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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701, 723, and 742

RIN 3133–AD68

Fixed Assets, Member Business Loans, and Regulatory Flexibility Program

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: NCUA is revising certain provisions of its Regulatory Flexibility Program (RegFlex) to enhance safety and soundness for credit unions. Those provisions pertain to fixed assets, member business loans (MBL), stress testing of investments, and discretionary control of investments. Some of these revisions will require conforming amendments to NCUA's fixed assets and MBL rules.

DATES: The rule is effective November 29, 2010.

FOR FURTHER INFORMATION CONTACT: Frank Kressman, Senior Staff Attorney, Office of General Counsel, 1775 Duke Street, Alexandria, Virginia 22314 or telephone (703) 518–6540.

SUPPLEMENTARY INFORMATION:

A. Background—Regulatory Flexibility Program

The RegFlex Program exempts from certain regulatory restrictions and grants additional powers to those federal credit unions (FCUs) that have demonstrated sustained superior performance as measured by CAMEL ratings and net worth classifications. 12 CFR 742.1. An FCU may qualify for RegFlex treatment automatically or by application to the appropriate regional director. 12 CFR 742.2. Specifically, an FCU automatically qualifies when it has received a composite CAMEL rating of "1" or "2" for the two preceding examinations and has maintained a net worth classification of "well capitalized" under Part 702 of NCUA's rules for six consecutive preceding quarters or, if subject to a risk-based net worth (RBNW) requirement under Part 702, has remained "well capitalized" for six consecutive preceding quarters after applying the applicable RBNW requirement. An FCU that does not automatically qualify may apply for a RegFlex designation with the appropriate regional director. 12 CFR 742.2(a) and (b). An FCU's RegFlex authority can be lost or revoked. 12 CFR 742.3.

The NCUA Board established RegFlex in 2002. 66 FR 58656 (November 23, 2001). Since then, NCUA has amended RegFlex a number of times to increase available relief for FCUs from a variety of regulatory restrictions or lessen the criteria required for obtaining RegFlex status. 71 FR 4039 (January 25, 2006); 72 FR 30247 (May 31, 2007); 74 FR 13083 (March 26, 2009).

B. March 2010 Proposal

1. Overview

The current RegFlex rule provides RegFlex credit unions with regulatory relief in the following ten areas: (1) Charitable contributions; (2) nonmember deposits; (3) fixed assets; (4) MBLs; (5) discretionary control of investments; (6) stress testing of investments; (7) zero-coupon securities; (8) borrowing repurchase transactions; (9) commercial mortgage related securities; and (10) purchase of obligations from a federally insured credit union. In March 2010, the NCUA Board proposed amendments to the fixed assets, MBL, stress testing of investments, and discretionary control of investments provisions of the RegFlex rule and requested comment on those amendments. 75 FR 14372 (March 25, 2010). The following sections discuss those proposed amendments in greater detail.

2. Fixed Assets

The Federal Credit Union Act authorizes FCUs to purchase, hold, and dispose of property necessary or incidental to their operations. 12 U.S.C. 1757(4). Generally, the fixed asset rule provides limits on fixed asset investments, establishes occupancy and other requirements for acquired and abandoned premises, and prohibits certain transactions. 12 CFR 701.36. Fixed assets are defined in 701.36(e) as premises, furniture, fixtures, and equipment and includes any office, branch office, suboffice, service center, parking lot, facility, real estate where a credit union transacts or will transact business, office furnishings, office machines, computer hardware and software, automated terminals, and heating and cooling equipment. Section 701.36 prohibits an FCU with $1 million or more in assets from investing in fixed assets, the aggregate of which exceeds five percent of the FCU's shares and retained earnings, although upon an FCU's application, a regional director may set a higher limit. 12 CFR 701.36(a)(1) and (2).

The RegFlex rule exempts RegFlex credit unions from the referenced five percent limit. 12 CFR 701.36(a)(1). In the proposal, NCUA stated it believed that investing in higher levels of non-earning assets can materially affect a credit union's earnings ability and, therefore, its viability. NCUA proposed to rescind this exemption for RegFlex credit unions. NCUA offered call report data to show that there is a higher percentage of earnings problems among credit unions with more than five percent of shares and retained earnings invested in fixed assets and that the percentage of earnings problems increases as the level of fixed assets increases. NCUA also included several examples to illustrate the kinds of fixed asset-related financial problems some credit unions have experienced.

3. MBLs

The MBL rule requires a credit union making a business loan to obtain the personal liability and guarantee of the borrower's principals as part of the rule's collateral and security requirements. 12 CFR 723.7(b). Under the current rules, RegFlex credit unions are exempt from that requirement but may choose to require the principals' guarantee as part of their own underwriting standards and best practices. *Id.*

NCUA proposed to rescind this exemption for RegFlex credit unions. NCUA stated that it believed obtaining the principals' personal guarantee is a prudent underwriting practice that greatly enhances the likelihood of loan repayment and should be required of all credit unions. NCUA also stated that a

credit union that fails to do so subjects itself to increased risk, particularly in economic times when MBL delinquencies and MBL charge-offs are increasing. NCUA noted that credit unions would continue to have the option of seeking a waiver of the guarantee requirement under 723.10(e).

4. Stress Testing of Investments

NCUA's investment rule requires an FCU to monitor the securities it holds. 12 CFR 703.12. Specifically, at least monthly, an FCU must prepare a written report setting out the fair value and dollar change since the prior month-end for each security held with summary information for its entire portfolio. 12 CFR 703.12(a). Similarly, at least quarterly, an FCU must prepare a written report setting out the sum of the fair values of all fixed and variable rate securities whose features include: (1) Embedded options; (2) remaining maturities greater than three years; or (3) coupon formulas that are related to more than one index or are inversely related to, or multiples of, an index. 12 CFR 703.12(b). If the sum in the quarterly report is greater than the FCU's net worth, then the report must estimate the potential impact, in percentage and dollar terms, of an immediate and sustained parallel shift in market interest rates of plus and minus 300 basis points on: (1) The fair value of each security in the FCU's portfolio; (2) the fair value of the FCU's portfolio as a whole; and (3) the FCU's net worth. 12 CFR 703.12(c). This calculation is known as "stress testing" the securities. Under the current rules, RegFlex credit unions are exempt from the requirement to stress test their securities.

NCUA noted in the proposal that because of low investment yields due to the current economic environment, many credit unions are incurring additional risk by investing in long-term instruments to increase yield and improve earnings. NCUA believes many credit unions are purchasing investment products they do not fully understand and are incurring significant interest rate and liquidity risk.

NCUA offered call report data to illustrate the degree to which credit unions are investing in products with longer maturities further out on the yield curve. Although this may help achieve greater yield in the short term, an increase in market rates could result in a significant decrease in product value and cause liquidity problems. NCUA stated that credit unions need to stress test their investments so they have a clearer understanding of their risk profile, can better manage risk, and as a matter of safety and soundness and responsible business practices. Accordingly, the Board proposed to rescind the RegFlex exemption in this context.

5. Discretionary Control of Investments

NCUA's investment rule requires an FCU to retain discretionary control over its purchase and sale of investments although, under the rule, an FCU will not be deemed to have delegated discretionary control to an investment adviser if the FCU reviews all recommendations from the investment adviser and authorizes a recommended purchase or sale transaction before its execution. 12 CFR 703.5(a). An exception to this general rule is that an FCU may delegate discretionary control over the purchase and sale of its investments to a person outside the FCU if the person is an investment advisor registered with the Securities and Exchange Commission and if the amount delegated is limited to up to 100 percent of the FCU's net worth at the time of delegation. 12 CFR 703.5(b). If an FCU exercises this limited authority, it must adjust the amount of funds held under discretionary control to comply with the 100 percent of net worth cap at least annually. *Id.*

Under the current rule, a RegFlex credit union is exempt from the discretionary control requirements in 703.5 that pertain to the 100 percent of net worth limitation. In the proposal, NCUA noted that it was becoming increasingly concerned about the safety and soundness of credit unions and their investments considering the recent investment climate and reports of fraudulent practices in the investment banking industry. Accordingly, the Board proposed to rescind the RegFlex exemption pertaining to discretionary control of investments.

C. Summary of Comments and Discussion

1. General

NCUA received 50 comments on the proposal: 30 from credit unions, 14 from credit union trade associations, 1 from a bank trade association, and 5 from other interested parties. Two commenters supported the proposal in its entirety. The vast majority of commenters opposed some aspect of the proposal and some supported some aspect of the proposal.

In broad terms, there was a consensus among commenters' opinion that the data and examples NCUA cited to support rescinding the four RegFlex exemptions were insufficient and highlighted a few extreme cases that do not represent a systemic problem in the credit union industry. Similarly, commenters generally agreed that the purpose of RegFlex is still important and should be preserved and noted that NCUA has the authority to revoke RegFlex status for underperforming credit unions.

2. MBL

The majority of those commenters who discussed the MBL aspect of the proposal opposed it. Most said that it would create a significant competitive disadvantage for credit unions where competing lenders may not have such a requirement. Most also stated that the personal guarantee requirement could result in credit unions losing their highest quality borrowers to competitors that do not require a guarantee.

Some noted that, even though the personal guarantee exemption is currently in place, most credit unions still obtain the guarantee on the bulk of their MBLs. They noted that the exemption should remain in place for those instances where it makes sense not to require a guarantee, such as when the borrower poses minimal credit risk, the underwriting is strong, or where other factors such as high collateral value is more important than a guarantee. Some commenters also noted that NCUA should not restrict a credit union's ability to make MBLs at a time when making small business loans is a national priority. Finally, many commenters stated that the process for obtaining a waiver from this requirement is too slow and cumbersome to deal with this issue.

NCUA has thoroughly considered these comments and appreciates the concerns the commenters have expressed. For the reasons discussed in the proposal as summarized above, NCUA still believes it is prudent to require all credit unions to comply with the personal guarantee requirement. NCUA recognizes that in the competitive MBL marketplace credit unions need to be free of unnecessary restrictions that hamper their ability to serve their members' business loan needs. NCUA does not believe this is an unnecessary restriction. Additionally, NCUA acknowledges that the current waiver process, in some circumstances, is too slow to accommodate the practical timing needs of processing MBLs. NCUA is committed to making the waiver process more user friendly in this context and will look into ways of doing so. However, NCUA believes it is in the interest of safety and soundness to rescind this exemption and reminds credit unions they will continue to have

the option of seeking a waiver of the guarantee requirement under 723.10(e).

3. Fixed Assets

The majority of those commenters who discussed the fixed asset component of the proposal opposed rescinding the exemption from the 5% fixed asset cap. About a third of them also noted that it could inhibit branching activities and credit union growth. Many commenters suggested raising the fixed asset cap to a higher level, such as 8–10% for all FCUs, or establishing a sliding scale where FCUs with higher net worth would have a higher fixed asset cap.

Some mentioned that the increasing need to purchase computer technology necessary to serve their members makes the 5% cap challenging. A few commenters noted that rescinding the exemption could be a hardship on those credit unions with long-term growth plans that are based, in part, on using the exemption. A handful of others suggested NCUA grandfather those credit unions already exceeding the cap.

NCUA believes that safety and soundness considerations dictate rescinding this exemption. Excessive investment in fixed assets often leads to other financial difficulties for credit unions. Also, the nature and timing of investing in fixed assets is such that credit unions have sufficient time to request a waiver from the 5% limitation if necessary even for credit unions that have begun executing their growth strategies.

Credit unions that have already exceeded the 5% limit on the effective date of this rule will be grandfathered at that limit. If their level of fixed assets subsequently trends downward, then so will the level at which they are grandfathered. Grandfathered credit unions are, however, still eligible to apply for a waiver to increase their fixed asset investments. For example, a credit union grandfathered at 8% whose fixed assets trend downward to 6.5% will have a new grandfathered limit of 6.5%. Further, if that same credit union then wishes to increase its fixed assets to 9%, then it may apply for a waiver to do so. Accordingly, the fixed assets exemption is rescinded as proposed.

4. Discretionary Control of Investments and Stress Testing of Investments

A relatively few commenters chose to discuss the discretionary control of investment authority and stress testing of investments components of the proposal. Among those that did comment, some opposed the proposal and others supported it. Accordingly, NCUA adopts the proposal to rescind these exemptions on safety and soundness grounds.

D. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a rule may have on a substantial number of small entities (primarily those under ten million dollars in assets). This rule enhances safety and soundness without additional regulatory burden. Accordingly, this will not have a significant economic impact on a substantial number of small credit unions, and therefore, no regulatory flexibility analysis is required.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, Public Law 104–121, provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedures Act. 5 U.S.C. 551. The Office of Information and Regulatory Affairs, an office within OMB, has reviewed this rule and determined that, for purposes of SBREFA, this is not a major rule.

Paperwork Reduction Act

NCUA has determined that this rule will not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. This final rule 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. NCUA has determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

NCUA has determined that this rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

List of Subjects

12 CFR Part 701

Credit unions.

12 CFR Part 723

Credit, Credit unions, Reporting and recordkeeping requirements.

12 CFR Part 742

Credit unions, reporting and recordkeeping requirements.

By the National Credit Union Administration Board on October 21, 2010.

Mary Rupp,

Secretary of the Board.

■ For the reasons discussed above, NCUA amends 12 CFR parts 701, 723, and 742 as follows:

PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

■ 1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, and 1789. Section 701.6 is also authorized by 31 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.,* 42 U.S.C. 1861 and 42 U.S.C. 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

■ 2. Amend § 701.36 by revising paragraphs (d) introductory text and (d)(1) to read as follows:

§ 701.36 FCU ownership of fixed assets.

* * * * *

(d) *Regulatory Flexibility Program.* Federal credit unions that meet Regulatory Flexibility Program standards, as determined pursuant to Part 742 of this chapter, are exempt from the three-year partial occupancy requirement described in paragraph (b) of this section when acquiring unimproved land for future expansion pursuant to the terms of section 742.4(a)(3) of this chapter. For a Federal credit union eligible for the Regulatory Flexibility Program that subsequently loses eligibility:

(1) Section 742.3 of this chapter provides that NCUA may require the credit union to divest any existing fixed

assets for substantive safety and soundness reasons; and

* * * * *

PART 723—MEMBER BUSINESS LOANS

■ 3. The authority citation for part 723 continues to read as follows:

Authority: 12 U.S.C. 1756, 1757, 1757A, 1766, 1785, 1789.

§ 723.7 [Amended]

■ 4. Amend § 723.7 by removing the last sentence of paragraph (b).

PART 742—REGULATORY FLEXIBILITY PROGRAM

■ 5. The authority citation for part 742 continues to read as follows:

Authority: 12 U.S.C. 1756, 1766.

§ 742.4 [Amended]

■ 6. Amend § 742.4 by removing the first sentence of paragraph (a)(3) and removing paragraphs (a)(4), (5), and (6) and redesignating paragraphs (a)(7), (8), and (9) as (a)(4), (5), and (6), respectively.

[FR Doc. 2010–27149 Filed 10–27–10; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 702

RIN 3133–AD81

Prompt Corrective Action; Amended Definition of Low-Risk Assets

AGENCY: National Credit Union Administration (NCUA).

ACTION: Interim final rule with request for comments.

SUMMARY: NCUA is issuing this Interim Final Rule to amend the definition of "low-risk assets" for regulatory capital purposes. Assets in this category receive a risk-weighting of zero, reflecting the absence of credit risk. The amendment will expand the definition of "low-risk assets" to include debt instruments on which the payment of principal and interest is unconditionally guaranteed by NCUA as an agency of the Executive Branch of the United States.

DATES: This rule is effective October 28, 2010. Comments must be received on or before November 29, 2010.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *NCUA Web Site: http://www.ncua.gov/Resources/RegulationsOpinionsLaws/ProposedRegulations.aspx*. Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov*. Include "[Your name] Comments on Risk Portfolio Defined" in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

FOR FURTHER INFORMATION CONTACT: Steven W. Widerman, Trial Attorney, at the above address, or *telephone:* (703) 518–6557.

SUPPLEMENTARY INFORMATION: *Public Inspection of Comments:* All public comments are available on the agency's Web site at: *http://www.ncua.gov/Resources/RegulationsOpinionsLaws/RegulationComments.aspx* as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an e-mail to *OGCMail@ncua.gov*.

A. Background

1. *Prompt Corrective Action.* In 1998, the Credit Union Membership Access Act, Public Law 105–219, 112 Stat. 913, mandated a system of regulatory capital standards for natural person credit unions entitled "Prompt Corrective Action" ("PCA"). 12 U.S.C. 1790d *et seq.* PCA imposes minimum capital standards and corresponding remedies to improve a credit union's net worth. *Id.* The NCUA Board implemented a comprehensive system of PCA primarily under Part 702.[1] 12 CFR 702 *et seq.*

Under PCA, a natural person credit union's "net worth ratio" determines its classification among five statutory net worth categories. 12 U.S.C. 1790d(c); 12 CFR 702.102. A credit union's minimum required "net worth ratio" is based upon a risk-weighting applied to each of eight different portfolios of credit union assets.[2] *Id.* § 702.104. As a credit union's "net worth ratio" declines, so does its classification among the five net worth categories, thus subjecting it to an expanding range of mandatory and discretionary supervisory actions. 12 U.S.C. 1790d(e), (f) and (g); 12 CFR 702.204(a)–(b).

2. *Corporate System Resolution.* In response to the unprecedented disruption in the nation's credit markets over the last two years, NCUA and other federal banking regulators have taken a series of steps to preserve the nation's confidence in financial institutions. Through its Corporate Stabilization Program, NCUA has taken specific actions to stabilize the corporate credit union ("CCU") system and to address problems associated with the impact of the economic downturn on CCUs. Chief among these problems is the substantial devaluation of the mortgage-backed and asset-backed securities ("the distressed assets") held in the investment portfolios of CCUs. In several cases, the realization of losses on these distressed assets has driven the CCU into insolvency, requiring NCUA to place the CCU into liquidation.

To monetize the distressed assets held by the liquidated CCUs, NCUA has embarked on a Corporate System Resolution Program primarily to sell those distressed assets to a trust established by NCUA. The trust will then resecuritize the distressed assets in the form of senior debt instruments denominated "NCUA Guaranteed Notes" ("NGNs") that will be offered to public investors, including financial institutions.[3] The trust will pass through to the NGN-holders the monthly cash flows produced by the

[1] Part 702 has been amended five times since it was originally adopted in 2000: First, to incorporate limited technical corrections. 65 FR 55439 (Sept. 14, 2000). Second, to delete sections made obsolete by adoption of a uniform quarterly schedule for filing Call Reports. 67 FR 12459 (March 19, 2002). Third, to incorporate a series of revisions and adjustments to improve and simplify PCA implementation. 67 FR 71078 (Nov. 29, 2002). Fourth, to add a third risk-weighting tier to the standard risk-based net worth component for member business loans. 68 FR 56537, 56546 (Oct. 1, 2003). A proposal to modify the criteria for filing a net worth restoration plan, 67 FR 7113 (Nov. 29, 2002), was never adopted. Fifth, to implement a statutory amendment allowing the acquirer in a merger of credit unions to combine the merging credit union's retained earnings with its own to determine the acquirer's post-merger "net worth." 73 FR 72688 (Dec. 1, 2008).

[2] "Long-term real estate loans," "Member Business Loans ("MBL") outstanding," "Investments," "Low-risk assets," "Average-risk assets," "Loans sold with recourse," "Unused MBL commitments" and "Allowance." 12 CFR 702.104.

[3] The first offering of this senior debt consists of $3.8 billion in fixed- and floating-rate "NCUA Guaranteed Notes 2010–R1." The underlying distressed assets of this debt are the residential mortgage-backed securities held by the liquidation estate of U.S. Central Federal Credit Union. Credit unions purchased a significant proportion of the first NGN offering. NCUA anticipates a series of similar NGN offerings.

underlying distressed assets. The NGNs will benefit from the credit enhancement provided by the overcollateralization and excess interest generated by the underlying distressed assets.

3. *NCUA Guaranty.* As a further incentive to instill investor confidence in the NGNs, NCUA, as an agency of the Executive Branch of the United States, has fully and unconditionally guaranteed to investors the timely payment of principal and interest ("the NCUA Guaranty"). As is the case with debt issued and guaranteed by other federal financial institution regulators, the NCUA Guaranty is backed by the full faith and credit of the United States. As a result of the NCUA Guaranty, the NGNs are legally permissible investments for federal credit unions. For state-chartered credit unions, the NGNs are legally permissible investments if they comply with state law at the time of purchase. Currently, the NGNs are permissible investments for CCUs, but may be purchased by CCUs only with NCUA prior approval once the recently adopted part 704 final rule takes effect on January 18, 2011.[4] *See* 75 FR 64786 (October 20, 2010).

4. *Risk-Weighting of Guaranteed Notes.* Under PCA as it exists today, the NGNs held by a natural person credit union would fall within the "investments" risk portfolio, consisting of investments "[a]s defined by federal regulation or applicable State law." 12 CFR 702.104(c). The minimum risk-weighting applied to assets in that portfolio, based on their weighted average life, is 3 percent. *Id.* § 702.106(c)(1). The "investments" portfolio does not permit a risk-weighting of zero to be applied to an investment even when it carries no credit risk. The "Low-risk assets" risk portfolio, in contrast, *does* apply a risk-weighting of zero, but the NGNs presently do not fall within its scope. *Id.* § 702.106(d). Only "Cash on hand * * * and the NCUSIF deposit" meet the definition of "Low-risk assets." *Id.* § 702.104(d).

Recognizing that an obligation supported by the full faith and credit of the United States carries no credit risk, the four other federal financial institution regulators—the Board of Governors of the Federal Reserve System ("Federal Reserve Board"), the Office of the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC") and the Office of Thrift Supervision ("OTS")—have jointly confirmed that their respective institutions may apply a zero percent risk-weighting to the NGNs the institutions purchase because of the direct, unconditional guaranty by NCUA.[5] The purpose of the Interim Final Rule is to accord the same zero percent risk-weighting to NGNs purchased by natural person credit unions.

To that end, the Interim Final Rule expands the PCA definition of "Low-risk assets" to extend that risk portfolio's zero percent risk weighting to "debt instruments unconditionally guaranteed by the National Credit Union Administration," such as the NGNs, and thus backed by the full faith and credit of the United States. Were the definition not expanded to include guaranteed debt instruments, potential credit union investors in the NGNs would face a disincentive to invest: A minimum 3 percent risk-weighting—and the adverse effect on PCA net worth—even though the NGNs are free of credit risk.

B. Interim Final Rule and Immediate Effective Date

NCUA is issuing this rulemaking as an Interim Final Rule effective upon publication. The Administrative Procedure Act ("APA"), 5 U.S.C. 553, requires that before a rulemaking can be finalized, it must first be published as a notice of proposed rulemaking with the opportunity for public comment, unless the agency for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest. Except for good cause, the APA further requires a final rule to have an effective date no earlier than 30 days from the date of publication.

In this rulemaking, NCUA invokes the good cause exception to the requirements of the APA. Good cause exists to issue as an interim final rule effective immediately that expands the "Low–risk assets" risk portfolio to include the NGNs that NCUA already has begun offering to investors, including credit unions. A series of similar NGN offerings is expected. To maximize credit union participation in these offerings of risk-free debt—beginning with the first one, which is set to close imminently—it is essential to implement a rule immediately expanding the "Low-risk assets" definition to include the NGNs, thus relieving credit unions of the risk-weighting disincentive explained above.

In this rulemaking, NCUA has determined that the APA's usual requirements for public notice and participation before a regulation may take effect would be contrary to the public interest and, further, that good cause exists to waive the customary 30-day period preceding the effective date. Nonetheless, NCUA believes it would benefit from public comments on the Interim Final Rule before adopting a permanent Final Rule. The public is therefore invited to submit comments during a 30-day comment period commencing on the date this Interim Final Rule is published. NCUA plans to revise Interim Final Rule, where appropriate, to reflect the public comments it receives.

C. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a rule may have on a substantial number of small entities (primarily those under ten million dollars in assets). The rule will not have a significant economic impact on a substantial number of small credit unions. Thus, a Regulatory Flexibility Analysis is not required.

Paperwork Reduction Act

NCUA has determined that this rule will not increase paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their regulatory actions on State and local interests. NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily adheres to the fundamental federalism principles addressed by the Executive Order. This rule 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. Accordingly, this rule does not constitute a policy that has federalism implications for purposes of the Executive Order.

Treasury and General Government Appropriations Act, 1999

NCUA has determined that the rule will not affect family well-being within the meaning of section 654 of the

[4] CCUs that purchase the NGNs prior to January 18, 2011 will not be required to divest provided the NGNs pose no safety and soundness concerns when assessed as part of the credit union's overall business strategy and balance sheet structure.

[5] See joint letter dated October 13, 2010, from the Federal Reserve Board, OCC, FDIC and OTS to Director, Division of Supervision, NCUA Office of Examination and Insurance.

Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the APA. 5 U.S.C. 551. NCUA does not believe this interim final rule is a "major rule" within the meaning of the relevant sections of SBREFA. NCUA has submitted the rule to the Office of Management and Budget for its determination in that regard.

List of Subjects in 12 CFR Part 702

Credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on October 21, 2010.

Mary F. Rupp,

Secretary of the Board.

■ For the reasons discussed above, 12 CFR part 702 is amended as follows:

PART 702—PROMPT CORRECTIVE ACTION

■ 1. The authority citation for part 702 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1790d.

■ 2. Amend § 702.104 by revising paragraph (d) to read as follows:

§ 702.104 Risk portfolios defined.

* * * * *

(d) *Low-risk assets.* Cash on hand (*e.g.,* coin and currency, including vault, ATM and teller cash), the NCUSIF deposit, and debt instruments unconditionally guaranteed by the National Credit Union Administration;

* * * * *

[FR Doc. 2010–27150 Filed 10–27–10; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–1182; Airspace Docket No. 09–ASW–37]

Amendment of Class E Airspace; Searcy, AR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace for Searcy, AR. Decommissioning of the Searcy non-directional beacon (NDB) at Searcy Municipal Airport, Searcy, AR, has made this action necessary to enhance the safety and management of Instrument Flight Rule (IFR) operations at the airport. The geographic coordinates of the airport also will be adjusted.

DATES: Effective date 0901 UTC, January 13, 2011. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

SUPPLEMENTARY INFORMATION:

History

On July 27, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace for Searcy, AR, reconfiguring controlled airspace at Searcy Municipal Airport (75 FR 43884) Docket No. FAA–2009–1182. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9U dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 by amending Class E airspace for the Searcy, AR area. Decommissioning of the Searcy NDB and cancellation of the NDB approach at Searcy Municipal Airport has made this action necessary for the safety and management of IFR operations at the airport. Adjustment to the geographic coordinates of the airport also will be made in accordance with the FAA's National Aeronautical Navigation Services.

The FAA has determined that this regulation 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 will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will 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 U.S. Code. Subtitle 1, 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 airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at Searcy Municipal Airport, Searcy, AR.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 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.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010 is amended as follows:

* * * * *

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface.

* * * * *

ASW AR E5 Searcy, AR [Amended]

Searcy Municipal Airport, AR
(Lat. 35°12′38″ N., long. 91°44′15″ W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Searcy Municipal Airport.

Issued in Fort Worth, Texas, on October 19, 2010.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2010–27257 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0404; Airspace Docket No. 10–ASW–7]

Amendment of Class E Airspace; Corpus Christi, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace for the Corpus Christi, TX, area. Additional controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAP) at Corpus Christi International Airport, Corpus Christi, TX. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at the airport.

DATES: Effective date 0901 UTC, January 13, 2011. The Director of the Federal Register approves this incorporation by reference action under 1 CFR Part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

SUPPLEMENTARY INFORMATION:

History

On July 27, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace for the Corpus Christi, TX, area, reconfiguring controlled airspace at Corpus Christi International Airport (75 FR 43886) Docket No. FAA–2010–0404. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9U dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E airspace extending upward from 700 feet above the surface for the Corpus Christi, TX, area. The addition of new SIAPs at Corpus Christi International Airport has made this action necessary for the safety and management of IFR operations at the airport.

The FAA has determined that this regulation 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 will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will 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 U.S. Code. Subtitle 1, 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 airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at Corpus Christi International Airport, Corpus Christi, TX.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 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.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010 is amended as follows:

* * * * *

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface.

* * * * *

ASW TX E5 Corpus Christi, TX [Amended]

Corpus Christi International Airport, TX
(Lat. 27°46′13″ N., long. 97°30′04″ W.)
Corpus Christi NAS/Truax Field, TX
(Lat. 27°41′34″ N., long. 97°17′25″ W.)
Port Aransas, Mustang Beach Airport, TX
(Lat. 27°48′43″ N., long. 97°05′20″ W.)
Rockport, San Jose Island Airport, TX
(Lat. 27°56′40″ N., long. 96°59′06″ W.)
Rockport, Aransas County Airport, TX
(Lat. 28°05′10″ N., long. 97°02′37″ W.)
Ingleside, T.P. McCampbell Airport, TX
(Lat. 27°54′47″ N., long. 97°12′41″ W.)
Robstown, Nueces County Airport, TX
(Lat. 27°46′43″ N., long. 97°41′26″ W.)
Corpus Christi VORTAC, TX
(Lat. 27°54′14″ N., long. 97°26′42″ W.)

That airspace extending upward from 700 feet above the surface within a 7.5-mile radius of Corpus Christi International Airport and within 1.4 miles each side of the 200° radial of the Corpus Christi VORTAC extending from the 7.5-mile radius to 8.5 miles north of the airport, and within 1.5 miles each side of the 316° bearing from Corpus Christi International Airport extending from the 7.5-mile radius to 10.1 miles northwest of the airport, and within 2 miles each side of the 179° bearing from Corpus Christi International Airport extending from the 7.5-mile radius to 14 miles south of the airport, and within an 8.8-mile radius of Corpus Christi NAS/Truax Field, and within a 6.3-mile radius of Mustang Beach Airport, and within a 6.4-mile radius of T.P. McCampbell Airport, and within a 6.3-mile radius of Nueces County Airport, and within a 7.6-mile radius of Aransas County Airport, and within 2 miles each side of the 010° bearing from the Aransas County Airport extending from the 7.6-mile radius to 9.9 miles north of the

airport, and within a 6.5-mile radius of San Jose Island Airport, and within 8 miles west and 4 miles east of the 327° bearing from the San Jose Island Airport extending from the airport to 20 miles northwest of the airport, and within 8 miles east and 4 miles west of the 147° bearing from San Jose Island Airport extending from the airport to 16 miles southeast of the airport, excluding that portion more than 12 miles from and parallel to the shoreline.

Issued in Fort Worth, Texas, on October 19, 2010.

Anthony D. Roetzel,

Manager, Operations Support Group ATO Central Service Center.

[FR Doc. 2010–27261 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0607; Airspace Docket No. 10–ACE–7]

Amendment of Class E Airspace; Boonville, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace for Boonville, MO. Decommissioning of the Viertel non-directional beacon (NDB) at Jesse Viertel Memorial Airport, Boonville, MO, has made this action necessary to enhance the safety and management of Instrument Flight Rule (IFR) operations at the airport.

DATES: Effective date 0901 UTC, January 13, 2011. The Director of the Federal Register approves this incorporation by reference action under 1 CFR Part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

SUPPLEMENTARY INFORMATION:

History

On July 27, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace for Boonville, MO, reconfiguring controlled airspace at Jesse Viertel Memorial Airport (75 FR 43887) Docket No. FAA–2010–0607. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9U dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E airspace extending upward from 700 feet above the surface for the new standard instrument approach procedures at Jesse Viertel Memorial Airport, Boonville, MO. Decommissioning of the Viertel NDB and cancellation of the NDB approach at Jesse Viertel Memorial Airport has made it necessary to reconfigure the airspace for the safety and management of IFR operations at the airport.

The FAA has determined that this regulation 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 will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will 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 U.S. Code. Subtitle 1, 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 airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at Jesse Viertel Memorial Airport, Boonville, MO.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 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.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010 is amended as follows:

* * * * *

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface.

* * * * *

ACE MO E5 Boonville, MO [Amended]

Jesse Viertel Memorial Airport, MO
(Lat. 38°56′48″ N., long. 92°40′58″ W.)
Hallsville VORTAC
(Lat. 39°06′49″ N., long. 92°07′42″ W.)

That airspace extending upward from 700 feet above the surface within a 6.9-mile radius of Jesse Viertel Memorial Airport, and within 2.4 miles each side of the Hallsville VORTAC 249° radial extending from the 6.9-mile radius of the airport to 19.4 miles southwest of the VORTAC.

Issued in Fort Worth, Texas, on October 19, 2010.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2010–27259 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0604; Airspace Docket No. 10–ACE–5]

Establishment of Class E Airspace; Kaiser/Lake Ozark, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Class E airspace for the Kaiser/Lake Ozark, MO, area to accommodate Area Navigation (RNAV) Standard Instrument Approach Procedures (SIAP) at Camdenton Memorial Airport, Camdenton, MO. The FAA is taking this action to enhance the safety and management of Instrument Flight Rule (IFR) operations at the airport.

DATES: Effective date: 0901 UTC, January 13, 2011. The Director of the Federal Register approves this incorporation by reference action under 1 CFR Part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone (817) 321–7716.

SUPPLEMENTARY INFORMATION:

History

On July 27, 2010, the FAA published in the **Federal Register** a notice of proposed rulemaking to amend Class E airspace for Kaiser/Lake Ozark, MO, creating additional controlled airspace at Camdenton Memorial Airport (75 FR 43885) Docket No. FAA–2010–0604. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9U dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR Part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This action amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by adding additional Class E airspace extending upward from 700 feet above the surface to accommodate SIAPs at Camdenton Memorial Airport, Camdenton, MO. This action will enhance IFR operations at the airport within the Kaiser/Lake Ozark, MO, area.

