malfunctions) and disapproval of an affirmative defense applicable to ''planned events'' (*e.g.,* planned startup and shutdown) in a Texas SIP submission were challenged by numerous parties. In 2012, the U.S. Court of Appeals for the 5th Circuit upheld EPA's actions, including both the Agency's approval and disapproval of the affirmative defense provisions applicable to the respective types of events.[22] In that litigation, the EPA defended its approval and disapproval actions, including the filing of an opposition to a petition for *certiorari* filed by industry challengers concerning the disapproval of the affirmative defense for planned events. Throughout the litigation over the Texas SIP revision, the EPA reiterated what was at the time its view that appropriately drawn affirmative defense provisions applicable to malfunctions can be consistent with CAA requirements for SIPs. In particular, the EPA argued in that litigation that sections 113 and 304 do not preclude appropriately drawn affirmative defense provisions for malfunctions in SIPs. The 5th Circuit applied the two-step *Chevron* analysis to the EPA's interpretation of section 113 in connection with both the approval of the affirmative defense provision applicable to ''unplanned events'' and the disapproval of the affirmative defense provision applicable to ''planned events.'' With respect to both the approval and disapproval, the court held that the Agency's interpretation of the CAA at that time was a ''permissible interpretation of section [113], warranting deference.'' [23] Subsequent events have caused EPA to reevaluate this interpretation of the CAA requirements.

The EPA has carefully evaluated the more recent April 2014 decision of the U.S. Court of Appeals for the District of Columbia Circuit in *NRDC* v. *EPA* in which the court came to a contrary conclusion with respect to the legal basis for an affirmative defense provision in the Agency's own regulations.[24] In light of this more recent decision, the EPA believes that its prior interpretation of the CAA with respect to the approvability of affirmative defense provisions in SIPs is no longer the best reading of the statute. The EPA has authority to revise its prior interpretation of the CAA when further consideration indicates to the Agency that its prior interpretation of the statute is incorrect.[25] In order to explain more fully why the EPA believes that the court's decision in *NRDC* v. *EPA* requires the Agency to change its SSM Policy and to revise its February 2013 proposal notice with respect to affirmative defense provisions in SIPs, the EPA will first explain why it believes that the reasoning of the court's decision is more broadly applicable and will then explain why it believes that the specific reasons given by the court for rejecting the EPA's prior interpretation of the CAA would apply with equal weight to SIP provisions.

[21] *See Luminant Generation Co.* v. *EPA,* 714 F.3d 841 (5th Cir. 2012) (upholding the EPA's approval of an affirmative defense applicable during malfunctions in a SIP submission as a permissible interpretation of the statute under *Chevron* step 2 analysis), *cert. denied,* 134 S.Ct. 387 (2013); *Mont. Sulphur & Chemical Co.* v. *EPA,* 666 F.3d 1174, 1191–93 (9th Cir. 2012) (upholding the EPA's creation of an affirmative defense applicable during malfunctions in a FIP); *Ariz. Public Service Co.* v. *EPA,* 562 F.3d 1116, 1130 (9th Cir. 2009) (upholding the EPA's creation of an affirmative defense applicable during malfunctions in a FIP).

[22] *Luminant Generation Co.* v. *EPA,* 714 F.3d 841 (5th Cir. 2012), *cert. denied,* 134 S.Ct. 387 (2013).

[23] *See Luminant Generation Co.* v. *EPA,* 714 F.3d 841, at 851 and 856 (5th Cir. 2012).

[24] *See NRDC* v. *EPA,* 749 F.3d 1055 (D.C. Cir. 2014).

[25] See, e.g., *White Stallion Energy Center, LLC* v. *EPA,* 748 F.3d 1222, 1235 (D.C. Cir. 2014) (citing *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967 (2005) and *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502 (2009)).

The EPA believes that the reasoning of the court's decision in *NRDC* v. *EPA* applies more broadly than to the specific facts of the case for several reasons. First, the EPA notes that the court's decision did not turn upon the specific provisions of CAA section 112. Although the court only evaluated the legal validity of an affirmative defense provision created by the EPA in conjunction with specific standards applicable to manufacturers of Portland cement, the court based its decision upon the provisions of sections 113 and 304 that pertain to enforcement of CAA requirements more broadly, including to SIPs. Sections 113 and 304 pertain to administrative and judicial enforcement generally and are in no way limited to enforcement of emission limitations promulgated by the EPA under section 112. Thus, the EPA does not think that the mere fact that the court only addressed the legality of an affirmative defense provision in this particular context means that the court's interpretation of sections 113 and 304 does not also apply more broadly. To the contrary, the EPA sees no reason why the logic of the court concerning sections 113 and 304 would not apply to SIP provisions as well.

Second, the EPA notes that footnote 2 in the opinion does not signify that the court intended to take any position with respect to the application of its interpretation of the CAA to SIP provisions, let alone to suggest that its interpretation would not apply more broadly. The court was clearly cognizant that a similar legal issue had arisen in litigation in the U.S. Court of Appeals for the 5th Circuit concerning the Texas SIP and merely acknowledged that fact and clearly stated in this footnote: ''[W]e do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan.'' [26] Given that the case before the court did not pertain to SIP provisions and thus the legal validity of affirmative defense provisions in a SIP did not need to be decided, the EPA believes that footnote 2 simply reflects the court's desire to be clear that it was only addressing the question of whether sections 113 and 304 preclude any EPA authority to create an affirmative defense applicable to private civil suits in its own regulations. However, the EPA believes that the logic of the court's decision in *NRDC* v. *EPA* regarding the import of sections 113 and 304 does extend to SIP provisions. In the remainder of this section of the SNPR, we explain in greater detail why we now think the D.C. Circuit's reading of the statute is the correct one.

Finally, the EPA notes that the fact that the court only addressed the legality of affirmative defense provisions in the context of citizen suit enforcement—which by definition is judicial rather than administrative enforcement—does not affect the relevance of the court's reasoning with respect to the legal basis for affirmative defenses in SIP provisions. Under the CAA, a state has the initial responsibility to develop and submit SIP submissions to meet various requirements (*e.g.,* to impose reasonably available control measures on sources in nonattainment areas). The EPA's evaluation and approval of the state's SIP submission in turn makes the contents of the submission federally enforceable parts of the SIP. Pursuant to sections 113 and 304, the state, the EPA and citizens then have the ability to seek to bring enforcement actions for violations of the requirements of the SIP in federal court. Thus, the court's logic in *NRDC* v. *EPA* would also apply to the provisions of the state's SIP, and the jurisdiction of a court to impose penalties or other forms of relief for violations of SIP requirements under the CAA cannot be altered by an affirmative defense in a state's SIP provision in the same way that it cannot be altered by such a provision in an EPA regulation.

Just as the court's decision is not limited in ways that would preclude it from applying to SIP provisions, the EPA also believes that the logic of the decision would apply with equal weight to affirmative defense provisions in SIPs for a number of reasons. Most significantly, the court rejected a series of arguments that the EPA made to support its legal authority under the CAA to create an affirmative defense in the Portland cement NESHAP. The EPA made the same or comparable arguments to support its interpretation of the CAA to provide authority for states to elect to create, and for the EPA to approve, affirmative defense provisions in SIPs applicable in judicial enforcement cases. The EPA has carefully evaluated the reasoning of the court in the *NRDC* v. *EPA* decision and now believes that its prior interpretation of the CAA with respect to affirmative defense provisions in the SSM Policy, as first stated in the 1999 SSM Guidance and as updated in the February 2013 proposal notice, was incorrect and would not withstand judicial review in light of the *NRDC* v. *EPA* decision. Evaluation of the key points of the court's reasoning in the decision indicates that the court's interpretation of the relevant statutory provisions applies equally to SIP provisions.

First, the *NRDC* v. *EPA* court examined the litigants' key argument that the EPA has no authority to alter the jurisdiction of courts to assess monetary penalties or to alter the factors that courts must consider when assessing the amount of such penalties. The litigants argued that the EPA's creation of an affirmative defense had the effect of altering or eliminating the jurisdiction of the federal courts to impose penalties in a citizen suit enforcement proceeding. The *NRDC* v. *EPA* court evaluated the litigants' argument with a straightforward reading of CAA section 304(a) concerning the rights of ''any person'' to bring an enforcement action and the jurisdiction of federal courts to assess liability and penalties in such an action and of CAA section 113(e)(1) concerning the factors that courts must consider when assessing civil penalties. Citing recent U.S. Supreme Court precedent, the court reasoned that section 304(a) creates a private right of action and that the courts alone are vested with authority to determine the scope of remedies in judicial enforcement, rather than the administrative agency. The *NRDC* v. *EPA* court treated this issue as a question that it could answer with a *Chevron* step 1 plain reading of the statute and evidently saw no ambiguity concerning whether the EPA has authority to alter the rights of litigants to seek monetary penalties for violations or to alter the jurisdiction of the federal courts to assess such penalties. In retrospect and in light of the court's decision, the EPA believes that this is the correct reading of CAA sections 113 and 304 with respect to this question in the SIP context as well. Thus, these statutory provisions functionally bar affirmative defense provisions in SIPs that would have the effect of altering the rights of litigants or the authority of the courts in the event of enforcement for violations of SIP requirements.

Second, the *NRDC* v. *EPA* court evaluated the EPA's argument that an affirmative defense ''fleshes out the statutory requirement that penalties be applied only when 'appropriate.' '' [27] The EPA had argued that CAA section 304(a) provides federal district courts with jurisdiction to ''apply any appropriate civil penalties'' and that such penalties would only be ''appropriate'' if the regulation being enforced specifically provided for such penalties in the first place. In other words, the EPA argued, if the regulation

[26] *See NRDC* v. *EPA,* 749 F.3d 1055, 1063 (D.C. Cir. 2014).

[27] *See NRDC* v. *EPA,* 749 F.3d 1055, 1063 (D.C. Cir. 2014).

contained an affirmative defense that precluded monetary penalties under certain circumstances, then it would not be ''appropriate'' for a court to assess the penalties in those circumstances. The *NRDC* v. *EPA* court disagreed with this argument, stating unequivocally that under the CAA ''deciding whether penalties are 'appropriate' is a job for the courts, not EPA.'' [28] To the extent that a defendant in an enforcement case has a basis for arguing that monetary penalties should be reduced, the court stated that CAA section 113(e)(1) already provides courts with factors that may be taken into consideration. The court emphasized that in judicial enforcement, the court decides whether or not to accept a defendant's arguments concerning the assessment of penalties, not the EPA. In the February 2013 proposal notice, the EPA relied on this same argument to support its position that affirmative defense provisions in SIPs would not contradict CAA sections 113 and 304 and to justify its proposed denial of the Petition with respect to affirmative defenses applicable to malfunctions events.[29] Given that the court has rejected this interpretation of the CAA for the EPA's own regulations, the EPA believes that the same principle applies to states that seek to alter the ability of federal courts to assess penalties for violations of CAA requirements in SIP provisions. If states have no authority to alter the jurisdiction of federal courts to impose remedies for violations explicitly provided for in the CAA, then this affects the EPA's authority to approve any such SIP provisions as consistent with the requirements of the CAA. Pursuant to its authority and responsibility under sections 110(k), 110(l) and 193, the EPA can only approve SIP provisions that comply with the applicable substantive requirements of the CAA. Approving an affirmative defense provision into a SIP that would purport to contravene the jurisdiction of federal courts to determine liability and to impose remedies in accordance with sections 113 and 304 would thus be inappropriate.

Third, the *NRDC* v. *EPA* court scrutinized the EPA's argument that it has authority under CAA section 301 to create an affirmative defense through the general authority of the EPA Administrator ''to prescribe such regulations as are necessary to carry out his functions under'' the CAA.[30] In the February 2013 proposal notice, the EPA did not make this particular argument because it was not proposing EPA regulations to implement the CAA, rather it was proposing action on a petition for rulemaking that entails evaluating the EPA's guidance to states in the SSM Policy concerning whether specific types of SIP provisions are consistent with CAA requirements. Nevertheless, the EPA notes, the court rejected the notion that the EPA has any authority to promulgate regulations that would alter or eliminate the jurisdiction of federal courts to assess penalties when Congress has already directly spoken to that issue. As the court expressed it, ''EPA cannot rely on its gap-filling authority to supplement the Clean Air Act's provisions when Congress has not left the agency a gap to fill.'' The EPA believes that the court's reasoning would extend to situations where the EPA is required to determine whether or not an affirmative defense provision is consistent with CAA requirements. Following this reasoning, the EPA would not have authority, through rulemaking on a state's SIP submission or otherwise, to approve an affirmative defense provision applicable in a judicial enforcement action, because to do so would be inconsistent with the statutory allocation of jurisdiction to the federal courts. In other words, just as the EPA's authority to promulgate regulations to implement the CAA does not encompass the authority to overwrite statutory provisions, the EPA likewise lacks authority to issue guidance to states concerning SIP provisions in the SSM Policy, or to approve a SIP submission that contains such SIP provisions, in a way that would likewise overwrite statutory provisions where Congress has spoken directly.

Fourth, the *NRDC* v. *EPA* court weighed the EPA's argument that CAA section 304 does not ''expressly deny'' EPA authority to create affirmative defenses and thus the EPA is not precluded from doing so.[31] Because the statute is silent with respect to whether or not such provisions are permissible, the EPA inferred that the EPA had authority to create them as a component of the Portland cement NESHAP. In the February 2013 proposal notice, the EPA used a comparable argument that sections 110(a), 113(b) and 113(e) of the CAA do not expressly forbid affirmative defense provisions in SIPs, both to support its position that states could elect to have affirmative defense provisions for malfunctions in SIPs and in support of its proposed denial of the Petition on this point.[32] In response to this particular argument, the *NRDC* v. *EPA* court rejected the suggestion that a court should ''presume a delegation of power absent an express withholding of such power'' as inconsistent with the principles of statutory interpretation under *Chevron*. The court thus expressly rejected the argument that affirmative defense provisions are consistent with the CAA by virtue of the fact that Congress has not explicitly forbidden them, especially in the face of conflicting provisions such as those in sections 113(b) and 304(a) giving jurisdiction to federal courts to assess penalties for violations of CAA requirements. The EPA now believes that this same reasoning applies to affirmative defense provisions in SIPs.