The FAA has determined that this regulation 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 will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will 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 U.S. Code. Subtitle 1, 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 airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at Camdenton Memorial Airport within the Kaiser/Lake Ozark, MO, area.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 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.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR Part 71.1 of the Federal Aviation Administration Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010 is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface.

* * * * *

ACE MO E5 Kaiser/Lake Ozark, MO [Amended]

Kaiser/Lake Ozark, Lee C. Fine Memorial Airport, MO
(Lat. 38°05′46″ N., long. 92°32′58″ W.)
Camdenton, Camdenton Memorial Airport, MO
(Lat. 37°58′26″ N., long. 92°41′28″ W.)
Osage Beach, Grand Glaize-Osage Beach Airport, MO
(Lat. 38°06′38″ N., long. 92°40′50″ W.)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Lee C. Fine Memorial Airport, and within a 6.3-mile radius of Camdenton Memorial Airport, and within 4 miles each side of the 155° bearing from the airport extending from the 6.3 mile radius to 10.5 miles southeast of the airport, and within a 6.3-mile radius of Grand Glaize-Osage Beach Airport.

Issued in Fort Worth, Texas, on October 19, 2010.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2010–27268 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2010–1014; Airspace Docket No. 10–ASW–14]

RIN 2120–AA66

Revocation of Restricted Areas R–3807 Glencoe, LA, and R–6320 Matagorda, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action removes Restricted Areas R–3807 Glencoe, LA, and R–6320 Matagorda, TX. These restricted areas were originally established to contain aerostat balloons used in detecting illegal entry across the southern border of the United States. The aerostat balloons have not been operational for several years and the United States Air Force (USAF) has no intent to replace them. Therefore, the FAA has determined that a valid requirement for the airspace no longer exists.

DATES: Effective date 0901 UTC, January 13, 2011.

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

SUPPLEMENTARY INFORMATION:

The Rule

This action amends 14 Code of Federal Regulations (CFR) part 73 by

removing Special Use Airspace R–3807 Glencoe, LA, and R–6320 Matagorda, TX. The Department of Defense no longer has a use for the two restricted areas, which were originally established as Tethered Air Radar Sites (TARS) to contain aerostat balloons used in detecting illegal entry across the southern border of the United States. The aerostat balloons have not been operational for several years and the USAF has no intent to replace them. Additionally, the USAF no longer controls the surface lands underlying the restricted areas and has taken action to terminate leases and return the control of the lands to the owners. Therefore, the FAA has determined that a valid requirement for the airspace no longer exists and the restricted areas are being returned to the National Airspace System.

Sections 73.38 and 73.63 of 14 CFR part 73 were published in FAA Order 7400.8S, dated February 16, 2010.

Since this action reduces restricted airspace, the solicitation of comments would only delay the return of airspace to public use without offering any meaningful right or benefit to any segment of the public; therefore, notice and public procedure under 5 U.S.C. 553(b) are unnecessary.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this action: (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 will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

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 311c. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist 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.

§ 73.38 Louisiana [Amended]

■ 2. Section 73.38 is amended as follows:

* * * * *

R–3807 Glencoe, LA [Removed]

* * * * *

§ 73.63 Texas [Amended]

■ 3. Section 73.63 is amended as follows:

* * * * *

R–6320 Matagorda, TX [Removed]

Issued in Washington, DC, on October 21, 2010.

Edith V. Parish,

Manager, Airspace, Regulations and ATC Procedures Group.

[FR Doc. 2010–27251 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 510 and 520

[Docket No. FDA–2010–N–0002]

New Animal Drugs; Change of Sponsor; Monensin Blocks

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor from Farmland Industries, Inc., to Land O' Lakes Purina Feed LLC for a free-choice supplement block containing monensin for pasture cattle.

DATES: This rule is effective October 28, 2010.

FOR FURTHER INFORMATION CONTACT: Steven D. Vaughn, Center for Veterinary Medicine (HFV–100), Food and Drug Administration, 7520 Standish Pl., Rockville, MD 20855, 240–276–8300, *e-mail: steven.vaughn@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Farmland Industries, Inc., Kansas City, MO 64116, has informed FDA that it has transferred ownership of, and all rights and interest in, NADA 118–509 for Pasture Gainer Block-37 R350 (monensin) to Land O' Lakes Purina Feed LLC, 100 Danforth Dr., Gray Summit, MO 63039. Accordingly, the regulations are amended in 21 CFR 520.1448a to reflect this change of sponsorship.

Following this change of sponsorship, Farmland Industries, Inc., is no longer the sponsor of an approved application. Accordingly, § 510.600 (21 CFR 510.600) is being amended to remove the entries for this firm.

In addition, Land O' Lakes Purina Feed LLC is not currently listed in the animal drug regulations as a sponsor of an approved application. Accordingly, § 510.600 is being amended to add entries for this sponsor.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 520

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510 and 520 are amended as follows:

PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

■ 2. In § 510.600, in the table in paragraph (c)(1), remove the entry for "Farmland Industries, Inc.", and alphabetically add a new entry for "Land O' Lakes Purina Feed LLC"; and in the table in paragraph (c)(2), remove the entry for "021676" and numerically add an entry for "066071" to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

* * * * *

(c) * * *

(1) * * *

Firm name and address	Drug labeler code
* * * * *	
Land O' Lakes Purina Feed LLC, 100 Danforth Dr., Gray Summit, MO 63039	066071
* * * * *	

(2) * * *

Drug labeler code	Firm name and address
* * * * *	
066071	Land O' Lakes Purina Feed LLC, 100 Danforth Dr., Gray Summit, MO 63039.
* * * * *	

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 3. The authority citation for 21 CFR part 520 continues to read as follows:

Authority: 21 U.S.C. 360b.

§ 520.1448a [Amended]

■ 4. Section 520.1448a is amended in paragraph (c)(2) by removing "021676" and by adding in its place "No. 066071".

Dated: October 21, 2010.

Elizabeth Rettie,

Deputy Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 2010–27287 Filed 10–27–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 706

Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972

AGENCY: Department of the Navy, DoD.

ACTION: Final rule.

SUMMARY: The Department of the Navy (DoN) is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General (DAJAG) (Admiralty and Maritime Law) has determined that USS WILLIAM P. LAWRENCE (DDG 110) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with certain provisions of the 72 COLREGS without interfering with its special function as a naval ship. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

DATES: This rule is effective October 28, 2010 and is applicable beginning October 7, 2010.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Ted Cook, JAGC, U.S. Navy, Admiralty Attorney, (Admiralty and Maritime Law), Office of the Judge Advocate General, Department of the Navy, 1322 Patterson Ave., SE., Suite 3000, Washington Navy Yard, DC 20374–5066, *telephone number:* 202–685–5040.

SUPPLEMENTARY INFORMATION: Pursuant to the authority granted in 33 U.S.C. 1605, the DoN amends 32 CFR Part 706.

This amendment provides notice that the DAJAG (Admiralty and Maritime Law), under authority delegated by the Secretary of the Navy, has certified that USS WILLIAM P. LAWRENCE (DDG 110) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with the following specific provisions of 72 COLREGS without interfering with its special function as a naval ship: Annex I, paragraph 2(f)(i), pertaining to the placement of the masthead light or lights above and clear of all other lights and obstructions; Annex I, paragraph 2(f)(ii), pertaining to the vertical placement of task lights; Annex I, paragraph 3(a), pertaining to the location of the forward masthead light in the forward quarter of the ship, and the horizontal distance between the forward and after masthead lights; and Annex I, paragraph 3(c), pertaining to placement of task lights not less than two meters from the fore and aft centerline of the ship in the athwartship direction. The DAJAG (Admiralty and Maritime Law) has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR Parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

List of Subjects in 32 CFR Part 706

Marine safety, Navigation (water), and Vessels.

■ For the reasons set forth in the preamble, amend part 706 of title 32 of the CFR as follows:

PART 706—CERTIFICATIONS AND EXEMPTIONS UNDER THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972

■ 1. The authority citation for part 706 continues to read as follows:

Authority: 33 U.S.C. 1605.

■ 2. Section 706.2 is amended as follows:

■ A. In Table Four, Paragraph 15 by adding, in alpha numerical order, by vessel number, an entry for USS WILLIAM P. LAWRENCE (DDG 110);

■ B. In Table Four, Paragraph 16 by adding, in alpha numerical order, by vessel number, an entry for USS WILLIAM P. LAWRENCE (DDG 110); and

■ C. In Table Five, by adding, in alpha numerical order, by vessel number, an entry for USS WILLIAM P. LAWRENCE (DDG 110).

§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.

* * * * *

■ 15. * * *

TABLE FOUR

Vessel	Number	Horizontal distance from the fore and aft centerline of the vessel in the athwartship direction
* * *	* * *	* * *
USS WILLIAM P. LAWRENCE	DDG 110	1.86 meters.
* * *	* * *	* * *

■ 16. * * *

Vessel	Number	Obstruction angle relative ship's headings
* * *	* * *	* * *
USS WILLIAM P. LAWRENCE	DDG 110	107.86 thru 112.50 [degrees].
* * *	* * *	* * *

* * * * *

TABLE FIVE

Vessel	Number	Masthead lights not over all other lights and obstructions. Annex I, sec. 2(f)	Forward masthead light not in forward quarter of ship. Annex I, sec. 3(a)	After masthead light less than ½ ship's length aft of forward masthead light. Annex I, sec. 3(a)	Percentage horizontal separation attained
* *	*	*	*	*	*
USS WILLIAM P. LAWRENCE	DDG 110	X	X	X	14.7
* *	*	*	*	*	*

* * * * *

Approved: October 7, 2010.

M. Robb Hyde,

Commander, JAGC, U.S. Navy, Deputy Assistant Judge Advocate, General (Admiralty and Maritime Law).

[FR Doc. 2010–26375 Filed 10–27–10; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2010–0228]

RIN 1625–AA09

Drawbridge Operation Regulation; Arkansas Waterway, Little Rock, AR

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: Drawbridge operations for the Baring Cross Railroad Drawbridge across the Arkansas Waterway at Mile 119.6 at Little Rock, Arkansas. Vessel operators shall contact the remote drawbridge operator via microphone keying four times within five seconds on VHF–FM Channel 13 when requesting a draw opening. This keying will activate an indicator on the remote drawbridge operator's console and send an acknowledgement tone back to the vessel. The remote drawbridge operator will then establish verbal radio communications with the vessel and operate the drawspan as normal.

DATES: This rule is effective November 29, 2010.

ADDRESSES: Comments and related materials received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2010–0228 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0228 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Eric A. Washburn, Bridge Administrator, Coast Guard, telephone (314) 269–2378, e-mail *Eric.Washburn@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On June 2, 2010, we published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulation; Arkansas Waterway, Little

Rock, AR in the **Federal Register** (75 FR 105). We received no comments on the proposed rule. No public meeting was requested, and none was held.

Background and Purpose

The Arkansas Waterway is a part of the McClellan-Kerr Arkansas River Navigation System. The System rises in the vicinity of Catoosa, Oklahoma, and embraces improved natural waterways and a canal to empty into the Mississippi River in southeast Arkansas. The Arkansas Waterway drawbridge operation regulations contained in 33 CFR 117.123(b), state that the draw of the Baring Cross Railroad Drawbridge, mile 119.6, at Little Rock, Arkansas, is maintained in the closed to navigation position and is remotely operated. Vessels requesting an opening shall establish contact by radio/telephone with the remote drawbridge operator on VHF–FM Channel 13 in Omaha, Nebraska. In order to better differentiate between vessel and rail traffic for the remote drawbridge operator, Union Pacific Railroad has requested this drawbridge be operated where vessels would key their VHF–FM radio microphone four times in five seconds and would receive an acknowledgement tone from the remote drawbridge operator. The keying-in will initiate an indicator on the remote drawbridge operator's console and the operator will then establish normal verbal radio communications with the vessel.

The Coast Guard has determined this regulation change will improve communications between the remote drawbridge operator and vessel operators, reducing drawspan opening delays experienced previously from missed calls under the prior regulatory guidance.

Discussion of Comments and Changes

There were no comments to the proposed regulatory change.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

We expect the economic impact of this rule on commercial traffic operating on the Arkansas Waterway to be so minimal that a full Regulatory Evaluation is unnecessary. The operating procedures affected by this change will be for the benefit of vessels transiting the bridge, reduced drawspan opening delays under the new regulatory guidance are anticipated.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), in the NPRM we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these

standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction.

Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 117.123(b)(1) and (2) to read as follows:

§ 117.123 Arkansas Waterway.

* * * * *

(b) * * *

(1) *Normal flow procedures.* Any vessel which requires an opening of the draw of this bridge shall establish contact by radiotelephone with the remote drawbridge operator on VHF–FM Channel 13 in Omaha, Nebraska. To establish contact, the vessel shall key the VHF–FM radio microphone four times in five seconds and listen for an acknowledgement tone. The remote drawbridge operator will then establish normal verbal radio communication on VHF–FM Channel 13 and advise the vessel whether the requested span can be immediately opened and will maintain constant radio contact with the vessel until the requested span has opened and vessel passage has been completed. The bridge is equipped with a Photoelectric Boat Detection System to prevent the span from lowering if there is an obstruction under the span. If the drawbridge cannot be opened immediately, the remote drawbridge operator will notify the calling vessel and provide an estimated time for a drawspan opening.

(2) *High velocity flow procedures.* The area from mile 118.2 to mile 125.4 is a regulated navigation area as described in § 165.817. During periods of high velocity flow rate of 70,000 cubic feet per second or greater at the Murray Lock and Dam, mile 125.4, downbound vessels which require that the draw of this bridge be opened for unimpeded passage shall contact the remote drawbridge operator as described in paragraph (b)(1) of this section either before departing Murray Lock and Dam or before departing the mooring cells at mile 121.5 to ensure that the drawspan is opened well in advance of arrival at the bridge. The remote drawbridge operator shall immediately respond to the vessel's contact, ensure the drawspan is open for passage, and ensure that it remains in the open to navigation position until the downbound vessel has safely passed through. If it cannot be opened immediately for unimpeded passage in accordance with § 165.817, the remote drawbridge operator will notify the downbound vessel and provide an estimated time for a drawspan opening. Upbound vessels shall request openings in accordance with the normal flow procedures as set forth in paragraph (b)(1) of this section. The remote drawbridge operator shall keep these approaching vessels informed of the position of the drawspan at all times until safe passage is completed.

* * * * *

Dated: October 15, 2010.

Mary E. Landry,

Rear Admiral, U.S. Coast Guard Commander, Eighth Coast Guard District.

[FR Doc. 2010–27236 Filed 10–27–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2010–0973]

Drawbridge Operation Regulation; New Jersey Intracoastal Waterway (NJICW), Point Pleasant Canal, NJ

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Fifth Coast Guard District, has issued a temporary deviation from the regulations governing the operation of the Route 88/Veterans Memorial Bridge across Point Pleasant Canal, at NJICW mile 3.0, in Point Pleasant, NJ. This closure is necessary to facilitate extensive mechanical rehabilitation and to maintain the bridge's operational integrity.

DATES: This deviation is effective from 7 a.m. on December 15, 2010 through 11:59 p.m. on March 15, 2011.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2010–0973 and are available online by going to *http://www.regulations.gov*, inserting USCG–2010–0973 in the "Keyword" box and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Waverly W. Gregory, Jr., Bridge Administrator, Fifth Coast Guard District; telephone 757–398–6222, e-mail *Waverly.W.Gregory@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The New Jersey Department of Transportation (NJDOT) owns and operates the vertical-lift span of the Route 88/Veterans Memorial Bridge across Point Pleasant Canal along the NJICW, in Point Pleasant, NJ. The bridge has a vertical clearance in the closed position to vessels of 10 feet, above mean high water. The current operating regulations are outlined at 33 CFR 117.5, which require the bridge to open is given.

The contractor, Agate Construction on behalf of NJDOT, has requested a temporary deviation to the existing regulations for the Route 88/Veterans Memorial Bridge to facilitate necessary repairs. The repairs consist of the replacement of bridge traffic control devices (barrier gates, warning gates, and bridge traffic control signals) along with major electrical rehabilitation. Under this deviation, the vertical-lift span of the drawbridge will be maintained in the closed-to-navigation position from 7 a.m. on December 15, 2010, through 11:59 p.m. on March 15, 2011.

Bridge opening data, supplied by NJDOT and reviewed by the Coast Guard, revealed a small amount of vessel openings of the draw span between the months of December and March in 2008 and 2009. Specifically, the bridge opened for vessels 15, 0, 0, and 4 times during the months of December 2008 to March 2009; and during the months of December 2009 to March 2010, the bridge opened for vessels 14, 0, 0, and 8 times, respectively.

The Coast Guard will inform the users of the waterway through our Local and Broadcast Notices to Mariners of the closure period so that vessels can arrange their transits to minimize any impact caused by the temporary deviation.

Vessels that can pass under the bridge without a bridge opening may continue to do so at anytime. The Atlantic Ocean is an alternate route for vessels with mast heights greater than 10 feet. In the event of an emergency, the drawbridge will open for vessels if at least 24 hours' advance notice is given to the bridge operator.

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

Dated: October 14, 2010.

Waverly W. Gregory, Jr.,

Chief, Bridge Administration Branch, Fifth Coast Guard District.

[FR Doc. 2010–27237 Filed 10–27–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 161 and 165

[Docket No. USCG–1998–4399]

RIN 1625–AA58

Vessel Traffic Service Lower Mississippi River

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a Vessel Traffic Service (VTS) on the Lower Mississippi River and is transferring certain vessel traffic management (VTM) provisions of the Mississippi River, Louisiana—Regulated Navigation Area to the VTS. This final rule establishes a mandatory participation VTS by implementing current voluntary practices and operating procedures. This rule facilitates vessel transits, enhances good order, promotes safe navigation, and improves existing waterway operating measures. The rule also proposes minor conforming revisions to the existing VTM provisions and related regulations.

DATES: This final rule is effective December 27, 2010.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–1998–4399 and are available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet by going to *http://www.regulations.gov,* inserting USCG–1998–4399 in the "Keyword" box, and then clicking "Search."

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Lieutenant Commander Jim Larson, Office of Shore Forces (CG–7413), Coast Guard; telephone 202–372–1554, e-mail *James.W.Larson@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

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I. Abbreviations

AIS Automatic Identification System
DHS Department of Homeland Security
LMR Lower Mississippi River
LMRWSAC Lower Mississippi River Waterways Safety Advisory Committee
NDG National Dialogue Group
NPRM Notice of Proposed Rulemaking
PAWSS Port and Waterways Safety Systems
PWSA Ports and Waterways Safety Act
PWSSC Ports and Waterways Safety Systems Committee
SNPRM Supplemental Notice of Proposed Rulemaking
VTC Vessel Traffic Center
VTM Vessel Traffic Management
VTS Vessel Traffic Service

II. Regulatory History

On April 26, 2000, the Coast Guard published a notice of proposed rulemaking (NPRM) entitled "Vessel Traffic Service Lower Mississippi River" (65 FR 24516) and requested comments during a 90-day comment period. Due to several requests for additional time to comment, on August 18, 2000, the Coast Guard published a notice (65 FR 50479) reopening the comment period until December 1, 2000. The Coast Guard received 23 letters containing three comments in response to the NPRM.

On September 20, 2000, the Coast Guard published a notice of public meeting (65 FR 56843) announcing the time and place of a public meeting. On October 24, 2000, the Coast Guard held the meeting in New Orleans, LA, to receive comments on the proposed rule. Twenty-four people attended the meeting and two people spoke.

On November 12, 2009, the Coast Guard published a supplemental notice of proposed rulemaking (SNPRM) entitled "Vessel Traffic Service Lower Mississippi River" (74 FR 58223). The SNPRM addressed important changes to maritime operations that have taken

place since the NPRM was published,[1] specifically: (1) The Coast Guard has installed and operationally tested a computer based Vessel Traffic Management (VTM) system that utilizes Automatic Identification System (AIS), closed circuit television cameras (CCTV), radar, and VHF radio communications to monitor and advise vessel traffic on the Lower Mississippi River (LMR), (2) the Vessel Traffic Service (VTS) Center is now fully staffed by trained and certified Coast Guard civilian employees augmented by two onsite Pilot Advisors, (3) remote traffic control light tower operations have been transitioned to the VTS Center, (4) AIS is now fully integrated with the Coast Guard traffic management systems throughout the United States,[2] and (5) the Coast Guard established a voluntary participation VTS in LMR.[3] In the SNPRM, we also addressed the comments received on the NPRM.

We received one letter containing two comments in response to the SNPRM, which are discussed later in this preamble.

III. Basis and Purpose

This final rule is issued, pursuant to the Ports and Waterways Safety Act (PWSA), as amended, (codified at 33 U.S.C. 1221 *et seq.*), to establish VTSs in the United States. Title I of the PWSA authorizes the Secretary to promulgate regulations to establish and maintain VTSs consisting of measures for controlling or supervising vessel traffic to protect the marine environment. 33 U.S.C. 1223, 1231.

The Coast Guard operates 12 VTSs in the United States. A VTS provides navigation and safety information that enables mariners to make informed decisions during their voyage. In the past, the Coast Guard operated variations of a VTS in the New Orleans area. Unfortunately, these efforts were hindered by budget constraints, the limitations of voluntary participation, and the temporary or part-time nature of the VTS operation; none of these proved to be a permanent or complete solution to the challenges of navigating the LMR.

This rule establishes mandatory participation for certain classes of vessels in the VTS LMR area. It amends vessel traffic measures within the Mississippi River Regulated Navigation Area and formalizes the existing, voluntary VTS on the LMR. Additionally, this rule updates certain operating practices, adopts standard traffic management procedures, and informs mariners of certain services provided by VTS LMR.

IV. Background

A. Vessel Traffic Services

Since disestablishment of the VTS in New Orleans in the 1980s, the Coast Guard, as directed by the Oil Pollution Act of 1990 (OPA 90, Pub. L. 101–380), has:

(1) Validated the need for VTSs in certain ports;

(2) Made participation mandatory in all VTS ports established in the National VTS regulations; and

(3) Invested in infrastructure improvement to VTS equipment and standardized operating procedures across all United States VTSs.

In 1997, the Coast Guard established the Ports and Waterways Safety System (PAWSS) acquisition project to address waterway users' needs and place a greater emphasis on partnerships with industry to reduce risk in the marine environment. As part of PAWSS, the Coast Guard immediately convened a National Dialogue Group (NDG) comprised of maritime and waterway community stakeholders to identify the needs of waterway users with respect to VTM and VTS systems. The Coast Guard sponsored these discussions, which were hosted by the Committee on Maritime Advanced Information Systems under the auspices of the Marine Board of the National Research Council. Those stakeholders, representing all major sectors of the U.S. and foreign-flagged maritime industry, port authorities, pilots, the environmental community, and the Coast Guard, were tasked to: (1) Identify the information needs of waterway users to ensure safe passage; (2) assist in establishing a process to identify candidate waterways for VTM improvements and VTS installations; and (3) identify the basic elements of a VTS. The goal of the NDG was to provide a foundation for the development of an approach to VTM that would meet the shared government, industry, and public objective of ensuring the safety of vessel traffic in U.S. ports and waterways in a technologically sound and cost effective way.

A federally operated and locally adopted VTM facility has been in place in New Orleans Harbor since the 1930s. In an effort to assist the mariner, safeguard the port, ensure good order, and improve safety, the local maritime community implemented the Algiers Point Control Lights. This system evolved from local river pilots standing watch using lanterns and whistle signals to a 24-hour, federally staffed communication station with twin control light towers at Governor Nicholls Street Wharf and Gretna Lights. Although not formally recognized as a VTS, the Algiers Point Control Lights have provided longstanding traffic management services.

Vessel movement in the vicinity of Algiers Point/Crescent area is currently subject to regulatory provisions established in 33 CFR 165.810(c). The primary objective of the existing regulatory system in 33 CFR 165.810(c) is to provide an orderly traffic flow around Algiers Point.

Algiers Point is one of the most challenging bends to safely navigate on the Mississippi River, particularly in high water conditions. In one of the busiest industrial harbors in the world, vessels must negotiate a 120-degree bend in the river amidst constantly changing hydrographic conditions, congested waters, and various bridges and piers. Mandatory vessel traffic measures, represented by the light signals, are utilized to lessen the potential for mishap during periods of high water. The consequences of improper navigation in this segment of the river are both significant and well-documented. Since 1991, there have been multiple reportable marine casualties within the area covered by this rulemaking. The failure to safely transit this area can quickly lead to a mishap that causes substantial property damage, serious environmental and economic consequences, and even loss of life.

The existing Control Light operation in and around Algiers Point has proven valuable in some measures of VTM; however, these measures are narrow in scope, limited to a small area, and only operated during periods of high water. The limited scope of the facility has caused further problems at times: Equipment, staffing, and location limitations have sometimes hindered the light operator's ability to ensure the overall safety and efficiency of anticipated vessel traffic beyond the immediate vicinity of Algiers Point.

The Coast Guard and local mariners recognize that this segment of the waterway warrants great vigilance. The nature of vessel traffic within this area and the anticipated increase in traffic requires that certain vessel traffic measures are active at all times or at

[1] For a more complete discussion of the reasons the Coast Guard published an SNPRM *see* 74 FR 58223.

[2] For a more complete discussion of AIS Carriage Requirement *see* the Coast Guard "Automatic Identification System; Vessel Carriage Requirement" final rule published on October 22, 2003, 68 FR 60559.

[3] The Coast Guard established a voluntary participation VTS in the LMR in 2004 that has been continuously operated since that time.

least available at a moment's notice. The availability of these measures can best be assured by operating a Vessel Traffic Center (VTC) for Algiers Point within the framework of a VTS. A VTC is a shoreside facility from which the VTS operates and has the communications capability to interact with marine traffic and respond to developing situations.

Through implementation of a continuously-operating VTC at Algiers Point within the framework of the mandatory LMR VTS being created by this rule, the Coast Guard seeks to overcome the limited scope of the existing Control Light operation and use the enhanced system capabilities of the mandatory LMR VTS to improve navigation safety on and around both Algiers Point and the entire LMR.

The procedures and practices in this rule concerning Algiers Point VTC are essentially the same as those currently used in the Algiers Point. This final rule simply moves the Algiers Point provisions from current 33 CFR 165.810(c) to new 33 CFR 161.65(c) to integrate the Algiers Point VTC into the VTS LMR and to consolidate all VTS LMR regulations under one section.

B. Stakeholder Involvement

The Coast Guard recognizes that a VTS on the LMR is a valuable asset to all stakeholders that may be impacted by what happens on or near the waterway either directly or indirectly. In addition, many of the stakeholders who regularly utilize the waterway have advised us that to achieve success, the VTS must meet the needs of the waterway users while imposing the least burden.

In 1997, the Coast Guard formed the Ports and Waterways Safety Systems Committee (PWSSC). The Coast Guard created this ad-hoc committee, a subcommittee under the Lower Mississippi River Waterway Safety Advisory Committee (LMRWSAC), of maritime, port community, government, and public stakeholders to define user requirements for a VTS that would accomplish the overall goals of safety and efficiency for the entire LMR. Since its formation, the PWSSC met several times, and the product of these meetings was a conceptual baseline VTS plan (*see* document USCG–1998–4399–0003 at *http://www.regulations.gov*) endorsed by the LMRWSAC. Key recommendations of this plan involved the need to implement AIS technology and to incorporate AIS as a key component of any VTS implementation. The currently operating, voluntary participation VTS on the LMR, established in 2004, incorporated full use of AIS technology.

V. Discussion of Comments and Changes

We received one response containing two comments and a request for a public meeting in response during the SNPRM comment period that ended on January 11, 2010. The Coast Guard determined that no significant issues were raised in the request which would have justified holding such a meeting and none was held.

The first comment recommended against the modeling of VTS LMR after VTS operations in Morgan City, Louisiana, and in Houston-Galveston, Texas, stating that those "VTS zones do not adequately fit the unique operating conditions of the LMR. The Coast Guard agrees in part. Although the VTM system used at VTS LMR is similar to the systems used in both Morgan City and Houston-Galveston, and some VTS operations are standardized through all Coast Guard VTS Centers, the operations of VTS LMR have been tailored to the unique nature of the Mississippi River, including the unique operating requirements at Algiers Point, as evidenced by the presence of Pilot advisors in the VTC and the special operating requirements being imposed at Algiers Point.

The second comment requested that a working group be established under the auspices of the LMRWSAC to address future changes to the VTS system. The Coast Guard agrees that port stakeholders should be involved in any major changes to VTS operations. To the extent that a future change to VTS operations would require a change to the governing regulations such a regulation change would require a rulemaking. As part of the rulemaking process the public and port stakeholders would have ample opportunity to participate. Further, and the Coast Guard intends to continue to consult with the State of Louisiana, the affected state and federal pilot's associations, vessel operators, users, and all other affected stakeholders on VTS operations. However, at this time the Coast Guard is not planning any significant changes to VTS operations on the LMR and therefore does not see the need to establish a separate working group. The Coast Guard encourages stakeholders to provide feedback on VTS operations by contacting VTS LMR.

No changes to the rule text have been made in response to these comments. The text of the final rule is the same as the text proposed in the SNPRM. For a complete discussion of the rule, *please see* the discussion included in the SNPRM at 74 FR 58227.

VI. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

A. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Comments on the proposed rule are summarized in the Discussion of Comments and Changes section of this preamble. The Coast Guard received no comments that altered our assessment of impacts in the SNPRM. We have found no additional data or information that changed our findings in the SNPRM. We have adopted the assessment in the SNPRM for this rule as final. Since vessels presently follow the rules outlined in this final rule, the Coast Guard believes that this final rule will only have a minimal economic impact.

This final rule will establish a VTS on the LMR and transfer certain VTM provisions of the Mississippi River, Louisiana—Regulated Navigation Area to the VTS. The rule will implement current practices and procedures appropriate to an AIS-based VTS.

Based on data from the Coast Guard Marine Information for Safety and Law Enforcement database, we estimate the rule will affect 1,796 U.S.-flagged vessels with hailing ports from mile 242.4 Above Head of Passes, which is near Baton Rouge, to the territorial sea boundary, and an estimated 2,294 foreign-flagged vessels.

The requirements for compliance with this rule include:

- Certain classes of commercial vessels will be required to carry functioning AIS equipment and to employ the AIS equipment while operating within the VTS.
- Commercial vessels not required to carry AIS equipment will be required to follow established reporting procedures via radiotelephone when operating within the VTS area.
- The Coast Guard will maintain an operational VTC to monitor and direct traffic within the VTS.

In 2003, the Coast Guard published a final rule that harmonized the AIS carriage and standardization requirements contained in the Maritime Transportation Security Act of 2002

with the requirements of the International Convention for the Safety of Life at Sea (SOLAS), that established AIS carriage requirements for commercial vessels (33 CFR part 164). Because of this prior regulation, all U.S.-flagged commercial vessels that are required to carry AIS equipment for operation in the VTS under this rule have been in compliance since 2004. Similarly, foreign-flagged vessels have been required to carry AIS equipment under the SOLAS Convention since 2004. A list of the categories of commercial vessels and the dates of compliance for AIS carriage are shown in Table 1.

While this rule will establish a mandatory participation VTS, its principal effect will be to codify current practices. The AIS carriage requirements of this rule have been implemented through prior regulations and we expect that there will not be additional costs to either industry or government resulting from this rule.

TABLE 1—COMMERCIAL VESSELS: AIS CARRIAGE REQUIREMENTS

Class of vessel	AIS currently required	Compliance date
Self-propelled vessels 65 feet or more in length in commercial service and on an international voyage (excludes passenger and fishing vessels).	Yes	December 31, 2004.
Passenger vessels of 150 gross tons or more on an international voyage	Yes	July 1, 2003.
Tankers on international voyages, regardless of tonnage	Yes	July 1, 2003.
Vessels of 50,000 gross tons or more, other than tankers or passenger ships, on international voyages.	Yes	July 1, 2004.
Vessels of 300 gross tons or more but less than 50,000 gross tons, other than tankers or passenger ships.	Yes	December 31, 2004.
Self-propelled vessels of 65 feet or more in length in commercial service (excludes fishing vessels and passenger vessels certificated to carry less than 151 passengers for hire).	Yes, when operating in a VTS or Vessel Movement Reporting System (VMRS).	December 31, 2004.
Towing vessels 26 feet or more in length and more than 600 horsepower in commercial service.	Yes, when operating in a VTS or VMRS	December 31, 2004.
Passenger vessels certificated to carry more than 150 passengers for hire	Yes, when operating in a VTS or VMRS	December 31, 2004.
Fishing vessels	No	

Commercial vessels that are not required to carry AIS equipment must maintain radiotelephone communication with the VTC while traversing the VTS. These requirements have been in place since July 1982, when the Coast Guard established specific radiotelephone frequencies and reporting procedures for vessels operating in the Mississippi River, LA–Regulated Navigation Area.

The Coast Guard has operated a VTC from a shoreside facility in downtown New Orleans since late 1999. This VTC provides the core communications and monitoring functions for the VTS.

The procedures and practices of this rule are the same as those currently in use at the Algiers Point/Crescent area of the VTS. Currently, commercial vessel movements in the VTS traverse the Algiers Point/Crescent area and current compliance with the rules of this area fulfills the requirements of the larger VTS.

As with the costs of the rule, the benefits were also realized through vessel compliance with the prior regulations that established AIS and radiotelephone carriage requirements and the VTC operations center. The principal benefit of changing VTS participation from voluntary to mandatory is to codify current practices that increase the efficiency of vessel operations on the LMR by consolidating and standardizing vessel operating procedures.

B. Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

In the NPRM, the Coast Guard certified under 5 U.S.C. 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities. We received no comments on this certification and have made no changes that would alter our assessment of the impacts in the NPRM.

Vessels are presently following the procedures outlined in this final rule, thus the adoption of these rules would not have a significant economic impact on a substantial number of small entities.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking.

If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult with: Lieutenant Commander Jim Larson, Office of Shore Forces (CG–7413), Coast Guard; telephone 202–372–1554, e-mail *James.W.Larson@uscg.mil.*

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

D. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

E. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments, and would either preempt State law or impose a substantial direct cost of compliance on them.

We have analyzed this proposed rule under that Order and have determined that it has implications for federalism. A summary of the impact of federalism in this rule follows.

Title I of the Ports and Waterways Safety Act (PWSA) (33 U.S.C. 1221 *et seq.*) authorizes the Secretary to issue regulations to establish and maintain vessel traffic services consisting of measures for controlling or supervising vessel traffic to protect the marine environment. In enacting PWSA in 1972, Congress found that advance planning and consultation with the affected States and other stakeholders was necessary to develop and implement a VTS. The Coast Guard, throughout the development of the VTS on the Lower Mississippi River, has consulted with the State of Louisiana, the affected State and Federal pilot's associations, vessel operators, users, and all affected stakeholders. Maritime conflict preemption principles apply to PWSA Title I. The Coast Guard has determined, after considering the factors developed by the Supreme Court in the consolidated cases of *United States* v. *Locke* and *Intertanko* v. *Locke,* 529 U.S. 89, 120 S.Ct. 1135 (March 6, 2000), that by enacting Chapter 25 of the Ports and Waterways Safety Act, Congress intended that Coast Guard regulations have preemptive impact over State law regarding vessel traffic services in United States ports and waterways. Therefore, the regulations proposed in this rulemaking for operation and equipment required on vessels preempt any State laws or regulations on the same subject matter.

Nevertheless, the Coast Guard recognizes the key role State and local governments may have in making regulatory determinations. The State of Louisiana and the Coast Guard have worked closely throughout the development of these regulations. Additionally, Sections 4 and 6 of Executive Order 13132 require that for any rules with preemptive effect, the Coast Guard shall provide elected officials of affected State and local governments and their representative national organizations the notice and opportunity for appropriate participation in any rulemaking proceedings, and to consult with such officials early in the rulemaking process. This participation and consultation has taken place within the Ports and Waterways Safety Systems Committee (PWSSC), which was formed in 1997. This ad-hoc committee of maritime, port community, and public stakeholders has met several times, and the product of these meetings was a conceptual baseline VTS plan (*see* U.S. Coast Guard Docket USCG–1998–4399–0003 at *http://www.regulations.gov*). The State of Louisiana was an active participant of PWSSC meetings and contributed to this plan. The Coast Guard will continue to consult with the State of Louisiana, the Governor's Task Force on Maritime Industry, as well as all affected stakeholders during implementation.

The preemptive impact of this rule is codified in new 33 CFR 161.6. New § 161.6 is slightly modified from the version proposed in the SNPRM to more accurately reflect that maritime conflict preemption principles apply to the regulations in this part. The preemptive impact of new § 161.6 is unchanged from the preemptive impact of proposed § 161.6.

F. Unfunded Mandates Reform Act

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

G. Taking of Private Property

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

H. Civil Justice Reform

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

I. Protection of Children

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

J. Indian Tribal Governments

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

K. Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

L. Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

M. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human

environment. This rule is categorically excluded under section 2.B.2, figure 2–1, paragraph 34(g) and (i) of the Instruction. This rule involves implementing current practices to facilitate vessel transit, promote safe navigation and improve existing waterway operating measures. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects

33 CFR Part 161

Harbors, Navigation (water), Reporting and recordkeeping requirements, Vessels, Waterways.

33 CFR Part 165

Harbors, Navigation (water), Reporting and recordkeeping requirements, Vessels, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 161 and 165 as follows:

PART 161—VESSEL TRAFFIC MANAGEMENT

■ 1. The authority citation for part 161 continues to read as follows:

Authority: 33 U.S.C. 1223, 1231; 46 U.S.C. 70114, 70119; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 161.2, revise paragraph (3) of the definition of *Hazardous Vessel Operating Condition* to read as follows:

§ 161.2 Definitions.

* * * * *

Hazardous Vessel Operating Condition

* * * * *

(3) Vessel characteristics that affect or restrict maneuverability, such as cargo or tow arrangement, trim, loaded condition, underkeel or overhead clearance, speed capabilities, power availability, or similar characteristics, which may affect the positive control or safe handling of the vessel or the tow.

* * * * *

■ 3. Add § 161.6 to read as follows:

§ 161.6 Preemption.

The regulations in this part have preemptive impact over State laws or regulations on the same subject matter. The Coast Guard has determined, after considering the factors developed by the Supreme Court in *U.S.* v. *Locke,* 529 U.S. 89 (2000), that by enacting Chapter 25 of the Ports and Waterways Safety Act (33 U.S.C. 1221 *et seq.*), Congress intended that Coast Guard regulations preempt State laws or regulations regarding vessel traffic services in United States ports and waterways.

■ 4. In § 161.12, in Table 161.12(c)—

■ a. In footnote 6, remove the words "VTS Lower Mississippi River and"; and

■ b. Amend Table 161.12(c) by revising the entries to New Orleans Traffic, to read as follows.

§ 161.12 Vessel operating requirements.

* * * * *

TABLE 161.12(c)—VTS AND VMRS CENTERS, CALL SIGNS/MMSI, DESIGNATED FREQUENCIES, AND MONITORING AREAS

Center MMSI [1] call sign	Designated frequency (channel designation)—purpose [2]	Monitoring area [3 4]
* *	* *	* * *
Lower Mississippi River—0036699952:		
New Orleans traffic	156.550 MHz (Ch. 11)	The navigable waters of the Lower Mississippi River below 29°55.3′ N 089°55.6′ W (Saxonholm Light) at 86.0 miles Above Head of Passes (AHP), extending down river to Southwest Pass, and, within a 12 nautical mile radius around 28°54.3′ N 089°25.7′ W (Southwest Pass Entrance Light at 20.1 miles Below Head of Passes.
New Orleans traffic	156.600 MHz (Ch. 12)	The navigable waters of the Lower Mississippi River bounded on the north by a line drawn perpendicular on the river at 29°55′30″ N and 090°12′46″ W (Upper Twelve Mile Point) at 109.0 miles AHP and on the south by a line drawn perpendicularly at 29°55.3′ N 089°55.6′ W (Saxonholm Light) at 86.0 miles AHP.
New Orleans traffic	156.250 MHz (Ch. 05A)	The navigable waters of the Lower Mississippi River below 30°38.7′ N 091°17.5′ W (Port Hudson Light) at 254.5 miles AHP bounded on the south by a line drawn perpendicular on the river at 29°55′30″ N and 090°12′46″ W (Upper Twelve Mile Point) at 109.0 miles AHP.
* *	* *	* * *

Notes:

[1] Maritime Mobile Service Identifier (MMSI) is a unique nine-digit number assigned by the Federal Communications Commission (FCC) that identifies ship stations, ship earth stations, coast stations, coast earth stations, and group calls for use by a digital selective calling (DSC) radio, an INMARSAT ship earth station or AIS. AIS requirements are set forth in §§ 161.21 and 164.46 of this subchapter. The requirements set forth in §§ 161.21 and 164.46 of this subchapter apply in those areas denoted with an MMSI number.

[2] In the event of a communication failure, difficulties, or other safety factors, the Center may direct or permit a user to monitor and report on any other designated monitoring frequency or the bridge-to-bridge navigational frequency, 156.650 MHz (Channel 13) or 156.375 MHz (Channel 67), to the extent that doing so provides a level of safety beyond that provided by other means. The bridge-to-bridge navigational frequency, 156.650 MHz (Ch. 13), is used in certain monitoring areas where the level of reporting does not warrant a designated frequency.

[3] All geographic coordinates (latitude and longitude) are expressed in North American Datum of 1983 (NAD 83).

[4] Some monitoring areas extend beyond navigable waters. Although not required, users are strongly encouraged to maintain a listening watch on the designated monitoring frequency in these areas. Otherwise, they are required to maintain watch as stated in 47 CFR 80.148.

* * * * *

■ 5. Add § 161.65 to read as follows:

§ 161.65 Vessel Traffic Service Lower Mississippi River.

(a) The Vessel Traffic Service (VTS) area consists of navigable waters of the Lower Mississippi River (LMR) below 30°38.7′ N 91°17.5′ W (Port Hudson Light at 254.5 miles Above Head of Passes (AHP)), the Southwest Pass, and

those within a 12-nautical mile radius around 28°54.3′ N 89°25.7′ W (Southwest Pass Entrance Light at 20.1 miles Below Head of Passes).

(b) The Algiers Point VTS Special Area consists of the navigable waters of the LMR bounded on the north by a line drawn from 29°57.62′ N 90°02.61′ W to 29°57.34′ N 90°02.60′ W and on the south by a line drawn from 29°56.89′ N 90°03.72′ W to 29°56.93′ N 90°03.34′ W (95.0 and 93.5 miles AHP) during periods of high water—that is, when the Carrolton Gage reads 8.0 feet or above on a rising stage or 9.0 feet or above on a falling stage, or under any other water conditions the Captain of the Port (COTP) deems necessary.

(c) *Additional Algiers Point VTS Special Area Operating Requirements.* The following additional requirements are applicable in the Algiers Point VTS Special Area:

(1) A vessel movement reporting system (VMRS) user must abide by the signals of the Governor Nicholls Street Wharf, 29°57.6′ N 90°03.4′ W, and Gretna, 29°55.5′ N 90°03.7′ W, Control Lights (94.3 and 96.6 miles AHP, respectively) in the following manner:

(i) *Green Light*—May proceed as intended.

(ii) *Red Light*—Do not proceed, unless otherwise directed by the VTS.

(iii) *No Light*—Do not proceed, immediately notify VTS and await further directions.

Note to § 161.65(c)(1): To provide advance notification to downbound vessels, a traffic repeater signal of Gretna Light is located at Westwego, LA, 29°54.8′ N; 90°08.3′ W (101.4 miles AHP).

(2) A vessel awaiting a signal change or VTS directions must keep clear of other vessels transiting the area.

(d) The Eighty-one Mile Point VTS Special Area consists of navigable waters of the LMR between 167.5 miles AHP and 187.9 miles AHP.

(e) *Additional Eighty-one Mile Point VTS Special Area Operating Requirements.* The following additional requirements are applicable in the Eighty-one Mile Point VTS Special Area:

(1) Prior to proceeding upriver past 167.5 miles AHP, Sunshine Bridge, vessels must contact VTS New Orleans on VHF Channel 5A to check-in. Vessels must provide name and destination, confirm proper operation of their automated identification system (AIS) if required under 33 CFR 164.46, and, if applicable, size of tow and number of loaded and empty barges. At 173.7 miles AHP, Bringier Point Light, ascending vessels must contact VTS New Orleans and provide a follow-on position check. At both check-in and follow-on position check, VTS New Orleans will advise the vessel on traffic approaching Eighty-one Mile Point.

(2) Prior to proceeding downriver past 187.9 miles AHP COS–MAR Lights, vessels must contact VTS New Orleans on VHF Channel 5A to check-in. Vessels must provide name and destination, confirm proper operation of their AIS if required under 33 CFR 164.46, and, if applicable, size of tow and number of loaded and empty barges. At 183.9 miles AHP, Wyandotte Chemical Dock Lights, descending vessels must contact VTS New Orleans and provide a follow-on position check. At both check-in and follow-on position check, VTS New Orleans will advise the vessel on traffic approaching Eighty-one Mile Point.

(3) All vessels getting underway between miles 167.5 and 187.9 AHP must check-in with VTS New Orleans on VHF Channel 5A immediately prior to getting underway and must comply with the respective ascending and descending check-in and follow-on points listed in paragraphs (e)(1) and (2) of this section.

(4) Fleet vessels must checkin with VTS New Orleans if they leave their respective fleet or if they move into the main channel. Fleet vessels are not required to checkin if they are operating exclusively within their fleet.

(f) *Reporting Points.* Table 161.65(f) lists the VTS Lower Mississippi River Reporting Points.

TABLE 161.65(f)—VTS LOWER MISSISSIPPI RIVER REPORTING POINTS

Designator	Geographic name	Geographic description	Latitude/ Longitude/ mile marker	Notes
A	Algiers Canal Forebay	88.0 AHP	29°56.6′ N; 90°10.1′ W	Upbound transiting Algiers Point Special Area.
B	Industrial Canal	92.7 AHP	29°57.2′ N; 90°01.68′ W	Upbound transiting Algiers Point Special Area.
C	Crescent Towing Smith Fleet	93.5 AHP	29°57.50′ N; 90°02.62′ W	Upbound Towing vessels transiting Algiers Point Special Area.
D	Marlex Terminal (Naval Ships)	99.0 AHP	29°54.65′ N; 90°05.87′ W	Downbound transiting Algiers Point Special Area.
E	Huey P Long Bridge	106.1 AHP	29°55.40′ N; 89°57.7′ W	Downbound transiting Algiers Point Special Area.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 7. In § 165.810—

■ a. Remove and reserve paragraph (c);

■ b. Remove and reserve paragraph (g); and

■ c. Add a note at the end of the section to read as follows:

§ 165.810 Mississippi River, LA-regulated navigation area.

* * * * *

Note to § 165.810: Control Light provisions (previously referenced in paragraph (c) of this section) used to manage vessel traffic during periods of high waters in the vicinity of Algiers Point are located in 33 CFR 161.65(c). The special operating requirements (previously referenced in paragraph (g) of this section) used to manage vessel traffic in the vicinity of Eighty-one Mile Point are located in 33 CFR 161.65(e).

Dated: October 22, 2010.

Vincent B. Atkins,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Capabilities.

[FR Doc. 2010–27235 Filed 10–27–10; 8:45 am]

BILLING CODE 9110–04–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR Part 1206

[FDMS Docket NARA–10–0001]

RIN 3095–AB67

National Historical Publications and Records Commission Grants

AGENCY: National Historical Publications and Records Commission, NARA.

ACTION: Final rule.

SUMMARY: The National Historical Publications and Records Commission (NHPRC), National Archives and Records Administration (NARA), is amending its regulations by removing individual eligibility for NHPRC grants, changing the time for posting of grant opportunity announcements from four to three months before the application deadline, and reflecting the new Office of Management and Budget (OMB) requirement to use Standard Form (SF) 425, Federal Financial Report. These actions are necessary updates to our business processes and are intended to allow us greater flexibility to respond to changing needs and a simplified financial reporting form and process. This final rule also adjusts the order and format of the definitions section for consistency with other NARA regulations, and makes minor typographical changes for clarity and consistency.

DATES: This rule is effective November 29, 2010.

FOR FURTHER INFORMATION CONTACT: Lucy Barber, Deputy Executive Director, National Historical Publications and Records Commission, National Archives and Records Administration, 700 Pennsylvania Avenue, NW., Room 106, Washington, DC 20408–0001, 202–357–5306.

SUPPLEMENTARY INFORMATION: On April 7, 2010, NARA published a proposed rule (75 FR 17638) for revisions to the regulations on the National Historical Publications and Records Commission. Some of the revisions were required by regulatory changes from the Office of Management and Budget; others proposed changes to eligible applicants and the required posting period for grant announcements before grant deadlines. We received five formal comments from individuals on the proposed changes. We are also responding to one comment made on a public blog Web site regarding individual applicants although we normally would not respond to comments that are made outside the formal comment process. We simply cannot monitor all possible ways people could make comments, including public blogs, so cannot be responsible for knowing about, or addressing, comments that are made outside the designated methods. In this case, however, the comment was brought to our attention and because it concerned a comment already raised through the formal process, we included it in our responses.

Of the comments we received, one commentator supported all the changes. Two individuals were concerned about changing the period for public notification of grant opportunities from four to three months prior to application deadlines. They commented that applicants wanted as much time as possible to prepare applications.

NARA will continue to post NHPRC grant opportunities in as timely a manner as possible to ensure that applicants have sufficient time to prepare their application packages. NARA notes that before any public posting can take place, the Commission must review and approve all grant opportunity announcements at its scheduled meetings. This ensures that the Commission members review overall funding priorities and offer grant programs that reflect those priorities. Given this requirement, the Commission has found that a four-month posting requirement has reduced its ability to initiate new grant programming in a timely and effective manner and is seeking a three-month public posting period in order to provide flexible and responsive grant programs. We have checked the grant posting periods for comparable federal agencies and programs, and we have found two to three months to be a typical time frame between grant postings and grant application deadlines. NARA will retain our proposed change to three months for its NHPRC grant opportunity postings.

The other two respondents commented on the proposal to no longer allow individuals to apply for NHPRC grants. In addition, on a public blog, a member of the public raised objections on this issue. Currently, the only program for which individual applicants are eligible is the Publishing Historical Records grant program. One respondent and the blog commenter felt that the overall decline in institutional support for research increased the need for the NHPRC to support independent scholars, despite any practical challenges associated with such grants. The other commenter supported the proposed change, noting that the administration of grants has become far more complex in recent years. In addition, he noted that projects funded in Publishing Historical Records often take decades to complete and require technological infrastructure rarely available to an independent scholar.

NARA considered the comments carefully. The Publishing Historical Records grant program is highly competitive and requires that all applicants have the ability to meet the Commission's substantial requirements for project cost-sharing and sustainability. NARA believes that some form of institutional support for publishing projects ensures that individual scholars have a better chance of meeting the grant requirements, particularly for projects of the scope involved in Publishing Historical Records. In the last five years, the Commission has found no proposals from independent scholars that have met the requirements for funding. However, the Commission has seen independent scholars partner with academic institutions to meet these requirements. We anticipate that this practice will continue in the future. We also hope that this change will make grant options less confusing for individuals who are seeking federal awards for activities entirely unrelated to the mission of the NHPRC who regularly contact us for individual support. NHPRC staff members currently spend considerable time redirecting these individuals to more appropriate venues. For both of these reasons, NARA therefore will implement the proposed change.

We have made two additional changes to the final rule; the revisions were made in response to two regulatory changes that occurred since publication of the proposed rule. The revisions are the inclusion of additional OMB regulatory requirements that apply to NHPRC grants and are found in § 1206.72(a)(1), 2 CFR Part 25 Universal Identifier and Central Contractor Registration, and § 1206.72(a)(2) 2 CFR Part 170 Reporting Subaward and Executive Compensation Information. Because these revisions became mandatory after the comment period for the proposed rule and are required after October 1, 2010, we have included them in the final rule.

This final rule is not a significant regulatory action for the purposes of Executive Order 12866. As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on small entities. This rule is not a major rule as defined in 5 U.S.C. Chapter 8, Congressional Review of Agency Rulemaking.

List of Subjects in 36 CFR Part 1206

Archives and records, Grant program—education, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, NARA amends Title 36 of the Code of Federal Regulations, Part 1206, as follows:

PART 1206—NATIONAL HISTORICAL PUBLICATIONS AND RECORDS COMMISSION

■ 1. The authority citation for part 1206 continues to read as follows:

Authority: 44 U.S.C. 2104(a); 44 U.S.C. 2501–2506.

Subpart A—[Amended]

§ 1206.1 [Removed]

■ 2. Section 1206.1 is removed.

§ 1206.2 [Redesignated as § 1206.1]

■ 3. Redesignate § 1206.2 as § 1206.1

■ 4. Revise § 1206.3 to read as follows:

§ 1206.3 What definitions apply to the regulations in Part 1206?

As used in Part 1206:

Board refers to a State historical records advisory board.

Commission (see NHPRC).

Coordinator means the coordinator of a State historical records advisory board.

Cost sharing means the financial contribution the applicant pledges toward the total cost of a project. Cost sharing can include both direct and indirect expenses, contributions provided by the applicant or by third parties as in-kind or cash contributions, and any income earned directly by the project.

Direct costs means expenses that are attributable directly to the cost of a project, such as salaries, project supplies, travel expenses, equipment rented or purchased for the project, or services procured for the project.

Grant opportunity announcement refers to a document published on the NHPRC Web site and at *http://www.grants.gov* that describes a type of grant offered, eligibility requirements, and application instructions.

Guidance refers to a non-binding document published on the NHPRC Web site to clarify or explain Commission policy or to provide procedural details.

Historical records means documentary material having permanent or enduring value, including manuscripts, personal papers, official records, maps, audiovisual materials, and electronic files.

Historical records repository means organizations whose mission is to acquire, preserve, and promote the use of historical records. They include archives, special collections, museums, and historical societies.

Indirect costs means costs incurred for common or joint objectives of an applicant's organization and therefore not attributable to a specific project or activity. Typically, indirect costs include items such as overhead for facilities maintenance and accounting services.

NHPRC means members of the National Historical Publications and Records Commission acting as a body.

NHPRC staff refers to the Executive Director and the staff of the Commission or the Executive Director of the Commission.

State, in §§ 1206.40 through 1206.42, means all 50 States of the Union, plus the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

The Manual of Suggested Practices refers to "The Manual of Suggested Practices for State Historical Records Advisory Boards." It is a type of guidance.

■ 5. Revise § 1206.4 to read as follows:

§ 1206.4 What is the purpose of the Commission?

The National Historical Publications and Records Commission (NHPRC or Commission), a statutory body affiliated with the National Archives and Records Administration (NARA), supports a wide range of activities to preserve, publish, and encourage the use of primary documentary sources. Through the NHPRC's grant programs, training programs, and special projects, the Commission offers advice and assistance to State and local government agencies, non-Federal nonprofit organizations and institutions, and Federally-acknowledged or state-recognized Native American tribes or groups committed to the preservation, publication, or use of United States documentary resources.

■ 6. Amend § 1206.8 by revising paragraphs (b), (d), and (e) to read as follows:

§ 1206.8 How do you operate the grant program?

* * * * *

(b) The Commission establishes grant program priorities as reflected in its grant opportunity announcements and, from time-to-time, issues non-binding, clarifying guidance documents through the NHPRC Web site.

* * * * *

(d) The purpose and work plan of all NHPRC-funded grant projects must be in accord with current Commission program guidance as reflected in the grant opportunity announcements.

(e) The Commission makes funding recommendations to the Archivist of the United States, who has the authority to award grants.

■ 7. Amend § 1206.10 by revising paragraphs (b) and (c) to read as follows:

§ 1206.10 How do you make grant opportunities known?

* * * * *

(b) The NHPRC staff prepares grant opportunity announcements consisting of all information necessary to apply for each grant and publishes the announcements on the NHPRC Web site (*http://www.archives.gov/nhprc*) at least three months before the final application due date.

(c) The NHPRC staff publishes notice of each announcement on *http://www.grants.gov,* a Federal government Web site widely available to the public, at least three months before the final application due date.

■ 8. Amend § 1206.12 by revising paragraph (a) to read as follows:

§ 1206.12 What are my responsibilities once I have received a grant?

(a) Comply with all Federal regulations about grants administration that are contained in § 1206.72.

* * * * *

Subpart B—[Amended]

■ 9. Amend § 1206.24 by revising paragraph (a) introductory text to read as follows:

§ 1206.24 What type of proposal is ineligible for a publications grant?

(a) The Commission does not support:

* * * * *

Subpart C—[Amended]

■ 10. Amend § 1206.32 by revising paragraphs (a) and (b) introductory text to read as follows:

§ 1206.32 What type of proposal is eligible for a records grant?

(a) The Commission provides grants to historical records repositories for locating, preserving and encouraging use of records held by State, local, and other governmental units and private archives and collections of papers maintained in non-Federal, nonprofit repositories and special collections

relating to the study of American history.

(b) The Commission provides support to historical records repositories and other institutions for:

* * * * *

■ 11. Amend § 1206.34 by revising the introductory text to read as follows:

§ 1206.34 What type of proposal is ineligible for a records grant?

In addition to other programmatic limitations established by the Commission as found in the grant opportunity announcements, NHPRC does not support proposals:

* * * * *

Subpart D—[Amended]

■ 12. Amend § 1206.40 by revising paragraph (a) to read as follows:

§ 1206.40 What is a State records program?

(a) Each State is eligible to receive NHPRC grants to support the work of the State historical records advisory board (board); to operate statewide historical records services; and to make sub-grants to eligible organizations within the State in support of historical records activities.

* * * * *

■ 13. Amend § 1206.41 by revising paragraphs (a) and the first and last sentence of paragraph (b) as follows:

§ 1206.41 What is a State historical records advisory board and how is it constituted?

(a) *Responsibilities.* The board is the central advisory body for historical records coordination within the State and for NHPRC State and local records projects within the State. The board engages in planning; it develops, revises, and submits to the Commission a State plan including priorities for State historical records projects following "The Manual of Suggested Practices." The board reviews all State and local records projects within the State and makes recommendations for State projects to the Commission.

(b) * * * Each State participating in the NHPRC State program must adopt an appointment process and appoint a board following "The Manual of Suggested Practices." * * * The board should be as broadly representative as possible of the public and private archives, records offices, and research institutions and organizations in the State.

■ 14. Amend § 1206.42 by revising paragraphs (a), the first two sentences of paragraph (b), and paragraph (c) to read as follows:

§ 1206.42 What is a State coordinator?

(a) *Duties.* The State coordinator (coordinator) is the officer responsible for the NHPRC State program. He or she reports the State board appointment process, membership and recommendations to the NHPRC at least on an annual basis and may serve as chair of the board and may perform other duties following applicable State statute or regulation and "The Manual of Suggested Practices."

(b) * * * The coordinator should be the full-time professional official in charge of the State archival program or agency, unless otherwise specified in State statute or regulation. The coordinator serves *ex officio,* unless otherwise specified in State statute or regulation. * * *

(c) *Replacement.* In the absence of a deputy coordinator, the State board may select an acting coordinator until another coordinator is appointed, in order to conduct the necessary business of the board.

§ 1206.43 [Amended]

■ 15. Amend § 1206.43 by capitalizing the "S" in the word "State" in the heading and in the text.

■ 16. Revise § 1206.44 to read as follows:

§ 1206.44 Who is eligible for sub-grants?

All organizations located within a State that has an active State historical records board and entities defined in § 1206.54 may be eligible, as determined by the board.

■ 17. Amend § 1206.45 by revising the heading and paragraphs (a)(1), (b), and (c) to read follows:

§ 1206.45 What rules govern sub-grant distribution, cost sharing, grant administration, and reporting?

(a) * * *

(1) The distribution of re-grant funds;

* * * * *

(b) Each participating State is responsible for ensuring that the sub-grantees comply with Federal grant administration and reporting requirements.

(c) Each participating State must annually prepare a report to the NHPRC on its sub-grant program, following the requirements outlined in § 1206.80.

Subpart E—[Amended]

■ 18. Amend § 1206.50 by revising the first two sentences of paragraph (a)(1) to read as follows:

§ 1206.50 What types of funding and cost sharing arrangements does the Commission make?

(a) * * *

(1) * * * A matching grant is a Federal grant awarded only after the applicant raises its share of non-Federal support for a project. We will match only funds raised from non-Federal sources, either monies provided by the applicant's own institution specifically for the project or from a non-Federal third-party source. * * *

* * * * *

§ 1206.52 [Amended]

■ 19. Amend § 1206.52 by removing the words "We describe" from the second sentence and adding in their place the words "The Commission describes".

■ 20. Revise § 1206.54 to read as follows:

§ 1206.54 Who may apply for NHPRC grants?

The Commission will consider applications from State government agencies in States where there is an active board; local government agencies; United States nonprofit organizations and institutions, including institutions of higher education; or Federally-acknowledged and State-recognized American Indian tribes or groups.

■ 21. Revise § 1206.56 to read as follows:

§ 1206.56 When are applications due?

The Commission generally meets twice a year, and considers grant proposals submitted by the deadlines set by the Commission. The deadlines are published in each grant opportunity announcement and at *http://www.grants.gov.* All proposals must be submitted by the published deadline.

■ 22. Amend § 1206.58 by revising paragraphs (a), (b) introductory text, (b)(1)(i), (b)(1)(ii), and (b)(2), and by removing paragraphs (b)(1)(iii) and (b)(3).

The revisions read as follows:

§ 1206.58 Whom may I contact about applying for a grant?

(a) *Contact the NHPRC staff.* The Commission encourages you to discuss your proposal through correspondence, by phone, or in person with NHPRC staff.

(b) *Contact your State Historical Records Advisory Board as appropriate.* NHPRC encourages you to discuss your proposal with your State historical records coordinator at all stages of your proposal's development and before you submit the proposal.

(1) * * *

(i) Your proposal is for publications or subvention projects; or

(ii) You are an American Indian tribe.

(2) You will find the staff contacts and a list of State historical records coordinators on the Commission's Web site at *http://www.archives.gov/nhprc.*

§ 1206.60 [Amended]

■ 23. Amend § 1206.60 in the first sentence by removing the word "Web" and adding in its place the word "web".

■ 24. Revise § 1206.64(a) to read as follows:

§ 1206.64 What formal notification will I receive, and will it contain other information?

(a) Successful grant applicants will receive a formal grant award document. The document and attachments specify terms of the grant. NHPRC staff notifies project directors informally of awards and any conditions soon after the Archivist approves the grants.

* * * * *

Subpart F—[Amended]

§ 1206.70 [Amended]

■ 25. Amend § 1206.70 by removing the second sentence.

■ 26. Amend § 1206.72 by revising paragraph (a) to read as follows:

§ 1206.72 What are, and where can I find, the regulatory requirements that apply to NHPRC grants?

(a) In addition to this Part 1206, NARA has issued other regulations that apply to NHPRC grants in 36 CFR Parts 1200 to 1212 and 2 CFR Part 2600. NARA also applies the principles and standards in the following regulations and Office of Management and Budget (OMB) Circular for NHPRC grants:

(1) 2 CFR Part 25 Universal Identifier and Central Contractor Registration;

(2) 2 CFR Part 170 Reporting Subaward and Executive Compensation Information;

(3) 2 CFR Part 220 Cost Principles for Educational Institutions (OMB Circular A–21);

(4) 2 CFR Part 225 Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A–87);

(5) 2 CFR Part 230 Cost Principles for Non-Profit Organizations (OMB Circular A–122); and

(6) OMB Circular A–133, "Audits of States, Local Governments, and Nonprofit Organizations." This circular is available at *http://www.whitehouse.gov/omb/circulars_default.*

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§ 1206.74 [Amended]

■ 27. Amend § 1206.74 in the first sentence by removing the word "Commission" and adding "NHPRC" in its place.

■ 28. Revise § 1206.76 to read as follows:

§ 1206.76 May I receive an extension to my grant project?

Yes, requests for extensions of the grant period should be signed by the grantee's authorized representative and submitted not more than two months before the scheduled end of the grant period. The NHPRC will not allow extensions unless a project is up-to-date in its submission of financial and narrative reports.

§ 1206.80 [Amended]

■ 29. Amend § 1206.80(a) in the first sentence by removing the word "status".

■ 30. Revise § 1206.82 to read as follows:

§ 1206.82 What is the format and content of the financial report?

Grant recipients must submit financial reports on Standard Form 425 and have them signed by the grantee's authorized representative or by an appropriate institutional fiscal officer.

■ 31. Amend § 1206.84 by revising the second sentence of paragraph (a) and removing paragraph (c).

The revision reads as follows:

§ 1206.84 What is the format and content of the narrative report?

(a) * * * The report should include a summary of project activities; whether the project proceeded on schedule; any revisions of the work plan, staffing pattern, or budget; any web address created by the project; and any other press releases, articles, or presentations relating to the grant project or its products. * * *

* * * * *

■ 32. Revise § 1206.86 to read as follows:

§ 1206.86 What additional materials must I submit with the final narrative report?

You must submit the materials required in the NHPRC grant announcements and in the grant award document.

§ 1206.88 [Amended]

■ 33. Amend § 1206.88 by removing the phrase "the National Archives and Records Administration (NARA)" and adding "NARA" in its place.

Dated: October 18, 2010.

David S. Ferriero,

Archivist of the United States.

[FR Doc. 2010–27282 Filed 10–27–10; 8:45 am]

BILLING CODE 7515–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 95

RIN 0970–AC33

State Systems Advance Planning Document (APD) Process

AGENCY: Office of Child Support Enforcement (OCSE), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: The Advance Planning Document (APD) process governs the procedure by which States obtain approval for Federal financial participation in the cost of acquiring automated data processing equipment and services. This final rule reduces the submission requirements for lower-risk information technology (IT) projects and procurements and increases oversight over higher-risk IT projects and procurements by making technical changes, conforming changes and substantive revisions in the documentation required to be submitted by States, counties, and territories for approval of their Information Technology plans and acquisition documents.

DATES: *Effective Date:* This regulation is effective October 28, 2010.

FOR FURTHER INFORMATION CONTACT: Robin Rushton, OCSE Division of State and Tribal Systems, (202) 690–1244, e-mail: *Robin.Rushton@acf.hhs.gov.* Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8 a.m. and 7 p.m. Eastern Time.

SUPPLEMENTARY INFORMATION:

Statutory Authority

This final regulation is published under the general authority of 5 U.S.C. 301, 42 U.S.C. 622(b), 629b(a), 652(a), 652(d) 654A, 671(a), 1302, and 1396a(a). This regulation is published under the authority granted to the Secretary of the U.S. Department of Health and Human Services, (the Secretary) by Section 1102 of the Social Security Act (the Act), 42 U.S.C. 1302. This section authorizes the Secretary to publish regulations that may be necessary for the efficient

administration of the functions for which she is responsible under the Act.