Finally, the *NRDC* v. *EPA* court evaluated the EPA's argument that affirmative defense provisions are ''necessary to account for the tension between requirements that emission limitations be 'continuous' and the practical reality that control technology can fail unavoidably.'' [33] This tension is an important point that the EPA has long noted as a basis for its interpretation of the CAA to allow affirmative defense provisions, not only in its own regulations such as the Portland cement NESHAP, but also in the SSM Policy providing guidance to states for SIP provisions. In the February 2013 proposal notice, the EPA used this same argument and the same case law support to justify its position that states could elect to have affirmative defense provisions for malfunctions in SIPs and for its proposed denial of the Petition on this point.[34] The *NRDC* v. *EPA* court agreed that this would be a ''good argument'' for a source to make in an enforcement proceeding but made clear that this ''tension'' does not give the EPA legal authority to create an affirmative defense.[35] The court thus

[28] *See NRDC* v. *EPA,* 749 F.3d 1055, 1062 (D.C. Cir. 2014).

[29] *See* February 2013 proposal notice, 78 FR 12459 at 12472 (middle column).

[30] *See NRDC* v. *EPA,* 749 F.3d 1055, 1063 (D.C. Cir. 2014).

[31] *Id.*

[32] *See* February 2013 proposal notice, 78 FR 12459 at 12470 (middle column); 12470 (right column); 12472 (right column).

[33] *See NRDC* v. *EPA,* 749 F.3d 1055, 1063 (D.C. Cir. 2014).

[34] *See* February 2013 proposal notice, 78 FR 12459 at 12470 (left column); 12472 (right column); 12487 (left column).

[35] The EPA interprets the court's opinion to mean that a defendant in an enforcement proceeding might want to make this argument as part of its efforts to seek lower penalties, consistent with the factors listed in CAA section 113(e). The court's reference to the EPA's making such an argument relates back to the court's earlier suggestion that the EPA could seek to participate as an intervenor or an *amicus* in a citizen suit enforcement matter if it

Continued

summarily rejected the EPA's argument that the need to ''balance'' the objectives of the CAA and to resolve the ''tension'' in the CAA authorizes creation of affirmative defenses that purport to alter or eliminate the jurisdiction of the courts to assess monetary penalties or other forms of relief. Given the result in the *NRDC* v. *EPA* decision, the EPA believes that this argument can no longer be a basis for the EPA's approval of affirmative defense provisions in SIPs that would apply in judicial enforcement actions. The net result would be that sources can continue to make this practical argument in the context of judicial enforcement proceedings and that this consideration would remain relevant in that forum, but without intercession by states or the EPA concerning whether the source should be liable for penalties in any specific circumstance through an affirmative defense provision in the SIP. In accordance with CAA section 113(e), sources retain the ability to seek lower monetary penalties through the statutory factors provided for consideration in administrative or judicial enforcement proceedings. In this context, for example, a violating source could argue that factors such as good-faith efforts to comply should reduce or eliminate otherwise applicable monetary penalties in a particular situation.

In light of the court's decision in *NRDC* v. *EPA,* the EPA believes it necessary to revise its SSM Policy and its February 2013 proposed response to the Petition with respect to the issues related to affirmative defense provisions in SIPs. Given the court's reasoning that sections 113 and 304 preclude the EPA from having authority to create an affirmative defense applicable in private civil suits in federal regulations because such a provision would impinge upon jurisdiction explicitly provided by Congress to the courts, the EPA believes that its past guidance to states in the SSM Policy is flawed. If the EPA has no authority to create affirmative defenses because it cannot alter the jurisdiction of the courts to assess penalties in enforcement proceedings for violations of CAA requirements, then it follows that states likewise cannot alter the jurisdiction of the federal courts in SIP provisions and the EPA cannot approve any SIP provision that purports to do so. The EPA emphasizes that the same logic applies to any SIP provision that purports to eliminate, restrict or otherwise alter the jurisdiction of federal courts to impose any of the expressly listed forms of relief in section 113(b), not merely those applicable to monetary penalties.[36] Pursuant to the requirements of sections 110(k), 110(l) and 193, the EPA has both the authority and the responsibility to evaluate SIP submissions to assure that they meet the requirements of the CAA. Pursuant to section 110(k)(5), the EPA has authority and discretion to take action to require states to revise previously approved SIP provisions if they do not meet CAA requirements.

For the foregoing reasons, in this SNPR the EPA is proposing to grant the Petition with respect to the Petitioner's request that the EPA rescind its SSM Policy element interpreting the CAA to allow affirmative defense provisions in SIPs for excess emissions during SSM events. Unlike the EPA's view at the time of the February 2013 proposal notice, the EPA now sees no valid basis for interpreting the CAA to permit affirmative defense provisions in SIPs for violations due to excess emissions during any type of event, whether that event is a malfunction totally beyond the control of the source or a planned event within the control of the sources such as a startup or shutdown.

V. Revised SSM Policy on Affirmative Defense Provisions in SIPs

In the February 2013 proposal notice, the EPA evaluated the issues raised by the Petitioner concerning the treatment of excess emissions during SSM events in SIP provisions. As part of responding to the Petition, the EPA proposed to clarify, reiterate and revise its longstanding SSM Policy. In this SNPR, the EPA is now proposing to revise further its interpretation of the CAA with respect to affirmative defense provisions applicable to excess emissions during SSM events.

Based upon a reevaluation of the CAA with respect to SIP provisions, and upon careful consideration of the implications of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

At this juncture, the EPA believes that the reasoning of the U.S. Court of Appeals for the District of Columbia Circuit in *NRDC* v. *EPA* logically extends to affirmative defense provisions created by states in SIPs, as well as to such provisions created by the EPA in its own regulations. Given that sections 113 and 304 functionally bar any affirmative defense that purports to alter or to eliminate the jurisdiction of federal courts to assess penalties for violations of CAA requirements or to impose the other remedies listed in section 113(b), this principle applies to SIP provisions as well. Although the *NRDC* v. *EPA* decision focused on the jurisdiction of the federal courts to assess civil penalties for violations of EPA regulations promulgated under section 112, because that was what was specifically at issue in the case before it, the EPA sees no reason why the same logic would not apply to any SIP provision that purported to alter or eliminate the jurisdiction of the federal courts to exercise their authority in the event of violations as provided in CAA section 113(b), including the authority to restrain violations, to require compliance, to assess civil penalties, to collect any fees and to award any other appropriate relief. In other words, affirmative defense provisions in SIPs that purport to alter or eliminate the broad authority of federal courts to award any of these types of relief in the event of an enforcement action, whether pursuant to section 113 or section 304, are likewise contrary to the enforcement structure of the CAA. Accordingly, the EPA proposes to revise its SSM Policy to interpret the CAA to preclude affirmative defense provisions in SIPs. When finalized, this rulemaking will embody the EPA's revised SSM Policy, and it will provide the most up-to-date and comprehensive EPA guidance on

wants to take a position on what monetary penalties are ''appropriate'' for a given violation.

[36] The EPA notes that CAA section 113(b) expressly gives federal courts jurisdiction ''to restrain such violation, to require compliance, to assess such civil penalty, to collect any fees owed the United States under this chapter (other than subchapter II of this chapter) and any noncompliance assessment and nonpayment penalty owed under section 7420 of this title, and to award any other appropriate relief.'' Similarly, CAA section 304 expressly provides that in the context of a citizen suit enforcement case, federal courts have jurisdiction ''to enforce such an emission standard or limitation, or such an order . . . and to apply any appropriate civil penalties.'' In the latter section, the term ''emission standard or limitation'' is defined broadly in section 304(f).

the subject of the proper treatment of excess emissions from sources during SSM events in SIP provisions.

VI. Legal Authority, Process and Timing for SIP Calls

In section VIII of the February 2013 proposal notice, the EPA explained in detail its statutory authority under CAA section 110(k)(5) to issue a SIP call to states to address SIP deficiencies, the process for making such a SIP call and the timing for such a SIP call. In this SNPR, the EPA is not revising its interpretations of the CAA with respect to those issues and thus is not seeking comment on these topics. The EPA is revising one aspect of the February 2013 proposal notice with respect to the basis for the proposed SIP calls for affirmative defense provisions. In the February 2013 proposal notice, the EPA explained its basis for concluding that different types of deficient SIP provisions identified in the Petition are substantially inadequate to comply with requirements of the CAA and thus warrant a SIP call for a state to revise or to eliminate the impermissible provision. With respect to affirmative defense provisions, the EPA articulated its evaluation of why inadequate affirmative defense provisions applicable to malfunction events, or any affirmative defense provisions applicable to planned events like startup and shutdown, would be inconsistent with fundamental legal requirements of CAA sections 110(a) and 302(k) and the enforcement structure provided in CAA sections 113 and 304.[37] The rationale provided by the EPA in the February 2013 proposal notice was obviously based upon the Agency's interpretation of the relevant requirements of the CAA at the time of that proposal.

In light of the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *NRDC* v. *EPA,* however, the EPA has reevaluated whether any form of affirmative defense provision is consistent with CAA requirements for SIP provisions. The court concluded that the EPA has no authority to alter the rights of litigants to seek monetary penalties for violations of CAA requirements and no authority to alter the broad jurisdiction of federal courts to assess such penalties for such violations under CAA sections 113 and 304. The EPA believes that the logic of the court's decision extends to the jurisdiction of the federal courts to impose other remedies expressly provided for in sections 113 and 304 as well. These sections of the CAA are thus among the fundamental requirements with which SIPs must comply in order to be consistent with the enforcement structure created by Congress in the CAA.

The EPA notes that the *NRDC* v. *EPA* court did not condition its decision on considerations such as whether the use of the affirmative defense provision in the Portland cement NESHAP would have a demonstrated causal connection to a given environmental impact (or undermine a specific enforcement action); the court decided the question based solely on the fundamental legal requirements of the CAA, which apply equally to SIPs. The court viewed the statutory requirements for enforcement of violations as a legal bar to the EPA's creating an affirmative defense. The EPA believes that this decision supports the EPA's view that an affirmative defense provision in a SIP that would operate to interfere with the rights of litigants to seek penalties for violations of the SIP or other statutory forms of relief, or to interfere with the jurisdiction of courts to assess penalties or other relief for such violations, is a substantial inadequacy because such provision would violate fundamental legal requirements of the CAA. This potential for interference with the intended enforcement structure of the CAA is sufficient to establish that such an affirmative defense provision is substantially inadequate to meet CAA requirements, and there is no need to demonstrate that the use of the affirmative defense would be causally connected to any particular impact (*e.g.,* a specific violation of a NAAQS at a particular monitor on a particular day, or the undermining of effective enforcement for a particular violation by a particular source). By specifying that parties have the right to seek relief for violations and that courts have jurisdiction to impose relief for such violations, the EPA believes, Congress has already made the determination that SIP provisions have to be consistent with the requirements of CAA sections 113 and 304 without regard to impact on other CAA requirements such as demonstrating attainment. Accordingly, the EPA has the authority and the responsibility to assure that SIP provisions meet the requirements of CAA sections 113 and 304 and do not undermine the enforcement structure for SIPs that was created in the CAA.

VII. What is the EPA proposing through this SNPR for each of the specific affirmative defense provisions identified in the Petition or identified independently by the EPA?

A. Overview of the EPA's Evaluation of Specific Affirmative Defense SIP Provisions

In addition to its overarching request that the EPA revise its interpretation of the CAA in the SSM Policy with respect to any form of affirmative defense provisions in SIPs, the Petitioner identified specific existing affirmative defense provisions that the Petitioner contended are not consistent with the EPA's own interpretation of the CAA as expressed in the 1999 SSM Guidance. In general, the provisions identified by the Petitioner are structured as affirmative defense provisions, regardless of whether they use the term ''affirmative defense'' and regardless of whether the EPA ever specifically evaluated the provisions with respect to the recommendations for such provisions in the 1999 SSM Guidance. While not agreeing with the EPA's guidance for affirmative defense provisions, the Petitioner expressed concern that all of the identified provisions fail to address some or all of the criteria for affirmative defense provisions that the EPA recommended in the 1999 SSM Guidance.

In the February 2013 proposal notice, the EPA explained that it was reviewing each identified affirmative defense provision on the merits. At that time, the EPA was operating under the belief that its interpretation of the CAA with respect to affirmative defense provisions in SIPs was correct. Accordingly, the EPA evaluated each of the provisions for consistency with the EPA's interpretation of the CAA as set forth in the 1999 SSM Guidance and as it was revising its interpretation in the February 2013 proposal notice. The February 2013 proposal notice thus contained the EPA's proposal to grant or to deny the Petition based on the EPA's evaluation as to whether the provision at issue provides adequate criteria to provide only a narrow affirmative defense for violations due to malfunctions for sources under certain circumstances consistent with the overarching CAA objectives, such as attaining and maintaining the NAAQS. In addition, the EPA proposed to grant the Petition with respect to any identified provision that creates an affirmative defense applicable during planned startup and shutdown events, because such provisions are not consistent with the requirements of the CAA.

[37] *See* February 2013 proposal notice, FR 12459 at 12487–88.

Now, however, the EPA is reevaluating each of the specific affirmative defense provisions identified by the Petitioner for consistency with the CAA in light of the court's decision in *NRDC* v. *EPA.* As explained in section III.C of this SNPR, the EPA is revising its interpretation of the CAA concerning the legal basis for affirmative defense provisions. Given that the reasoning of the court applies equally to SIP provisions, the EPA is proposing to grant the Petition with respect to each of these provisions. Thus, the EPA is proposing to find that these provisions are substantially inadequate because they are not consistent with fundamental legal requirements of the CAA and the EPA is proposing to issue a SIP call to each affected state for these specific provisions.

In addition to provisions identified by the Petitioner, the EPA is independently identifying other specific existing problematic affirmative defense provisions in SIPs. As a result, the EPA is newly including one or more affirmative defense provisions in the SIPs of the following four states: (1) New Mexico (Albuquerque-Bernalillo County); (2) Texas; (3) California (Eastern Kern Air Pollution Control District, Imperial County Air Pollution Control District and San Joaquin Valley Air Pollution Control District); and (4) Washington (Energy Facility Site Evaluation Council and Southwest Clean Air Agency). The EPA is including these additional affirmative defense provisions in this SNPR in order to provide comprehensive guidance to all states concerning such provisions in SIPs and to avoid confusion that may arise due to recent Agency administrative actions, litigation and resulting court decisions relevant to such provisions under the CAA. In particular, the EPA is concerned that its explicit approval of affirmative defense provisions in the SIPs of other states as being consistent with the requirements of the CAA as reflected in the 1999 SSM Guidance warrants affirmative action by the Agency to ask those states to revise their SIPs. Accordingly, the EPA is proposing to make a finding of substantial inadequacy for these additional affirmative defense provisions because they are not consistent with fundamental legal requirements of the CAA and the EPA is proposing to issue a SIP call with respect to each affected state for these specific provisions as well.