Background

The Department of Health and Human Services (HHS) provides national leadership and direction in planning, managing, and coordinating the nationwide administration and financing of comprehensive State public assistance systems to support programs for children and families. The Advance Planning Document (APD) process governs the procedure by which States obtain approval for Federal Financial Participation (FFP) in the cost of acquiring automated data processing (ADP) equipment and services. The APD process was designed to mitigate financial risks, avoid incompatibilities among systems and ensure that a system supports the program goals and objectives and operates as intended by law and regulation. The APD process also assists in ensuring that the expenditure of Federal funds is made in accordance with Federal regulation.

This rule sets forth technical and conforming revisions, establishes new requirements and modifies existing requirements. The technical revisions delete or update obsolete references to agency names and assistance programs. The conforming revisions to regulations reflect the inclusion of entitlement grants under procurement standards found in 45 CFR Part 92, Uniform Administrative Requirements for Grants and Cooperative Agreements to State, Local and Tribal Governments. (Prior to this rule, Part 95 cross-referenced procurement standards in 45 CFR Part 74, titled Uniform Administrative Requirements for Awards and Subawards to Institutions of Higher Education, Hospitals, Other Nonprofit Organizations, and Commercial Organizations). These conforming changes are being made in response to comments and reflect Federal regulations that were published on September 8, 2003 [68 FR 52843] to promulgate uniform administrative requirements for certain Federal grants and agreements with State, local and tribal governments. The rule eliminates and reduces the documentation required to be submitted for Federal approval of FFP in the costs of acquiring ADP equipment or services.

Technical revisions were prompted in part by changes made by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which eliminated the Job Opportunities and Basic Skills (JOBS) training program and replaced the Aid to Families with Dependent Children (AFDC) program with a Temporary Assistance for Needy Families (TANF) block grant that is not subject to 45 CFR Part 95. Other technical amendments were due to the name change from Health Care Financing Administration to Centers for Medicare & Medicaid Services (CMS).

The conforming revisions were made to reflect the final rule on Uniform Administrative Requirements for Awards and Subawards to Institutions of Higher Education, Hospitals, Other Nonprofit Organizations, and Commercial Organizations; and Certain Grants and Agreements with States, Local Governments and Indian Tribal Governments and Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments [68 FR 52843], which brought entitlement grant programs administered by HHS, such as the Child Support Enforcement (CSE) program, under the same regulations that already applied to non-entitlement programs for grants and cooperative agreements to State, local, and tribal governments. This was done by expanding the scope of 45 CFR Part 92 to include entitlement grant programs and removing such programs from the scope of Part 74. According to the rules published in 68 FR 52843, the affected programs under an approved State plan for titles I (Grants to States for Old-Age Assistance for the Aged), IV–A (Block Grants to States for Temporary Assistance for Needy Families), IV–B (Child and Family Services), IV–D (Child Support and Establishment of Paternity), IV–E (Federal Payments for Foster Care and Adoption Assistance), X (Grants to States for Aid to the Blind), XIV (Grants to States for Aid to the Permanently and Totally Disabled), XVI (Grants to States for Aid to the Aged, Blind, and Disabled), XIX (Grants to States for Medical Assistance Programs), and XXI (Children's Health Insurance Program) of the Social Security Act (the Act) and title IV, chapter 2 (Refugee Assistance) of the Immigration and Nationality Act must comply with procurement standards in 45 CFR Part 92. (Please note this final rule on State Systems Advance Planning Documents (APD) narrows the cross-reference to Part 92 by deleting reference to titles I, IV–A, X, XIV, XVI of the Act and title IV, chapter 2 of the Immigration and Nationality Act from § 95.601, titled Scope and Applicability, of this final rule.)

Prior to this rule, regulations at 45 CFR Part 95 (§ 95.605, Definitions, § 95.613, Procurement Standards, § 95.615, Access to Systems and Records, § 95.621, ADP Reviews, § 95.705, Equipment Costs—Federal Financial Participation, § 95.707, Equipment Management and Disposition) contained six references to Part 74; those references were deleted in this final rule and replaced with references to Part 92 where applicable. (Please refer to the Provisions of the Regulation and Changes Made in Response to Comments and the Response to Comments sections of this preamble for additional information.)

The new and modified requirements in this rule were made in response to a variety of studies and recommendations from Federal, State and private organizations over the last decade, including the U.S. Government Accountability Office (GAO), the Technology and Procurement Policy Subcommittee of the House Government Reform Committee, the National Association of State Chief Information Officers (NASCIO), the American Public Human Service Association (APHSA) and the Office of Management and Budget (OMB).

In March 1998, the U.S. General Accounting Office, now known as the Government Accountability Office (GAO) and the Nelson A. Rockefeller Institute of Government jointly established the GAO/Rockefeller Institute Working Seminar on Social Program Information Systems. The working seminar had about 30 members, including congressional staff, Federal and State program and information technology managers, and welfare researchers. The working seminar met eight times and discussed how the shifting human services landscape had transformed States automated systems needs. The three key challenges identified by participants at this conference were: (1) Simplifying the approval process for obtaining Federal funding for information systems; (2) enhancing strategic collaboration among different levels of government; and; (3) obtaining staff expertise in project management and information technology.

In 2002, the GAO reviewed the statutory and regulatory requirements for Federal approval and funding of State IT development and acquisition projects. (*See* GAO–02–347T, July 2002). The review examined agencies' processes for reviewing, approving, and funding State IT development acquisition projects and whether these processes hinder or delay States' efforts to obtain approval for projects. The review also examined how the Food and Nutrition Service (FNS) (under the U.S. Department of Agriculture (USDA)), ACF and CMS ensure that they consistently apply the OMB Circular A–87 to fund IT development and acquisition projects. The GAO found

that in fiscal years 2000 and 2001 States had submitted 866 planning and acquisition documents. In its analysis of these submissions, GAO determined that 92 to 96 percent of the State requests submitted to Child Support Enforcement (CSE), Child Welfare, and CMS were responded to within the required 60 days but only 74 percent of the State requests involving multiple programs were responded to within the 60 days.

On July 9, 2002, the Subcommittee on Technology and Procurement Policy, House Government Reform Committee, held a Congressional hearing on State and Local Information Technology Management. The hearing included testimony from State and Federal IT officials, the National Association of State Information Resource Executives (NASIRE), representatives from the IT vendor community, and GAO. Although testimony differed on the degree of Federal oversight, witnesses agreed that the regulations and policies should be updated to reflect changes in technology over the last two decades.

The National Association of State Chief Information Officers (NASCIO) and the American Public Human Services Association (APHSA) also have been actively involved in this issue and submitted proposals on how to reform the Federal oversight of State IT projects and procurement approval process.

The Office of Management and Budget (OMB) also has raised concerns about the information paperwork burden imposed on States by the APD prior approval process. Normally the renewal of the OMB Information Collection authority is granted for a three-year period, but in 2003 and 2004 OMB limited the renewal to one-year increments and has asked to be kept informed of the Department's efforts to reduce or streamline the APD process. In April 2005, OMB approved the current APD process for an additional three years based partially on the progress that has been made on this reform effort. Another three-year extension was approved through February 2, 2011.

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (Affordable Care Act) into law. This law has very significant implications for millions of Americans who will now be eligible for the benefits under Medicaid and the Child Health Insurance Program (CHIP). The Centers for Medicare and Medicaid Services (CMS) anticipates millions of newly eligible individuals applying for, and being determined to be eligible for, these programs. CMS plans to build upon the provisions described herein as it implements the Affordable Care Act and does not expect implementation to conflict with measures in this current rule.

Provisions of the Regulation and Changes Made in Response to Comments

A Notice of Proposed Rule Making (NPRM) was published in the **Federal Register** [73 FR 12341] on March 7, 2008. During the comment period, we received 33 letters generating 153 comments. On the whole, comments were positive and welcomed the increased flexibility in the APD submission requirements for lower-risk projects. Many of the comments suggested we retain the term "Advance Planning Document" (APD) and eliminate use of the proposed term "Information Technology Document" (ITD). Accordingly, we have retained the term "Advance Planning Document" in all of its permutations and deleted "Information Technology Document" throughout this rule. In response to comments, we also revised the regulation to clarify that States are permitted to transmit electronic versions of the APD, acquisition solicitation and contract documents as long as a valid signature accompanies the documentation. We did this by replacing the phrase "in writing" with "in a record" throughout this regulation.

Other commenters asserted that the procurement standards in Part 92 should be cross-referenced in Subpart F (titled Automated Data Processing Equipment and Services—Conditions for Federal Financial Participation) of Part 95, rather than the procurement requirements in Part 74. This comment also affects proposed § 95.613, Procurement Standards, which removed the general cross-reference to Part 74, but added certain key requirements from Part 74 (i.e., recipient's or grantee's responsibilities, codes of conduct, competition, procurement procedures, contract provisions) to the proposed section. We agreed with these comments and have deleted all cross-references to Part 74 and removed the proposed requirements in § 95.613 of the NPRM which were taken from Part 74. Where applicable, we have replaced the previous reference to Part 74 with a cross-reference to Part 92, which permits grantees to follow the same State procurement rules and standards that are used for non-FFP matched projects. Accordingly all HHS grantees are now subject to the procurement standards set forth in 45 CFR Part 92.

Section 95.613 Procurement Standards was revised to provide for a limited exception where the Department retains the authority to provide greater oversight, including requiring a State to comply with the competition provisions of § 92.36(c) if it determines that a State procurement process is an impediment to competition that could substantially impact project cost or risk of failure.

Changes made in response to comments are discussed in more detail under the Response to Comments section of this preamble. Following is a summary of those changes:

Section 95.601—Scope and Applicability

Section 95.601 prescribes conditions under which the Department of Health and Human Services will approve FFP in the costs of automated data processing services or equipment for social service programs under certain titles of the Act. In the proposed rule we narrowed the scope of this part by deleting reference to titles I, IV–A, X, XIV, XVI and XXI of the Act and title IV, chapter 2 of the Immigration and Nationality Act. In response to comments, we re-inserted the reference to title XXI, titled Children's Health Insurance Program, to clarify that this part applies to the automated data processing equipment and services related to the CHIP program, if a State enhances its existing Medicaid Management Information System (MMIS) to include CHIP functions.

Consistent with the proposed rule, the scope of this final rule does not apply to titles I, X, XIV or XVI of the Act as these titles have been repealed by the Social Security Amendments of 1972 (P.L. 92–603). Similarly, this rule does not apply to title IV–A of the Act since PRWORA eliminated the JOBS program and replaced AFDC with TANF, a block grant. Lastly, this rule does not apply to title IV, chapter 2 of the Immigration and Nationality Act because the State Legalization Impact Assistance Grants program, a time-limited program previously administered by the Office of Refugee Resettlement, has expired. Consequently, the scope of this rule is limited to titles IV–B (Child and Family Services), IV–D (Child Support and Establishment of Paternity), IV–E (Federal Payments for Foster Care and Adoption Assistance), XIX (Grants to States for Medical Assistance Programs) and XXI of the Act (Children's Health Insurance Program).

Section 95.605—Definitions

Section 95.605 sets forth definitions as used in this part. Certain defined terms in the NPRM, such as Alternative approach to the APD requirements, Base Contract, Grantee, Project, Service Agreement paragraphs (d)–(f) and

Service Oriented Architecture are being adopted in the final rule without revision. The intent of this section is to identify and define relevant terms in a centralized location at the beginning of the regulation to facilitate reading of the rule. To that end and in response to comments in the final rule, we used language from § 95.610(a)(1), (b) and (c) and § 95.626(a), to create or revise definitions for the terms Acquisition Checklist, Advance Planning Document (APD), Planning APD, Implementation APD, APD Update, Operational APD and Independent Verification and Validation (IV&V). We also revised the definitions of Commercial-off-the-shelf (COTS) Software, Software Maintenance and Non-Competitive.

Acquisition Checklist means the standard Department checklist that States can submit to meet prior written approval requirements instead of submitting the actual Request for Proposal (RFP), contracts or contract amendments. The Acquisition Checklist allows States to self-certify that their acquisition documents, which include RFPs, contracts, contract amendments or similar documents, meet State and Federal procurement requirements, contain appropriate language about software ownership and licensing rights in compliance with § 95.617, and provide access to documentation in compliance with § 95.615.

Advance Planning Document, Initial advance automated data processing planning document or Initial APD means a recorded plan of action to request funding approval for a project which will require the use of ADP service or equipment. The term APD refers to a Planning APD, or to a planning and/or development and implementation action document i.e., Implementation APD, or to an Advance Planning Document Update. Requirements are detailed in § 95.610, paragraphs (a), (b), and (c).

Advanced Planning Document Update (APDU) means a document or record submitted annually (Annual APDU) to report project status and/or post implementation cost-savings, or on an as needed (As Needed APDU) basis, to request funding approval for project continuation when significant project changes are anticipated; for incremental funding authority and project continuation when approval is being granted by phase; or to provide detailed information on project and/or budget activities as specified in § 95.610(c).

Planning APD means a plan of action in a record which requests FFP to determine the need for, feasibility, and cost factors of an ADP equipment or services acquisition and to perform one or more of the following: Prepare a Functional Requirements Specification; assess other States' systems for transfer, to the maximum extent possible, of an existing system; prepare an Implementation APD; prepare a request for proposal (RFP) and/or develop a General Systems Design (GSD).

Implementation APD means a recorded plan of action to request Federal financial participation (FFP) in the costs of designing, developing and implementing the system.

Operational APD means a record of no more than two pages to be submitted annually by State programs whose system is not in development. The Operational APD provides a short summary of the activities, method of acquisition, and annual budget for operations and software maintenance.

Similarly, in response to commenters, we also added a definition for the term Independent Verification and Validation (IV&V) to this section, which "means a well-defined standard process for examining the organizational, management, and technical aspects of a project to determine the effort's adherence to industry standards and best practices, to identify risks, and make recommendations for remediation, where appropriate."

Under § 95.605 we revised the definitions of the terms Commercial-off-the-shelf (COTS) Software and Software Maintenance in response to comments that the proposed definitions were too limiting. With regard to COTS Software, we removed the last sentence of the proposed definition which read: "Examples of COTS include: Standard word processing, database, and statistical packages" and added that language to the preamble discussion of COTS. Likewise, comments indicated that the last sentence in the proposed definition of Software Maintenance inappropriately contains a requirement: "Software maintenance that substantially increases risk or cost or functionality will require an as-needed ITD." We removed that sentence from the definition. For added clarity, an As-Needed APD is required when Software Maintenance results in major changes in the scope of the project, system concept or developmental approach. We revised the definition of acquisition checklist to expand the definition to include contracts and contract amendments as well as RFPs.

Non-competitive means solicitation of a proposal from only one source, or after solicitation of a number of sources, negotiation with selected sources based on a finding that competition is inadequate. The definition of non-competitive was significantly modified from the definition proposed in the NPRM. This revised definition removes specific Federal criteria for sole source justifications from the definition of non-competitive and reflects that each State is permitted under 45 CFR 92.36 to use the same procurement policies and procedures that it uses for procurements from non-Federal funds. Several commenters recommended HHS deference to State procurement policies. One commenter noted, "as always (we) take the position that if a state was in compliance with its procurement rules, that it should be able to self-declare that its IT procurement meets all state standards and this should be sufficient for Federal approval". Another commenter stated "We recommend using the same approach to procurement standards that is used in Part 92 of Title 45 of the Code of Federal Regulations which governs 'Uniform Administrative Requirements for Grants and Cooperative Agreement to State, Local and Tribal Governments'. In Subpart C, Section 92.36 sets forth the requirements related to procurement; 92.36(a) exempts states from complying with the requirements set forth in this section. Instead, States are required to follow the same policies and procedures used for procurements from its non-Federal funds. The procurement standards set forth in Section 95.613 may conflict with or contradict procurement standards set forth in State law even though both are attempting to achieve similar goals."

As noted below, in the discussion of section 95.610(a)(2)(viii)(C), a State that uses a non-competitive solicitation will need to include a justification for this procedure in describing its procurement strategy. That justification should make reference to the procurement policies and procedures used by the State for procurement from non-Federal funds.

Section 95.610—Submission of Advance Planning Documents

We deleted the first sentence of proposed § 95.610(a)(1) from the NPRM and moved that language to the definition of Advance Planning Document in § 95.605. We added the phrase "including the use of shared or purchased services in lieu of State acquired stand-alone resources: To § 95.610 to clarify that it is permissible for States to form consortia to acquire and maintain development, maintenance or other services to address their automation needs. We added § 95.610(a)(2)(viii) to specify the need for an acquisition summary in the Planning APD that will provide for the basis for exempting acquisitions from prior approval.

Section 95.610(c) identifies the criteria for submitting an APD Update (APDU), including an Annual APDU and an As-Needed APDU. In response to comments we revised the timeframe for submitting the Annual APDU from 60 days prior to the anniversary date of the Planning APD to 60 days prior to the expiration of authority for FFP in the costs of acquiring automated data processing equipment and services. By requiring the APDU 60 days before the expiration of authority for FFP granted in the previous APDU, the process decreases the likelihood of a gap in approved FFP in the cost of the State's system.

Section 95.610(c)(1)(viii) of the proposed rule related to requesting an annual cost benefit analysis has been deleted. We received nine comments on this provision. The revisions to the annual cost benefit analysis in the NPRM were supported by all commenters, but they suggested a total elimination of the cost benefit updates. The commenters pointed out that not all projects have tangible, measurable benefits and that CBA updates are unnecessarily burdensome when the values often are stable for large software application developments. We concur that this annual requirement has not provided the type of information useful to determine whether States are pursuing the most cost-effective methods to justify the additional burden it placed on States. We have modified our oversight and monitoring to focus on high risk projects and we believe that the proposed IV&V and disapproval provisions in the final rule are a more targeted means of insuring development of cost effective human service systems.

We modified the requirements of § 95.610(c) related to Annual and As-Needed APDU to require an acquisition summary to describe the information needed on planned acquisitions in order to qualify for an exemption from the prior approval requirements of § 95.611. The information that must be included in the APD in order for the State to qualify for an exemption from prior approval requirements is now listed in § 95.610(c)(1)(viii) as follows:

(a) Type and scope of contract—Examples of type of contract are: Firm fixed price, labor hours, and time and materials. Examples of scope of contract are: Maintenance and operation, COTS software, application software development, service contract, and licenses.

(b) Procurement strategy—Examples of procurement strategy are: Full and open competition, limited competition (*e.g.* master service contract) and sole source procurement. If the procurement is sole source, the State needs to provide a sole source justification, either separately or as part of the APDU. That justification should make reference to the procurement policies and procedures used by the State for procurement from non-Federal funds.

(c) Estimated cost or not to exceed amount—Describes the total cost of the acquisition and annual cost if applicable, or the specified number of labor hours not to be exceeded for all project categories.

(d) Timeframe of contract—Examples of the timeframe of a contract should include the years in the initial contract with the number of options for additional years. This should include the estimated begin and end dates of the contract.

(e) A signed certification from the authorized State official that the proposed acquisition will comply with all State and Federal requirements including the retention of software ownership rights specified in § 95.617. The Acquisition Checklist issued in OCSE Information Memorandum 05–03 provides a summary of Federal requirements that should be included in the acquisition solicitation documents. A statement in the APD that the acquisitions summarized will comply with all applicable State procurement requirements and the Federal requirement specified in the Acquisition Checklist will be sufficient.

Section 95.611 Prior Approval Conditions

Section 95.611 provides the thresholds for prior approval conditions. This final rule changes the manner in which acquisition exemptions from prior Federal approval are granted. Currently, only the cost of the acquisition triggers prior Federal approval. The intent of these regulatory revisions is to presumptively approve a wider range of acquisitions based on risk rather than simply cost of the acquisition. Sections 95.611(a)(2) and (b) were revised in the final rule to substitute "which is reflected in a record" or "in a record", instead of the current language of "in writing." The revision is in response to comments encouraging a move toward e-government and expediting electronic submissions and approvals. Language within § 95.611(b)(1)(iii) states "unless specifically exempted by the Department," which permits Federal programs to grant exemptions for RFPs, contracts and contract amendments. All Federal programs have granted exemptions, but not routinely, and the burden to request the exemption is on the State. The final rule amends § 95.611(b)(2)(iii) to facilitate the routine granting of these exemptions by including an acquisition summary in the Planning, Annual or As-Needed APDUs. Section 95.611(b)(2)(iii) specifies that for acquisition documents, the exemption request is assumed to be approved concurrent with the approval of the Planning, Annual or As-Needed APDU unless the Federal program office specifically indicates in writing which acquisition(s) should be submitted for prior Federal review and approval. Section 95.611(b)(1)(iii) also specifies the conditions for assumed approval of an exemption. These conditions include: Providing sufficient detail to base an exemption, no deviation from the terms of the exemption, and the acquisition is not the initial acquisition for a high risk activity such as software application development. Examples of failure to meet the first two conditions include, but are not limited to the following:

- The exemption was based on the acquisition summary that indicated the procurement would pursue full and open competition; the eventual acquisition was sole source.
- The summary indicated the acquisition will be a firm fixed price contract; the eventual acquisition was modified to time and materials.
- The acquisition summary indicated that the scope of the contract will be maintenance and operation; the eventual acquisition was expanded to include software development.
- The acquisition summary specified that the acquisition was for a specific functionality, such as document generation; the eventual acquisition was expanded to include other functionality, such as calendaring.

The third condition for assumed approval of an exemption is when "the acquisition is not the initial acquisition for a high risk activity, such as software application development." Examples of situations that may prompt the Department to not grant an exemption request include, but are not limited to the following: The acquisition is for high risk activity such as customized software development; the RFP and contract are related to developing a new or replacement system; the project has past significant cost overruns and/or implementation problems; the State has a past pattern of limiting competition; or the size of the acquisition does not appear to be commensurate with the size of the program or caseload. While the acquisition summary is not required for an Implementation APD, this will not prevent a Federal program office from exercising existing regulatory authority and exempting acquisitions

included in an Implementation APD. For example, the Department may request prior approval of an RFP, but exempt the resulting contract from prior approval if the State keeps the Department informed during the procurement process and submits an information copy of the signed contract. In addition, the Implementation APD may summarize several different types of procurements in the first year such as IV&V, Quality Assurance, or Project Management in addition to the software development acquisition. While the acquisition for software development is high risk and subject to prior approval, at the program office's discretion the other acquisition in an Implementation APD could be exempted, so the State is encouraged to provide an acquisition summary in the Implementation APD as well.

We have retained the submission thresholds for prior approval requirements of § 95.611 for those requestors who opt not to include a description of planned acquisitions in their APDU. The Federal program offices will continue to review and provide comments on any acquisition document submitted by the requesting State, Territory or Tribe as technical assistance. In response to comments, we increased the submission threshold for regular rate software application development from $5 million to $6 million for competitive procurements. In keeping with the comments encouraging an increased submission threshold, we also revised § 95.611(b)(2)(iv) to increase the submission thresholds for enhanced funded projects from $300,000 to $500,000.

Section 95.611(d) was revised to improve the clarity of the provision. We replaced the term "ACF" with "the Department" to clarify that this provision applies to CMS as well as ACF program offices. The term "approving components" was replaced with a new term, "Federal program offices," and clarifies that the Department will send the State an acknowledgment letter once it has received the incoming request from the State and will respond within 60 days. If the State has not received a response from the Federal program office(s) within 60 days of the acknowledgment letter, then the State can assume that it has approval to proceed. The regulation uses the term "provisional approval" to signify that the Federal program office retains the authority to disapprove the Initial APD or IT acquisition, but if the Federal program office has not provided any guidance within those 60 days, then the burden shifts to the Federal program office to justify subsequent requests for more information or disapproval. The phrase "approval, disapproval or request for more information" is retained in the regulation. The term "written approval" was replaced with "which is reflected in a record" to permit electronic transmissions which is intended to improve and expedite communications between the State and Federal offices. However, this revision does not change the requirement that the State's request be sent by an authorized requestor and that the Federal approval, disapproval or request for additional information, while no longer required to be in writing, must still be reflected in a record by the authorized individual in the Federal program office. An oral request or an e-mail for additional information from a Federal program office will not "stop the clock." The State should expect an approval, disapproval or request for additional information from the same Federal official to whom the State's request was sent.

Section 95.611(e) was revised to specify which acquisitions are not subject to prior approval and clarify that the Department retains the authority to request submittal of acquisition documents regardless of threshold.

Section 95.613 Procurement Standards

Section 95.613 provides that the procurement standards for ADP equipment and services are subject to Part 92 instead of Part 74. Since § 92.36 exempts States from the provisions of § 92.36 paragraphs (b) through (i) the State will follow the same procurement policies and procedures that they use for non-Federal matched ADP State projects. The Department retains the authority to provide greater oversight, including requiring a State to comply with the competition provisions in § 92.36(c) if it determines that a State procurement process is an impediment to competition that could substantially impact project cost or risk of failure. This revision is in response to multiple comments urging the Federal programs to defer to State procurement standards, especially in the area of limitations on competition.

Section 95.617 Software and Ownership Rights

Section 95.617 provides the software and ownership rights that must be contained in the contract for all software or modifications developed or installed with Federal financial participation. In response to comments, we eliminated the examples of software packages in § 95.617(c) that met the exemption from this software ownership provision.

Section 95.621 ADP Reviews

Section 95.921 provides the types of periodic on-site surveys and reviews of State and local agency ADP methods that the Department may conduct. Paragraph (d) related to acquisitions not subject to prior approval was updated to delete the previous reference to Part 74 and substitute Part 92.

Section 95.623 Reconsideration of Denied FFP for Failure To Obtain Prior Approval

Section 95.623 provides a process by which a State may request reconsideration for FFP which was denied due to the State's failure to request Federal prior approval. In response to comments requesting additional specificity, a new paragraph (b) was added that specifies information and documentation that must be submitted with the request for reconsideration. To provide more clarification on the criteria that must be met to qualify for reconsideration, we have revised § 95.623(b) to add the criteria that is currently in OSSP-Action Transmittal 00–01. However, we anticipate that requests for reconsideration will abate given the new authority in § 95.610 to exempt planned acquisitions from prior approval.

Section 95.624 Consideration for FFP in Emergency Situations

Section 95.624 was revised to change the introductory text, paragraph (a) and paragraph (b)(2) to eliminate the reference to written request and substitute "which is reflected in a record" or "reflected in a record." This change was prompted by comments received that encouraged us to move toward e-government and remove any requirement for written submissions and approvals. This change will expedite transmittal of requests from States and Territories in emergency situations.

Section 95.626 Independent Verification and Validation

Proposed § 95.626 is revised to correct the introductory text and references to "Independent Validation and Verification" and replace it with the correct terminology of "Independent Verification and Validation." We also made a technical changes to the first two triggers, i.e., missing regulatory and statutory deadlines and failing to meet a critical milestone, by adding lead-in language to clarify that the assessment is intended to be prospective and not reactive if the agency determines that the State is "at risk" of these problems.

In keeping with our focus on high risk projects, two additional triggers to IV&V

were added to § 95.626. The two triggers are:

(7) State's procurement policies put the project at risk, including a pattern of failing to pursue competition to the maximum extent feasible.

(8) State's failure to adequately involve the State program office responsible for administering the program in the development and implementation of the project.

We included these additional triggers for IV&V because past experience tells us that the State's failure to seek full and open competition to the maximum extent practicable or to involve State program offices in the planning/development effort are indicators that the project is at risk. Lack of competition in itself is not a trigger for IV&V; rather, the Department will conduct an assessment to determine if the pattern of failing to pursue competition creates risk to the project. This determination may require an IV&V assessment review to evaluate the impact that the lack of competition has had on the project for both increased cost and increased risk for system failure. A decision on whether an IV&V contract is required or the scope of the IV&V services will be deferred until after the IV&V assessment. Lack of involvement of State program offices in the development and implementation of the project is a trigger for IV&V. During the IV&V assessment, the team will consult with all stakeholders, which includes end users, caseworkers and business partners, to assess the user involvement and buy-in regarding system functionality and the ability of the system to support program business needs.

The changes proposed to § 95.631 in the NPRM were related to a change in terminology from Advance Planning Document to Information Technology Document. Since the comments expressed overwhelming opposition to the change, § 95.631 will be unchanged in the final rule.

Several sections in the NPRM are being adopted as proposed. Section 95.612 Disallowance of Federal Financial Participation, § 95.615 Access to systems and records, § 95.627 Waivers, 95.635 Disallowance for automated system that fails to comply with requirements, § 95.705 Equipment costs and § 95.707 Equipment management and disposition are being adopted without revision in the final rule.

Response to Comments

We received 153 comments from 33 State Agencies and other interested parties. Below is a summary of the comments and our response.

General Comments

1. *Comment:* Commenters were overwhelmingly supportive of keeping the terminology of Advance Planning Document (APD) in lieu of the proposed term, Information Technology Documents (ITD). This proposed change generated the most comments, all of which supported retaining the term APD. One commenter suggested several corresponding changes if the terminology was changed from APD to ITD.

Response: We agree and the terminology of Advance Planning Document (APD) is retained in the final regulation.

2. *Comment:* Several commenters urged compatible rules and guidelines across Federal human service agencies to minimize confusion and allow needed automation projects to proceed without unnecessary delay.

Response: We agree and note that the USDA's Food and Nutrition Services, which has jurisdiction over the Supplemental Nutrition Assistance Program (SNAP) systems in commenting on the NPRM, stated: "In the interest of sustaining a consistent federal approval process for State agencies, we intend to minimize differences in the procedures to the extent possible. We intend to propose similar changes in a proposed regulation in the near future."

3. *Comment:* One commenter requested clarification on why Title I, X, XIV, XVI (AABD) and XXI were deleted.

Response: The NPRM proposed deleting reference to title XXI (Children's Health Insurance Program (CHIP)) because, in general, CHIP programs are not subject to Part 95. However, if a State opts to enhance its MMIS to include CHIP functions, then Part 95 would apply to the MMIS in its entirety, including the CHIP portion. Consequently, we have re-inserted reference to title XXI in § 95.601, titled Scope and Applicability, and clarified the circumstances by which the CHIP programs are subject to Part 95 in the preamble.

The other titles of the Act, as identified by the commenter, were deleted from this rule because those titles were repealed by the Social Security Amendments of 1972 (Pub. L. 92–603) and are no longer applicable. (*Please note* that Pub. L. 92–603, § 303, repealed titles I (Grants to States for Old-Age Assistance for the Aged), X (Grants to States for Aid to the Blind), XIV (Grants to States for Aid to the Permanently and Totally Disabled) and XVI (Grants to States for Aid to the Aged, Blind, and Disabled) of the Act, except with respect to Puerto Rico, Guam, and the Virgin Islands. Also, the Commonwealth of the Northern Marianas may elect to initiate social services programs under these titles if it chooses; see Vol. II, Pub. L. 94–241, approved March 24, 1976, 90 Stat. 263, Covenant to Establish Northern Mariana Islands).

4. *Comment:* Several commenters requested training materials and training sessions on the new regulations as quickly as possible after the regulations are finalized. Several commenters specifically requested that the Medicaid manual be updated to reflect final regulations.

Response: All Federal agencies involved have committed to developing training materials and providing training and technical assistance on the new regulations once the regulations are issued in final form. With respect to the State Medicaid manual and other guidance to States, CMS will update these policy guidelines accordingly.

5. *Comment:* One commenter requested that we submit the NPRM for another round of comments. No rationale was provided as to why a second round of comments was needed.

Response: The NPRM was widely disseminated to State agencies and other interested parties with ample opportunity to comment. Furthermore, the comments received were predominately supportive of the proposed changes. Thus, we are not extending the comment period.

6. *Comment:* Several commenters applauded the reduction and elimination of documentation and noted that the ability to submit documents electronically is welcome. One commenter suggested that the term "written" be eliminated or redefined throughout the regulation to permit electronic transmission of the APD and related IT documentation.

Response: We agree and have revised the regulation to clarify that States are permitted to transmit electronic versions of APDs, acquisition solicitations and contract documents as long as a valid form of the authorized requester's signature accompanies the documentation (i.e., signature may be transmitted by fax, scanned PDF electronic document or electronic signature). We note that the elimination of the term "written" does not permit oral approvals or disapprovals by the Federal program offices. The regulation still requires that the approval or disapproval be recorded. We also stress that the State should expect that the electronic approval or disapproval will be made by the same Federal official to

whom the State's request was addressed. An email from a Federal program analyst requesting additional information in order to complete the analysis of the State's request should be considered technical assistance and would not constitute an official request for additional information under § 95.611(d). If no official response is received by the requesting State within 60 days of the acknowledgment letter, the State may assume provisional approval.

Section 95.605—Definitions

1. *Comment:* One commenter requested additional specificity regarding the definition of noncompetitive and asked that the following terms within the definition also be defined: Infeasible; what constitutes a delay; what criteria is used to determine exigency or emergency; and what number of proposals is required to satisfy adequate competition.

Response: We have not added definitions for the terms identified by the commenter because these terms are used in previous Federal standards for sole source justifications under Part 74 which is no longer relevant for State procurements. For the reasons discussed above, definitions of these terms are no longer needed.

2. *Comment:* One commenter suggested a definition of APD and suggested that the substantive requirements for APD should remain in § 95.610, Submission of advance planning documents, but that the initial paragraph of § 95.610 as well as subparagraph (a)(1) and paragraphs (b) and (c) should be moved to § 95.605, Definitions.

Response: We agree with the commenter that § 95.605, Definitions, should include the definitions for the terms Advance Planning Document, (APD), Planning APD, Implementation APD, APD Update and Operational Update. We have taken language from § 95.610(a)(1) and added this language as the definition for APD under § 95.605. We have also retained this language in § 95.610(a)(1) rather than deleting it. We determined that paragraphs (b) and (c) set forth requirements for submitting APDs and are not a part of the definition for APD. These paragraphs are appropriately placed in § 95.610, Submission of advance planning documents, and have not been moved to § 95.605, Definitions.

3. *Comment:* There were several interrelated comments requesting clarification of the definitions of commercial-off-the-shelf (COTS) software, service-oriented architecture (SOA) and a recommendation for a new definition of Enterprise Architecture. Some commenters suggested that the examples cited in the regulation be deleted; other commenters recommended the addition of new examples. Several commenters suggested that the definition of COTS be cross-referenced to § 95.610(b)(3) to clarify that enterprise-level COTS software meets the definition of COTS and requirements for FFP when conducting feasibility studies. One commenter suggested removing the examples in the COTS definition as examples might be limiting and urged clarification that both SOA and enterprise-level COTS software are acceptable for consideration in feasibility studies, analysis of alternatives and overall system approach. One commenter suggested that we remove the specific term "service-oriented architecture" from regulations because terms and meanings change with such frequency and technology advances at such a pace that such specificity will only be current in regulation for a short span of time. Another commenter suggested that the regulation should concentrate on the intent that States can explore other alternative technology solutions beyond system transfers and new custom development. The commenter also noted that based on open standards, a description of the intent would be relevant for a longer period of time. A commenter suggested that a requirement to provide an explanation of why a system transfer is not feasible whenever an alternative technology is identified implies that system transfer is the development approach of choice. Another commenter recommended allowing enterprise framework applications under the examples cited in § 95.617, Software ownership rights, to simplify State procurements. All the comments were related to other alternative technology solutions beyond system transfers and new custom development that can be considered in the Feasibility Study/Analysis of Alternatives. Some commenters requested confirmation that COTS software that is not available to the general public at a list price or needs customization does not meet the definition of COTS under this rule.

Response: We agree that the examples in the COTS definition might be limiting. We have removed them from the regulation and instead reference them in the preamble.

We did not find it necessary to revise § 95.617, Software and ownership rights. Federal program agencies, OCSE and the Administration for Children, Youth and Families, have previously issued guidance explaining that Enterprise level COTS and SOA are acceptable alternatives in a feasibility analysis. OCSE issued an Information Memorandum IM–05–04, which is titled Use of Enterprise Level Commercial-Off-the-Shelf (COTS) Software in Automated Human Services Information Systems and may be accessed at the following link: *http://www.acf.hhs.gov/programs/cse/pol/IM/2005/im-05-04.htm.* The Children's Bureau has issued guidance under ACYF–IM–07–03, titled Service Oriented Architecture (SOA) and available at *http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2007/im0703.htm.* These policy issuances sufficiently explain that the business process the Department uses for enterprise-level COTS is the same for any other information technology product.

We note that a definition of the term COTS is needed due to the inclusion of a new submission threshold for hardware and COTS software. However, we believe that commenters may have assumed the definition of COTS was related to § 95.617, titled Software and Ownership rights. Under § 95.617 COTS products that are provided at established catalog or market prices, not developed solely for human service programs and sold or leased to the general public are exempted from the State and Federal government's software ownership provisions. We would like to clarify that a COTS product available at list price and in need of customization (i.e. modifications to meet the State's particular requirements) meets the definition of COTS under this rule. An example is an Excel application that is available at list price but needs customization to meet a human service program need. The Excel application is a COTS product exempt from software and ownership provisions of § 95.617. In this example, the vendor may charge a licensing fee, but any customization to the COTS product that was funded with FFP would be subject to the software and ownership rights in § 95.617 even if the customization was made by the vendor providing the COTS software. We defined the term Service-Oriented Architecture (SOA) because we introduced it in § 95.610(b)(3) in the discussion of criteria for submitting an Implementation APD related to feasibility studies and analysis of alternatives.

4. *Comment:* Several commenters suggested that Enterprise Architecture be defined in § 95.605 as well as defined in Medicaid Information Technology Architecture (MITA).

Response: We have chosen to limit the regulatory definitions to terms that impact the application of the regulatory requirements. As previously mentioned, OCSE and the Children's Bureau have issued guidance on Enterprise Architecture through IM–05–04, which is titled Use of Enterprise Level Commercial-Off-the-Shelf (COTS) Software in Automated Human Services Information Systems and may be accessed at the following link: *http://www.acf.hhs.gov/programs/cse/pol/IM/2005/im-05-04.htm* and ACYF–IM–07–03, titled Service Oriented Architecture (SOA) and available at *http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2007/im0703.htm*. These policy issuances clarify that Enterprise Architecture is subject to the same regulatory requirements of Part 95. There is nothing about Enterprise Architecture that impacts the applicability of the regulations. The suggestion that CMS define Enterprise Architecture in their MITA, is outside the scope of this regulation. MITA is not defined in this final rule because it is outside the scope of the NPRM and to introduce it now would not provide interested parties sufficient notice or an opportunity to comment on the definition or applicability of MITA for Enterprise Architecture and cost allocation.

5. *Comment:* One commenter suggested that the definition of Independent Verification and Validation should be moved from § 95.626(a) to the definitions section under § 95.605. They also pointed out that the words verification and validation are sometimes transposed and should be used consistently.

Response: We agree and added the definition of IV&V based on the language from § 95.626(a) to the definitions section under § 95.605. We also agree that the consistent terminology should be Independent Verification and Validation (IV&V) and have revised the regulation accordingly.

6. *Comment:* We received several comments on the new definition of Software Maintenance. Several commenters requested additional specification as to quantity, scope, criteria, risk, increased functionality and level of risk. One commenter asked for clarification whether Software Maintenance and operation phase begins when a project is certified or when the project is implemented.

Response: The Institute of Electrical and Electronics Engineers (IEEE) definition of maintenance was used as the basis for the regulatory definition. While we understand the desire for additional clarity and specificity, we believe that adding specificity in the definition would result in less flexibility and latitude on the part of the Federal and State agencies in meeting their program goals in a cost-effective manner. Neither system certification nor implementation defines when a project's software development and maintenance phase begins. It is the absence of system development that determines whether the State is eligible to submit an Operations and Software Maintenance (O&SM) APD Update under § 95.611(c)(3).

7. *Comment:* Several commenters asked for clarification of funding requirements on a phased implementation basis and the implications, if any, should phased concepts conflict with contract approval.

Response: This is not a new requirement. The APDU references incremental funding authority and project continuation when approval is being granted by phase. The contract may be approved for a longer period of time, but FFP approval is usually limited to the planning, development, testing, implementation, or maintenance phases. The majority of States request FFP on an annual basis because their State matching funds are appropriated on an annual basis. But Federal funding by development phases is still permitted and used by Federal agencies on a case-by-case basis. The APD and procurement approval process has always been a two-step process regardless of whether FFP is being approved on a phased or annual basis. Prior approval is required under the conditions set forth in § 95.611 for the acquisition solicitation and contract documents which may be multi-phase or multi-year. This is consistent with the incremental funding authority under the definition of Advance Planning Document. Whether FFP is approved on a phased or annual basis is in part determined by which time period (phased or annual) is provided in the Annual APD Update.

8. *Comment:* Several commenters understood that there was a substantive requirement embedded in the definition of Software Maintenance in § 95.605, "Software maintenance that substantially increases risk or cost or functionality will require an As-Needed APD." Other commenters requested that the summary section provide clarification on what distinguishes a high-risk from a low-risk project, whether it is related to costs, production timetables or a particular phase of production.

Response: We have removed this sentence from the definition of Software Maintenance and moved it to the preamble with additional clarification of when changes to Software Maintenance would warrant an As-Needed APD.

9. *Comment:* Several commenters requested a definition of the terms Enhanced Match Rate and Regular Match Rate. They requested a clear definition of the match rate associated with those terms. One commenter had a specific question on a Statewide Automated Child Welfare Information System (SACWIS) project whose development was initially funded at the enhanced FFP rate, but is now receiving FFP at the regular match rate for its operational costs. This commenter asked for clarification as to which thresholds and requirements apply.

Response: Enhanced Match Rate is already defined under § 95.605 as "Enhanced matching rate means the higher than regular rate of FFP authorized by Title IV–D, IV–E and XIX of the Social Security Act for acquisition of services and equipment that conform to specific requirements designed to improve administration of the Child Support Enforcement, Foster Care and Adoption Assistance and Medicaid programs." We cannot provide the percentages associated with the enhanced and regular rate in regulation, because the percentages are established in legislation and vary with both the program and the period of time. For example, provisions under the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985 (Pub. L. 99–177) impacted the percentage rates for both Enhanced and Regular Match Rates in the past. Under these regulations, if a project was initially developed with funding at the Enhanced Match Rate but is currently being completed or enhanced with funding at the Regular Match Rate, then the Regular Match Rate submission thresholds apply.

Section 95.610—Submission of Advance Planning Documents

1. *Comment:* Several commenters asked whether ACF would retroactively approve FFP in the costs of tasks associated with the planning phase if a State combines its Planning APD and Implementation APD submissions.

Response: Paragraphs (a) and (b) of § 95.611 require prior approval of a Planning APD and Implementation APD when the State plans to acquire ADP equipment and services that it anticipates will have total acquisition costs of $5,000,000 or more in Federal and State funds. Section 95.605 defines the term Total Acquisition Cost to mean "all anticipated expenditures (including State staff costs) for planning and

implementation for the project. For purposes of this regulation total acquisition cost and project cost are synonymous."

2. *Comment:* One commenter asked why an As-Needed APDU would be necessary if the State can request additional funding or project extension through an Annual APDU. Another commenter noted that existing rules allow agencies to submit an As-Needed APDU with the Annual APDU and stated that the proposed rule would require a State to submit the As-Needed APDU, no later than 60 days after the occurrence of project changes. The commenter stated that such change would represent an increased burden to States and would be inconsistent with the purpose of the NPRM.

Response: Neither the proposed rule nor this final rule prevents a State from including changes in an Annual APD Update that otherwise would need to be reported in an As-Needed APDU. This is not a new provision and is consistent with requirements in the former § 95.605(b)(ii) as a part of the definition for As-Needed APDU. Additionally, the NPRM and this final rule retained the following language in § 95.610(c)(2): "The As-Needed APDU may be submitted any time as a stand-alone funding or project continuation request, or may be submitted as part of the Annual APDU."

3. *Comment:* Two commenters requested clarification on when modernization of a legacy system would fall into the Planning APD (PAPD) or Implementation APD (IAPD) process. One commenter asked for clarification on whether a Federal feasibility study must be prepared and approved before Federal funding is provided for modernization tasks that, while significant in scope, do not result in a new system.

Response: If the State has an open APDU, and wishes to enhance its legacy system, an APD Update is the appropriate mechanism to obtain approval for each incremental improvement. If a State is incrementally enhancing its system, it would not be required to submit a PAPD or an IAPD; the State also would not be required to conduct a feasibility study or an analysis of alternatives.

We have learned that several States opt to conduct feasibility studies and include the option of enhancing their legacy system as one of their alternatives in their analysis of alternatives. This practice may be especially advantageous when the benefit of modernization is in question. This point is predicated by the commenter's statement that while incremental modernization is significant in scope, it does not result in a new system. If the incremental enhancement results in a substantial departure from the base system, HHS reserves the right to require additional documentation, including a feasibility study.

4. *Comment:* A majority of commenters welcomed the changes to the Cost Benefit Analysis (CBA) reporting requirements and indicated that the current requirement of annual submission is burdensome. One commenter indicated that this proposal brought the HHS CBA requirements closer to those of the Food and Nutrition Service (FNS) under the Department of Agriculture (USDA). Several commenters, while supporting the additional flexibility, urged additional modifications and flexibility with regard to CBA requirements. Commenters suggested that we consider information technology projects that are not being done to generate savings, but mandated to comply with Federal requirements. The commenters also stated that there are many intangible benefits that are difficult to quantify and recommend permitting a social return on investment approach. Two commenters asked if the revenue stream model and its report were eliminated. One commenter asked for clarification on whether the CBA is a separate report or can be included in the APDU.

Response: Based on the comments, we have removed the requirement for an annual cost benefit analysis from § 95.610(c)(1)(viii) related to required components of the Annual APDU. In response to the numerous comments received, we concur that this annual requirement has not provided the type of information useful to determine whether States are pursuing the most cost-effective methods to justify the additional burden the annual CBA placed on States. We have modified our oversight and monitoring to focus on high risk projects and we believe that the proposed IV&V and disapproval regulatory provisions in the final rule provides more targeted means of insuring development of cost effective human service systems. Please note, the CBA is a required element of the Planning APDU and Implementation APDU as stated in § 95.610(a)(2)(v) and § 95.610(b)(4), respectively. The CBA should not be submitted as a separate report.

HHS has issued several guidance documents to assist State human service agencies to meet this cost benefit analysis requirement. These include: (1) Feasibility, Alternatives and Cost/Benefit Analysis Guide—July 1993; (2) Companion Guide #2—Cost/Benefit Analysis Illustrated—August 1994 (Revised 2004); (3) An Overview of Companion Guide 3—Cost/Benefit Analysis Illustrated for Child Support Enforcement Systems—September 2004; and (4) Companion Guide 3—Cost/Benefit Analysis Illustrated for Child Support Enforcement Services—September 2000 (Revised June 2004). Each of these documents may be accessed at the following link: *http://www.acf.hhs.gov/programs/cse/stsys/dsts_plan_cba.html.* The Children's Bureau has developed three additional CBA companion guide chapters specifically to assist Child Welfare-related system projects. They may be accessed at the following link: *http://www.acf.hhs.gov/programs/cb/systems/sacwis/federal.htm.*

We have also provided technical assistance on CBA requirements through revenue stream model spreadsheets, help files and functional model spreadsheets, which are available by request. The revenue stream model is a mechanism used by State Child Support Enforcement (CSE) agencies to meet the annual CBA requirement. The Revenue Stream Model will not be required under this final rule, but will remain available to assist States in tracking the cost benefit of child support automation.

Lastly, we recognize that there may be Congressional or regulatory mandates requiring system enhancements that will not result in monetary benefits that exceed the costs of those system enhancements. We expect States to analyze and consider the most cost effective of the various automation alternatives.

5. *Comment:* Several commenters asked for clarification of situations where a State has closed its APD. Commenters asked whether the final regulation would require them to submit an Operational APDU if the Total Acquisition Cost exceeds $5 million and, if so, whether the Operational APDU would be reviewed under new streamlined approval requirements. One commenter also asked if the final regulations require States to submit an As-Needed APDU based on the new requirements. Another commenter asked if the State is required to submit an APD if it initially submitted an Operation and Software Maintenance (O&SM) APDU and then acquired hardware and application software that do not meet the definition of O&SM but the cost of those items was under the submission thresholds. This commenter also asked if a State is required to submit an APD in the situation described above, how that requirement would impact the State's project.

Response: By definition, an Operational APDU is "to be submitted annually by State programs whose system is not in development. The Operational APD provides a short summary of the activities, method of acquisition, and annual budget for operations and software maintenance."

Under the final rule States would not be required to reopen an Implementation APD, but would be required to submit an Operational APDU that consists of no more than two pages of information about summary of operational activities, acquisitions and annual budget. If the State is only acquiring maintenance services as defined in the regulation, the State would be exempt from submitting procurement documents related to those operational activities unless requested to do so in writing by the Federal agency. In response to comments, we are also permitting an exemption from the prior approval requirement for acquisition documents for projects still in development mode, if the planned acquisitions are sufficiently described in the Planning, Annual or As-Needed APDU. This regulatory change permits a wider range of acquisitions to be exempted from prior approval regardless of the estimated cost of the acquisition. Instead of basing prior approval solely on cost, the revision to this regulation would place the burden on the Federal approving agency to notify the requesting State if the description was inadequate or if the summary of the planned acquisition raises concern and requires the full acquisition documents to be submitted for prior Federal approval.

If the State is submitting an Operational APD, it will not be required to submit an APD because hardware falls under the definition of operations. If the State anticipates acquiring software development that does not meet the definition of Software maintenance, it should submit either an Annual or As-Needed APDU and summarize the planned acquisition. The Federal program office, in its approval of the APDU, will either exempt the planned acquisition from prior Federal approval or specify which acquisitions it requires to be submitted in full for prior Federal review and approval. If the software development occurs after the submittal and approval of the annual APDU, the State may submit an As-Needed APDU updating the acquisition strategy or submit the acquisition for Federal prior approval.

6. *Comment:* One commenter disagreed with the APD Update due date of 60 days prior to the anniversary date of the APD. The commenter stated that such a due date is inconsistent with Food and Nutrition Service (FNS), which requires that the APDU be submitted after 90 days of the anniversary date so agencies can report actual expenditures and a full year's activities.

Response: We have revised the regulation at § 95.610(c) to clarify that the APD Update is due 60 days prior to the expiration of authorized FFP in the costs of acquiring automated data processing equipment or services. We acknowledge the discrepancy with the FNS regulations, but do not believe that it is in States' interest to further revise the HHS regulation at § 95.610(c). By requiring the APDU 60 days before the expiration of authority for FFP granted in the previous APDU, the HHS process decreases the likelihood of a gap in approved FFP in the cost of the State's system.

7. *Comment:* Several commenters supported the new, shorter APD for State systems that are in operations and maintenance mode. One commenter supported the change, but recommended stipulating the specific information that must be included in the report. If it proves insufficient, more information or a full APDU could be requested by the Federal approving agency.

Response: The comment was focused on the Operational APDU, but the final rule expands the APDU acquisition summary that should be included in a Planning, Annual or As-Needed APDU to qualify for exemption from prior approval. Therefore, § 95.610 has been expanded to specify the type of specific information that must be included in the areas of summary of activities, acquisitions and annual budget.

Section 95.611—Prior Approval Conditions

1. *Comment:* One commenter disagreed with the proposed requirement for States to request approval of O&SM (Operation and Software Maintenance) acquisition documents on an exception basis or if the acquisition is non-competitive. Another commenter requested clarification on the threshold for submitting non-competitive O&SM acquisitions.

Response: As stated in § 95.611(a)(3) of this rule, "A State shall obtain prior approval from the Department, which is reflected in a record, for a sole source/non-competitive acquisition of ADP equipment or services with a total State and Federal acquisition cost of $1,000,000 or more." Therefore the threshold for submitting sole source or noncompetitive operational acquisitions is $1 million or more. Please note, the final rule now revises § 95.613 to reference the procurement standards of § 92.36(a), which indicates that grantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and standards identified in this section. Therefore, grantees must still submit sole source procurements over the $1 million threshold for Federal approval, but the Federal program offices will consider the State procurement laws and policies related to acceptable sole source justifications used in non-FFP-matched State projects.

2. *Comment:* One commenter asked for clarification on what happens to a State's project if a State contracts for custom software that is under the prior approval threshold of $1 million and the Federal approving agency later asks for a full Implementation APD.

Response: The Advance Planning Document is the written plan of action to acquire the proposed ADP services or equipment. The requirement in the current as well as the proposed regulation at § 95.611 is for a State to obtain prior written approval for an Implementation APD when the State plans to acquire ADP equipment or services with FFP that it anticipates will have total acquisition costs of $5 million or more. Total acquisition cost is defined in § 95.605 as "all anticipated expenditures (including State staff costs) for planning and implementation for the project. For purposes of this regulation, total acquisition cost and project costs are synonymous." The fact that an individual contract is under the threshold for submission for prior approval does not affect the threshold for the total or negate the need for the State to submit an APD and provide a detailed description of the activities to be undertaken and the methods to be used to accomplish the project. This would include a report of the tasks/milestones remaining to be completed.

3. *Comment:* One commenter wanted clarification of which threshold applies if the State uses all State staff and does not contract for its system development or maintenance.

Response: Total Acquisition Cost is defined in § 95.605 as "all anticipated expenditures (including State staff costs) for planning and implementation for the project. For purposes of this regulation total acquisition cost and project costs are synonymous." Thus the threshold for submission of an APD is $5 million in anticipated expenditures, whether a State uses its staff or contracts with an outside vendor.

4. *Comment:* We received comments suggesting that we expand the Acquisition Checklist to include acquisitions related to § 95.611(a)(1)(iii) and § 95.611(a)(2)(iii). (Since subparagraphs (a)(1)(iii) and (a)(2)(iii) do not exist in § 95.611, Prior approval conditions, we assume the comments were referring to § 95.611(b)(1)(iii) and § 95.611(b)(2)(iii), which cover specific prior approval requirements for regular and enhanced FFP requests, respectively, for RFP and contracts.) Another commenter requested that the use of the Acquisition Checklist be extended to include the use of master contracts.

Response: We agree. The final rule expands the scope of acquisitions that are not subject to prior Federal approval to contracts, as well as RFPs, non-competitive acquisitions and acquisitions over the previous submission thresholds. The definition of Acquisition Checklist has been revised to reflect that it applies to contracts and contract amendments as well as RFPs and may include sole source as well as competitive procurements. This is consistent with the final rule revising § 95.611 to permit an exemption from prior approval through the Annual or As-Needed APDU process. We are retaining the optional vehicle of an expanded Acquisition Checklist for use by grantees that opt not to include acquisition summary information in their APD or who prefer the Acquisition Checklist approach. Existing policy under IM–05–03 (titled Optional checklist for states and territories use in requesting an exemption of prior approval for Information Technology acquisition documents and available at the following link *http://www.acf.hhs.gov/programs/cse/pol/IM/2005/im-05-03.htm*) and ACYF–CB–IM–05–02, (titled Relationship Of Master Contracts For Acquisition Of State Information Technology Products Or Services And Competition and available at the following link *http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2005/im0502.htm*), already provides States the option to self-certify that acquisition of automated data processing equipment and/or services complies with all Federal regulations and policies by using the Acquisition Checklist. As stated in IM–05–03 and ACYF–CB–IM–05–02, the Acquisition Checklist currently may be used for Request for Proposals, Requests for Quote, Invitations to Bid, or similar State and local acquisition documents seeking Federal funding for development or maintenance acquisitions at either the regular or enhanced matching rate, including acquisitions under § 95.611(b)(1)(iii) and § 95.611(b)(2)(iii) as noted by the commenter. Guidance related to the Acquisition Checklist will be updated following the issuance of this final rule. The NPRM and this final rule include a definition of Acquisition Checklist in § 95.605 as follows:

Acquisition Checklist means the standard Department checklist that States can submit to meet prior written approval requirements instead of submitting the actual Request for Proposal (RFP) contract or contract amendment. The Acquisition Checklist allows States to self-certify that their acquisition documents, which include RFPs, contracts, contract amendments or similar documents, meet State and Federal procurement requirements, contain appropriate language about software ownership and licensing rights in compliance with § 95.617, and provide access to documentation in compliance with § 95.615.

Currently, IM–05–03 and ACYF–CB–IM–05–02 limit use of the Acquisition Checklist stating that it is not to be used for contracts (including master contracts as asked by the commenter), Advance Planning Documents or sole source acquisitions (including contract amendments that exceed the regulatory submission threshold of $1 million). States and territories must continue to submit the acquisition document(s) associated with these procurements to the Department(s) for Federal prior approval. However, a State may use the Acquisition Checklist when submitting a task order solicitation in connection with an approved master contract, if the initial master contract has been submitted and approved by a Federal agency, prior to approving the use of solicitations in the State's acquisition checklist. We retained the "unless specifically exempted" language in § 95.611(b)(1)(iii) and (b)(2)(iii) permitting the Federal agencies to exempt in writing contracts and contract amendments from prior approval on a case by case basis. Please note that if the State is soliciting services related to a high risk project, the Federal agency may request the full acquisition document rather than the Acquisition Checklist.

5. *Comment:* One commenter asked if the streamlined approval and thresholds identified in § 95.611(b)(1)(v) apply to States with closed APDs.

Response: Yes, the acquisition submission thresholds of § 95.611(b)(1)(v) apply to States with closed as well as open APDs.

6. *Comment:* One commenter inquired whether States are required to use the term Request for Proposal (RFP) or acquisition solicitation document and if so, asked that we provide examples.

Response: There is no requirement for a State to utilize the terminology of either RFP or acquisition solicitation document. States can continue to use their preferred terminology to refer to RFPs or similar documents. The reason for the term acquisition solicitation document is that States use different terminology such as Invitation for Bid (IFB) without realizing that the provisions of § 95.611 applied to those documents as well.

7. *Comment:* Several commenters stated that although the ability to self-certify through the Acquisition Checklist exists under IM–05–03 and ACYF–CB–IM–05–02, they support including a definition of Acquisition Checklist in this rule. Another commenter (a Federal approving agency) does not support use of the Acquisition Checklist and points out that FNS does not accept the Acquisition Checklist for its SNAP system acquisitions.

Response: Use of the Acquisition Checklist is optional. It is appropriate for States to use the Acquisition Checklist for solicitation documents seeking FFP in the costs of automated data processing equipment or services from HHS agencies. States seeking funding approval from the FNS should comply with the rules of that agency.

8. *Comment:* One commenter expressed concern that HHS agencies could nullify or set aside the self-certification Acquisition Checklist at their discretion.

Response: We would like to reassure the commenter that the Acquisition Checklist is an authorized tool for a State to self-certify that its acquisition of automated data processing equipment and/or services complies with all Federal regulations and policies. As previously stated, we have issued Federal policy in support of the Acquisition Checklist through IM–05–03 (titled Optional checklist for states and territories use in requesting an exemption of prior approval for Information Technology acquisition documents and available at the following link *http://www.acf.hhs.gov/programs/cse/pol/IM/2005/im-05-03.htm*) and ACYF–CB–IM–05–02, (titled Relationship Of Master Contracts For Acquisition Of State Information Technology Products Or Services And Competition and available at the following link *http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2005/im0502.htm*).

We believe it is important to note, however, that neither the inclusion of a

summary of planned acquisitions in the APD nor the use of the Acquisition Checklist guarantee Federal acceptance. The Department is modifying its approach to review of acquisitions, from a trigger that is based solely on cost of the contract, to an approach that is based on assessed risk to the project. We anticipate that the summary of acquisitions included in the State's Annual APD Update will provide us with sufficient information to exempt the acquisition from prior Federal approval; however, we reserve the authority to request that specified acquisitions be submitted for prior Federal review and approval. One example of acquisitions that will require prior Federal review and approval is the initial acquisition for system development, but it may also include acquisitions for customized software development. The final rule shifts the burden of requesting that the full acquisition documentation be provided for prior Federal approval from the grantee to the Federal program office. As stated in IM–05–03 and ACYF–CB–IM–05–02, the Federal approving authority will provide a record of acceptance or denial of the State's Acquisition Checklist or the APDU within 60 days of submittal.

9. *Comment:* Several commenters urged that the thresholds for large States or large multi-program enterprise initiatives be increased to $15 million for software application development and $60 million for hardware including COTS software. Several commenters suggested utilizing a percentage of total project cost rather than a dollar threshold. One commenter was concerned that the increase in prior approval thresholds for enhanced funding from $100,000 to $300,000 was too low and suggested a percentage factor. Alternatively, commenters recommended increasing the enhanced funding threshold to $500,000, which is consistent with their State's multiple award schedule master services agreement. One commenter asked if the $20 million threshold would apply if a State's enhanced funding has expired and the State is currently seeking funding at the regular match rate for hardware and COTS towards its Statewide Automated Child Welfare Information System (SACWIS).

Response: We agree. We amended the acquisition threshold for regular rate software acquisition development in § 95.611(b)(5)(A) from $5 million to $6 million for competitive RFP and procurements. Section 95.611 has been amended to permit exemptions for acquisitions over the increased thresholds. While sole source procurements over $1 million must include a justification, that justification may be included with the exemption request in the Annual or As-Needed APDU, and the State's procurement policies regarding sole source justifications will be considered in the assessment of risk. Section 95.611(b)(2)(iii) increases the submission threshold for acquisition solicitation documents and contracts at the enhanced match rate from $100,000 in current regulation to $300,000 proposed in the NPRM to $500,000 in the final rule. In eliminating the majority of submission thresholds for projects funded at the regular rate, we shift the burden to the Federal program offices to limit their requests for full acquisition documentation to those procurements that are either insufficiently described in the APD or appear to be at high risk. The final rule acknowledges that the acquisition thresholds for large States or grantees seeking funding for multi-program projects do not in themselves signify that the acquisition is high risk. The Federal program offices will consider multiple risk factors before requesting the full acquisition documentation be submitted for prior Federal approval. We amended § 95.621 to clarify that ADP reviews of acquisitions not subject to prior approval include those acquisitions exempted from prior approval as well as those acquisitions under the submission threshold.

10. *Comment:* One commenter disagreed with the proposal in § 95.611(b)(1)(vi) to eliminate the requirement to submit procurement documents related to competitive Software Maintenance and Operations. They pointed out that this will be inconsistent with FNS, which requires States to submit RFPs and contracts, and considers such acquisition documents critical to assess the scope of work and identify any potential issues with regard to program requirements.

Response: We believe that the Operational APD, as defined in § 95.605, will provide us with sufficient information to highlight potential problems. We also believe that the Federal programs can assess the risk associated with procurements that are summarized in the APD and it is appropriate to limit requests for submitting additional solicitation documents for prior Federal approval to those acquisition documents determined to be at higher risk.

11. *Comment:* One commenter asked for clarification on whether prior approval would be needed if there are several RFPs that compromise the scope of a project. The commenter also asked if a single RFP is defined as the base contract or if the cumulative total of multiple RFPs that have been awarded to accomplish a single agency goal is defined as the base contract and whether each RFP stands on its own and is subject to the 20 percent prior approval threshold. We also received comments asking if States have to submit previous contract amendments when the contract amendments exceed the 20 percent threshold. Another commenter agreed with the proposal as long as a copy of the amendments is sent to the Federal program office.

Response: We have retained the definition of Base Contract for those grantees that opt to not seek an exemption or submit an Acquisition Checklist. Base Contract is defined in § 95.605 to mean "the initial contractual activity, including all option years, allowed during a defined unit of time, for example, 2 years. The base contract includes option years but does not include amendments." The Base Contract refers to the contract, not the RFP, and is related to each individual contract, not multiple contracts associated with a specific project or agency goal.

As stated in § 95.611(b)(1)(vi), prior approval is not required for contract amendments involving contract cost increases with a cumulative total that is below 20 percent of the base contract cost. If the State later learns that the amendments for that contract will exceed the 20 percent threshold, the State should submit all previous contract amendments for information purposes. Provided that those contract amendments comply with the scope of the project, the amendments would not require prior approval. However, we remind States that under § 95.621(d), ADP Reviews, Federal agencies retain the right to review acquisitions not subject to prior approval.

12. *Comment:* One commenter requested clarification of the term "scope" or "change in scope" as it applies to thresholds for procurements. The commenter noted that changes in scope can be minor and involve a limited number of additional hours and resources and have minimal impact on timelines; or changes in scope can require significant resource and a rebase line of the project.

Response: "Changes in the scope of the contract" refers to significant changes such as requesting new functionality not addressed in the original contract or expanding the types of expertise needed for the project. States that consider their scope changes to be minor or have minimal impact may submit such rationale as

justification for seeking a sole source contract amendment, rather than conducting a new procurement of that task.

13. *Comment:* One commenter opposed the requirement that a State submit acquisition documents under the threshold amounts on an exception basis if requested to do so in writing. The commenter stated that such a requirement would create hardship on State staff to recreate documentation that had been exempt from submission.

Response: This is not a new requirement and is consistent with regulations at § 95.621(d) which state that the Department will conduct periodic on-site reviews and surveys of automated data processing equipment and services, including acquisitions not subject to prior approval. Also, this requirement would not require State staff to "recreate" documentation, since all States receiving Federal Financial Participation for a contract are required to retain the contract records and documentation during the contract timeframe and three years after the contract has been terminated as indicated in § 92.42, Retention and access requirements for records.

Section 95.613—Procurement Standards

1. *Comment:* One commenter representing a national organization indicated that revising the procurement standards in § 95.613 to include the procurement language currently in Part 74 makes the proposed rule less cumbersome and is a positive action. However, the same commenter stated "if a state was in compliance with its procurement rules, that it should be able to self-declare that its IT procurement meets all state standards and this should be sufficient for federal approval." Other commenters urged that the procurement standards in Part 92 (titled Uniform Administrative Requirements for Grants and Cooperative Agreements to State, Local and Tribal Governments) be used for Subpart F (titled Automated Data Processing Equipment and Services—Conditions for Federal Financial Participation) of Part 95. The commenter asserts that States should be permitted to follow the same policies and procedures used for procurements that do not receive FFP. One commenter asked why we are reverting to the procurement standards removed in 2003 when HHS grants were transferred from Part 74 (titled Uniform Administrative Requirements for Awards and Subawards to Institutions of Higher Education, Hospitals, Other Nonprofit Organizations and Commercial Organizations) to Part 92. One commenter indicated that State laws may conflict with these Federal procurement standards.

Response: We agree with comments that States should be permitted to follow the same policies and procedures used for procurements that do not receive FFP. We removed all cross-references to Part 74 and deleted the requirements in proposed § 95.613 that require maximum practical full and open competition. We have added a sentence that retains limited authority for the Department to require additional oversight, including compliance with § 92.36(c) for acquisitions if it determines that a State procurement process is an impediment to competition that could substantially impact project cost or risk of failure. Procurements for Electronic Benefit Transfer (EBT) remain subject to the prior approval requirements and are unlikely to be exempted from prior approval. The final rule also replaces the cross-reference to Part 74 with the cross-reference to Part 92. Section 95.613 as published in this final rule subjects procurement of automated data processing equipment and services to the procurement standards in Part 92 and prior approval requirements in § 95.611 of this final rule.