B. Affected States in EPA Region III

1. District of Columbia

a. Petitioner's Analysis

The Petitioner objected to five provisions in the District of Columbia (DC) SIP as being inconsistent with the CAA and the EPA's SSM Policy.[38] Among the other alleged SIP deficiencies, the Petitioner objected to the provision in the DC SIP that provides an affirmative defense for violations of visible emission limitations during ''unavoidable malfunction'' (D.C. Mun. Regs. tit. 20 § 606.4). The Petitioner objected to this provision because the elements of the defense are not laid out clearly in the SIP, because the term ''affirmative defense'' is not defined in the SIP, and finally, the Petitioner argues, because affirmative defense provisions for any excess emissions are wholly inconsistent with the CAA and should be removed from the SIP. The Petitioner's overarching claim was that CAA section 113 is a bar to affirmative defense provisions because EPA does not have authority to alter the jurisdiction of the courts to assess penalties or the factors that Congress directed the courts to consider.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to D.C. Mun. Regs. tit. 20 § 606.4 because it is not a permissible affirmative defense provision consistent with the requirements of the CAA and the EPA's recommendations in the EPA's SSM Policy. The EPA previously stated its belief that, by purporting to create a bar to enforcement that applies not only to monetary penalties but also to injunctive relief, this provision is inconsistent with the requirements of CAA sections 113 and 304. By not including sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions, the provision also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. Thus, the EPA previously reasoned that this provision is not appropriate as an affirmative defense provision because it is inconsistent with fundamental requirements of the CAA.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for D.C. Mun. Regs. tit. 20 § 606.4. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether the provision met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304. The EPA interprets the provision of D.C. Mun. Regs. tit. 20 § 606.4 to create an impermissible affirmative defense for violations of visible emission limitations during ''unavoidable malfunction'' events. The provision operates to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For this reason, the EPA is proposing to find D.C. Mun. Regs. tit. 20 § 606.4 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal with respect to the proposed action on the other four provisions in the DC SIP that are at issue in the Petition.

2. Virginia

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Virginia SIP that allows for discretionary exemptions during periods of malfunction (9 Va.

[38] Petition at 29–30.

Admin. Code § 5–20–180(G)).[39] The Petitioner objected to this provision on multiple grounds, including: (i) That it provides an exemption from the otherwise applicable SIP emission limitations; (ii) that it provides a discretionary exemption for excess emissions during malfunction because the provision gives the state the authority to determine whether a violation ''shall be judged to have taken place''; and (iii) that if intended as an affirmative defense provision it fails to meet EPA's interpretation of the CAA with respect to such provisions for several reasons.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to 9 Va. Admin. Code § 5–20–180(G). The EPA explained that the provision at issue is deficient for several reasons, including the fact that it is not sufficient as an affirmative defense provision to meet CAA requirements. With respect to the deficiency of the provision as an affirmative defense, the EPA noted that even if it were to consider 9 Va. Admin. Code § 5–20–180(G) as providing for an affirmative defense rather than an automatic or discretionary exemption, the provision is not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's recommendations in the EPA's SSM Policy. The EPA previously stated its belief that, by purporting to create a bar to enforcement that applies not only to monetary penalties but also to injunctive relief, this provision is inconsistent with the requirements of CAA sections 113 and 304. The EPA also argued that by not including sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions, the provision fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. Thus, the EPA previously proposed to find that this provision is not appropriate as an affirmative defense provision because it is inconsistent with fundamental requirements of the CAA.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for 9 Va. Admin. Code § 5–20–180(G). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304. The EPA interprets the provision of 9 Va. Admin. Code § 5–20–180(G) to create an impermissible affirmative defense for violations of SIP emission limits. The provision would operate to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find 9 Va. Admin. Code § 5–20–180(G) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal notice with respect to the other separate bases for the finding of substantial inadequacy of this provision.

3. West Virginia

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified one affirmative defense provision in the SIP for the state of West Virginia in W.Va. Code Section 45–2–9.4. This provision provides an affirmative defense available to sources for excess emissions that occur during malfunctions. The EPA notes that it has already proposed to make a finding of substantial inadequacy and to issue a SIP call for another related provision in W.Va. Code Section 45–2–9.1 for separate reasons not relevant here and the EPA is not reopening its February 2013 proposal notice with respect to the latter SIP provision.

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. The affirmative defense in W.Va. Code Section 45–2–9.4 provides that if a source establishes certain factual criteria ''to the satisfaction of'' a state official, then the occurrence of a malfunction is an ''affirmative defense.'' The EPA notes that the affirmative defense for malfunctions in W.Va. Code Section 45–2–9.4 was not consistent with the EPA's prior interpretation of the CAA and with its recommendations for such provisions in the 1999 SSM Guidance. Regardless of that fact, the EPA believes that this provision impermissibly purports to alter or eliminate the jurisdiction of federal courts to assess penalties or to impose other forms of relief for violations of SIP emission limits. Under this provision, if the source is able to establish that it met each of the specified criteria to the satisfaction of the state official, then the provision purports to bar any relief for those violations. Accordingly, the EPA believes that this affirmative defense provision is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that

[39] Petition at 70–71.

the provision is not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for the affirmative defense provision applicable to excess emissions that occur during malfunctions in W.Va. Code Section 45–2–9.4. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets W.Va. Code Section 45–2–9.4 to provide an affirmative defense that operates to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties or to impose other forms of relief as contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find W.Va. Code Section 45–2–9.4 substantially inadequate to meet CAA requirements and thus the EPA is proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal with respect to the proposed action on the other provisions in the West Virginia SIP that are at issue in the Petition.

C. Affected States in EPA Region IV

1. Georgia

a. Petitioner's Analysis

The Petitioner objected to a provision in the Georgia SIP that provides for exemptions for excess emissions during startup, shutdown or malfunctions under certain circumstances (Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7)).[40] The Petitioner objected to this provision on multiple grounds, including: (i) That it provides an exemption from the otherwise applicable SIP emission limitations by providing that the excess emissions ''shall be allowed'' subject to certain conditions; (ii) that although the provision provides some ''substantive criteria,'' the provision does not meet the criteria the EPA recommends for an affirmative defense provision consistent with the requirements of the CAA in the EPA's 1999 SSM Guidance; and (iii) that the provision is not a permissible ''enforcement discretion'' provision applicable only to state personnel, because it ''is susceptible to interpretation as an enforcement exemption, precluding EPA and citizen enforcement as well as state enforcement.''

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7). The EPA explained that the provision at issue is deficient for several reasons, including the fact that it is not sufficient as an affirmative defense provision to meet CAA requirements. With respect to the deficiency of the provision as an affirmative defense, the EPA noted that Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) is not a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's recommendations in the EPA's SSM Policy. By purporting to create a bar to enforcement that applies not only to monetary penalties but also to injunctive relief, the EPA reasoned that this provision is inconsistent with the requirements of CAA sections 113 and 304. The EPA also argued that by not including sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions, the provision also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations. Moreover, the EPA previously reasoned that Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) was deficient because it applies not only to malfunctions but also to startup and shutdown events, contrary to the EPA's interpretation of the CAA set forth in the February 2013 proposal notice. Thus, the EPA previously proposed to find that Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) is not appropriate as an affirmative defense provision because it is inconsistent with fundamental requirements of the CAA.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304. The EPA interprets the provision of Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) to create an impermissible affirmative defense for violations of SIP emission limits. The provision operates to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find Ga. Comp. R. & Regs. 391–3–1–.02(2)(a)(7) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision.

[40] Petition at 32.

The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal with respect to the other separate bases for the finding of substantial inadequacy of this provision.

2. Mississippi

a. Petitioner's Analysis

The Petitioner objected to three provisions in the Mississippi SIP as being inconsistent with the CAA and the EPA's SSM Policy.[41] Among the other alleged SIP deficiencies, the Petitioner objected to two generally applicable provisions in the Mississippi SIP that allow for affirmative defenses for violations of otherwise applicable SIP emission limitations during periods of upset, *i.e.,* malfunctions (11–1–2 Miss. Code R. § 10.1) and unavoidable maintenance (11–1–2 Miss. Code R. § 10.3).[42] First, the Petitioner objected to both of these provisions based on its assertion that the CAA allows no affirmative defense provisions in SIPs. Second, the Petitioner asserted that even if affirmative defense provisions were permissible under the CAA, the affirmative defenses in these provisions ''fall far short of the EPA policy.'' Specifically, the Petitioner argued that the EPA's guidance for affirmative defenses recommends that they ''are not appropriate where a single source or a small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments,'' [43] and Mississippi's provisions do not contain a restriction to address this point. Further, the Petitioner argued that the affirmative defenses in Mississippi's SIP are not limited to actions seeking civil penalties and that they fail to meet other criteria ''that EPA requires for acceptable defense provisions.'' [44] Finally, the Petitioner argued that the CAA and the EPA's SSM Policy interpreting it do not allow affirmative defenses for excess emissions during maintenance events under any circumstances.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3 because they are deficient affirmative defense provisions. By purporting to create a bar to enforcement that applies not only to monetary penalties but also to injunctive relief, the EPA reasoned that these provisions are inconsistent with the requirements of CAA sections 113 and 304. The EPA also argued that by not including sufficient criteria to assure that sources seeking to raise these affirmative defenses have in fact been properly designed, maintained and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions, the provision also fails to be sufficiently narrowly drawn to justify shielding from monetary penalties for violations during malfunctions. With respect to the comparable affirmative defense for maintenance in 11–1–2 Miss. Code R. § 10.3, the EPA reiterated its long held position that no affirmative defense is appropriate for violations that occur during maintenance because maintenance is a normal mode of source operation during which the source should be expected to comply with the applicable emission limitations. Thus, the EPA previously proposed to find that 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3 are not appropriate as affirmative defense provisions because they are inconsistent with fundamental requirements of the CAA.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether the provision met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304. The EPA interprets the provisions of 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3 to create an impermissible affirmative defenses for violations of SIP emission limits. These provisions operate to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that these provisions interfere with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3 provisions substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions. The EPA notes that in this SNPR it is only addressing 11–1–2 Miss. Code R. § 10.1 and 11–1–2 Miss. Code R. § 10.3 with respect to the deficiency as affirmative defense provisions and is not revising its February 2013 proposal with respect to another SIP provision, 11–1–2 Miss. Code R. § 10.2, for which the EPA has proposed to make a finding of substantial inadequacy and to issue a SIP call on different grounds.

3. South Carolina

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified one affirmative defense provision in the SIP for the state of South Carolina in S.C. Code Ann. Regs. 62.1, Section II(G)(6). This provision provides that permits for certain sources may contain an affirmative defense for excess emissions that occur during emergencies. The permits at issue embody federally enforceable emission limits that assure the sources will remain below the threshold for major stationary sources subject to the permitting requirements of title V of the CAA. By accepting these emission limits in permits as authorized by this provision of the state's SIP, these sources are treated as minor sources rather than major sources for regulatory purposes.

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the

[41] Petition at 29–30.

[42] Petition at 47–49.

[43] Petition at 48.

[44] Petition at 47–48.

EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. The affirmative defense in S.C. Code Ann. Regs. 62.1, Section II(G)(6) provides that if a source meets certain factual criteria, then the occurrence of an emergency is an ''affirmative defense'' for any technology-based emission limitation violations that occur during the emergency. The affirmative defense is not limited to monetary penalties and appears to bar any form of relief if the source meets the criteria for the defense. The EPA notes that the affirmative defense for emergencies in S.C. Code Ann. Regs. 62.1, Section II(G)(6) was not consistent with the EPA's prior interpretation of the CAA and with its recommendations for such provisions in the 1999 SSM Guidance. Regardless of that fact, the EPA believes that this provision impermissibly purports to alter or eliminate the jurisdiction of federal courts to assess penalties or to impose other forms of relief for violations of federally enforceable SIP or permit emission limits. Under this provision, if the source is able to establish that it met each of the specified criteria, then the provision purports to bar any relief for those violations. Accordingly, the EPA believes that this affirmative defense provision is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that the provision is not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for the affirmative defense provisions applicable to excess emissions that occur during emergencies in S.C. Code Ann. Regs. 62.1, Section II(G)(6). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets S.C. Code Ann. Regs. 62.1, Section II(G)(6) to provide an affirmative defense that operates to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties or to impose other forms of relief as contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find S.C. Code Ann. Regs. 62.1, Section II(G)(6) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal with respect to the proposed action on the other provisions in the South Carolina SIP that are at issue in the Petition.

D. Affected States in EPA Region V

1. Illinois

a. Petitioner's Analysis

The Petitioner objected to three generally applicable provisions in the Illinois SIP (Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262 and Ill. Admin. Code tit. 35 § 201.265) which the Petitioner argued have the effect of providing discretionary exemptions from otherwise applicable SIP emission limitations.[45] The Petitioner objected to these provisions on multiple grounds, including: (i) that the provisions invite sources to request, during the permitting process, advance permission to continue to operate during a malfunction or breakdown and to request advance permission to ''violate'' otherwise applicable emission limitations during startup; (ii) that the provisions state that, once granted, the advance permission to violate the emission limitations ''shall be a prima facie defense to an enforcement action''; and (iii) that the term ' ''prima facie defense' is ambiguous in its operation.'' The Petitioner argued that the latter provision is not clear regarding whether the defense is to be evaluated ''in a judicial or administrative proceeding or whether the Agency determines its availability.'' Allowing defenses to be raised in these undefined contexts, the Petitioner argued, is ''inconsistent with the enforcement structure of the Clean Air Act.'' The Petitioner asserted that ''if . . . the 'prima facie defense' is anything short of the 'affirmative defense,' '' as contemplated in the 1999 SSM Guidance, then ''it clearly has the potential to interfere with EPA and citizen enforcement.''

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262 and Ill. Admin. Code tit. 35 § 201.265. The EPA proposed to grant the Petition for these provisions even though the state has asserted that the effect of these provisions together only provides sources with a *prima facie* defense in an enforcement proceeding. Even if interpreted to provide an affirmative defense rather than an automatic or discretionary exemption, however, the EPA previously noted that the provisions do not provide a permissible affirmative defense provision consistent with the requirements of the CAA as interpreted in the EPA's recommendations in the EPA's SSM Policy.

In the February 2013 proposal notice, the EPA enumerated various ways in which the provisions were not consistent with the EPA's recommendations in the EPA's SSM Policy interpreting the CAA: (i) It is not clear that the defense applies only to monetary penalties, which is inconsistent with the requirements of CAA sections 113 and 304; (ii) the defense applies to violations that occurred during startup periods, which

[45] Petition at 33–36.

is inconsistent with CAA sections 113 and 304; (iii) the provisions shift the burden of proof to the enforcing party; and (iv) the provisions do not include sufficient criteria to assure that sources seeking to raise the affirmative defense have in fact been properly designed, maintained and operated, and to assure that sources have taken all appropriate steps to minimize excess emissions. Accordingly, even if Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262 and Ill. Admin. Code tit. 35 § 201.265 are together interpreted to provide a *prima facie* defense to enforcement rather than to provide exemptions, the EPA already proposed to find that these provisions are substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call with respect to these provisions.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262 and Ill. Admin. Code tit. 35 § 201.265. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304. To the extent that Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262 and Ill. Admin. Code tit. 35 § 201.265 together do provide only a defense as characterized by the state rather than an exemption, the EPA believes that they create an impermissible affirmative defense for violations of SIP emission limits. These provisions would operate together to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that these provisions interfere with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262 and Ill. Admin. Code tit. 35 § 201.265 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions. The EPA notes that in this SNPR it is only addressing these provisions with respect to their deficiency as an affirmative defense and is not revising its February 2013 proposal notice with respect to the other separate bases for the finding of substantial inadequacy for these provisions.

2. Indiana

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in the Indiana SIP that allows for discretionary exemptions during malfunctions (326 Ind. Admin. Code 1–6–4(a)).[46] The Petitioner objected to this provision on multiple grounds, including: (i) That it provides an exemption from the otherwise applicable SIP emission limitations; (ii) that it is ambiguous because it provides that excess emissions during malfunction periods ''shall not be considered a violation'' if the source demonstrates that a number of conditions are met, but it does not specify to whom or in what forum such demonstration must be made; (iii) that if the foregoing demonstration need only be made to the satisfaction of the state, then this would give a state official the sole authority to determine that the excess emissions were not a violation and could thus be read to preclude enforcement by the EPA or citizens; and (iv) that if the demonstration is to be made in an enforcement context, then the provision could be interpreted as providing an affirmative defense, but one that is inconsistent with the requirements of the CAA as interpreted in the EPA's SSM Policy.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to 326 Ind. Admin. Code 1–6–4(a). The EPA noted at that time that even if it were to interpret 326 Ind. Admin. Code 1–6–4(a) to be an affirmative defense applicable in an enforcement context, then the provision is not consistent with the EPA's recommendations for such affirmative defenses in the EPA's SSM Policy interpreting the CAA. By purporting to create a bar to enforcement that applies not just to monetary penalties but also to injunctive relief, and by including criteria inconsistent with those recommended by the EPA for affirmative defense provisions, this provision is inconsistent with the requirements of CAA sections 113 and 304. For these reasons, the EPA previously proposed to find that 326 Ind. Admin. Code 1–6–4(a) is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for 326 Ind. Admin. Code 1–6–4(a). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

To the extent that 326 Ind. Admin. Code 1–6–4(a) provides only a defense rather than an exemption, the EPA believes that it creates an impermissible affirmative defense for violations of SIP emission limits. The provision would operate to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise

[46] Petition at 36–37.

their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find 326 Ind. Admin. Code 1–6–4(a) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense and is not revising its February 2013 proposal notice with respect to the other separate bases for the finding of substantial inadequacy for the provision.

3. Michigan

a. Petitioner's Analysis

The Petitioner objected to a generally applicable provision in Michigan's SIP that provides for an affirmative defense to monetary penalties for violations of otherwise applicable SIP emission limitations during periods of startup and shutdown (Mich. Admin. Code r. 336.1916).[47] The Petitioner objected to this provision on multiple grounds, including: (i) That one of the criteria in the affirmative defense provision, Mich. Admin. Code r. 336.1916, makes the defense available to a single source or small group of sources as long as such source did not ''cause[] an exceedance of the national ambient air quality standards or any applicable prevention of significant deterioration increment'' thereby applying to sources with the ''potential'' to cause violations of the NAAQS contrary to the recommendations of EPA's 1999 SSM Guidance; and (ii) that the affirmative defense provision is available for violations of ''an applicable emission limitation,'' which Petitioner argued could be construed by a court to include ''limits derived from federally promulgated technology based standards, such as NSPSs and NESHAPs,'' contrary to EPA's interpretation of the CAA in the 1999 SSM Guidance to preclude SIP-based affirmative defenses for violations of these federal technology-based standards.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to Mich. Admin. Code r. 336.1916, which provides for an affirmative defense to violations of applicable emission limitations during startup and shutdown events. The EPA noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup and shutdown was contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.,* during malfunctions. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance. For this reason, the EPA previously proposed to find that Mich. Admin. Code r. 336.1916 is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for Mich. Admin. Code r. 336.1916. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Mich. Admin. Code r. 336.1916 to provide an affirmative defense that operates to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. The fact that this affirmative defense applies during planned and predictable events exacerbates this problem, but even if the provision were applicable only to genuine malfunction events it is not a permissible SIP provision. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find Mich. Admin. Code r. 336.1916 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision.

E. Affected States and Local Jurisdictions in EPA Region VI

1. Arkansas

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Arkansas SIP as inconsistent with the CAA and the EPA's SSM Policy.[48] One of these provisions, Reg. 19.602, provides an ''affirmative defense'' applicable to violations by sources in certain circumstances. The Petitioner objected to Reg. 19.602 because it provides a ''complete affirmative defense'' for excess emissions that occur during emergency conditions. The Petitioner argued that this provision, which the state may have modeled after the EPA's title V regulations, is impermissible because its application is not clearly limited to operating permits.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to Reg. 19.602. The EPA explained its view that Reg. 19.602 is an impermissible affirmative defense provision because it does not explicitly limit the defense to monetary penalties, it establishes criteria that are inconsistent with those recommended in the EPA's SSM Policy, and it can be read to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations. As a consequence, the EPA reasoned that Reg. 19.602 is inconsistent with the requirements for SIP provisions in CAA sections 110(a)(2)(A), 110(a)(2)(C) and 302(k). For these reasons, the EPA previously proposed to find that Reg. 19.602 is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of

[47] Petition at 44–46.

[48] Petition at 24. The Petitioner cites to 014–01–1 Ark. Code R. §§ 19.1004(H) and 19.602. The EPA interprets these citations as references to Reg. 19.1004(H) and Reg. 19.602 of the Arkansas Pollution Control & Ecology Commission (APC&EC), Regulation No. 19—Regulations of the Arkansas Plan of Implementation for Air Pollution Control, as approved by the EPA on Apr. 12, 2007 (72 FR 18394). For ease of description, we refer herein to Reg. 19.602.

substantial inadequacy and the SIP call for Reg. 19.602. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Reg. 19.602 to provide an affirmative defense that operates to limit the jurisdiction of the federal court in an enforcement action and to preclude both liability and any form of judicial relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find Reg. 19.602 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal with respect to the proposed action on the other provision in the Arkansas SIP that is at issue in the Petition.

2. New Mexico

a. Petitioner's Analysis

The Petitioner objected to three provisions in the New Mexico SIP that provide affirmative defenses for excess emissions that occur during malfunctions (20.2.7.111 NMAC), during startup and shutdown (20.2.7.112 NMAC), and during emergencies (20.2.7.113 NMAC).[49] The Petitioner objected to the inclusion of these provisions in the SIP based on its view that affirmative defense provisions are always inconsistent with CAA requirements. The Petitioner also argued that each of these affirmative defenses is generally available to all sources, which is in contravention of the EPA's recommendation in the SSM Policy that affirmative defenses should not be available to ''a single source or groups of sources that has the potential to cause an exceedance of the NAAQS.'' Finally, the Petitioner argued that the affirmative defense provision applicable to emergency events is impermissible because it was modeled after the EPA's title V regulations, which are not meant to apply to SIP provisions.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to 20.2.7.112 NMAC, which includes an affirmative defense applicable during startup and shutdown events that is contrary to the EPA's interpretation of the CAA. The EPA noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup and shutdown was contrary to the EPA's current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.,* during malfunctions. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance. The EPA also proposed to grant the Petition with respect to 20.2.7.111 NMAC, which includes an affirmative defense applicable during malfunction events. The EPA previously reasoned that this provision is inconsistent with the CAA because it neither limits the defense to only those sources that do not have the potential to cause exceedances of the NAAQS or PSD increments nor requires sources to make an ''after the fact'' showing that no such exceedances actually occurred as an element of the affirmative defense. Finally, the EPA proposed to grant the Petition with respect to 20.2.7.113 NMAC. The EPA previously stated its belief that this provision is an impermissible affirmative defense because it does not explicitly limit the defense to monetary penalties, it establishes criteria that are inconsistent with those in the EPA's SSM Policy, and it can be read to create different or additional defenses from those that are provided in underlying federal technology-based emission limitations. Thus, the EPA previously proposed to find that all three of these provisions are inconsistent with CAA sections 110(a)(2)(A), 110(a)(2)(C) and 302(k), and with respect to CAA sections 113 and 304.

c. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for the affirmative defense provisions applicable to excess emissions that occur during malfunctions (20.2.7.111 NMAC), during startup and shutdown (20.2.7.112 NMAC), and during emergencies 20.2.7.113 NMAC). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets 20.2.7.111 NMAC and 20.2.7.112 NMAC to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. As to 20.2.7.113 NMAC, the EPA interprets this provision to operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose any form of relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that each of these provisions interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP

[49] Petition at 54–57. The EPA interprets the Petitioner's reference to N.M. Code R. § 20.2.7.111, N.M. Code R. § 20.2.7.112 and N.M. Code R. § 20.2.7.113 as citations to 20.2.7.111 NMAC, 20.2.7.112 NMAC and 20.2.7.113 NMAC, as approved by the EPA on Sept. 14, 2009 (74 FR 46910) (hereinafter referred to as 20.2.7.111 NMAC, 20.2.7.112 NMAC and 20.2.7.113 NMAC).

emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find 20.2.7.111 NMAC, 20.2.7.112 NMAC and 20.2.7.113 NMAC substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions.

3. New Mexico: Albuquerque-Bernalillo County

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified three affirmative defense provisions in the SIP for the state of New Mexico that apply in the Albuquerque-Bernalillo County area. These provisions provide affirmative defenses available to sources for excess emissions that occur during malfunctions (20.11.49.16.A NMAC), during startup and shutdown (20.11.49.16.B NMAC) and during emergencies (20.11.49.16.C NMAC). The EPA acknowledges that it explicitly approved these affirmative defense provisions in 2010, after ascertaining that they were consistent with the Agency's interpretation of the CAA and its recommendations for such provisions in the 1999 SSM Guidance, applicable at that point in time.[50]

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Although the EPA previously determined that 20.11.49.16.A NMAC, 20.11.49.16.B NMAC and 20.11.49.16.C NMAC were consistent with CAA requirements, the Agency now believes that these provisions impermissibly purport to alter or eliminate the jurisdiction of federal courts to assess penalties for violations of SIP emission limits. In the case of the affirmative defenses applicable to malfunctions and to startup and shutdown, the provisions set forth the elements of an affirmative defense to be asserted by sources in the event of violations during such events. In the case of the affirmative defense applicable to emergencies, the provision sets forth the elements of an affirmative defense to be asserted in the event of violations during emergencies. For each of these affirmative defense provisions, if the source is able to establish that it met each of the specified criteria to a trier of fact in an enforcement proceeding, then the provision purports to bar any civil penalties for those violations (and in the case of the affirmative defense for emergencies could be construed to bar other forms of relief as well). Accordingly, the EPA believes that each of these affirmative defense provisions is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that these provisions are not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for the affirmative defense provisions applicable to excess emissions that occur during malfunctions (20.11.49.16.A NMAC), during startup and shutdown (20.11.49.16.B NMAC) and during emergencies (20.11.49.16.C NMAC). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets 20.11.49.16.A NMAC and 20.11.49.16.B NMAC to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. As to 20.11.49.16.C NMAC, the EPA interprets this provision to operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose any form of relief contemplated in CAA sections 113 and 304. Thus, the EPA believes that each of these provisions interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find 20.11.49.16.A NMAC, 20.11.49.16.B NMAC and 20.11.49.16.C NMAC substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions. The EPA notes that removal of 20.11.49.16.A NMAC, 20.11.49.16.B NMAC and 20.11.49.16.C NMAC from the SIP will render 20.11.49.16.D NMAC, 20.11.49.16.E, 20.11.49.15.B (15) (concerning reporting by a source of intent to assert an affirmative defense for a violation), a portion of 20.11.49.6 NMAC (concerning the objective of establishing affirmative defense provisions) and 20.11.49.18 NMAC (concerning actions where a determination has been made under 20.11.49.16.E NMAC) superfluous and no longer operative, and the EPA thus recommends that these provisions be removed as well.

4. Texas

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA

[50] *See,* ''Approval and Promulgation of Implementation Plans; Albuquerque-Bernalillo County, NM; Excess Emissions,'' 75 FR 5698 (Feb. 4, 2010).

has identified four affirmative defense provisions in the SIP for the state of Texas. These provisions provide affirmative defenses available to sources for excess emissions that occur during upsets (30 TAC 101.222(b)), unplanned events (30 TAC 101.222(c)), upsets with respect to opacity limits (30 TAC 101.222(d)) and unplanned events with respect to opacity limits (30 TAC 101.222(e)).[51] The EPA acknowledges that it explicitly approved these affirmative defense provisions in 2010, after ascertaining that they were consistent with the Agency's interpretation of the CAA and its recommendations for such provisions in the 1999 SSM Guidance, applicable at that point in time. Moreover, the EPA defended its approval of these specific provisions (as well as its disapproval of related provisions relevant to affirmative defenses for planned events) in litigation in the U.S. Court of Appeals for the 5th Circuit.