2. *Comment:* One commenter asked for clarification if the simplified acquisition threshold remains at $100,000.

Response: Regulations at § 95.613(e)(8)(ii) were deleted in the final rule. The threshold amount is referenced in § 92.36(d), Methods of procurement to be followed, and is defined in 41 U.S.C. 403(11), Public Contracts—Office of Federal Procurement Policy, which currently sets the Simplified Acquisition Threshold at $100,000. This final rule does not change the definition of Simplified Acquisition Threshold.

3. *Comment:* Several commenters recommended excluding the language regarding preference for products and services that conserve natural resources and protect the environment and are energy efficient, as this language may be burdensome and unenforceable.

Response: We have deleted the specific language in this rule and replaced it with a general cross-reference to Part 92. Please note that the final rule related to procurement standards references the procurement standards of § 92.36(a) which provides that States are exempt from § 92.36(b) through (i).

4. *Comment:* One commenter was unable to find reference to Subpart Q of Part 74 and asked for clarification on what portion of Part 92 is applicable.

Response: Subpart Q of Part 74 was eliminated in the publication of a final rule on March 22, 1996 [61 FR 11743], which is the reason that this regulation eliminates that and other obsolete regulatory references to Part 74 in Part 95.

5. *Comment:* One commenter disagreed with the requirement that all contracts include language regarding partial breach for termination. The commenter suggested that the clauses be at the State's discretion. They stated that they want the contractor to perform, regardless of forces beyond their control, because the providers are considered critical for business continuity purposes.

Response: We have retained this requirement through the cross-reference to Part 92 (specifically § 92.44, titled Termination for convenience). This is not a new requirement as States have been subject to these requirements for over 15 years.

Section 95.617—Software and Ownership Rights

1. *Comment:* Several commenters urged that this final rule clarify whether enterprise architecture framework software such as Curam, Lagan, Harmony and @dvantage, which can be customized or configured to meet the needs of a vast variety of HHS programs, meets the COTS criteria and is acceptable in place of the traditional custom developed model or transfer model. One commenter suggested replacing the language on proprietary software in § 95.617(c) with a reference to the new definition of acceptable COTS software as the exception to the software ownership provisions. The commenter stated that the belief that custom developed or transfer solutions are fundamentally superior to COTS software is a false premise and one not supported by current market research, experience, or Federal regulation. Another commenter recommended amending the ownership and licensing requirements for proprietary software in § 95.617(c) to provide FFP in the costs of proprietary applications software developed specifically for the public assistance programs covered under this subpart and recommended that FFP should only be considered if the State provides: (1) A business justification for purchase of the software, and (2) a plan detailing how any future transition from a proprietary application to any other type of application will be accomplished. The commenter limited the recommendation to proprietary applications software developed without FFP and noted that the ownership requirements in § 95.617(a)

and the licensing requirements in § 95.617(b) continue to apply to any software designed, developed or installed with FFP.

Response: We did not propose any changes to § 95.617, Software and ownership rights, in the NPRM, other than removal of the example of listed software packages. Although we appreciate the commenters' recommendations, we do not consider it necessary or appropriate to revise § 95.617 at this stage of the regulatory process, since the public would not have an opportunity to comment on what would be a significant change in the regulation. However, related guidance is available through IM–05–04, Use of Enterprise Level Commercial-Off-the-Shelf (COTS) Software in Automated Human Services Information Systems, which clarifies that enterprise architecture framework software are acceptable alternatives to be considered in a Feasibility Study or Analysis of Alternatives. Please refer to the following link for a more detailed discussion on this topic: *http://www.acf.hhs.gov/programs/cse/pol/IM/2005/im-05-04.htm.*

Section 95.623—Reconsideration of Denied FFP for Failure To Obtain Prior Approval

1. *Comment:* One commenter stated that they appreciate and support the ability of Federal agencies to allow FFP in situations where a State inadvertently neglected to obtain prior approval. One commenter recommended that the timeframe for reconsideration of disallowance be extended from 30 days to 90 days. Another commenter requested clarification as to whether the 30 days was from the date of the letter, 30 calendar days, State/Federal workdays or 30 days from receipt of the letter.

Response: As stated in § 95.623, a "State may request reconsideration of the disallowance of FFP by written request to the head of the Federal program office within 30 days of the initial written disallowance determination." The 30 days are calendar days and begin from the receipt date stamped on the letter by the Federal program office.

We disagree with the comment to extend the timeframe for responding to a disallowance from thirty days to ninety days. Thirty days was selected as the appropriate timeframe to request reconsideration to ensure that this rule is consistent with the timeframe established in the rules and regulations that govern the HHS disallowance and reconsideration appeal processes as set forth in 45 CFR Part 16, titled Procedures of the Departmental Grant Appeals Board.

Section 95.626—Independent Verification and Validation

1. *Comment:* Several commenters pointed out an error in transposing validation and verification.

Response: We agree and have corrected the error throughout this rule, including the definition section under § 95.605. The term is properly denoted Independent Verification and Validation (IV&V).

2. *Comment:* Several commenters supported the IV&V for high risk projects only. One commenter was unclear on the criteria used to determine low or high risk projects and suggested that providing consistent guidelines, such as those used in project management methodologies, would improve this process. One commenter asked that we clarify when a project requires IV&V. Commenters recommended that such determination be based on project risk rating with quantifiable ways of measuring risk and deriving the rating. One commenter was concerned that if the State does not plan for IV&V in its budget up front, the project could be delayed. Another commenter requested further clarification of what constitutes significant and critical triggers for IV&V. Another commenter asked for additional clarification on the process used to determine whether an IV&V vendor is required.

Response: The circumstances specified in § 95.626(a) represent high-risk situations wherein IV&V by an entity independent of the State is required as stated in § 95.626(b). We have revised the language in the first two triggers to permit intervention before the project misses a statutory or regulatory deadline or a critical milestone. We also have added two additional triggers that we believe put the project at risk and justify an IV&V assessment review. The first trigger relates to the State's procurement practices and whether the State has a pattern of failing to pursue competition to the maximum extent feasible. Under the final rule, the State will follow the same policies and procedures it uses for procurement from non-Federal funds, which means that in most situations, the Federal program office will accept the States certification that the sole source justification or other competition limiting terms and conditions are consistent with State procurement policy used for procurements from non-Federal funds. The Department continues to encourage all grantees to pursue full and open competition to the maximum extent feasible. If we detect a pattern of sole source contracts or contract amendments or other provisions that limit competition, this will trigger an IV&V assessment review. The IV&V assessment review will determine if the pattern of limiting competition has put the project at higher risk for increased costs or system failure. Only if the IV&V assessment review determines that the lack of competition increases the risk to the system project, will IV&V be required for that project.

The other trigger is related to the States failure to adequately involve the State program offices in the development and implementation of the project. An analysis of past projects indicates that the lack of stakeholder involvement was a major indicator of system failures or putting the project at risk. Again, if a pattern of failure to adequately involve the State program offices is determined, it will trigger an IV&V assessment review.

The State should plan for IV&V in the budget in case any of these events occur.

The CSE program, which has exercised regulatory authority for IV&V since 1999, issued additional guidance on critical milestones, significant delays and cost overruns in OCSE–AT–99–03, titled Distribution of the Addendum to the State Systems APD Guide for Child Support Enforcement Systems and available at the following link: *http://www.acf.hhs.gov/programs/cse/pol/AT/1999/at-9903.htm.* We believe that existing policy provides sufficient guidance in this area and further definition of these terms in regulation would unnecessarily reduce flexibility in determining when IV&V is required.

3. *Comment:* One commenter stated that there is a discrepancy between CSE regulations that require an IV&V and proposed requirements in the NPRM which state that IV&V *may* be required (emphasis added). The commenter questions whether Part 95 language will override CSE language on IV&V.

Response: CSE regulations referred to by the commenter (which can be found in § 307.15(b)(10), Approval of advance planning documents for computerized support enforcement systems) do not contradict Part 95. OCSE routinely conducts an IV&V assessment when one or more of the criteria in § 95.626(a) is triggered. (Note the criteria in § 95.626(a) are incorporated into § 307.15(b)(10)(i). Depending on the results of that assessment, OCSE may or may not determine that IV&V is required.)

4. *Comment:* One commenter recommended that IV&V be funded at 100 percent because it is mandated.

Another commenter requested enhanced funding for IV&V.

Response: Federal funding is available for approved IV&V activities at either the regular or enhanced match rate as defined in § 95.605 of this rule and in accordance with the relevant statutes governing Federal program(s).

Section 95.627—Waivers

1. *Comment:* Several commenters expressed significant concern about the risk associated with submitting an APD based on a waiver for an alternative approach. Some commenters asked if the State would be required to forfeit FFP entirely, if the APD is not approved and there is no appeal. Other commenters asked if the State would be permitted to submit a new APD for the project, if the APD for the alternative approach was disapproved and whether the State would receive funding from the date of original APD submission. Commenters also asked about the HHS timeline to approve or disapprove a waiver.

Response: If the waiver for an alternative approach is not approved, the State does not forfeit FFP entirely; it can submit a new APD. Regardless of whether the APD contains a waiver for an alternative approach or not, FFP is approved from the date of the HHS approval letter, not the date of the State's APD submission, unless the Federal program office agrees, as noted in a recorded approval, to a different approval date. The exception is the provisional approval in § 95.611(d) where the State can assume approval if the Federal program office has not provided approval, disapproval or a request for information within 60 days of the HHS acknowledgment letter.

If a State is contemplating submitting a waiver for an alternative approach, we recommend that the State consult with the appropriate Federal agency prior to submission to expedite the review and approval process.

Section 95.635—Disallowance of Federal Financial Participation (FFP) in the Costs of Automated Systems That Failed To Comply Substantially With Requirements

1. *Comment:* One commenter opposed disallowance of any FFP if the project was in compliance and suggested that any disallowance should be limited to the portion of a contract out of compliance. The commenter asked if there was an appeal process and requested clarification of the phrases "certain ITD projects" and "substantially." One commenter recommended deletion of this provision.

Response: There is no reference to "certain ITD projects" in § 95.635, Disallowance of FFP in the costs of automated systems that failed to comply substantially with requirements. This regulation refers to the disallowance of FFP for the APD project, not disallowance of contract costs which is covered in § 95.612. While substantially is retained in the title, we have modified the language in the final rule by replacing "substantially" with "major failure to comply" in § 95.635(b). This change is consistent with the language in § 95.610(c)(2). An example of an APD that has a major failure to comply with requirements is an APD that meets one of the triggers for an As-Needed APDU such as schedule extension of more than 60 days for major milestones, major changes in the scope of the project, significant changes to its cost distribution methodology or distribution of costs among Federal programs, as defined in § 95.605(b). The authority in § 95.635 permits, but does not require, recoupment of all or part of any costs from system projects that have a major failure to comply with an APD. The Federal program offices will consider a variety of factors in determining whether a project has "failed" and the amount of funding subject to recoupment. The good faith efforts of the grantee and the operational benefits arising from the expenditure will be among the factors that are considered. A funding disallowance is subject to the HHS appeal process as detailed in Part 16, Procedures of the Departmental Grant Appeals Board.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), HHS is required to submit to the Office of Management and Budget (OMB) for review and approval any reporting or record keeping requirements in a proposed or final rule. The revisions in this final rule to the requirements at 45 CFR Part 95 reduces the documentation required to be submitted by States and territories to the Federal government. The current information collection burden, before this final rule is implemented is as follows:

Instrument	Estimated number of respondents	Proposed frequency of response	Average burden per response	Total annual burden
Advance Planning Document	50	1.84	58	5,336
RFP and Contract	50	.75	1.5	56.35
Emergency Funding Request	27	1	1	27
Service Agreements	14	1	1	14
Biennial Security reports	50	1	1.5	75

This regulation will result in the following reductions:

In Advance Planning Documents—a reduction in the average burden hours for projects that are implemented and in Operational mode. Instead of having to submit a full Annual or As-Needed APDU, States with projects in maintenance and operation mode will only have to submit a one- to two-page document. The Department also plans to develop a process for the States to submit this Operational APDU electronically. Since the majority of States and territories appear to be continuing to do ongoing software enhancements as part of continuing performance, we are estimating only a small reduction in the average burden hours associated with reducing the documentation required for annual Operational APDU submissions. The elimination of the annual cost benefit analysis in the APDU was also factored into the estimated reduction from 60 hours to 58 or 5,336 total burden hours for information technology documents.

In RFP and contracts—a reduction is made in the average burden hours per RFP and acquisition due to the final rule providing several options for the grantee to avoid submitting their full RFP and contracts for prior Federal approval. We anticipate that 90% of the prior approval submissions of RFP and contracts will be eliminated as grantees seek exemptions from prior approval or opt to utilize the Acquisition Checklist. We believe that this will reduce the average number of submissions from 50 to 5 and reduce the total burden hours to 11.5 hours.

The revised annual burden estimates based on this regulation is as follows:

Instrument	Estimated number of respondents	Proposed frequency of response	Average burden per response	Total annual burden
Advance Planning Document	50	1.84	58	5,336
RFP and Contract	5	.75	1.5	11.5
Emergency Funding Request	27	1	1	27
Service Agreements	14	1	1	14
Biennial Security reports	50	1	1.5	75

The respondents affected by this information collection are State agencies and territories.

The Department considered comments by the public on this proposed collection of information in the following areas:

- Evaluating whether the proposed collection activity is necessary for the proper performance and function of the Department, including whether the information will have a practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical or other technology, *e.g.,* permitting electronic submission of responses.

No comments were received specifically on this information collection on the associated burden hours, but numerous commenters urged the elimination of or higher submission thresholds for prior approval of acquisition documents.

Regulatory Flexibility Analysis

The Secretary certifies, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96–354), that this rule will not result in a significant impact on a substantial number of small entities. The primary impact is on State and Territorial governments. State and Territorial governments are not considered small entities under the Regulatory Flexibility Act. The intent of these rules is to reduce the submission requirements for lower-risk information technology (IT) projects and procurements and increase oversight over higher-risk IT projects and procurements by making technical changes, conforming changes and substantive revisions in the documentation required to be submitted by States, counties, and territories for approval of their IT plans and acquisition documents.

Regulatory Impact Analysis

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this final rule is consistent with these priorities and principles. Since it significantly reduces the documentation required to be submitted by the States and Territories related to lower risk IT projects and procurement, costs are reduced. Examples of documentation that is no longer required to be submitted for prior approval under this final rule are that most acquisitions will be exempt from prior approval, and instead of having to submit a full Annual or As-Needed APDU, States with projects in maintenance and operation mode will only have to submit a document with as few as 2 pages, depending on the scope of activities. The current information collection burden is reduced to reflect these reduced costs to States and Territories. Thus the rule will not increase costs and in fact will result in some cost savings. To estimate the savings we used the same methodology and State and contractor average annual rate as we recommend that States use for their cost estimates in our Planning Advance Planning Document training. In those training documents we recommend an average standard hourly rate of $100 for State systems staff and $175 for contractor State staff. The reduction of 243.25 hours for APDs would translate to a cost savings of $24,325 for State staff, or $42,568 if the RFP is prepared by a Quality Assurance contractor. The reduction of 288 hours for submission of RFPs would translate to a cost savings of $28,800 if prepared by State staff and $50,400 if prepared by contractor staff. So the estimate of total cost savings related to the reduction in the information collection budget would be $53,125 to $92,968 a year.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501) requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments in the aggregate, or by the private sector, of $100 million adjusted for inflation, or more in any one year.

If a covered agency must prepare a budgetary impact statement, section 205 further requires that it select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with the statutory requirements. In addition, section 203 requires a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

We have determined that this rule will not result in the expenditure by State, local, and Tribal governments in the aggregate, or by the private sector, of more than $100 million in any one year adjusted annually for inflation. The current threshold adjusted for inflation using the Gross Domestic Price deflator is $135 million. Accordingly, we have not prepared a budgetary impact statement, specifically addressed the regulatory alternatives considered, or prepared a plan for informing and advising any significantly or uniquely impacted small governments.

Congressional Review

This rule is not a major rule as defined in 5 U.S.C. chapter 8.

Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a policy or regulation may affect family well-being. These regulations will not have an impact on family well-being as defined in the legislation.

Executive Order 13132

Executive Order 13132 prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. We

do not believe the regulation has federalism impact as defined in the Executive Order.

List of Subjects in 45 CFR Part 95

Administrative practice and procedure, Claims, Computer technology, Grant programs—health, Grant programs, Social programs.

Approved: July 30, 2010.

Kathleen Sebelius,

Secretary of Health and Human Services.

■ For the reasons set forth above, 45 CFR Part 95 is amended as follows:

PART 95—GENERAL ADMINISTRATION—GRANT PROGRAMS (PUBLIC ASSISTANCE, MEDICAL ASSISTANCE AND STATE CHILDREN'S HEALTH INSURANCE PROGRAMS)

■ 1. The authority citation for 45 CFR Part 95 is revised to read as follows:

Authority: 5 U.S.C. 301, 42 U.S.C. 622(b), 629b(a), 652(a), 652(d), 654A, 671(a), 1302, and 1396a(a).

Subpart A—Time Limits for States To File Claims

■ 2. In § 95.4 revise the definition of "We, our, and us" to read as follows:

§ 95.4 Definitions.

* * * * *

We, our, and *us* refer to the HHS Centers for Medicare & Medicaid Services (CMS), and Administration for Children and Families (ACF), depending on the program involved.

■ 3. In § 95.31 revise paragraph (a) to read as follows:

§ 95.31 Where to send a waiver request for good cause.

(a) A request which affects the program(s) of only one HHS agency, CMS or ACF and does not affect the programs of any other agency or Federal Department should be sent to the appropriate HHS agency.

* * * * *

Subpart E—Cost Allocation Plans

■ 4. In § 95.505 revise the definition of "Operating Divisions" to read as follows:

§ 95.505 Definitions.

* * * * *

Operating Divisions means the Department of Health and Human Services (HHS) organizational components responsible for administering public assistance programs. These components are the Administration for Children and Families (ACF) and the Centers for Medicare & Medicaid Services (CMS).

* * * * *

Subpart F—[Amended]

■ 5. Remove the authority citation for subpart F.

■ 6. Revise § 95.601 to read as follows:

§ 95.601 Scope and applicability.

This subpart prescribes part of the conditions under which the Department of Health and Human Services will approve the Federal Financial Participation (FFP) at the applicable rates for the costs of automated data processing incurred under an approved State plan for titles IV–B, IV–D, IV–E, XIX or XXI of the Social Security Act. The conditions of approval of this subpart add to the statutory and regulatory requirements for acquisition of Automated Data Processing (ADP) equipment and services under the specified titles of the Social Security Act.

■ 7. Amend § 95.605 by:

■ a. Adding the definitions "Acquisition Checklist," "Alternative approach to APD requirements," "Base contract," "Commercial off the shelf software," "Federal program office," "Grantee," "Independent Verification and Validation," "Noncompetitive," "Operational APD," "Service Oriented Architecture" and "Software maintenance."

■ b. Revising the definitions of "Advance Planning Document," "Implementation APD," and "Planning APD," and "Advance Planning Document Update (APDU)."

■ c. Amending the definition of "Acceptance Documents" by removing the phrase "written evidence" and adding in its place "a record".

■ d. Revising the definition heading "Automatic data processing" to read "Automated data processing."

■ e. Revising the definition heading of "Automatic data processing equipment" to read "Automated data processing equipment."

■ f. Removing the definition of "Approving component."

■ g. Revising the definition of "Project."

■ h. Revising paragraphs (d), (e), and (f) under the definition of "Service agreement."

§ 95.605 Definitions.

* * * * *

Acquisition Checklist means the standard Department checklist that States can submit to meet prior written approval requirements instead of submitting the actual Request for Proposal (RFP), contracts or contract amendments. The Acquisition Checklist allows States to self-certify that their acquisition documents, which include RFPs, contracts, contract amendments or similar documents, meet State and Federal procurement requirements, contain appropriate language about software ownership and licensing rights in compliance with § 95.617, and provide access to documentation in compliance with § 95.615.

Advance Planning Document (APD), Initial advance automated data processing planning or Initial APD means a recorded plan of action to request funding approval for a project which will require the use of ADP service or equipment. The term APD refers to a Planning APD, or to a planning and/or development and implementation action document, i.e., Implementation APD, or to an Advance Planning Document Update. Requirements are detailed in § 95.610, paragraphs (a), (b), and (c).

Advance Planning Document Update (APDU) is a document or record submitted annually (Annual APDU) to report project status and/or post implementation cost-savings, or, on an as-needed (As-Needed APDU) basis, to request funding approval for project continuation when significant project changes are anticipated; for incremental funding authority and project continuation when approval is being granted by phase; or to provide detailed information on project and/or budget activities as specified in § 95.610(c).

Alternative approach to APD requirements means that the State has developed an APD that does not meet all conditions for APD approval in § 95.610, resulting in the need for a waiver under § 95.627(a).

Base contract means the initial contractual activity, including all option years, allowed during a defined unit of time, for example, 2 years. The base contract includes option years but does not include amendments.

Commercial-off-the-shelf (COTS) software means proprietary software products that are ready-made and available for sale to the general public at established catalog or market prices.

* * * * *

Federal program office means the Federal program office within the Department that is authorized to approve requests for the acquisition of ADP equipment or ADP services. The Federal program offices within the Administration for Children and Families (ACF) are the Children's Bureau for titles IV–B (child welfare services) and IV–E (foster care and adoption assistance), the Office of Child

Support Enforcement for title IV–D (child support enforcement), and the Centers for Medicare & Medicaid Services (CMS) for titles XIX (Medicaid) and XXI (the Children's Health Insurance Program) of the Social Security Act.

* * * * *

Grantee means an organization receiving financial assistance directly from an HHS awarding agency to carry out a project or program.

Implementation APD means a recorded plan of action to request Federal Financial Participation (FFP) in the costs of designing, developing, and implementing the system.

Independent Verification and Validation—(IV&V) means a well-defined standard process for examining the organizational, management, and technical aspects of a project to determine the effort's adherence to industry standards and best practices, to identify risks, and make recommendations for remediation, where appropriate.

* * * * *

Noncompetitive means solicitation of a proposal from only one source, or after solicitation of a number of sources, negotiation with selected sources based on a finding that competition is inadequate.

Operational APD—An operational APD is a record of no more than two pages to be submitted annually by State programs whose system is not in development. The Operational APD provides a short summary of the activities, method of acquisition, and annual budget for operations and software maintenance.

Planning APD is a plan of action in a record which requests FFP, to determine the need for, feasibility, and cost factors of an ADP equipment or services acquisition and to perform one or more of the following: prepare a Functional Requirements Specification, assess other State's systems for transfer, to the maximum extent possible, of an existing system; prepare a request for proposal (RFP) and/or develop a General Systems Design (GSD).

Project means a defined set of information technology related tasks, undertaken by the State to improve the efficiency, economy and effectiveness of administration and/or operation of one or more of its human services programs. For example, a State may undertake a comprehensive, integrated initiative in support of its Child Support, Child Welfare and Medicaid program's intake, eligibility and case management functions. A project may also be a less comprehensive activity such as office automation, enhancements to an existing system or an upgrade of computer hardware.

* * * * *

Service Agreement * * *

* * * * *

(d) Includes assurances that services provided will be timely and satisfactory; preferably through a service level agreement;

(e) Includes assurances that information in the computer system as well as access, use and disposal of ADP data will be safeguarded in accordance with provisions of all applicable federal statutes and regulations, including §§ 205.50 and 307.13;

(f) Requires the provider to obtain prior approval pursuant to § 95.611(a) from the Department for ADP equipment and ADP services that are acquired from commercial sources primarily to support the titles covered by this subpart and requires the provider to comply with § 95.613 for procurements related to the service agreement. ADP equipment and services are considered to be primarily acquired to support the titles covered by this subpart when the human service programs may reasonably be expected to either: be billed for more than 50 percent of the total charges made to all users of the ADP equipment and services during the time period covered by the service agreement, or directly charged for the total cost of the purchase or lease of ADP equipment or services;

* * * * *

Service Oriented Architecture (SOA), also referred to as *Service Component Based Architecture,* describes a means of organizing and developing Information Technology capabilities as collaborating services that interact with each other based on open standards. Agency SOA artifacts may include models, approach documents, inventories of services or other descriptive documents.

Software maintenance means routine support activities that normally include corrective, adaptive, and perfective changes, without introducing additional functional capabilities. Corrective changes are tasks to correct minor errors or deficiencies in software. Adaptive changes are minor revisions to existing software to meet changing requirements. Perfective changes are minor improvements to application software so it will perform in a more efficient, economical, and/or effective manner. Software maintenance can include activities such as revising/creating new reports, making limited data element/data base changes, and making minor alterations to data input and display screen designs.

* * * * *

■ 8. Add § 95.610 to read as follows:

§ 95.610 Submission of advance planning documents.

Advance Planning Document (APD) refers to an Initial advance automated data processing planning document or Initial APD, providing a recorded plan of action to request funding approval for a project which will require the use of ADP services or equipment, including the use of shared or purchased services in lieu of State acquired stand-alone resources. Requirements are detailed in paragraph (a), (b) and (c) of this section.

(a) *Planning APD.* (1) A separate planning effort and Planning APD is optional, but highly recommended, and generally applies to large statewide system developments and/or major hardware acquisitions. States with large, independent counties requesting funding at the regular match rate for county systems are strongly encouraged to engage in planning activities commensurate with the complexity of the projected ADP project and to submit a Planning APD to allow for time and to provide funding for its planning activities. Therefore, States must consider the scope and complexity of a project to determine whether to submit a Planning APD as a separate document to HHS or whether to combine the two phases of planning and implementation into one APD covering both the Planning APD and the Implementation APD requirements.

(2) The Planning APD is a relatively brief document, usually not more than 6–10 pages, which must contain:

(i) A statement of the problem/need that the existing capabilities can not resolve, new or changed program requirements or opportunities for improved economies and efficiencies and effectiveness of program and administration and operations;

(ii) A project management plan that addresses the planning project organization, planning activities/deliverables, State and contractor resource needs, planning project procurement activities and schedule;

(iii) A specific budget for the planning phase of the project;

(iv) An estimated total project cost and a prospective State and Federal cost allocation/distribution, including planning and implementation;

(v) A commitment to conduct/prepare the problem(s) needs assessment, feasibility study, alternatives analysis, cost benefit analysis, and to develop a Functional Requirements Specification and/or a General Systems Design (GSD);

(vi) A commitment to define the State's functional requirements, based on the State's business needs which may be used for the purpose of evaluating the transfer of an existing system, including the transfer of another State's General System Design that the State may adapt to meet State specific requirements;

(vii) Additional Planning APD content requirements, for enhanced funding projects as contained in § 307.15 and §§ 1355.50 through 1355.57; and

(viii) An acquisition summary for the upcoming year or development phase that provides the following information on proposed acquisitions:

(A) Type and scope of contract

(B) Procurement strategy

(C) Estimated cost or not to exceed amount

(D) Timeframe of contract

(E) A statement or certification that the proposed acquisition will comply with all State and Federal requirements including the retention of software ownership rights specified in § 95.617.

(b) *Implementation APD.* The Implementation APD shall include:

(1) The results of the activities conducted under a Planning APD, if any;

(2) A statement of problems/needs and outcomes/objectives;

(3) A requirements analysis, feasibility study and a statement of alternative considerations including, where appropriate, the use of service-orientated architecture and a transfer of an existing system and an explanation of why such a transfer is not feasible if another alternative is identified;

(4) A cost benefit analysis;

(5) A personnel resource statement indicating availability of qualified and adequate numbers of staff, including a project director to accomplish the project objectives;

(6) A detailed description of the nature and scope of the activities to be undertaken and the methods to be used to accomplish the project;

(7) The proposed activity schedule for the project;

(8) A proposed budget (including an accounting of all possible Implementation APD activity costs, e.g., system conversion, vendor and state personnel, computer capacity planning, supplies, training, hardware, software and miscellaneous ADP expenses) for the project;

(9) A statement indicating the duration the State expects to use the equipment and/or system;

(10) An estimate of the prospective cost allocation/distribution to the various State and Federal funding sources and the proposed procedures for distributing costs;

(11) A statement setting forth the security and interface requirements to be employed and the system failure and disaster recovery/business continuity procedures available or to be implemented; and

(12) Additional requirements, for acquisitions for which the State is requesting enhanced funding, as contained at §§ 1355.54 through 1355.57, § 307.15 and 42 CFR subchapter C, part 433.

(c) *Advance Planning Document Update (APDU).* (1) The Annual APDU, which is due 60 days prior to the expiration of the FFP approval, includes:

(i) A reference to the approved APD and all approved changes;

(ii) A project activity report which includes the status of the past year's major project tasks and milestones, addressing the degree of completion and tasks/milestones remaining to be completed, and discusses past and anticipated problems or delays in meeting target dates in the approved APD and approved changes to it and provides a risk management plan that assesses project risk and identifies risk mitigation strategies;

(iii) A report of all project deliverables completed in the past year and degree of completion for unfinished products and tasks;

(iv) An updated project activity schedule for the remainder of the project;

(v) A revised budget for the entirety of the project's life-cycle, including operational and development cost categories;

(vi) A project expenditures report that consists of a detailed accounting of all expenditures for project development over the past year and an explanation of the differences between projected expenses in the approved APD and actual expenditures for the past year;

(vii) A report of any approved or anticipated changes to the allocation basis in the APD's approved cost allocation methodology; and

(viii) An acquisition summary for the upcoming year or development phase that provides the following information on proposed acquisitions:

(A) Type and scope of contract

(B) Procurement strategy

(C) Estimated cost or not to exceed amount

(D) Timeframe of contract

(E) A statement or certification that the proposed acquisition will comply with all State and Federal requirements including the retention of software ownership rights specified in § 95.617.

(2) The As-Needed APDU is a document that requests approval for additional funding and/or authority for project continuation when significant changes are anticipated, when the project is being funded on a phased implementation basis, or to clarify project information requested as an approval condition of the Planning APD, Annual APDU, or Implementation APD. The As-Needed APDU may be submitted any time as a stand-alone funding or project continuation request, or may be submitted as part of the Annual APDU. The As-Needed APDU is submitted:

(i) When the State anticipates incremental project expenditures (exceeding specified thresholds);

(ii) When the State anticipates a schedule extension of more than 60 days for major milestones;

(iii) When the State anticipates major changes in the scope of its project, e.g., a change in its procurement plan, procurement activities, system concept or development approach;

(iv) When the State anticipates significant changes to its cost distribution methodology or distribution of costs among Federal programs; and/or,

(v) When the State anticipates significant changes to its cost benefit projections. The As-Needed APDU shall provide supporting documentation to justify the need for a change to the approved budget.

(vi) Changes to the acquisition summary in the following areas:

(A) Type and scope of contract

(B) Procurement strategy

(C) Estimated cost or not to exceed amount

(D) Timeframe of contract

(E) A statement or certification that the proposed acquisition will comply with all State and Federal requirements including the retention of software ownership rights specified in § 95.617.

(F) New acquisitions not summarized in the Annual APDU.

(3) The Operational Advance Planning Document Update (OAPDU) is an annual submission of no more than two pages, including:

(i) Summary of activities;

(ii) Acquisitions; and,

(iii) Annual budget by project/system receiving funding through the programs covered under this part.

■ 9. In § 95.611, revise paragraphs (a), (b)(1)(iii) and (iv), (b)(2)(iii) and (iv), (c)(1)(i), (c)(2)(ii)(A), and (d); and add paragraphs (b)(1)(v) and (vi) and (e) to read as follows:

§ 95.611 Prior approval conditions.

(a) *General acquisition requirements.* (1) A State shall obtain prior approval from the Department which is reflected

in a record, as specified in paragraph (b) of this section, when the State plans to acquire ADP equipment or services with proposed FFP at the regular matching rate that it anticipates will have total acquisition costs of $5,000,000 or more in Federal and State funds. States will be required to submit an Operational APDU only if they exceed the threshold requiring Federal approval, and only upon the receipt of a submission request, which is reflected in a record, from the Department. See definition of software maintenance under § 95.605.

(2) A State shall obtain prior approval from the Department which is reflected in a record, as specified in paragraph (b) of this section, when the State plans to acquire ADP equipment or services with proposed FFP at the enhanced matching rate authorized by § 205.35, Part 307, § 1355.52 or 42 CFR part 433, subpart C, regardless of the acquisition cost.

(3) A State shall obtain prior approval from the Department, which is reflected in a record, for a sole source/non-competitive acquisition, of ADP equipment or services with a total State and Federal acquisition cost of $1,000,000 or more.

(4) Except as provided for in paragraph (a)(5) of this section, the State shall submit multi-program requests for Department approval, signed by the appropriate State official, to the Department's Secretary or his/her designee. For each HHS agency that has federal funding participation in the project, an additional copy must be provided to the applicable Federal program office and respective Regional Offices.

(5) States shall submit requests for approval which affect only one approving component of HHS (CMS, OCSE, or Children's Bureau), to the applicable Federal program office and Regional Administrator.

(6) The Department will not approve any Planning or Implementation APD that does not include all information required in § 95.610.

(b) *Specific prior approval requirements.* The State agency shall obtain approval of the Department in a record, prior to the initiation of project activity.