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Although the EPA previously determined that 30 TAC 101.222(b), 30 TAC 101.222(c), 30 TAC 101.222(d) and 30 TAC 101.222(e) were consistent with CAA requirements, the Agency now believes that these provisions impermissibly purport to alter or eliminate the jurisdiction of federal courts to assess penalties for violations of SIP emission limits. For all of these affirmative defenses applicable to upsets and unplanned events, the provisions set forth the elements of an affirmative defense to be asserted by sources in the event of violations during such events. For each of these affirmative defense provisions, if the source is able to establish that it met each of the specified criteria to a trier of fact in an enforcement proceeding, then the provision purports to bar any civil penalties for those violations. Accordingly, the EPA believes that each of these affirmative defense provisions is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that these provisions are not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for the affirmative defense provisions applicable to excess emissions that occur during upsets (30 TAC 101.222(b)), unplanned events (30 TAC 101.222(c)), upsets with respect to opacity limits (30 TAC 101.222(d)), and unplanned events with respect to opacity limits (30 TAC 101.222(e)). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets 30 TAC 101.222(b), 30 TAC 101.222(c), 30 TAC 101.222(d), and 30 TAC 101.222(e) to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. Thus, the EPA believes that each of these provisions interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate. The EPA appreciates the efforts previously undertaken by the state to amend its SIP to make it consistent with the CAA, as interpreted in the Agency's 1999 SSM Guidance, but the EPA must now revise its SSM Policy with respect to affirmative defense provisions in SIPs.

For these reasons, the EPA is proposing to find 30 TAC 101.222(b), 30 TAC 101.222(c), 30 TAC 101.222(d) and 30 TAC 101.222(e) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions. The EPA notes that removal of these four provisions from the SIP will render cross-references to these provisions in 30 TAC 101.221(e) (as it applies to 30 TAC 101.222(b)–(e)), 30 TAC 101.222(f) and 30 TAC 101.222(g) superfluous and no longer operative, and the EPA thus recommends that these provisions be removed as well.

F. Affected State in EPA Region VIII: Colorado

1. Petitioner's Analysis

The Petitioner objected to two affirmative defense provisions in the Colorado SIP that provide for affirmative defenses to qualifying sources during malfunctions (5 Colo. Code Regs § 1001–2(II.E)) and during periods of startup and shutdown (5 Colo. Code Regs § 1001–2(II.J)).[52] The Petitioner acknowledged that this state has correctly revised its SIP in important ways in order to be consistent with CAA requirements, as interpreted in the EPA's SSM Policy, including providing affirmative defense provisions that are limited to monetary penalties, that do not apply in actions to enforce federal standards such as NSPS or NESHAP approved into the SIP, and that meet ''almost word for word'' the recommendations of the 1999 SSM Guidance. Nevertheless, the Petitioner had two concerns with these SIP provisions.

First, the Petitioner objected to both of these provisions based on its assertion that the CAA allows no affirmative defense provisions in SIPs. Second, the Petitioner asserted that even if affirmative defense provisions were permissible under the CAA, the state

[51] The EPA notes that ''upsets'' and ''unplanned events'' in these provisions are what are more commonly referred to as malfunctions, as confirmed by the state at the time the EPA approved these provisions as part of the SIP. *See,* ''Approval and Promulgation of Implementation Plans; Texas; Excess Emissions During Startup, Shutdown, Maintenance, and Malfunction,'' 75 FR 68989 (Nov. 10, 2010).

[52] Petition at 25–27.

had properly followed EPA guidance in the affirmative defense provision applicable to startup and shutdown events but failed to do so in the affirmative defense provision applicable to malfunctions. Specifically, the Petitioner argued that the EPA's own guidance for affirmative defenses recommended that they ''are not appropriate where a single source or a small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments.'' [53] Instead, the state's affirmative defense for malfunction events is potentially available to any source, if it can establish that the excess emissions during the event did not result in exceedances of ambient air quality standards that could be attributed to the source.[54] The Petitioner objected to this as not merely inconsistent with the EPA's 1999 SSM Guidance but also as an approach ''that does not have the same deterrent effect'' on sources and that would not have the same effects on sources to assure that they comply at all times in order to avoid violations. As a practical matter, the Petitioner also argued that including this element to the affirmative defense could ''mire enforcement proceedings in the question of whether or not the NAAQS or PSD increments were exceeded as a matter of fact.''

2. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to 5 Colo. Code Regs § 1001–2(II.J) because it provides an affirmative defense for violations due to excess emissions applicable during startup and shutdown events, contrary to the EPA's interpretation of the CAA. The EPA noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup and shutdown was contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.,* during malfunctions. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance. For these reasons, the EPA previously proposed to find that 5 Colo. Code Regs § 1001–2(II.J) is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision.

The EPA previously proposed to deny the Petition with respect to 5 Colo. Code Regs § 1001–2(II.E), because this provision includes an affirmative defense applicable to malfunction events that is consistent with the requirements of the CAA, as interpreted by the EPA in the SSM Policy. In particular, the EPA proposed to deny the Petition with respect to the claim that this provision is inconsistent with the CAA because it is available to sources or groups of sources that might have the potential to cause an exceedance of the NAAQS or PSD increments. The EPA reasoned that an acceptable alternative approach is to require the source to establish, as an element of the affirmative defense, that the excess emissions in question did not cause such impacts. The EPA noted in the February 2013 proposal notice that it was updating its previous guidance recommendations to states for SIPs in the SSM Policy in order to indicate that in lieu of restricting the application of an affirmative defense provision only to sources without the potential to cause NAAQS violations, the state could elect to require a source to prove that the excess emissions did not cause an exceedance of the NAAQS or PSD increments as an element of the defense instead. Accordingly, the EPA previously proposed to find that 5 Colo. Code Regs § 1001–2(II.E) is consistent with CAA requirements and declined to make a finding of substantial inadequacy with respect to this provision.

3. The EPA's Revised Proposal

In this SNPR, the EPA is proposing to revise the basis for the finding of substantial inadequacy and the SIP call for the affirmative defense provisions applicable to excess emissions that occur during startup and shutdown in 5 Colo. Code Regs § 1001–2(II.J). The EPA is also reversing its prior denial of the Petition with respect to the affirmative defense provision applicable to malfunctions in 5 Colo. Code Regs § 1001–2(II.E) and is proposing to find that provision substantially inadequate and to issue a SIP call for that provision as well. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets 5 Colo. Code Regs § 1001–2(II.J) and 5 Colo. Code Regs § 1001–2(II.E) to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action to assess monetary penalties under certain circumstances as contemplated in CAA sections 113 and 304. Thus, the EPA believes that these provisions interfere with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find 5 Colo. Code Regs § 1001–2(II.J) and 5 Colo. Code Regs § 1001–2(II.E) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions.

G. Affected States and Local Jurisdictions in EPA Region IX

1. Arizona

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Arizona Department of Environmental Quality's (ADEQ) Rule R18–2–310, which provide affirmative defenses for excess emissions during malfunctions (AAC Section R18–2–310(B)) and for excess emissions during startup or shutdown (AAC Section R18–2- 310(C)).[55] First, the Petitioner asserted that all affirmative defenses for excess emissions are inconsistent with the CAA and should be removed from the Arizona SIP.

Additionally, quoting from the EPA's recommendation in the SSM Policy that such affirmative defenses should not be available to ''a single source or small group of sources [that] has the potential to cause an exceedance of the NAAQS or PSD increments,'' the Petitioner contended that ''sources with the power to cause an exceedance should be strictly controlled at all times, not just when they actually cause an

[53] *Id.* at 25.

[54] *See,* 5 Colo. Code Regs § 1001–2(II.E.1.j).

[55] Petition at 20–22.

exceedance.'' [56] Although acknowledging that R18–2–310 contains some limitations to address this issue, the Petitioner argued that the limitations in the SIP provision do not reduce the incentive for such sources to emit at levels close to those that would violate a NAAQS or PSD increment in the way that entirely disallowing affirmative defenses for these types of sources would. Accordingly, the Petitioner requested that the EPA require Arizona either to remove R18–2–310(B) and (C) from the SIP entirely or to revise the rule so that affirmative defenses ''are not available to a single source or one of a small group of sources who have the potential to cause an exceedance of the NAAQS.''

Second, the Petitioner asserted that the provision applicable to startup and shutdown periods (R18–2–310(C)) does not include an explicit requirement for a source seeking to establish an affirmative defense to prove that ''the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance.'' The Petitioner provided a table specifically comparing the provisions in R18–2–310(C) against the EPA's recommended criteria for affirmative defense provisions in the 1999 SSM Guidance to show that R18–2–310(C) does not contain a specific provision to address this recommended criterion and stated that the SIP provision should be revised to require such a demonstration.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to deny the Petition with respect to the arguments concerning ADEQ's affirmative defense provisions for malfunctions in R18–2–310(B) because this provision is consistent with the requirements of the CAA, as interpreted by the EPA in the SSM Policy. In particular, the EPA proposed to deny the Petition with respect to the claim that this provision is inconsistent with the CAA because it is available to sources or groups of sources that might have the potential to cause an exceedance of the NAAQS or PSD increments. The EPA reasoned that an acceptable alternative approach is to require the source to establish, as an element of the affirmative defense, that the excess emissions in question did not cause such impacts. The EPA noted in the February 2013 proposal notice that it was updating its previous guidance recommendations to states for SIPs in the SSM Policy in order to indicate that in lieu of restricting the application of an affirmative defense provision only to sources without the potential to cause NAAQS violations, the state could elect to require a source to prove that the excess emissions did not cause a violation of the NAAQS as an element of the defense instead. Accordingly, the EPA previously proposed to find that R18–2–310(B) is consistent with CAA requirements and declined to make a finding of substantial inadequacy with respect to this provision.

With respect to the arguments concerning ADEQ's affirmative defense provisions for startup and shutdown periods in R18–2- 310(C), the EPA proposed to grant the Petition because it provides an affirmative defense for violations due to excess emissions applicable during startup and shutdown events, contrary to the EPA's current interpretation of the CAA. The EPA noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup and shutdown was contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.,* during malfunctions. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance. For these reasons, the EPA previously proposed to find that R18–2–310(C) is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is reversing its prior proposed denial of the Petition with respect to the affirmative defense provision applicable to malfunctions in R18–2–310(B) and is proposing to find that provision substantially inadequate and to issue a SIP call for that provision. The EPA is also revising the prior basis for the finding of substantial inadequacy and the SIP call for the affirmative defense provisions applicable to excess emissions that occur during startup and shutdown in R18–2–310(C). The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets R18–2–310(B) and R18–2–310(C) to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action to assess monetary penalties under certain circumstances as contemplated in CAA sections 113 and 304. Thus, the EPA believes that these provisions interfere with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find R18–2–310(B) and R18–2–310(C) substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions.

2. Arizona: Maricopa County

a. Petitioner's Analysis

The Petitioner objected to two provisions in the Maricopa County Air Pollution Control Regulations that provide affirmative defenses for excess emissions during malfunctions (Maricopa County Air Pollution Control Regulation 3, Rule 140, § 401) and for excess emissions during startup or shutdown (Maricopa County Air Pollution Control Regulation 3, Rule 140, § 402).[57] These provisions in Maricopa County Air Quality Department (MCAQD) Rule 140 are similar to the affirmative defense provisions in ADEQ R18–2–310.[58]

First, the Petitioner asserted that the affirmative defense provisions in Rule 140 are problematic for the same reasons identified in the Petition with respect to ADEQ R18–2–310. Specifically, the Petitioner argued that affirmative defenses should not be allowed in any SIP and, alternatively, that to the extent affirmative defenses are permissible, the provisions in Rule 140 addressing exceedances of the ambient standards are ''inappropriately permissive and do not comply with EPA guidance.'' [59] Accordingly, the

[56] Petition at 20.

[57] Petition at 23.

[58] Petition at 20–22.

[59] *Id.*

Petitioner requested that the EPA require Arizona and/or MCAQD either to remove these provisions from the SIP entirely or to revise them so that they are not available to a single source or small group of sources that has the potential to cause a NAAQS exceedance. Second, the Petitioner asserted that the provisions for startup and shutdown in Rule 140 do not include an explicit requirement for a source seeking to establish an affirmative defense to prove that ''the excess emissions in question were not part of a recurring pattern indicative of inadequate design, operation, or maintenance.'' The Petitioner argued that Rule 140 should be revised to require such a demonstration.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to deny the Petition with respect to the arguments concerning MCAQD's affirmative defense provisions for malfunctions in Regulation 3, Rule 140, § 401 because this provision is consistent with the requirements of the CAA, as interpreted by the EPA in the SSM Policy. In particular, the EPA proposed to deny the Petition with respect to the claim that this provision is inconsistent with the CAA because it is available to sources or groups of sources that might have the potential to cause an exceedance of the NAAQS or PSD increments. The EPA reasoned that an acceptable alternative approach is to require the source to establish, as an element of the affirmative defense, that the excess emissions in question did not cause such impacts. The EPA noted in the February 2013 proposal notice that it was updating its previous guidance recommendations to states for SIPs in the SSM Policy in order to indicate that in lieu of restricting the application of an affirmative defense provision only to sources without the potential to cause NAAQS violations, the state could elect to require a source to prove that the excess emissions did not cause a violation of the NAAQS as an element of the defense instead. Accordingly, the EPA previously proposed to find that Regulation 3, Rule 140, § 401 is consistent with CAA requirements and declined to make a finding of substantial inadequacy with respect to this provision.

With respect to the arguments concerning ADEQ's affirmative defense provisions for startup and shutdown periods in Regulation 3, Rule 140, § 402, the EPA previously proposed to grant the Petition because it provides an affirmative defense for violations due to excess emissions applicable during startup and shutdown events, contrary to the EPA's interpretation of the CAA. The EPA noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup and shutdown was contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.,* during malfunctions. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance. For these reasons, the EPA previously proposed to find that Maricopa County Air Pollution Control Regulation 3, Rule 140, § 402 is substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to this provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is reversing its prior proposed denial of the Petition with respect to the affirmative defense provision applicable to malfunctions in Regulation 3, Rule 140, § 401 and is proposing to find that provision substantially inadequate and to issue a SIP call for that provision. The EPA is also revising the prior basis for the finding of substantial inadequacy and the SIP call for the affirmative defense provisions applicable to excess emissions that occur during startup and shutdown in Regulation 3, Rule 140, § 402. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Regulation 3, Rule 140, § 401 and Regulation 3, Rule 140, § 402 to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action to assess monetary penalties under certain circumstances as contemplated in CAA sections 113 and 304. Thus, the EPA believes that these provisions interfere with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find Regulation 3, Rule 140, § 401 and Regulation 3, Rule 140, § 402 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions.

3. California: Eastern Kern Air Pollution Control District

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified an affirmative defense provision in the SIP for the state of California applicable in the Eastern Kern Air Pollution Control District (APCD). The affirmative defense is included in Kern County ''Rule 111 Equipment Breakdown.'' This SIP provision provides an affirmative defense available to sources for excess emissions that occur during a breakdown condition (*i.e.,* malfunction).

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Kern County Rule 111 includes the elements of an affirmative defense to be asserted by sources in the event of violations during breakdown conditions. The provision defines ''breakdown conditions'' as any unforeseeable failure or malfunction of air pollution control equipment or monitoring equipment. If the source is able to establish that it met each of the specified criteria to an ''air pollution control officer'' (*i.e.,* an official of the state or the Eastern Kern APCD), then the provision purports to bar any enforcement action and thus any form of remedy for the violations that occur during the malfunction. Accordingly, the EPA believes that the affirmative defense provision created by Kern County Rule 111 is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that the provision is not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for Kern County Rule 111 Equipment Breakdown in the California SIP applicable in the Eastern Kern APCD.[60] The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. The EPA notes that Kern County Rule 111 did not meet the Agency's prior interpretation of the CAA with regard to affirmative defense provisions in SIPs. Regardless of that fact, however, the Agency must now evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Kern County ''Rule 111 Equipment Breakdown'' to provide an affirmative defense that operates to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. The provision provides that if a violating source meets certain criteria set forth in Rule 111, then ''no enforcement action may be taken.'' By proscribing any enforcement by any party if the source meets certain criteria, Rule 111 creates an affirmative defense that would preclude enforcement for excess emissions that would otherwise constitute a violation of the applicable SIP emission limitations. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find Kern County ''Rule 111 Equipment Breakdown'' substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision.

4. California: Imperial County Air Pollution Control District

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified an affirmative defense provision in the SIP for the state of California applicable in the Imperial Valley APCD. The affirmative defense is included in Imperial County ''Rule 111 Equipment Breakdown.'' This SIP provision provides an affirmative defense available to sources for excess emissions that occur during a breakdown condition (*i.e.,* malfunction).

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Imperial County Rule 111 includes the elements of an affirmative defense to be asserted by sources in the event of violations during breakdown conditions. The provision defines ''breakdown conditions'' as any unforeseeable failure or malfunction of air pollution control equipment or monitoring equipment. If the source is able to establish that it met each of the specified criteria to an ''air pollution control officer'' (*i.e.,* an official of the state or the Imperial Valley APCD), then the provision purports to bar any enforcement action and thus any form of remedy for the violations that occur during the malfunction. Accordingly, the EPA believes that the affirmative defense provision created by Imperial County Rule 111 is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that the provision is not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for Imperial County ''Rule 111 Equipment Breakdown'' in the California SIP applicable in the Imperial Valley APCD. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. The EPA notes that Imperial County Rule 111 did not meet the Agency's prior interpretation of the CAA with regard to affirmative defense provisions in SIPs. Regardless of that fact, however, the Agency must now evaluate such

[60] The EPA is proposing in this SNPR to make a finding of substantial inadequacy and to issue a SIP call for Kern County Rule 111 Equipment Breakdown in the California SIP as it applies in each the Eastern Kern APCD and the San Joaquin Valley APCD.

provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Imperial County ''Rule 111 Equipment Breakdown'' to provide an affirmative defense that operates to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. The provision provides that if a violating source meets certain criteria set forth in Rule 111, then ''no enforcement action may be taken.'' By proscribing any enforcement by any party if the source meets certain criteria, Rule 111 creates an affirmative defense that would preclude enforcement for excess emissions that would otherwise constitute a violation of the applicable SIP emission limitations. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find Imperial County ''Rule 111 Equipment Breakdown'' substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision.

5. California: San Joaquin Valley Air Pollution Control District

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified affirmative defense provisions in the SIP for the state of California applicable in the San Joaquin Valley APCD. The affirmative defenses are included in: (i) Fresno County ''Rule 110 Equipment Breakdown''; (ii) Kern County ''Rule 111 Equipment Breakdown''; (iii) Kings County ''Rule 111 Equipment Breakdown''; (iv) Madera County ''Rule 113 Equipment Breakdown''; (v) Stanislaus County ''Rule 110 Equipment Breakdown''; and (vi) Tulare County ''Rule 111 Equipment Breakdown.'' [61] Each of these SIP provisions provides an affirmative defense available to sources for excess emissions that occur during a breakdown condition (*i.e.,* malfunction).

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Fresno County Rule 110, Kern County Rule 111, Kings County Rule 111, Madera County Rule 113, Stanislaus County Rule 110 and Tulare County Rule 111 include the elements of an affirmative defense to be asserted by sources in the event of violations during breakdown conditions. Each of these provisions defines ''breakdown conditions'' in comparable ways as any unforeseeable failure or malfunction of air pollution control equipment or monitoring equipment. If the source is able to establish that it met each of the specified criteria to a ''Control Officer'' (*i.e.,* an official of the state or the San Joaquin Valley APCD), then the provision purports to bar any enforcement action and thus any form of remedy for the violations that occur during the malfunction. Accordingly, the EPA believes that each of the affirmative defense provisions created by Fresno County Rule 110, Kern County Rule 111, Kings County Rule 111, Madera County Rule 113, Stanislaus County Rule 110 and Tulare County Rule 111 is inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that these provisions are not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for six provisions in the California SIP applicable in the San Joaquin Valley APCD: (i) Fresno County ''Rule 110 Equipment Breakdown''; (ii) Kern County ''Rule 111 Equipment Breakdown''; (iii) Kings County ''Rule 111 Equipment Breakdown''; (iv) Madera County ''Rule 113 Equipment Breakdown''; (v) Stanislaus County ''Rule 110 Equipment Breakdown''; and (vi) Tulare County ''Rule 111 Equipment Breakdown.'' [62] The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. The EPA notes that Fresno County Rule 110, Kern County Rule 111, Kings County Rule 111, Madera County Rule 113, Stanislaus County Rule 110 and Tulare County Rule 111 did not meet the Agency's prior interpretation of the CAA with regard to affirmative defense provisions in SIPs. Regardless of that fact, however, the Agency must now evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to

[61] The EPA notes that comparable provisions appear in the California SIP for the San Joaquin Valley APCD in Merced County (in ''Rule 109 Equipment Breakdown'') and in San Joaquin County (in ''Rule 110 Equipment Breakdown''). However, the EPA interprets these provisions to be enforcement discretion provisions, applicable only to the state or air district personnel. In each of these counties, the applicable rules provide that if the source meets certain criteria, then ''the Air Pollution Control Officer may elect to take no enforcement action.'' The EPA believes that these provisions unequivocally apply only to the exercise of enforcement discretion by the state or air district personnel and are not operative in the event of enforcement by the EPA or others under the authority of the citizen suit provision of CAA section 304. For this reason, the EPA is not proposing to make a finding of substantial inadequacy and a SIP call for these comparable provisions in Merced County Rule 109 and San Joaquin County Rule 110. If the state of California disagrees with this interpretation, the EPA anticipates that the state will inform the Agency of that fact though comment on this SNPR.

[62] The EPA is proposing in this SNPR to make a finding of substantial inadequacy and to issue a SIP call for Kern County Rule 111 Equipment Breakdown in the California SIP as it applies in each the Eastern Kern APCD and the San Joaquin Valley APCD.

assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Fresno County Rule 110, Kern County Rule 111, Kings County Rule 111, Madera County Rule 113, Stanislaus County Rule 110 and Tulare County Rule 111 to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. These provisions provide that if a violating source meets certain criteria set forth in each of the Rules, then ''no enforcement action may be taken.'' By proscribing any enforcement by any party if the source meets certain criteria, each of these provisions creates an affirmative defense that would preclude enforcement for excess emissions that would otherwise constitute a violation of the applicable SIP emission limitations. Thus, the EPA believes that these provisions interfere with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find Fresno County ''Rule 110 Equipment Breakdown,'' Kern County ''Rule 111 Equipment Breakdown,'' Kings County ''Rule 111 Equipment Breakdown,'' Madera County ''Rule 113 Equipment Breakdown,'' Stanislaus County ''Rule 110 Equipment Breakdown'' and Tulare County ''Rule 111 Equipment Breakdown'' substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to these provisions.

H. Affected States and Local Jurisdictions in EPA Region X

1. Alaska

a. Petitioner's Analysis

The Petitioner objected to a provision in the Alaska SIP that provides an excuse for ''unavoidable'' excess emissions that occur during SSM events, including startup, shutdown, scheduled maintenance and ''upsets'' (Alaska Admin. Code tit. 18 § 50.240).[63] The provision provides: ''Excess emissions determined to be unavoidable under this section will be excused and are not subject to penalty. This section does not limit the department's power to enjoin the emission or require corrective action.'' The Petitioner argued that this provision excuses excess emissions in violation of the CAA and the EPA's SSM Policy, which require all such emissions to be treated as violations of the applicable SIP emission limitations. The Petitioner further argued that it is unclear whether the provision could be interpreted to bar enforcement actions brought by the EPA or citizens, because it is drafted as if the state were the sole enforcement authority. Finally, the Petitioner pointed out, the provision is worded as if it were an affirmative defense, but it uses criteria for enforcement discretion. Finally, the Petitioner pointed out, the provision is worded as if it were an affirmative defense, but it uses criteria more relevant for enforcement discretion. In other words, the Petitioner argued that the provision is inconsistent with the EPA's recommendations for affirmative defense provisions in SIPs in the 1999 SSM Guidance.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to Alaska Admin. Code tit. 18 § 50.240. To the extent that this provision is intended to be an affirmative defense, the EPA believed it to be deficient to meet the requirements of the CAA for such provisions. The provision applies to excess emissions during startup, shutdown and maintenance events, contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for malfunctions. The EPA noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup and shutdown was contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.,* during malfunctions. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance. Additionally, the EPA previously reasoned that the section of Alaska Admin. Code tit. 18 § 50.240 applying to ''upsets'' is inadequate because the criteria referenced are not sufficiently similar to those recommended in the EPA's SSM Policy for affirmative defense provisions applicable to malfunctions. Thus, the EPA previously considered Alaska Admin. Code tit. 18 § 50.240 to be inconsistent with the fundamental requirements of the CAA and thus proposed to find the provision substantially inadequate to meet CAA requirements and to issue a SIP call with respect to the provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is revising the prior basis for the finding of substantial inadequacy and the SIP call for the affirmative defense provisions applicable to excess emissions that occur during startup, shutdown and upsets in Alaska Admin. Code tit. 18 § 50.240. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Alaska Admin. Code tit. 18 § 50.240 to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action to assess monetary penalties or impose injunctive relief under certain circumstances as contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find Alaska Admin. Code tit. 18 § 50.240 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its

[63] Petition at 18–20.

February 2013 proposal notice with respect to the other separate bases for the finding of substantial inadequacy of this provision.

2. Washington

a. Petitioner's Analysis

The Petitioner objected to a provision in the Washington SIP that provides an excuse for ''unavoidable'' excess emissions that occur during certain SSM events, including startup, shutdown, scheduled maintenance and ''upsets'' (Wash. Admin. Code § 173–400–107).[64] The provision provides that ''[e]xcess emissions determined to be unavoidable under the procedures and criteria under this section shall be excused and are not subject to penalty.'' The Petitioner argued that this provision excuses excess emissions, in violation of the CAA and the EPA's SSM Policy, which require all such emissions to be treated as violations of the applicable SIP emission limitations. The Petitioner further argued that it is unclear whether the provision could be interpreted to bar enforcement actions brought by the EPA or citizens, because it is drafted as if the state were the sole enforcement authority. Finally, the Petitioner pointed out, the provision is worded as if it were an affirmative defense, but it uses criteria more relevant for enforcement discretion.

b. The EPA's Prior Proposal

In the February 2013 proposal notice, the EPA proposed to grant the Petition with respect to Wash. Admin. Code § 173–400–107. The provision applies to startup, shutdown and maintenance events, contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for malfunctions. The EPA noted at that time that an affirmative defense for excess emissions that occur during planned events such as startup, shutdown and maintenance was contrary to the EPA's then current interpretation of the CAA to allow such affirmative defenses only for events beyond the control of the source, *i.e.,* during malfunctions. In the February 2013 proposal notice, the EPA proposed to revise its SSM Policy to reflect this interpretation of the CAA, and to update the recommendations it previously made concerning affirmative defense provisions applicable to startup and shutdown events in the 1999 SSM Guidance.[65] Furthermore, the EPA previously reasoned that the section of Wash. Admin. Code § 173–400–107 applying to ''upsets'' is inadequate because the criteria referenced are not sufficiently similar to those recommended in the EPA's SSM Policy for affirmative defense provisions applicable to malfunctions. Moreover, the provision appears to bar the EPA and citizens from seeking penalties and injunctive relief. Thus, the EPA previously considered Wash. Admin. Code § 173–400–107 to be inconsistent with the fundamental requirements of the CAA and the EPA thus proposed to find the provision substantially inadequate to meet CAA requirements and proposed to issue a SIP call with respect to the provision.

c. The EPA's Revised Proposal

In this SNPR, the EPA is revising the prior basis for the proposed finding of substantial inadequacy and the proposed SIP call for the affirmative defense provisions applicable to excess emissions that occur during startup, shutdown, maintenance and upsets in Wash. Admin. Code § 173–400–107. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. Now, the Agency must evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Wash. Admin. Code § 173–400–107 to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action to assess monetary penalties or impose injunctive relief under certain circumstances as contemplated in CAA sections 113 and 304. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find Wash. Admin. Code § 173–400–107 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision. The EPA notes that in this SNPR it is only addressing this provision with respect to its deficiency as an affirmative defense provision and is not revising its February 2013 proposal notice with respect to the other separate bases for the finding of substantial inadequacy of this provision.