(1) * * *

(iii) For acquisition documents, an exemption from prior Federal prior approval shall be assumed in the approval of the Planning, Annual or As-Needed APDU provided that:

(A) The acquisition summary provides sufficient detail to base an exemption request;

(B) The acquisition does not deviate from the terms of the exemption; and

(C) The acquisition is not the initial acquisition for a high risk activity, such as software application development. Acquisitions, whether exempted from prior Federal approval or not, must comply with the Federal provisions contained in § 95.610(c)(1)(viii) or (c)(2)(vi) or submit an Acquisition Checklist.

(iv) For noncompetitive acquisitions, including contract amendments, when the resulting contract is anticipated to exceed $1,000,000, States will be required to submit a sole source justification in addition to the acquisition document. The sole source justification can be provided as part of the Planning, Annual or As-Needed APDU.

(v) If the State does not opt for an exemption or submittal of an Acquisition Checklist for the contract, prior to the execution, the State will be required to submit the contract when it is anticipated to exceed the following thresholds, unless specifically exempted by the Department:

(A) Software application development—$6,000,000 or more (competitive) and $1,000,000 or more (noncompetitive);

(B) Hardware and Commercial Off-the-Shelf (COTS) software—$20,000,000 or more (competitive) and $1,000,000 or more (noncompetitive);

(C) Operations and Software Maintenance acquisitions combined with hardware, COTS or software application development—the thresholds stated in § 95.611(b)(1)(v)(A) and (B) apply.

(vi) For contract amendments within the scope of the base contract, unless specifically exempted by the Department, prior to execution of the contract amendment involving contract cost increases which cumulatively exceed 20 percent of the base contract cost.

(2) * * *

(iii) For the acquisition solicitation documents and contract, unless specifically exempted by the Department, prior to release of the acquisition solicitation documents or prior to execution of the contract when the contract is anticipated to or will exceed $500,000.

(iv) For contract amendments, unless specifically exempted by the Department, prior to execution of the contract amendment, involving contract cost increases exceeding $500,000 or contract time extensions of more than 60 days.

* * * * *

(c) * * *

(1) * * *

(i) For an annual APDU for projects with a total cost of more than $5,000,000, and projects with a total estimated cost of less than $5,000,000 only if requested by the Department.

* * * * *

(2) * * *

(ii) * * *

(A) A projected cost increase of $300,000 or 10 percent of the project cost, whichever is less;

* * * * *

(d) Prompt action on requests for prior approval. The Department will promptly send to the approving Federal program offices the items specified in paragraph (b) of this section. If the Department has not provided approval, disapproval, or a request for information which is reflected in a record, within 60 days of the date of the Departmental letter acknowledging receipt of a State's request, the Department will consider the request to have provisionally met the prior approval conditions of paragraph (b) of this section.

(e) Acquisitions not subject to prior approval. If the Department has not specifically requested in a record, the submittal of additional acquisition documentation for those acquisitions summarized in the APD, the approval of the Planning, Annual or As-Needed APDU will constitute an exemption of the acquisition documents from prior Federal approval. States will be required to submit acquisition documents, contracts and contract amendments under the threshold amounts on an exception basis if requested to do so in a record by the Department.

■ 10. Revise § 95.612 to read as follows:

§ 95.612 Disallowance of Federal Financial Participation (FFP).

If the Department finds that any ADP acquisition approved or modified under the provisions of § 95.611 fails to comply with the criteria, requirements, and other activities described in the approved APD to the detriment of the proper, efficient, economical and effective operation of the affected program, payment of FFP may be disallowed. In the case of a suspension of the approval of a Child Support APD for enhanced funding, *see* § 307.40(a). In the case of a suspension of the approval of an APD for a State Automated Child Welfare Information System (SACWIS) project, *see* § 1355.56.

■ 11. In § 95.613, revise paragraph (a) to read as follows:

§ 95.613 Procurement Standards.

(a) *General.* Procurements of ADP equipment and services are subject to the procurement standards prescribed by Part 92 regardless of any conditions

for prior approval. The Department retains the authority to provide greater oversight including requiring a State to comply with § 92.36(c) if the Department determines that the State procurement process is an impediment to competition that could substantially impact project cost or risk of failure.

* * * * *

■ 12. Revise § 95.615 to read as follows:

§ 95.615 Access to systems and records.

The State agency must allow the Department access to the system in all of its aspects, including pertinent state staff, design developments, operation, and cost records of contractors and subcontractors at such intervals as are deemed necessary by the Department to determine whether the conditions for approval are being met and to determine the efficiency, economy and effectiveness of the system.

■ 13. In § 95.617 revise paragraph (c) to read as follows:

§ 95.617 Software and ownership rights.

* * * * *

(c) Proprietary software. Proprietary operating/vendor software packages which are provided at established catalog or market prices and sold or leased to the general public shall not be subject to the ownership provisions in paragraphs (a) and (b) of this section. FFP is not available for proprietary applications software developed specifically for the public assistance programs covered under this subpart.

■ 14. In § 95.621 revise paragraphs (d) and (e) to read as follows:

§ 95.621 ADP reviews.

* * * * *

(d) *Acquisitions not subject to prior approval.* Reviews will be conducted on an audit basis to assure that system and equipment acquisitions costing less than $200,000 or acquisitions exempted from prior approval were made in accordance with Part 92 and the conditions of this subpart and to determine the efficiency, economy and effectiveness of the equipment or service.

(e) *State Agency Maintenance of Service Agreements.* The State agency will maintain a copy of each service agreement in its files for Federal review.

* * * * *

■ 15. In § 95.623, revise the heading, introductory text, and paragraph (b) to read as follows:

§ 95.623 Reconsideration of denied FFP for failure to obtain prior approval.

For ADP equipment and services acquired by a State without prior approval, which is reflected in a record, the State may request reconsideration of the disallowance of FFP by written request to the head of the Federal program office within 30 days of the initial written disallowance determination. In such a reconsideration, the agency may take into account overall federal interests. The Department may grant a request for reconsideration if:

* * * * *

(b) The State requests reconsideration of a denial by submitting in a record information that addresses the following requirements:

(1) The acquisition must be reasonable, useful and necessary;

(2) The State's failure to obtain prior approval, which is reflected in a record, must have been inadvertent (i.e., the State did not knowingly avoid the prior approval requirements);

(3) The request was not previously denied by HHS;

(4) The acquisition must otherwise meet all other applicable Federal and State requirements, and would have been approved under Part 95, Subpart F had the State requested in a record, prior approval;

(5) The State must not have a record of recurrent failures, under any of the programs covered by the prior approval regulations, to comply with the requirement to obtain prior approval in a record, of its automatic data processing acquisitions (i.e., submissions under these procedures, from States that have failed in the past to acquire prior approval which is reflected in a record, in accordance with Part 95, Subpart F, may be denied);

■ 16. In § 95.624, revise the introductory text, paragraph (a), introductory text and paragraph (b)(2) to read as follows:

§ 95.624 Consideration for FFP in emergency situations.

For ADP equipment and services acquired by a State after December 1, 1985 to meet emergency situations, which preclude the State from following the requirements of § 95.611, the Department will consider providing FFP upon receipt of a request from the State which is reflected in a record. In order for the Department to consider providing FFP in emergency situations, the following conditions must be met:

(a) The State must submit a request to the Department, prior to the acquisition of any ADP equipment or services. The request must be reflected in a record, and include:

* * * * *

(b) * * *

(2) Inform the State in a communication reflected in a record, that the Department recognizes that an emergency exists and that within 90 days from the date of the State's initial request, the State must submit a formal request for approval which includes the information specified at § 95.611 in order for the ADP equipment or services acquisition to be considered for the Department's approval.

* * * * *

■ 17. Add § 95.626 to read as follows:

§ 95.626 Independent Verification and Validation.

(a) An assessment for independent verification and validation (IV&V) analysis of a State's system development effort may be required in the case of APD projects that meet any of the following criteria:

(1) Are at risk of missing statutory or regulatory deadlines for automation that is intended to meet program requirements;

(2) Are at risk of failing to meet a critical milestone;

(3) Indicate the need for a new project or total system redesign;

(4) Are developing systems under waivers pursuant to sections 452(d)(3) or 627 of the Social Security Act;

(5) Are at risk of failure, major delay, or cost overrun in their systems development efforts;

(6) Fail to timely and completely submit APD updates or other required systems documentation.

(7) State's procurement policies put the project at risk, including a pattern of failing to pursue competition to the maximum extent feasible.

(8) State's failure to adequately involve the State program offices in the development and implementation of the project.

(b) Independent Verification and Validation efforts must be conducted by an entity that is independent from the State (unless the State receives an exception from the Department) and the entity selected must:

(1) Develop a project workplan. The plan must be provided directly to the Department at the same time it is given to the State.

(2) Review and make recommendations on both the management of the project, both State and vendor, and the technical aspects of the project. The IV&V provider must give the results of its analysis directly to the federal agencies that required the IV&V at the same time it reports to the State.

(3) Consult with all stakeholders and assess the user involvement and buy-in regarding system functionality and the system's ability to support program business needs.

(4) Conduct an analysis of past project performance sufficient to identify and

make recommendations for improvement.

(5) Provide risk management assessment and capacity planning services.

(6) Develop performance metrics which allow tracking project completion against milestones set by the State.

(c) The acquisition document and contract for selecting the IV&V provider (or similar documents if IV&V services are provided by other State agencies) must include requirements regarding the experience and skills of the key personnel proposed for the IV&V analysis. The contract (or similar document if the IV&V services are provided by other State agencies) must specify by name the key personnel who actually will work on the project. The acquisition documents and contract for required IV&V services must be submitted to the Department for prior written approval.

■ 18. Add § 95.627 to read as follows:

§ 95.627 Waivers.

(a) *Application for a waiver.* A State may apply for a waiver of any requirement in Subpart F by presenting an alternative approach. Waiver requests must be submitted and approved as part of the State's APD or APD Update.

(b) *Waiver approvals.* The Secretary, or his or her designee, may grant a State a waiver if the State demonstrates that it has an alternative approach to a requirement in this chapter that will safeguard the State and Federal Governments' interest and that enables the State to be in substantial compliance with the other requirements of this chapter.

(c) *Contents of waiver request.* The State's request for approval of an alternative approach or waiver of a requirement in this chapter must demonstrate why meeting the condition is unnecessary, diminishes the State's ability to meet program requirements, or that the alternative approach leads to a more efficient, economical, and effective administration of the programs for which federal financial participation is provided, benefiting both the State and Federal Governments.

(d) *Review of waiver requests.* The Secretary, or his or her designee, will review waiver requests to assure that all necessary information is provided, that all processes provide for effective economical and effective program operation, and that the conditions for waiver in this section are met.

(e) *Agency's response to a waiver request.* When a waiver is approved by an agency, it becomes part of the State's approved APD and is applicable to the approving agency. A waiver is subject to the APD suspension provisions in § 95.611(c)(3). When a waiver is disapproved, the entire APD will be disapproved. The APD disapproval is a final administrative decision and is not subject to administrative appeal.

■ 19. Add § 95.635 to read as follows:

§ 95.635 Disallowance of Federal financial participation for automated systems that fail to comply substantially with requirements.

(a) Federal financial participation at the applicable matching rate is available for automated data processing system expenditures that meet the requirements specified under the approved APD including the approved cost allocation plan.

(b) All or part of any costs for system projects that have a major failure to comply with an APD approved under applicable regulation at § 95.611, or for the Title IV–D program contained in Part 307, the applicable regulations for the Title IV–E and Title IV–B programs contained in Chapter 13, subchapter G, § 1355.55, or the applicable regulations for the Title XIX program contained in 42 CFR Chapter 4 Subchapter C, Part 433, are subject to disallowance by the Department.

Subpart G—Equipment Acquired Under Public Assistance Programs

■ 20. In § 95.705, revise paragraph (a) to read as follows:

§ 95.705 Equipment costs—Federal financial participation.

(a) *General rule.* In computing claims for Federal financial participation, equipment having a unit acquisition cost of $25,000 or less may be claimed in the period acquired or depreciated, at the option of the State agency. Equipment having a unit acquisition cost of more than $25,000 shall be depreciated. For purposes of this section, the term depreciate also includes use allowances computed in accordance with the cost principles prescribed in part 92.

* * * * *

■ 21. In § 95.707, revise paragraphs (a) and (b) introductory text to read as follows:

§ 95.707 Equipment management and disposition.

(a) Once equipment, whose costs are claimed for Federal financial participation (i.e., equipment that is capitalized and depreciated or is claimed in the period acquired), has reached the end of its useful life (as defined in an approved APD), the equipment shall be subject to the property disposal rules in § 92.32, Equipment.

(b) The State agency is responsible for adequately managing the equipment, maintaining records on the equipment, and taking periodic physical inventories. Physical inventories may be made on the basis of statistical sampling. The following requirements apply to the disposition of this equipment:

* * * * *

[FR Doc. 2010–26727 Filed 10–27–10; 8:45 am]

BILLING CODE P

Proposed Rules

Federal Register

Vol. 75, No. 208

Thursday, October 28, 2010

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0892; Directorate Identifier 2010–NE–32–AD]

RIN 2120–AA64

Airworthiness Directives; Thielert Aircraft Engines GmbH Models TAE 125–02–99 and TAE 125–02–114 Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed 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:

> Service experience has shown that fracture of the timing chain has occurred due to chain wear. This condition, if not corrected, could lead to in-flight cases of engine shutdown.

We are proposing this AD to prevent engine in-flight shutdown leading to loss of control of the airplane by requiring life limits for the timing chain.

DATES: We must receive comments on this proposed AD by December 13, 2010.

ADDRESSES: You may send comments by any of the following methods:

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

Contact Thielert Aircraft Engines GmbH, Platanenstrasse 14 D–09350, Lichtenstein, Germany, *telephone:* +49–37204–696–0; *fax:* +49–37204–696–55; *e-mail: info@centurion-engines.com* for the service information identified in this proposed AD.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Alan Strom, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *alan.strom@faa.gov;* telephone (781) 238–7143; fax (781) 238–7199.

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–2010–0892; Directorate Identifier 2010–NE–32–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 with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, *etc.*). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD 2010–0136, dated June 30, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> Service experience has shown that fracture of the timing chain has occurred due to chain wear. This condition, if not corrected, could lead to in-flight cases of engine shutdown.

Engine experience shows that the design of the timing chain does not have the expected durability as evidenced by accelerated, premature wear, causing chain fracture resulting in engine in-flight shutdown. The chain link pins and link plates become weakened and break from wear caused by hard sooty particles that are by-products of combustion. The link wear also lengthens the chain causing camshaft sprocket wear. Replacing the timing chain at the compliance times in this AD will help to avoid chain failure, which would cause engine shutdown.

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

Relevant Service Information

Thielert Aircraft Engines GmbH has issued Service Bulletin No. TM TAE 125–1010 P1, Revision 2, dated May 26, 2010. 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 Germany and is approved for operation in the United States. Pursuant to our bilateral agreement with Germany, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists

and is likely to exist or develop on other products of the same type design. This proposed AD would require initial replacement of the timing chain on the TAE 125–02–99 and TAE 125–02–114 reciprocating engines listed by serial number in Table 1 of the proposed AD, and thereafter, repetitive replacements of the timing chain on all TAE 125–02–99 and TAE 125–02–114 reciprocating engines.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 112 engines installed on airplanes of U.S. registry. We also estimate that it would take about 8 work-hours per product to comply with this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $162 per engine. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $94,304.

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); and

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Thielert Aircraft Engines GmbH: Docket No. FAA–2010–0892; Directorate Identifier 2010–NE–32–AD.

Comments Due Date

(a) We must receive comments by December 13, 2010.

Affected Airworthiness Directives (ADs)

(b) None.

Applicability

(c) This AD applies to Thielert Aircraft Engines GmbH models TAE 125–02–99 and TAE 125–02–114 reciprocating engines installed in, but not limited to, Cessna 172 and (Reims-built) F172 series (European Aviation Safety Agency (EASA) Supplemental Type Certificate (STC) No. EASA.A.S.01527); Piper PA–28 series (EASA STC No. EASA.A.S. 01632); APEX (Robin) DR 400 series (EASA STC No. A.S.01380); and Diamond Aircraft Industries Models DA 40, DA 42, and DA 42M NG airplanes.

Reason

(d) 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:

Service experience has shown that fracture of the timing chain has occurred due to chain wear. This condition, if not corrected, could lead to in-flight cases of engine shutdown.

We are issuing this AD to prevent engine in-flight shutdown leading to loss of control of the airplane by requiring life limits for the timing chain.

Actions and Compliance

(e) Unless already done, do the following actions.

Initial Replacement of Timing Chain

(1) For engines with serial numbers (S/Ns) listed in Table 1 of this AD, replace the timing chain within 600 flight hours-since-new, or no later than 55 flight hours after the effective date of this AD, whichever occurs later.

TABLE 1—S/NS OF ENGINES AFFECTED BY THE COMPLIANCE TIME IN PARAGRAPH (E)(1) OF THIS AD

02–02–01510 to 02–02–01514 inclusive.
02–02–01518 to 02–02–01520 inclusive.
02–02–01529.
02–02–01717.
02–02–01718.
02–02–01720.
02–02–01721.
02–02–01727.
02–02–01728.
02–02–01730 to 02–02–01733 inclusive.
02–02–01739 to 02–02–01752 inclusive.

(2) For engines with S/Ns not listed in Table 1 of this AD, replace the timing chain within 910 flight hours-since-new, or no later than 55 flight hours after the effective date of this AD, whichever occurs later.

Repetitive Replacements of Timing Chains for All TAE 125–02–99 and TAE 125–02–114 Engines

(3) Thereafter, for all TAE 125–02–99 and TAE 125–02–114 engines, repetitively replace the timing chain within every additional 910 flight hours.

(4) Guidance on replacing the timing chain can be found in Thielert Aircraft Engines GmbH Service Bulletin No. TM TAE 125–1010 P1, Revision 2, dated May 26, 2010.

FAA AD Differences

(f) This AD differs from the MCAI and/or service information, which require initial replacement of the timing chain for the engines listed in paragraph (e)(1) above within either the next 110 flight hours or at the next maintenance, whichever occurs first, for those engines having accumulated between 500 and 600 flight hours time-since-new. The reason for the difference is to ensure that the compliance requirements for all engines in paragraph (e)(1) above are consistent.

Alternative Methods of Compliance (AMOCs)

(g) The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(h) Refer to MCAI European Aviation Safety Agency AD 2010–0136, dated June 30, 2010, and Thielert Aircraft Engines GmbH Service Bulletin No. TM TAE 125–1010 P1, Revision 2, dated May 26, 2010, for related information. Contact Thielert Aircraft Engines GmbH, Platanenstrasse 14 D–09350, Lichtenstein, Germany, *telephone:* +49–37204–696–0; *fax:* +49–37204–696–55; *e-mail: info@centurion-engines.com,* for a copy of this service information.

(i) Contact Alan Strom, Aerospace Engineer, Engine Certification Office, FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *alan.strom@faa.gov;* telephone (781) 238–7143; fax (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on October 21, 2010.

Peter A. White,

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

[FR Doc. 2010–27228 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–1022; Airspace Docket No. 10–AWP–4]

RIN 2120–AA66

Amendment of Jet Route J–93; CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Jet Route J–93 in California between the Julian VHF Omnidirectional Radio Range Tactical Air Navigation Aid (VORTAC), and the ASUTA intersection on the United States/Mexican border. The FAA is proposing to realign the jet route due to the relocation of the Penasco VOR, located in Mexico. This would ensure the efficient use of our National Airspace System.

DATES: Comments must be received on or before December 13, 2010.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; *telephone:* (202) 366–9826. You must identify FAA Docket No. FAA–2010–1022 and Airspace Docket No. 10–AWP–4 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace Regulation and ATC Procedures Group, Office of Mission Support Services, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; *telephone:* (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2010–1022 and Airspace Docket No. 10–AWP–4) and be submitted in triplicate to the Docket Management Facility (*see* **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA–2010–1022 and Airspace Docket No. 10–AWP–4." The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (*see* **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Western Service Center, Operations Support Group, Federal Aviation Administration, 1601 Lind Avenue, SW., Renton, WA 98055.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

History

In May 2010, the FAA was notified by the Mexican Government that the Penasco VOR in Mexico had been relocated. This proposed action is necessary to realign Jet Route J–93 with the revised location of the Penasco VOR.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to amend J–93 in California, between the Julian VORTAC and the ASUTA intersection along the United States/Mexican Border, by realigning the route with the revised locations of the Penasco VOR located in Mexico.

Jet routes are published in paragraph 2004 of FAA Order 7400.9U, dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The jet routes listed in this document will be published subsequently in the order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of Transportation (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 will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will 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 it would amend Jet Route J–93 in California.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures," prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 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.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9U, Airspace Designations and Reporting Points, signed August 18, 2010 and effective September 15, 2010 is amended as follows:

Paragraph 2004 Jet Routes

* * * * *

J–93 [Amended]

From the INT of the United States/Mexican Border and the Julian, CA, 107°(M)/122°(T) radial via Julian; Paradise, CA; INT Paradise 290° and Los Angeles, CA, 083° radials; to Los Angeles.

Issued in Washington, DC, on October 20, 2010.

Edith V. Parish,

Manager, Airspace Regulation and ATC Procedures Group.

[FR Doc. 2010–27316 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0842; Airspace Docket No. 10–ASW–11]

Proposed Amendment of Class E Airspace; Taos, NM

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class E airspace at Taos, NM. Decommissioning of the Ski non-directional beacon (NDB) at Taos Regional Airport, Taos, NM, has made it necessary to reconfigure controlled airspace for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

DATES: 0901 UTC. Comments must be received on or before December 13, 2010.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2010–0842/Airspace Docket No. 10–ASW–11, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; *telephone:* (817) 321–7716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2010–0842/Airspace Docket No. 10–ASW–11." The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (*see* **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd., Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), part 71 by modifying Class E airspace extending upward from 700 feet above the surface for standard instrument approach procedures at Taos Regional Airport, Taos, NM. Airspace reconfiguration is necessary due to the decommissioning of the Ski NDB and the cancellation of the NDB approach, and would enhance the safety and management of IFR operations at the airport.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9U, dated August 18, 2010, and effective September 15, 2010, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation

listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (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 will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will 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 U.S. Code. Subtitle 1, 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 airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify controlled airspace at Taos Regional Airport, Taos, NM.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 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.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9U, Airspace Designations and Reporting Points, dated August 18, 2010, and effective September 15, 2010, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ASW NM E5 Taos, NM [Amended]

Taos Regional Airport, NM
(Lat. 36°27′29″ N., long. 105°40′21″ W.)
Taos VORTAC
(Lat. 36°36′32″ N., long. 105°54′23″ W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Taos Regional Airport and within 1.5 miles each side of the 129° radial from the Taos VORTAC extending from the 6.5-mile radius to 9.4 miles northwest of the airport; and that airspace extending upward from 1,200 feet above the surface beginning at lat. 36°07′00″ N., long. 105°47′42″ W., thence via the 21.3-mile arc of Taos Regional Airport clockwise to lat. 36°48′00″ N., long. 105°47′35″ W., thence to lat. 36°30′00″ N., long. 105°30′02″ W., thence to the point of beginning.

Issued in Fort Worth, TX, on October 19, 2010.

Anthony D. Roetzel,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2010–27263 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–13–P

Notices

Federal Register

Vol. 75, No. 208

Thursday, October 28, 2010

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

October 25, 2010.

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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. 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.

Farm Service Agency

Title: Guaranteed Farm Loans.

OMB Control Number: 0560–0155.

Summary of Collection: The Consolidated Farm and Rural Development Act. (CONACT), as amended, authorize the Secretary of Agriculture to make and service loans guaranteed by the Farm Service Agency (FSA) to eligible farmers and ranchers. The statutory authority for the guaranteed loan program is set out in the Code of Federal Regulations, title 7, chapter VII, part 762. The loans made and serviced under 762 include farm operating, farm ownership, and soil and water loans. The loan applicant must be a citizen of the United States, own and operate or become the owner and operator of not larger than a family size farm and be unable to obtain sufficient credit elsewhere at reasonable rates and terms. FSA will collect information using several agency forms.

Need and Use of the Information: FSA will collect information to determine lender and loan applicant eligibility for farm loan guarantees, and to ensure the lender protects the government's financial interests. FSA will collect some supporting material electronically, via facsimile, telephone, or on line and some information is obtained from other agencies or program areas. If the information were not collected, the agency would be unable to meet the congressionally mandated mission of the guaranteed loan program.

Description of Respondents: Farms; Business or other for-profit.

Number of Respondents: 15,220.

Frequency of Responses: Reporting: Other (when applying for loans).

Total Burden Hours: 256,104.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2010–27267 Filed 10–27–10; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–602]

Brass Sheet and Strip From Germany: Amended Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

SUMMARY: On October 12, 2010, the Deputy Assistant Secretary of the U.S. Department of Commerce (the Department) signed the final results of the administrative review of the antidumping duty order on brass sheet and strip (BSS) from Germany for the period of review (POR) March 1, 2008, through February 28, 2009. In preparing documentation for the release to the interested parties, we noted that we had inadvertently referred to business proprietary information (BPI) in explaining the Department's position for certain comments discussed in the Issues and Decision Memorandum accompanying the final results of the instant review. This error was discovered prior to publication in the **Federal Register**; therefore, the Department did not publish the original notice or place the Issues and Decision memorandum on the Import Administration Web site. In order to ensure that such BPI is not inappropriately released to any party, we have amended the accompanying Issues and Decision memorandum to remove BPI. The original Department's position containing the BPI information for Comments 1 and 5 are included as BPI in the Cost and Sales Calculation Memorandum for reference.[1] There was no substantive change to the Department's positions associated with this change. The original signed notice of final results of the instant review was public in its entirety. We have adopted the entire original notice below correcting only the citation to the Issues

[1] *See* Memorandum from Ernest Gziryan through Taija Slaughter to Neal Halper, titled "Cost of Production and Constructed Value Calculation Adjustments for the Final Results—Wieland-Werke AG," dated October 12, 2010; *see also* Memorandum from Dennis McClure through James Terpstra to The File, titled "Sales Analysis Memorandum for the Final Results—Wieland-Werke AG," dated October 12, 2010 ("Cost and Sales Calculation Memorandum").

and Decision Memorandum. This notice is being published in place of the original.

On April 13, 2010, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on brass sheet and strip (BSS) from Germany for the period of review (POR) March 1, 2008, through February 28, 2009. *See Brass Sheet and Strip from Germany: Preliminary Results of Antidumping Duty Administrative Review,* 75 FR 18801 (April 13, 2010) (*Preliminary Results*). We gave the interested parties an opportunity to comment on the *Preliminary Results.* Based on our analysis of the comments received, we have made changes to the margin calculation. The final weighted-average dumping margin for Wieland-Werke AG (Wieland) is in the section entitled "Final Results of Review."

DATES: *Effective Date:* October 28, 2010

FOR FURTHER INFORMATION CONTACT: Dennis McClure or George McMahon, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; *telephone:* (202) 482–5973 or (202) 482–1167, respectively.

SUPPLEMENTARY INFORMATION

Background

On May 17, 2010, the Department published the postponement of the final results. *See Brass Sheet and Strip from Germany: Extension of Time Limit for the Final Results of Antidumping Duty Administrative Review,* 75 FR 27538 (May 17, 2010). The Department held its sales verification at Wieland from April 12, 2010, through April 14, 2010. We issued the sales verification report on June 10, 2010. The cost verification was held from July 5, 2010, through July 9, 2010. We issued the cost verification report on July 22, 2010.

We invited parties to comment on the *Preliminary Results.* We received a case brief from Wieland on July 30, 2010, and the petitioners [2] submitted a revised case brief on August 6, 2010, based on a request to not include new information from the Department. Rebuttal briefs were submitted on August 9, 2010, by Wieland and the petitioners.

[2] The petitioners include GBC Metals, LLC of Global Brass and Copper, Inc., doing business as Olin Brass, Heyco Metals, Inc., Luvata Buffalo, Inc., PMX Industries, Inc., and Revere Copper Products, Inc.

Scope of the Order

The scope of this order covers shipments of brass sheet and strip, other than leaded and tinned, from Germany. The chemical composition of the covered products is currently defined in the Copper Development Association (C.D.A.) 200 Series or the Unified Numbering System (U.N.S.) C2000; this review does not cover products the chemical compositions of which are defined by other C.D.A. or U.N.S. series. In physical dimensions, the products covered by this review have a solid rectangular cross section over 0.006 inches (0.15 millimeters) through 0.188 inches (4.8 millimeters) in finished thickness or gauge, regardless of width. Coiled, wound-on-reels (traverse wound), and cut-to-length products are included. The merchandise is currently classified under Harmonized Tariff Schedule of the United States (HTSUS) item numbers 7409.21.00 and 7409.29.00. Although the HTSUS item numbers are provided for convenience and customs purposes, the Department's written description of the scope of this order remains dispositive.

Analysis of Comments Received

All issues raised in the case briefs are addressed in the "Amended Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Brass Sheet and Strip from Germany" (Amended Issues and Decision Memorandum), which is dated concurrently with and hereby adopted by this notice. A list of the issues which parties raised and to which we responded in the Amended Issues and Decision Memorandum is attached to this notice as an Appendix. The Amended Issues and Decision Memorandum is a public document which is on file in the CRU, and is accessible on the web at *http://www.ia.ita.doc.gov/frn.* The paper copy and electronic version of the memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we made the following changes in calculating the dumping margin for the final results: (1) We adjusted the reported fabrication costs and G&A expenses; (2) we used Wieland's day-specific metal costs to calculate the cost of production for the sales-below-cost test and the calculation of the constructed value; (3) we revised the cost recovery test to exclude the cost of other materials from the calculation of the quarterly indexed metal costs and calculated the POR-average cost of other materials; (4) we modified our price-to-price comparisons to ensure that all comparisons had the same metal fix date (if there were no matches, we used constructed value); and (5) we removed the trial sales in the comparison market from our analysis. *See* Amended Issues and Decision Memorandum at Comments 1, 2, 4, 5, and 6. For further details on how the cost changes above were applied in the calculation, *see* "Memorandum to Neal M. Halper from Ernest Z. Gziryan, Cost of Production and Constructed Value Calculation Adjustments for the Final Results—Wieland-Werke AG dated October 12, 2010."

Final Results of Review

We determined that the following weighted-average dumping margin exists for Wieland for the period March 1, 2008 through February 28, 2009.

Manufacturer/exporter	Margin (percent)
Wieland-Werke AG	0.00

Assessment Rate

Pursuant to 19 CFR 351.212(b), the Department calculated an assessment rate for each importer of the subject merchandise. Upon issuance of the final results of this administrative review, if any importer-specific assessment rates calculated in the final results are above *de minimis* (*i.e.,* at or above 0.5 percent), the Department will issue appraisement instructions directly to CBP to assess antidumping duties on appropriate entries by applying the assessment rate to the entered value of the merchandise. For assessment purposes, we calculated importer-specific assessment rates for the subject merchandise by aggregating the dumping margins for all U.S. sales to each importer and dividing the amount by the total entered value of the sales to that importer. Where appropriate, to calculate the entered value, we subtracted international movement expenses (*e.g.,* international freight) from the gross sales value.

The Department clarified its "automatic assessment" regulation on May 6, 2003 (68 FR 23954). This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see*

Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties, 68 FR 23954 (May 6, 2003).

Cash Deposit Requirements

To calculate the cash deposit rate for Wieland, we divided its total dumping margin by the total net value of its sales during the review period. The following deposit rates will be effective upon publication of the final results of this administrative review for all shipments of BSS from Germany entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for companies subject to this review will be the rate established in the final results of this review, except if the rate is less than 0.5 percent and, therefore, *de minimis,* no cash deposit will be required; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent final results for a review in which that manufacturer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent final results for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be 7.30 percent, the all-others rate established in the LTFV investigation. *See Antidumping Duty Order: Brass Sheet and Strip from the Federal Republic of Germany,* 52 FR 6997 (March 6, 1987), amended at 52 FR 35750 (September 23, 1987). These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

These final results of review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: October 21, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

Appendix: Comments in the Amended Issues and Decision Memorandum

Comment 1: Whether To Use Wieland's Daily Metal Costs for Purposes of Computing Costs of Production for the Sales Below Cost Test

Comment 2: Whether the Department's Quarterly Indexed Cost Methodology Meets the Requirements of the Statute's Cost Recovery Test

Comment 3: Whether To Revise Wieland's General and Administrative (G&A) Expense Ratio

Comment 4: Whether To Make Other Adjustments to the OTHMAT Costs, Fabrication Costs and General and Administrative Expenses

Comment 5: Whether the Department Should Adjust for Fluctuations in Metal Price in its Comparison of Export Price to Normal Value

Comment 6: Whether the Department Should Exclude Samples and Trial Shipments From its Antidumping Analysis

Comment 7: Whether Facts Available Should Be Applied

Comment 8: Whether Wieland's U.S. Sale is Bona Fide

Comment 9: Whether To Make a Finding of Reimbursement of Antidumping Duties

[FR Doc. 2010–27295 Filed 10–27–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce ("the Department") has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with September anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews.

DATES: *Effective Date:* October 28, 2010.

FOR FURTHER INFORMATION CONTACT: Sheila E. Forbes, Office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, *telephone:* (202) 482–4697.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various antidumping and countervailing duty orders and findings with September anniversary dates.

All deadlines for the submission of various types of information, certifications, or comments or actions by the Department discussed below refer to the number of calendar days from the applicable starting date.