3. Washington: Energy Facility Site Evaluation Council

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified affirmative defense provisions in the SIP for the state of Washington that relate to the Energy Facility Site Evaluation Council (EFSEC).[66] The EFSEC portion of the SIP includes Wash. Admin. Code § 463–39–005, which adopts by reference Wash. Admin. Code § 173–400–107, thereby incorporating the affirmative defenses applicable to startup, shutdown, scheduled maintenance and ''upsets'' for which, as explained earlier in this SNPR, the EPA has proposed to find Wash. Admin. Code § 173–400–107 substantially inadequate to meet CAA requirements.

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit

[64] Petition at 71–72.

[65] The EPA notes that its SSM Policy guidance has always stated that affirmative defense provisions in SIPs are not appropriate for excess emissions that occur during maintenance activities. The 1999 SSM Guidance only made recommendations with respect to affirmative defense provisions applicable to malfunctions and to startup and shutdown. The 1983 SSM Guidance recommended that ''scheduled maintenance is a predictable event which can be scheduled at the discretion of the operator'' and therefore recommended even against the exercise of enforcement discretion for violations during maintenance except under limited circumstances. *See* 1983 SSM Guidance at Attachment, Page 3.

[66] This is the state agency that reviews and authorizes the construction and operation of major energy facilities in Washington for all media in lieu of any other individual state or local agency permits. Thus these affirmative defense provisions can become embodied in the authorizations for such sources.

states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Wash. Admin. Code § 463–39–005 incorporates by reference the elements of an affirmative defense to be asserted by sources in the event of violations during startup, shutdown, scheduled maintenance and upsets. The provision provides criteria for each type of event. If the source is able to establish that it met each of the specified criteria, then the provision purports to bar any enforcement action and thus any form of remedy for the violations that occur during such events. The provision explicitly states that if the criteria are met, then the violations ''shall be excused and not subject to penalty.'' Accordingly, the EPA believes that the affirmative defenses created by Wash. Admin. Code § 463–39–005 through its incorporation by reference of Wash. Admin. Code § 173–400–107 are inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that the Wash. Admin. Code § 463–39–005 provision is not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for Wash. Admin. Code § 463–39–005's incorporation by reference of Wash. Admin. Code § 173–400–107 in the Washington SIP with respect to the EFSEC. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. The EPA notes that the affirmative defenses created in Wash. Admin. Code § 463–39–005 through its incorporation by reference of Wash. Admin. Code § 173–400–107 did not meet the Agency's prior interpretation of the CAA with regard to affirmative defense provisions in SIPs. Regardless of that fact, however, the Agency must now evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets Wash. Admin. Code § 463–39–005's incorporation by reference of Wash. Admin. Code § 173–400–107 to provide affirmative defenses that would operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. The provision provides that if a violating source meets certain criteria incorporated by reference from Wash. Admin. Code § 173–400–107, then the excess emissions are ''excused and not subject to penalty.'' By proscribing any enforcement by any party if the source meets certain criteria, Wash. Admin. Code § 463–39–005 creates affirmative defenses that would preclude enforcement for excess emissions that would otherwise constitute a violation of the applicable SIP emission limitations. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find Wash. Admin. Code § 463–39–005's incorporation by reference of Wash. Admin. Code § 173–400–107 substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision.

4. Washington: Southwest Clean Air Agency

a. The EPA's Evaluation

In addition to evaluating specific affirmative defense provisions identified by the Petitioner, the EPA is also evaluating other affirmative defense provisions that may be affected by the Agency's revision of its interpretation of CAA requirements for such provisions in SIPs. As part of its review, the EPA has identified affirmative defense provisions in the SIP for the state of Washington applicable in the portion of the state regulated by the Southwest Clean Air Agency (SWCAA).[67] The affirmative defenses are included in the SIP in SWAPCA ''400–107 Excess Emissions.'' This SIP provision provides an affirmative defense available to sources for excess emissions that occur during startup and shutdown, maintenance and upsets (*i.e.,* malfunctions). It is identical to Wash. Admin. Code § 173–400–107 in all respects except that SWAPCA 400–107(3) contains a more stringent requirement for the reporting of excess emissions.

In light of the court's decision in *NRDC* v. *EPA,* the EPA is proposing to revise its SSM Policy concerning the issue of affirmative defense provisions. In particular, the EPA is proposing to reverse its prior recommendations to states on this issue provided in the 1999 SSM Guidance. In that guidance, the EPA had interpreted the CAA to permit states to elect to create narrowly drawn affirmative defense provisions in SIPs, both for malfunction events and for startup and shutdown events, so long as the provisions were consistent with the criteria recommended by the Agency. In the February 2013 proposal notice, the EPA had already proposed to revise this interpretation of the CAA to permit states to develop affirmative defense provisions only for malfunction events and not for startup and shutdown events. The decision of the court in *NRDC* v. *EPA* indicates that the EPA needs to revise the SSM Policy yet further.

As discussed in sections IV and V of this SNPR, the EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. SWAPCA 400–107 Excess Emissions includes the elements of an affirmative defense to be asserted by sources in the event of violations during startup and shutdown, maintenance and upsets. The provision provides criteria for each type of event. If the source is able to establish that it met each of the specified criteria to ''the Authority or the decision-making entity'' (*i.e.,* officials of the state or the SWCAA), then the provision purports to bar any enforcement action and thus any form of

[67] The EPA notes that the SWCAA was formerly named, and in some places in the SIP still appears, as the ''Southwest Air Pollution Control Authority'' or ''SWAPCA.'' The EPA anticipates that the name will be updated in the SIP in due course as the state revises the SIP.

remedy for the violations that occur during such events. The provision explicitly states that if the criteria are met, then the violations ''shall be excused and not subject to penalty.'' Accordingly, the EPA believes that the affirmative defenses created by SWAPCA 400–107 are inconsistent with the fundamental enforcement structure of the CAA and the EPA thus believes that the provision is not consistent with CAA requirements for SIP provisions.

b. The EPA's Proposal

In this SNPR, the EPA is proposing to make a finding of substantial inadequacy and to issue a SIP call for SWAPCA ''400–107 Excess Emissions'' in the Washington SIP applicable in the area regulated by SWCAA. The EPA is proposing to revise its interpretation of the CAA with respect to affirmative defense provisions in SIPs. Previously the EPA assessed whether such provisions met certain requirements, such as being limited to monetary penalties rather than injunctive relief and containing sufficiently robust criteria to assure that the defense applied only in appropriately narrow circumstances. The EPA notes that SWAPCA 400–107 Excess Emissions did not meet the Agency's prior interpretation of the CAA with regard to affirmative defense provisions in SIPs. Regardless of that fact, however, the Agency must now evaluate such provisions to determine whether they are constructed in a way that would purport to preclude federal court jurisdiction under section 113 to assess civil penalties or other forms of relief for violations of SIP emission limits, to prevent courts from considering the statutory factors for the assessment of civil penalties under section 113 or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of section 304.

The EPA interprets SWAPCA ''400–107 Excess Emissions'' to provide affirmative defenses that operate to limit the jurisdiction of the federal court in an enforcement action and to limit the authority of the court to impose monetary penalties as contemplated in CAA sections 113 and 304. The provision provides that if a violating source meets certain criteria set forth in SWAPCA 400–107, then the excess emissions are ''excused and not subject to penalty.'' By proscribing any enforcement by any party if the source meets certain criteria, SWAPCA 400–107 creates affirmative defenses that would preclude enforcement for excess emissions that would otherwise constitute a violation of the applicable SIP emission limitations. Thus, the EPA believes that this provision interferes with the intended enforcement structure of the CAA, through which parties may seek to bring enforcement actions for violations of SIP emission limits and courts may exercise their jurisdiction to determine what, if any, relief is appropriate.

For these reasons, the EPA is proposing to find SWAPCA ''400–107 Excess Emissions'' substantially inadequate to meet CAA requirements and the EPA is thus proposing to issue a SIP call with respect to this provision.

VIII. Statutory and Executive Order Reviews

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

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action'' because it raises novel legal or policy issues. Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The EPA's SPNR, in response to the Petition, merely states the EPA's current interpretation of the statutory requirements of the CAA and does not require states to collect any additional information. To the extent that the EPA proposes to issue a SIP call to a state under CAA section 110(k)(5), the EPA is only proposing an action that requires the state to revise its SIP to comply with existing requirements of the CAA.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[68]

After considering the economic impacts of this SNPR on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Courts have interpreted the RFA to require a regulatory flexibility analysis only when small entities will be subject to the requirements of the rule. *See, e.g., Michigan* v. *EPA,* 213 F.3d 663 (D.C. Cir. 2000); *Mid-Tex Elec. Co-op, Inc.* v. *FERC,* 773 F.2d 327 (D.C. Cir. 1985). This proposed rule will not impose any requirements on small entities. Instead, the proposed action merely states the EPA's current interpretation of the statutory requirements of the CAA. To the extent that the EPA proposes to issue a SIP call to a state under CAA section 110(k)(5), the EPA is only proposing an action that requires the state to revise its SIP to comply with existing requirements of the CAA. The EPA's action, therefore, would leave to states the choice of how to revise the SIP provision in question to make it consistent with CAA requirements and determining, among other things, which of the several lawful approaches to the treatment of excess emissions during SSM events will be applied to particular sources. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local and tribal governments, in the aggregate, or the private sector in any one year. The action may impose a duty on certain state governments to meet their existing obligations to revise their SIPs to comply with CAA requirements. The direct costs of this action on states would be those associated with preparation and submission of a SIP revision by those states for which the EPA issues a SIP call. Examples of such costs could include development of a state rule, conducting notice and public hearing and other costs incurred in connection with a SIP submission. These aggregate costs would be far less than the $100-million threshold in any one year. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA

[68] Small entities include small businesses, small organizations and small governmental jurisdictions. For purposes of assessing the impacts of this notice on small entities, *small entity* is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (*see* 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

because it contains no regulatory requirements that might significantly or uniquely affect small governments. The regulatory requirements of this action would apply to the states for which the EPA issues a SIP call. To the extent that such states allow local air districts or planning organizations to implement portions of the state's obligation under the CAA, the regulatory requirements of this action would not significantly or uniquely affect small governments because those governments have already undertaken the obligation to comply with the CAA.

E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it will simply maintain the relationship and the distribution of power between the EPA and the states as established by the CAA. The proposed SIP calls are required by the CAA because the EPA is proposing to find that the current SIPs of the affected states are substantially inadequate to meet fundamental CAA requirements. In addition, the effects on the states will not be substantial because where a SIP call is finalized for a state, the SIP call will require the affected state to submit only those revisions necessary to address the SIP deficiencies and applicable CAA requirements. While this action may impose direct effects on the states, the expenditures would not be substantial because they would be far less than $25 million in the aggregate in any one year. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with the EPA's policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this SNPR from state and local officials.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). In this action, the EPA is not addressing any tribal implementation plans. This action is limited to states. Thus, Executive Order 13175 does not apply to this action. However, the EPA invites comment on this SNPR from tribal officials.

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

The EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it merely prescribes the EPA's action for states regarding their obligations for SIPs under the CAA.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This action merely prescribes the EPA's action for states regarding their obligations for SIPs under the CAA.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the EPA decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

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

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

The EPA has determined that this SNPR will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The rule is intended to ensure that all communities and populations across the affected states, including minority, low-income and indigenous populations overburdened by pollution, receive the full human health and environmental protection provided by the CAA. This proposed action concerns states' obligations regarding the treatment they give, in rules included in their SIPs under the CAA, to excess emissions during startup, shutdown and malfunctions. This SNPR would require 17 states to bring their treatment of these emissions into line with CAA requirements, which would lead to sources' having greater incentives to control emissions during such events.

K. Determination Under Section 307(d)

Pursuant to CAA section 307(d)(1)(V), the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d) establishes procedural requirements specific to rulemaking under the CAA. Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to ''such other actions as the Administrator may determine.''

L. Judicial Review

Section 307(b)(1) of the CAA indicates which Federal Courts of Appeal have venue for petitions of review of final agency actions by the EPA under the CAA. This section provides, in part, that petitions for review must be filed in the U.S. Court of Appeals for the District of Columbia Circuit (i) when the agency action consists of ''nationally applicable regulations promulgated, or final actions taken, by the Administrator'' or (ii) when such action is locally or regionally applicable, if ''such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.''

This rule responding to the Petition is ''nationally applicable'' within the meaning of section 307(b)(1). First, the

rulemaking addresses a Petition that raises issues that are applicable in all states and territories in the U.S. For example, the Petitioner requested that the EPA revise its SSM Policy with respect to whether affirmative defense provisions in SIPs are consistent with CAA requirements. The EPA's response is relevant for all states nationwide. Second, the rulemaking will address a Petition that raises issues relevant to specific existing SIP provisions in states across the U.S. that are located in each of the 10 EPA Regions, 10 different federal circuits and multiple time zones. Third, the rulemaking addresses a common core of knowledge and analysis involved in formulating the decision and a common interpretation of the requirements of the CAA being applied to SIPs in states across the country. Fourth, the rulemaking, by addressing issues relevant to appropriate SIP provisions in one state, may have precedential impacts upon the SIPs of other states nationwide. Courts have found similar rulemaking actions to be of nationwide scope and effect.[69]

This determination is appropriate because in the 1977 CAA Amendments that revised CAA section 307(b)(1), Congress noted that the Administrator's determination that an action is of ''nationwide scope or effect'' would be appropriate for any action that has ''scope or effect beyond a single judicial circuit.'' H.R. Rep. No. 95–294 at 323–324, reprinted in 1977 U.S.C.C.A.N. 1402–03. Here, the scope and effect of this rulemaking extends to numerous judicial circuits because the action on the Petition extends to states throughout the country. In these circumstances, section 307(b)(1) and its legislative history authorize the Administrator to find the rule to be of ''nationwide scope or effect'' and thus to indicate the venue for challenges to be in the D.C. Circuit. Thus, any petitions for review must be filed in the U.S. Court of Appeals for the District of Columbia Circuit. Accordingly, the EPA is proposing to determine that this will be a rulemaking of nationwide scope or effect.

In addition, pursuant to CAA section 307(d)(1)(V), the EPA is determining that this rulemaking action will be subject to the requirements of section 307(d), which establish procedural requirements specific to rulemaking under the CAA.

IX. Statutory Authority

The statutory authority for this action is provided by CAA section 101 *et seq.* (42 U.S.C. 7401 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Affirmative defense, Air pollution control, Carbon dioxide, Carbon dioxide equivalents, Carbon monoxide, Excess emissions, Greenhouse gases, Hydrofluorocarbons, Incorporation by reference, Intergovernmental relations, Lead, Methane, Nitrogen dioxide, Nitrous oxide, Ozone, Particulate matter, Perfluorocarbons, Reporting and recordkeeping requirements, Startup, shutdown and malfunction, State implementation plan, Sulfur hexafluoride, Sulfur oxides, Volatile organic compounds.

Dated: September 5, 2014.

Janet G. McCabe,

Acting Assistant Administrator.

[FR Doc. 2014–21830 Filed 9–16–14; 8:45 am]

BILLING CODE 6560–50–P

[69] *See, e.g., State of Texas, et al.* v. *EPA,* 2011 U.S. App. LEXIS 5654 (5th Cir. 2011) (finding SIP call to 13 states to be of nationwide scope and effect and thus transferring the case to the U.S. Court of Appeals for the D.C. Circuit in accordance with CAA section 307(b)(1)).

FEDERAL REGISTER

Vol. 79 Wednesday,

No. 180 September 17, 2014

Part IV

The President

Proclamation 9166—National Hispanic Heritage Month, 2014

Proclamation 9167—National Hispanic-Serving Institutions Week, 2014

Federal Register
Vol. 79, No. 180
Wednesday, September 17, 2014

Presidential Documents

Title 3—

The President

Proclamation 9166 of September 12, 2014

National Hispanic Heritage Month, 2014

By the President of the United States of America

A Proclamation

Nearly 50 years after the United States first observed what was then National Hispanic Heritage Week, Hispanics represent a vibrant and thriving part of our diverse Nation. Their histories and cultures stretch across centuries, and the contributions of those who come to our shores today in search of their dreams continue to add new chapters in our national story. This month, we honor the rich heritage of the Hispanic community and celebrate its countless achievements.

This month's theme, ''Hispanics: A legacy of history, a present of action and a future of success,'' reminds us of all the ways Hispanics have enriched our Union and shaped our character. From those with roots that trace back generations to those who have just set out in pursuit of the promise of America, they have come to represent the spirit of our Nation: that with hard work, you can build a better life for yourself and a better future for your children. Hispanics have served honorably in our Armed Forces, defending the values we hold dear. They have transformed industries with new, innovative ideas. And they have led and inspired movements that have made our Nation more equal and more just.

In these accomplishments, we recognize that when we lift up the Hispanic community, we strengthen our Nation; when we create more ladders of opportunity, we provide the chance for all Americans to reach their greatest potential. My Administration is committed to supporting and fighting for policies that help Hispanics succeed. We are investing in programs that better prepare students and workers for today's economy, continuing to address disparities in health care, and pushing initiatives that grow our middle class.

Reforming our immigration system remains crucial for our economic future. When workers educated in America are unable to stay and innovate here, we are deprived of their full contributions, and when immigrants have to labor in the shadows, they often earn unfair wages and their families and our economy suffer. That is why I continue to call on the Congress to enact comprehensive immigration reform, and why I am determined to address our broken immigration system through executive action in a way that is sustainable and effective, and within the confines of the law.

America has always drawn its strength from the contributions of a diverse people. Throughout our Nation, Hispanics are advancing our economy, improving our communities, and bettering our country. During National Hispanic Heritage Month, let us renew our commitment to ensuring ours remains a society where the talents and potential of all its members can be fully realized.

To honor the achievements of Hispanics in America, the Congress by Public Law 100–402, as amended, has authorized and requested the President to issue annually a proclamation designating September 15 through October 15 as ''National Hispanic Heritage Month.''

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim September 15 through October 15, 2014,

as National Hispanic Heritage Month. I call upon public officials, educators, librarians, and all Americans to observe this month with appropriate ceremonies, activities, and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of September, in the year of our Lord two thousand fourteen, and of the Independence of the United States of America the two hundred and thirty-ninth.

[FR Doc. 2014–22342
Filed 9–16–14; 11:15 am]
Billing code 3295–F4

Presidential Documents

Proclamation 9167 of September 12, 2014

National Hispanic-Serving Institutions Week, 2014

By the President of the United States of America

A Proclamation

In America, every child should have access to a world-class education. Our Nation's classrooms cultivate and challenge young minds and build a skilled and competitive workforce, securing a brighter future for our children and our country. Across America, Hispanic-Serving Institutions (HSIs) provide essential education opportunities and play a vital role in fulfilling our responsibility to the rising group of Hispanic innovators, entrepreneurs, artists, and scholars. This week, we honor these halls of learning and recommit ourselves to inspiring and preparing the next generation of leaders.

Our Nation can strengthen our economy and have the highest proportion of college graduates in the world by 2020, but achieving this goal will require us to unlock the full talents and potential of every student. Hispanic Americans represent the largest and one of the fastest growing minority groups in the United States, yet they are continually underrepresented in our colleges and universities. HSIs—where more than half of America's Hispanic undergraduates attend—are critical to increasing the college enrollment, retention, and graduation rates of this expanding population. That is why the Federal Government is investing more than $1 billion over 10 years in these schools to renew, reform, and expand higher education programs for Hispanics.

Today, the Hispanic dropout rate has fallen by more than half, and more Hispanics are enrolled in college than ever before—but we have more work to do to ensure that hardworking students are never priced out of a higher education. My Administration has increased Pell Grants, expanded pathways to earn degrees at our community colleges, and offered new tuition tax credits and better student loan repayment options to millions of people, and we will keep fighting to improve college affordability throughout our country. By lowering the cost of college for students and their parents and supporting HSIs, we can extend the promise of a college degree to an increasing number of Hispanics.

In a changing economy, a college education is one of the surest ways into the middle class, and this week we celebrate institutions that help improve the lives of their students and revitalize the communities where they serve. Let us never forget that the future belongs to the nation that best educates its people. When we strengthen our HSIs, we help ensure that all our children, no matter who they are or where they come from, have the chance to achieve their dreams.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim September 14 through September 20, 2014, as National Hispanic-Serving Institutions Week. I call on public officials, educators, and all the people of the United States to observe this week with appropriate programs, ceremonies, and activities that acknowledge the many ways these institutions and their graduates contribute to our country.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of September, in the year of our Lord two thousand fourteen, and of the Independence of the United States of America the two hundred and thirty-ninth.

[FR Doc. 2014–22343
Filed 9–16–14; 11:15 am]
Billing code 3295–F4

Reader Aids

Federal Register

Vol. 79, No. 180

Wednesday, September 17, 2014

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6064**
Public Laws Update Service (numbers, dates, etc.)	**741–6043**
TTY for the deaf-and-hard-of-hearing	**741–6086**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.fdsys.gov.**

Federal Register information and research tools, including Public Inspection List, indexes, and Code of Federal Regulations are located at: **www.ofr.gov.**

E-mail

FEDREGTOC-L (Federal Register Table of Contents LISTSERV) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **http://listserv.access.gpo.gov** and select *Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings);* then follow the instructions.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html** and select *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC-L and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

CFR Checklist. Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

FEDERAL REGISTER PAGES AND DATE, SEPTEMBER

51887–52164 2
52165–52542 3
52543–52952 4
52953–53126 5
53127–53280 8
53281–53600 9
53601–54184 10
54185–54566 11
54567–54886 12
54887–55350 15
55351–55602 16
55603–55962 17

CFR PARTS AFFECTED DURING SEPTEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
9154 52937
9155 52939
9156 52941
9157 52943
9158 52945
9159 52947
9160 52949
9161 52951
9162 53599
9163 54181
9164 54885
9165 54887
9166 55959
9167 55961

Administrative Orders:
Notices:
Notice of September 4, 2014 53279
Presidential Determinations:
No. 2014–14 of September 5, 2014 54183

5 CFR

Ch. XCIX.....54567
550 53601
1653 53603

7 CFR

63 55603
319 52543
915 55351
944 55351
1220 53605

Proposed Rules:
27 53633
28 53633
29 53633
51 53633
52 53633
54 53633
56 53633
58 53633
62 53633
70 53633
75 53633
91 53633
318 53346
319 53346
761 52239
762 52239
763 52239
764 52239
765 52239
766 52239
767 52239
770 52239
772 52239
773 52239
774 52239
799 52239
1436 52239
1940 52239
4279 55316
4287 55316

8 CFR

Proposed Rules:
1003.....55659, 55662
1240 55662
1241 55662

9 CFR

77 53606

10 CFR

72 53281

Proposed Rules:
72 53352
430 54213
431.....54215, 55538

12 CFR

30 54518
168 54518
170 54518
652 53127

Proposed Rules:
607 52814
614 52814
615 52814
620 52814
628 52814
1263 54848
1282 54482

13 CFR

Proposed Rules:
121.....53646, 54146

14 CFR

25 .....52165, 52169, 53128, 53129, 54571, 54572, 54574, 54576
29 54889
39 .....52172, 52174, 52177, 52181, 52184, 52187, 52190, 52545, 52953, 53285, 53288, 54577, 54579, 54891, 54893, 54895, 54897, 55604
71 .....51887, 52192, 52194, 52957, 54185, 54901, 55354, 55355, 55356, 55357
73 55606
97.....51888, 51891
1204 54902

Proposed Rules:
Ch. 1 52223
39 .....52260, 52263, 52267, 52270, 52585, 52588, 54218, 54220, 54672, 54917, 54919,

54922, 54925, 55673, 55675
60 55407
71 ....51919, 51920, 53667, 53669
121 53008
145 53008

15 CFR

30 54588
738 52958
740 52958
742 52958
744 ....52958, 55608
746 55608
772 52958
774 52958
801 53291
902 54590
922 52960
Proposed Rules:
Ch. VII 53355

16 CFR

305 52549
435 55615

17 CFR

232 55078
240 55078
249 55078
249b 55078
Proposed Rules:
230 ....54218, 54224
270 51922
274 51922

21 CFR

310 ....53133, 53134
314 ....53133, 53134
329 ....53133, 53134
520 53134
522 53134
558 53134
600 ....53133, 53134
864 52195
866 53608
1300 53520
1301 53520
1304 53520
1305 53520
1307 53520
1317 53520
Proposed Rules:
172 51922
182 51922
610 53670
680 53670
870 54927

22 CFR

22 52197

23 CFR

627 52972
773 55381
Proposed Rules:
450 ....51922, 53673
771 53673
773 55381

24 CFR

5 ....54186, 55360
232 55360
500 51893
501 51893
502 51893
503 51893
504 51893
505 51893
506 51893
507 51893
508 51893
509 51893
510 51893
511 51893
572 51893
585 51893
590 51893
597 51893
598 51893
943 54186
982 54186
3285 53609
3286 53609

25 CFR

Proposed Rules:
41 54936

26 CFR

31 55362

27 CFR

73 52198
Proposed Rules:
9 52273

28 CFR

0 54187
Proposed Rules:
36 53146

29 CFR

4022 54904
4044 54904

30 CFR

Proposed Rules:
100 55408

32 CFR

157 55622
706 52556
Proposed Rules:
238 55679
286 52500

33 CFR

100 ....51895, 52556, 53291, 54905, 54906
117 53294
147 ....51898, 52559
151 54907
165 ....52199, 52561, 53295, 53297, 54603, 54605, 54607
Proposed Rules:
100 53671
117 ....54241, 54244
165 ....52591, 54937, 55409

34 CFR

Proposed Rules:
Ch. II 53254
Ch. VI 52273

36 CFR

Proposed Rules:
13 52595

37 CFR

201 55633
Proposed Rules:
201 ....55687, 55694, 55696

38 CFR

3 ....52977, 54608
14 52977
17 54609
20 52977
43 54609
Proposed Rules:
36 53146

39 CFR

111 54188
3001 54552
3020 53139
3035 54552

40 CFR

9 ....51899, 52563
52 ....51913, 52420, 52426, 52439, 52564, 53299, 54617, 54908, 54910, 55637, 55641, 55645
62 52201
81 ....52205, 55645
180 ....52210, 52215, 52985, 52990, 54620, 55653
271 52220
300 55657
721 ....51899, 52563
Proposed Rules:
51 55412
52 ....51923, 52602, 53355, 54941, 55412, 55712, 55920
58 54356
60 55413
62 52275
81 53008
180 53009
271 52275

41 CFR

102 55363
103 55363
104 55363
105 55363
106 55363
107 55363
108 55363
109 55363
110 55363
111 55363
112 55363
113 55363
114 55363
115 55363
116 55363
117 55363
Proposed Rules:
60–1 55712

42 CFR

37 55366
495 52910

43 CFR

2 51916
Proposed Rules:
2 51926

44 CFR

64 53618
67 ....54913, 54915

45 CFR

89 55367
146 52994
147 52994
148 52994
155 52994
156 52994
170 ....52910, 54430

46 CFR

2 53621
11 55657
24 53621
25 53621
30 53621
70 53621
90 53621
188 53621
Proposed Rules:
401 52602

47 CFR

1 54190
20 55367
25 52224
64 53303
73 ....52225, 53006, 53143, 54916
97 52226
Proposed Rules:
20 ....53356, 55413
32 54942
73 ....54674, 54675, 55742

48 CFR

1201 54626
1202 54626
Proposed Rules:
42 54949
515 54126
538 54126
552 54126

49 CFR

109 55403
171 55403
172 55403
173 55403
174 55403
175 55403
176 55403
177 55403
178 55403
179 55403
180 55403
264 55381
622 55381
Proposed Rules:
105 54676
107 54676
171 54676
232 53356
594 54247
613 ....51922, 53673
622 53673

50 CFR

17 ....52567, 52576, 53303, 53315, 54627, 54635, 54782
20 52226
80 54668
223 53852
300 53631
622 ....53006, 53144, 54668, 55658
635 53344
648 ....51917, 52578

679 .....52583, 54590, 54669
Proposed Rules:
Ch. II 53151
Ch. III 53151
Ch. IV.....53151
Ch. V.....53151
Ch. VI.....53151
17.....53384, 55874
92.....53120
216.....53013
223.....51929, 52276
226.....53384
600.....53386
635.....54247, 54252
648.....52293, 53386
660.....53401, 54950

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List August 13, 2014

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.