Notice of No Sales

Under 19 CFR 351.213(d)(3), the Department may rescind a review where there are no exports, sales, or entries of subject merchandise during the respective period of review ("POR") listed below. If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the POR, it must notify the Department within 60 days of publication of this notice in the **Federal Register**. The Department will consider rescinding the review only if the producer or exporter, as appropriate, submits a properly filed and timely statement certifying that it had no exports, sales, or entries of subject merchandise during the period of review. All submissions must be made in accordance with 19 CFR 351.303 and are subject to verification in accordance with section 782(i) of the Tariff Act of 1930, as amended ("the Act"). Six copies of the submission should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room 1870, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Further, in accordance with 19 CFR 351.303(f)(1)(i), a copy of each request must be served on every party on the Department's service list.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews, the Department intends to select

respondents based on U.S. Customs and Border Protection ("CBP") data for U.S. imports during the period of review ("POR"). We intend to release the CBP data under Administrative Protective Order ("APO") to all parties having an APO within seven days of publication of this initiation notice and to make our decision regarding respondent selection within 21 days of publication of this **Federal Register** notice. The Department invites comments regarding the CBP data and respondent selection within five days of placement of the CBP data on the record of the applicable review.

Separate Rates

In proceedings involving non-market economy ("NME") countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China,* 56 FR 20588 (May 6, 1991), as amplified by *Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China,* 59 FR 22585 (May 2, 1994). In accordance with the separate-rates criteria, the Department assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate-rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate-rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate-rate eligibility, the Department requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on the Department's Web site at *http://www.trade.gov/ia* on the date of publication of this **Federal Register.** In responding to the certification, please follow the "Instructions for Filing the Certification" in the Separate Rate Certification. Separate Rate Certifications are due to the Department no later than 60 days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

For entities that have not previously been assigned a separate rate, to demonstrate eligibility for such, the Department requires a Separate Rate Status Application. The Separate Rate Status Application will be available on the Department's Web site at *http://www.trade.gov/ia* on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Status Application, refer to the instructions contained in the application. Separate Rate Status Applications are due to the Department no later than 60 days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Status Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

For exporters and producers who submit a separate-rate status application or certification and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for separate-rate status unless they respond to all parts of the questionnaire as mandatory respondents.

Initiation of Reviews

In accordance with sections 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than September 30, 2011.

	Period to be reviewed
Antidumping Duty Proceedings	
India: Certain Lined Paper Products, A–533–843	9/1/09–8/31/10
Abhinav Paper Products Pvt. Ltd.	
American Scholar, Inc. and/or I-Scholar	
Ampoules & Vials Mfg. Co., Ltd.	
AR Printing & Packaging (India) Pvt	
Bafna Exports	
Cello International Pvt. Ltd. (M/S Cello Paper Products)	
Creative Divya	
Corporate Stationery Pvt. Ltd.	
D.D International	
Excel India (Pvt.) Ltd.	
Exmart International Pvt. Ltd.	
Fatechand Mahendrakumar	
FFI International	
Freight India Logistics Pvt. Ltd.	
International Greetings Pvt. Ltd.	
Kejriwal Paper Ltd. and Kejriwal Exports	
Lodha Offset Limited	
Magic International Pvt Ltd.	
Marigold ExIm Pvt. Ltd.	
Marisa International	
Navneet Publications (India) Ltd.	
Orient Press Ltd.	

	Period to be reviewed
Paperwise Inc.	
Pioneer Stationery Pvt. Ltd.	
Premier Exports	
Rajvansh International	
Riddhi Enterprises	
SAB International	
Sar Transport Systems	
Seet Kamal International	
Sonal Printers Pvt Ltd.	
Super Impex	
Swati Growth Funds Ltd.	
V & M	
Yash Laminates	
The People's Republic of China: Certain Lined Paper Products,[1] A–570–901	9/1/09–8/31/10
Shanghai Lian Li Paper Products Co., Ltd.	
Leo's Quality Products Co., Ltd./Denmax Plastic Stationary Factory	
Watanabe Group (consisting of the following companies):	
Watanabe Paper Products (Shanghai) Co., Ltd.	
Watanabe Paper Products (Linqing) Co., Ltd.	
Hotrock Stationery (Shenzhen) Co., Ltd.	
The People's Republic of China: Certain New Pneumatic Off-the-Road Tires,[2] A–570–912	9/1/09–8/31/10
Guizhou Tyre Co., Ltd.	
Guizhou Advance Rubber Co., Ltd.	
Guizhou Tyre Import and Export Corporation	
Hangzhou Zhongce Rubber Co., Ltd.	
Hebei Starbright Tire Co., Ltd.	
KS Holding Limited/KS Resources Limited	
Laizhou Xiongying Rubber Industry Co., Ltd.	
Mai Shandong Radial Tyre Co., Ltd.	
Qingdao Free Trade Zone Full-World International Trading Company, LTD.	
Qingdao Tiafa Group Co., Ltd.	
Tianjin United Tire & Rubber International Co., Ltd.	
Weihai Zhongwei Rubber Co., Ltd.	
The People's Republic of China: Freshwater Crawfish Tail Meat,[3] A–570–848	9/1/09–8/31/10
China Kingdom (Beijing) Import & Export Co., Ltd.	
Nanjing Gemsen International Co., Ltd.	
Shanghai Ocean Flavor International Trading Co., Ltd.	
Xiping Opeck Food Co., Ltd.	
Xuzhou Jinjiang Foodstuffs Co., Ltd.	
Yancheng Hi-King Agriculture Developing Co., Ltd.	
The People's Republic of China: Kitchen Appliance Shelving and Racks,[4 5] A–570–941	3/5/09–8/31/10
Asia Pacific CIS (Wuxi) Co., Ltd.	
Asia Pacific CIS (Thailand) Co., Ltd.	
Guangdong Wire King Co., Ltd. (formerly known as Foshun Shunde Wireking Housewares & Hardware)	
Hangzhou Dunli Import & Export Co., Ltd. and Hangzhou Dunli Industry Co., Ltd.	
Hengtong Hardware Manufacturing (Huizhou) Co., Ltd.	
Jiangsu Weixi Group Co.	
King Shan Wire Co., Ltd. (parent company of New King Shan (Zhuhai) Co., Ltd.)	
Leader Metal Industry Co., Ltd. (aka Marmon Retail Services Asia)	
New King Shan (Zhu Hai) Co., Ltd.	
Taiwan Rail Company	
Countervailing Duty Proceedings	
Brazil: Certain Hot-Rolled Carbon Steel Flat Products, C–351–829	1/1/09–12/31/09
Usinas Siderurgicas de Minas Gerais S.A.—Usiminas	
Companhia Siderurgica Paulista—Cosipa	
The People's Republic of China: Certain New Pneumatic Off-the-Road Tires, C–570–913	1/1/09–12/31/09
Guizhou Tyre Co., Ltd.	
Guizhou Advance Rubber Co., Ltd.	
Guizhou Tyre Import and Export Corporation	
Qingda Etyre International Trade Co., Ltd.	
Qingdao Hengda Tyres Co., Ltd.	
Qingdao Sinorient International Ltd.	
Qingdao Qizhou Rubber Co., Ltd.	
Shandong Huitong Tyre Co., Ltd.	
Tianjin United Tire & Rubber International Co., Ltd.	
Techking Tires Limited	
Wendeng Sanfeng Tyre Co., Ltd.	
The People's Republic of China: Kitchen Appliance Shelving and Racks,[6] C–570–942	1/7/09–12/31/09
Asia Pacific CIS (Wuxi) Co., Ltd.	
Asia Pacific CIS (Thailand) Co., Ltd.	
Guangdong Wire King Co., Ltd. (formerly known as Foshun Shunde	

	Period to be reviewed
Wireking Housewares & Hardware)	
Hangzhou Dunli Import & Export Co., Ltd. and Hangzhou Dunli Industry Co., Ltd.	
Hengtong Hardware Manufacturing (Huizhou) Co., Ltd.	
Jiangsu Weixi Group Co.	
King Shan Wire Co., Ltd. (parent company of New King Shan (Zhuhai) Co., Ltd.)	
Leader Metal Industry Co., Ltd. (aka Marmon Retail Services Asia)	
New King Shan (Zhu Hai) Co., Ltd.	
Taiwan Rail Company	

[1] If one of the above named companies does not qualify for a separate rate, all other exporters of Certain Lined Paper Products from the People's Republic of China ("PRC") who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[2] If one of the above named companies does not qualify for a separate rate, all other exporters of Certain New Pneumatic Off-the-Road Tires from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[3] If one of the above named companies does not qualify for a separate rate, all other exporters of Freshwater Crawfish Tail Meat from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[4] If one of the above named companies does not qualify for a separate rate, all other exporters of Kitchen Appliance Shelving and Racks from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

[5] Petitioners, SSW Holding Company, Inc. and Nashville Wire Products, Inc, also requested a review of five additional companies. However, the Department has sought additional information as to why Petitioners desire a review of these companies, as required by 19 CFR 351.213(b)(1). We are still considering the appropriateness of initiating a review of these five companies. Therefore, at this time, we are not initiating a review with respect to the following companies: Asia Pacific CIS (Wuxi) Co., Ltd., Asia Pacific CIS (Thailand) Co., Ltd., Hengtong Hardware Manufacturing (Huizhou) Co., Ltd., Taiwan Rail Company, and King Shan Wire Co., Ltd.

[6] *See* footnote 5.

Suspension Agreements

None.

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine, consistent with *FAG Italia* v. *United States,* 291 F.3d 806 (Fed. Cir. 2002), as appropriate, whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional measures "gap" period, of the order, if such a gap period is applicable for the POR.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008). Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.,* the filing of separate letters of appearance as discussed in 19 CFR 351.103(d)).

These initiations and this notice are in accordance with section 751(a) of the Act, (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(I).

Dated: October 25, 2010.

Susan H. Kuhbach,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–27296 Filed 10–27–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–836]

Glycine From the People's Republic of China: Initiation of Antidumping Anti-circumvention Inquiry

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to a request from GEO Specialty Chemicals, Inc. and Chattem Chemicals, Inc., domestic interested parties in the above-referenced proceeding ("domestic interested parties"), the Department of Commerce ("the Department") is initiating an antidumping anti-circumvention inquiry pursuant to section 781(b) of the Tariff Act of 1930, as amended ("the Act"). This inquiry will examine whether the activities of three Indian companies, Salvi Chemical Industries (allegedly affiliated with Nutracare International) (collectively, "Salvi"), Paras Intermediates Pvt. Ltd. ("Paras"), and AICO Laboratories India Ltd. ("AICO") are circumventing the antidumping duty order on glycine from the People's Republic of China (PRC). *See Antidumping Duty Order: Glycine from People's Republic of China,* 60 FR 16116 (March 29, 1995) ("*PRC Glycine Order*").

DATES: *Effective Date:* October 28, 2010.

FOR FURTHER INFORMATION CONTACT: David Cordell or Olga Carter, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–0408 or (202) 482–8221, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 18, 2009, the domestic interested parties filed a request for initiation of an anti-circumvention inquiry, alleging two companies (AICO and Paras) were circumventing the order covering glycine from the PRC under section 781(b) of the Act and 19 CFR

351.225(h), through completion and assembly in India of the same class or kind of merchandise that is subject to the *PRC Glycine Order* and by labeling the merchandise as Indian origin. *See* domestic interested parties request "Antidumping Duty Order on Glycine from the People's Republic of China—Circumvention of Antidumping Duty Order," dated December 18, 2009 ("Circumvention Allegation").

On January 15, 2010, the Department requested that domestic interested parties resubmit legible copies of AICO financial statements and of the Port Import Export Reporting Service ("PIERS") report regarding AICO's shipments to the United States, provided in their original Circumvention Allegation, at Exhibits B and A, respectively. The legible copies of the requested documents were submitted by the domestic interested parties on January 22, 2010. *See* letter from the domestic interested parties to the Department, dated January 22, 2010. On February 18, 2010, the domestic interested parties met with the Department to discuss their December 18, 2009, and January 22, 2010, submissions, in which they requested the Department initiate an anti-circumvention inquiry for glycine from the PRC. *See* Memorandum to the File, from Olga Carter, analyst, titled "Scope Determination Request Based on Circumvention Inquiry: Meeting with Counsel and Executive Vice President and CFO of Domestic Interested Party GEO Specialty Chemicals, Inc.," dated February 22, 2010. On February 22, 2010, the Department requested additional information from the domestic interested parties in the form of a supplemental questionnaire.

In response to a request from the domestic interested parties, on July 29, 2010, the Department held a meeting to further discuss the December 18, 2009, and January 22, 2010, submissions, as well as the Department's February 22, 2010, deficiency questionnaire. *See* Memorandum to the File, titled "Scope Determination Request Based on Circumvention Inquiry: Meeting with Counsel of Domestic Interested Party GEO Specialty Chemicals, Inc.," dated August 2, 2010.

On August 19, 2010, the domestic interested parties filed additional information and data, supplementing their Circumvention Allegation, titled "Antidumping Duty Order on Glycine from the People's Republic of China—Circumvention of Antidumping Duty Order" ("August 19, 2010 submission"), in which the domestic interested parties also included an anti-circumvention allegation against a third company, Salvi, and its export arm, Nutracare International. In their Circumvention Allegation, as supplemented, the domestic interested parties allege that all three Indian companies are importing technical-grade glycine from companies in the PRC, processing [1] and/or repackaging the PRC-origin glycine, then exporting the finished product to the United States, marked as Indian-origin glycine.

On August 31, 2010, the Department requested the domestic interested parties to provide additional information to justify their claim that there is a clear and compelling need to withhold certain double bracketed information in their August 19, 2010, submission from disclosure under an administrative protective order ("APO"). On September 7, 2010, the domestic interested parties provided such justification in a response to the Department's request, thus satisfying the basic requirements for filing a request for an anti-circumvention inquiry. *See* Letter from the Domestic Interested Parties to the Department, entitled "Antidumping Duty Order on Glycine from the People's Republic of China ("PRC") Scope Determination Request Based on Circumvention Inquiry: Response of Domestic Glycine Industry to Department's August 31, 2010 Letter." In response to this submission, on September 8, 2010, the Department established an APO and a Public Service List for this segment of the proceeding. *See* the Memorandum to the File "Scope Request Based on Circumvention Inquiry: Glycine from the PRC," dated September 8, 2010.

On September 23, 2010, the Department conducted a telephone interview with the foreign market researcher to corroborate the information in the market report that the domestic interested parties filed on the record as support for their allegations and to clarify the details of the research process. *See* the Memorandum to the File entitled "Antidumping Circumvention Inquiry: Telephone Interview with the Foreign Market Researcher," dated October 5, 2010 ("Telephone Interview Memo").

On October 6, 2010, the domestic interested parties amended their request for the initiation of an anti-circumvention inquiry with respect to AICO, citing to the Telephone Interview Memo. *See* domestic interested parties' submission, titled "Antidumping Duty Order on Glycine from the People's Republic of China (PRC): Antidumping Circumvention Inquiry—Amendment to Domestic Industry's Circumvention Allegation based on Department's Memorandum to File" ("Amendment Letter"), dated October 6, 2010, at 2. Therein, the domestic interested parties allege that, based on the telephone interview, AICO is both repackaging and refining the glycine. *Id.*

Scope of Order

The product covered by this order is glycine, which is a free-flowing crystalline material, like salt or sugar. Glycine is produced at varying levels of purity and is used as a sweetener/taste enhancer, a buffering agent, re-absorbable amino acid, chemical intermediate, and a metal complexing agent. Glycine is currently classified under subheading 2922.49.4020 of the Harmonized Tariff Schedule of the United States ("HTSUS"). The scope of this order includes glycine of all purity levels. Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

Initiation of Antidumping Anti-Circumvention Inquiry

Section 781(b)(1) of the Act provides that the Department may find circumvention of an antidumping duty order when merchandise of the same class or kind subject to the order is completed or assembled in a foreign country other than the country to which the order applies. In conducting anti-circumvention inquiries, under section 781(b)(1) of the Act, the Department will also evaluate whether: (1) The process of assembly or completion in the other foreign country is minor or insignificant; (2) the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States; and (3) action is appropriate to prevent evasion of such an order or finding. As discussed below, the domestic interested parties supported their claims with information available to them with respect to these criteria.

A. Merchandise of the Same Class or Kind

Domestic interested parties state that the *PRC Glycine Order* covers all grades and purity levels of glycine and that both the Department and U.S. Customs and Border Protection ("CBP") have determined that purifying or refining

[1] The domestic interested parties used a variety of terms (*e.g.* refining, purifying, processing, sieving) in their submissions to describe the processing activities that are allegedly taking place in India. We have used the term "processing" to encompass all of them for purposes of this initiation notice.

glycine does not result in a substantial transformation necessary to change its country of origin. *See* Circumvention Allegation at 5. Therefore, the domestic interested parties argue that the merchandise being imported into the United States from India from Salvi, Paras and Aico is of the same class or kind as that subject to the *PRC Glycine Order,* pursuant to section 781(b)(1)(A)(i) of the Act. To further support this allegation, domestic interested parties cite to the investigation of glycine from India,[2] where Paras stated that it was further processing PRC-origin glycine into higher grades and the Department found that "the further processing incurred in India with respect to imported technical grade glycine is not substantial enough to change the country of origin." [3] Therefore, domestic interested parties contend that the PRC-origin glycine processed by Paras, Salvi, and AICO in India continues to be PRC glycine, and therefore is the merchandise of the same class or kind as that subject to the *PRC Glycine Order.*

B. Completion of Merchandise in a Foreign Country

Domestic interested parties allege that, based on the face-to-face interviews with the market researchers, in the case of Paras, Salvi and AICO, all three companies acknowledge that they have imported technical-grade PRC glycine into India, refined it and shipped it to the United States. *See* August 19, 2010, submission at 4, footnote 7. In addition, the domestic interested parties again cite to *Indian Glycine,* in which Paras acknowledged it had further-processed PRC glycine in India. *See* August 19, 2010, submission at 4. With respect to Salvi, the domestic interested parties cite to the foreign market research report, titled "Market Survey to Assess the Dynamics of the Glycine Market in India" (Market Research Report), which identifies Salvi as an exporter of PRC glycine to the United States, which it allegedly refined in India,. *See* August 19, 2010, submission at Exhibit 12. With respect to AICO, the domestic interested parties contend that AICO both repackages and refines glycine originating in the PRC. *See* Amendment Letter at 3.

C. Minor or Insignificant Process

Domestic interested parties allege that for the purposes of section 781(b)(1)(C) of the Act, the process of refining or purifying technical-grade PRC glycine into purified glycine is "minor or insignificant," as defined by the Act. To demonstrate that the processing is "minor or insignificant," the domestic interested parties calculate a cost to process the PRC glycine that is imported into India, and allegedly performed by Paras and Salvi, based on the domestic industry's cost of production. *See* August 19, 2010, submission at Exhibit 2. They allege that the refining of lower-grade glycine in India does not include "the reactor, washing and centrifuge steps," which are critical to the production process. *Id.* Domestic interested parties conclude that refinement costs that do not include production-related processes (*i.e.,* the reactor, washing and centrifuge steps) are insignificant or minor when measured against the value of glycine exported to the United States. Further, the domestic interested parties argue that based on their own estimates, the cost to refine PRC glycine ranges from 2.28 percent for AICO to 2.85 percent for Paras and Salvi of the average value of Indian glycine imported into the United States during the period from April 1, 2008, through March 31, 2009. *See* August 19, 2010, submission at 5 and 6.

D. Value of Merchandise Produced in the PRC is a Significant Portion of the Total Value of the Merchandise Exported to the United States

Domestic interested parties allege that the production process for glycine that takes place in the PRC prior to processing in India and subsequent shipment to the United States accounts for the significant portion of the total value of the final product. *See* August 19, 2010, submission at 5 and 6.

Domestic interested parties argue that an analysis of the relevant statutory factors of section 781(b)(2) of the Act further supports the conclusion that the Indian processing is "minor or insignificant." These factors include: (1) Level of investment in the foreign country; (2) level of research and development in the foreign country; (3) nature of the production process in the foreign country; (4) extent of production facilities in the foreign country; and (5) whether the value of the processing performed in the foreign country represents a small proportion of the value of the merchandise imported into the United States. The domestic interested parties' analysis of these factors, including citations as appropriate, is as follows.

(1) Level of Investment

Domestic interested parties state that manufacturing of glycine requires a significant level of investment. *See* August 19, 2010, submission at 8. Domestic interested parties further contend that unlike the manufacturing of glycine, the processing of a lower-grade, PRC-origin glycine into a more refined grade does not require a significant level of investment, since Indian companies are allegedly re-processing the PRC-origin glycine by refining it, and then repackaging the PRC-origin glycine. *See* August 19, 2010, submission at 6 through 8 and 19.

(2) Level of Research and Development

Domestic interested parties state that the purification, refining, and repackaging of glycine are technically mature processes and, therefore, believe no research and development is required to refine, purify and repackage PRC-origin glycine as performed by Paras, Salvi, and AICO. *See* August 19, 2010, submission at 9.

(3) Nature of the Production Process

Domestic interested parties state that they were not able to acquire definitive information regarding the production processes used by Paras, Salvi, and AICO. *See* August 19, 2010 submission at 9. However, the domestic interested parties describe a possible scenario where Paras and Salvi refine PRC glycine by placing it in a sieve and then repackage the processed PRC-origin glycine for export as Indian glycine. *Id* at 9–10. Further, the domestic interested parties state that the Department has previously determined that Paras' further processing of imported glycine into higher-purity grades was not significant enough to substantially transform the glycine into Indian-origin glycine. *See* August 19, 2010, submission at 4, citing to *Indian Glycine* and the accompanying Issues and Decision Memorandum at Comment 5. Domestic interested parties' allegations that AICO's production process involves processing in addition to repackaging PRC-origin glycine, are based on the Market Research Report and foreign market researcher's statement during the telephone interview with the Department. *See* Market Research Report at 25; *see also* Amendment Letter at 2. Thus, the domestic interested parties claim that the production processes of the named Indian companies are limited to refining and repackaging of technical-grade PRC glycine. *See* August 19, 2010, submission at 5.

[2] *See Notice of Final Determination of Sales at Less Than Fair Value: Glycine From India,* 73 FR 16640 (March 28, 2008) (*Indian Glycine*), and the accompanying Issues and Decision Memorandum at Comment 5 (Issues and Decision Memorandum).

[3] *Id.*

(4) Extent of Production Facilities

The domestic interested parties allege that AICO does not manufacture glycine. *See* August 19, 2010, submission at 6. Further, the domestic interested parties allege that the extent of AICO's production facilities is limited to the facilities required for processing and repackaging. *See* Telephone Interview Memo at 4. *See also* August 19, 2010, submission at 6.

With respect to Paras, the domestic interested parties described Paras's production facilities, as it pertained to the processing of PRC-origin glycine, as consisting of a refining line, in which PRC glycine bypasses the reactor, washing and centrifuge steps. *See* August 19, 2009, submission at 4.

With respect to Salvi, the domestic interested parties claim that Salvi's operation is similar to Paras's operation. *See* August 19, 2010, submission at 2.

(5) Value of Processing Performed in India Represents a Small Proportion of the Value of the Merchandise Imported into the United States

Domestic interested parties allege that the production process for glycine that takes place in the PRC prior to refining in India and subsequent shipment to the United States accounts for the vast majority of the total value of the final product. *See* August 19, 2010, submission, Exhibits 2 and 3. *See also* Market Research Report at 25. Domestic interested parties claim that the value of processing performed in India represents a small portion of the value, compared to either the cost of production or import value. *See* August 19, 2010, submission at 5 and at Exhibit 2. In support of their claim, domestic interested parties submit the domestic industry's estimated cost of Paras's and Salvi's processing of PRC glycine. According to their calculations, both companies' estimated cost of processing (*i.e.,* "repackaging and refining cost") amounts to $0.0784 per pound, representing 2.85 percent of the average value of Indian glycine imported into the United States. *Id.* In addition, based on the analysis of AICO's financial statements, the domestic interested parties contend that AICO's purchases of imported goods were the dominant components of its 2007 and 2009 costs of goods sold. *See* August 19, 2010, submission at 18. According to the domestic interested parties' calculations of AICO's estimated processing cost of PRC glycine, its value amounts to $0.0628 per pound, or 2.28 percent of the average value of Indian glycine imported to the United States. *See* August 19, 2010, submission at 6 and at Exhibit 3. Therefore, the domestic interested parties contend that the value of glycine processing that is performed in India represents a small portion of the value of the glycine imported to the United States. *Id.*

Factors to Consider in Determining Whether Action is Necessary

Domestic interested parties argue that the additional factors contained in section 781(b)(3) of the Act must also be considered in the Department's decision whether to issue a finding of anti-circumvention regarding importation of Indian glycine.

Pattern of Trade

Domestic interested parties state that section 781(b)(3)(C) of the Act directs the Department to take into account the pattern of trade, including sourcing patterns, when making a decision whether to include merchandise assembled or completed in India within the scope of the *PRC Glycine Order.* Domestic interested parties allege that from 2008 to 2009, glycine imports from the PRC to the United States decreased by 96.5 percent and imports of glycine from India rose by 13.8 percent and India's share of the U.S. glycine imports rose from 27 percent to 50 percent over the same time period. *See* August 19, 2010, submission at 12 and at Exhibit 5. Domestic interested parties also point out that the market share of total U.S. imports of glycine from the PRC dropped from 38 percent to 2 percent over the same time period. *Id.*

Affiliation

None of the companies alleged to be circumventing the order are alleged to be affiliated with PRC producers. However, the domestic interested parties claim a buyer/seller relationship exists between AICO and Chiyuen International Trading Ltd., a manufacturer in the PRC of amino acetic acid (*i.e.,* glycine). *See* August 19, 2010, submission at 18.

Subsequent Import Volume

Domestic interested parties cite to section 781(b)(3)(C) of the Act, which directs the Department to take into account whether imports of the merchandise into the foreign country have increased after the initiation of the investigation which resulted in the issuance of such an order or finding when making a decision on anti-circumvention rulings. Domestic interested parties allege that from 2003–2004 to 2008–2009, imports into India of PRC glycine rose more than 246 percent. *See* August 19, 2010, submission at 13.

Analysis

Based on our analysis of the domestic interested parties' anti-circumvention inquiry request, as supplemented, and our September 23, 2010, phone call with the foreign market researcher, the Department determines that the domestic interested parties have satisfied the criteria under section 781(b)(1) of the Act to warrant the Department's initiation of an anti-circumvention inquiry. In accordance with 19 CFR 351.225(e), if the Department finds that the issue of whether a product is included within the scope of an order cannot be determined based solely upon the application and the descriptions of the merchandise contained in the petition, the investigation and other determinations, the Department will notify by mail all parties on the Department's scope service list of the initiation of a scope inquiry, including an anti-circumvention inquiry. In addition, in accordance with 19 CFR 351.225(f)(1)(ii), a notice of the initiation of an anti-circumvention inquiry issued under paragraph (e) of this section will include a description of the product that is the subject of the anti-circumvention inquiry, *i.e.,* glycine from the PRC that is processed and/or repackaged in India, as provided in the scope of the *PRC Glycine Order,* and an explanation of the reasons for the Department's decision to initiate the anti-circumvention inquiry, as provided below.

With regard to whether the merchandise from India is of the same class or kind as the merchandise produced in the PRC, the domestic interested parties have presented information to the Department which appears to indicate that, pursuant to section 781(b)(1)(A) of the Act, the merchandise being produced in and/or exported from India by AICO, Paras and Salvi may be of the same class or kind as glycine produced in the PRC and subject to the *PRC Glycine Order.* Consequently, the Department finds that the domestic interested parties provided sufficient information in its request, as supplemented regarding the class or kind of merchandise to warrant initiation of an anti-circumvention inquiry.

With regard to completion or assembly of merchandise in a foreign country, pursuant to section 781(b)(1)(B) of the Act, the domestic interested parties have also presented information to the Department which appears to indicate that certain glycine exported from India to the United States is being further processed by AICO, Paras and

Salvi using glycine imported into India from the PRC. We find that the information presented by the domestic interested parties regarding this criterion supports their request to initiate an anti-circumvention inquiry.

The Department believes that the domestic interested parties sufficiently addressed the factors described by sections 781(b)(1)(C) and 781(b)(2) of the Act regarding whether the processing of glycine in India is minor or insignificant. Specifically, in support of its argument, the domestic interested parties relied on information from *Indian Glycine,* on the domestic interested parties' calculations based on their estimated cost of production and cost of processing and repackaging of PRC-origin glycine, allegedly performed by Paras, Salvi, and AICO, and information in the Market Research Report as described above. Thus, we find that the information presented by the domestic interested parties supports their request, as supplemented, to initiate an anti-circumvention inquiry. In particular, for the purposes of initiation, we find that the domestic interested parties have sufficiently supported their allegations that: (1) Little investment has been made by either Paras, Salvi, or AICO in their respective processing of PRC glycine; (2) Paras, Salvi, and AICO perform processing and repackaging of the lower-grade PRC glycine, which are technologically mature processes that do not require research and development by these companies; (3) the mere processing of the lower-grade glycine through refinement, purification, and repackaging does not alter the fundamental characteristics of the glycine, or whether it is subject to the scope of the *PRC Glycine Order;* (4) Paras's, Salvi's, and AICO's facilities for processing and repackaging PRC glycine do not require the typically capital-intensive production facilities needed to manufacture glycine; and (5) refining and repackaging of PRC glycine represents a small proportion of the value of the merchandise exported to the United States.

Our analysis will focus on Paras's, Salvi's, and AICO's processing operations in India and, in the context of this proceeding, we will closely examine the extent of processing done in India, as well as Paras's, Salvi's, and AICO's relationships with glycine suppliers in the PRC. With respect to the value of the merchandise produced in the PRC, pursuant to section 781(b)(1)(D) of the Act, the domestic interested parties relied on their information and arguments presented in the "minor or insignificant" portion of their anti-circumvention request, as supplemented, to indicate that the value of PRC glycine may be significant relative to the total value of the glycine processed and repackaged in India and then exported to the United States. We find that the information provided adequately addresses this factor, as discussed above, for the purposes of initiating an anti-circumvention inquiry.

Finally, the domestic interested parties argue that, pursuant to section 781(b)(3) of the Act, the Department should also consider the pattern of trade, affiliation, and subsequent import volumes as factors in determining whether to initiate an anti-circumvention inquiry. The export and import data submitted by the domestic interested parties suggests that imports of glycine from the PRC into India rose significantly in recent years. Accordingly, based on the domestic interested parties' allegations, as supplemented, we have determined that domestic interested parties have provided a sufficient basis to initiate an anti-circumvention inquiry concerning the *PRC Glycine Order,* pursuant to section 781(b) of the Act. These anti-circumvention inquiries pertain solely to Paras, Salvi, and AICO.

If, within sufficient time, the Department receives a formal request from an interested party regarding potential anti-circumvention of the *PRC Glycine Order* by other Indian companies, we will consider conducting additional inquiries concurrently.

In accordance with 19 CFR 351.225(l)(2), if the Department issues a preliminary affirmative determination, we will then instruct CBP to suspend liquidation and require a cash deposit of estimated duties on the merchandise.

The Department will, following consultation with interested parties, establish a schedule for questionnaires and comments on the issues. The Department intends to issue its final determination within 300 days of the date of publication of this initiation. *See* section 781(f) of the Act.

This notice is published in accordance with section 777(i)(1) of the Act.

Dated: October 22, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–27294 Filed 10–27–10; 8:45 am]

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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Materials Processing Equipment Technical Advisory Committee; Notice of Partially Closed Meeting

The Materials Processing Equipment Technical Advisory Committee (MPETAC) will meet on November 17, 2010, 9 a.m., Room 6087B, in the Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to materials processing equipment and related technology.

Agenda:

Open Session

1. Opening Remarks and Introductions.
2. Presentation of Papers and Comments by the Public.
3. Discussion on Proposals from last and for next Wassenaar Meeting.
4. Report on Proposed changes to the Export Administration Regulation.
5. Other Business.

Closed Session

6. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yspringer@bis.doc.gov* no later than November 10, 2010.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via e-mail.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on October 15, 2010, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § (10)(d)), that the portion of the meeting dealing with matters the disclosure of which would

be likely to frustrate significantly implementation of an agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)1 and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: October 22, 2010.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2010–27219 Filed 10–27–10; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA007

New England Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) will hold a three-day meeting on Tuesday through Thursday, November 16–18, 2010 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will be held on Tuesday, November 16, Wednesday, November 17 and Thursday, November 18, 2010 starting at 8:30 a.m. each day.

ADDRESSES: The meeting will be held at the Ocean Edge Resort, 2907 Main Street, Brewster, MA 02631–1946; *telephone:* (508) 896–9000; *fax:* (508) 896–9123. Requests for special accommodations should be addressed to the New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950; *telephone:* (978) 465–0492.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Tuesday, November 16, 2010

Following introductions and any announcements, the Council will hold a closed session to allow Council members to comment on 2011–13 nominees to its Scientific and Statistical Committee. Following this agenda item, the Council will receive brief reports from the Council Chairman and Executive Director, the NOAA Fisheries Regional Administrator, Northeast Region, Northeast Fisheries Science Center and Mid-Atlantic Fishery Management Council liaisons, NOAA General Counsel, representatives of the U.S. Coast Guard and the Atlantic States Marine Fisheries Commission, as well as NOAA Enforcement and the Chairman of the Research Steering Committee. There will be a review of any experimental fishery permit applications that have been received since the last Council meeting, and an open public comment period. This time is scheduled for any interested party who may wish to provide brief comments on issues relevant to Council business but not otherwise listed on the meeting agenda. Prior to a break the Council will discuss and approve management priorities for 2011–12. The afternoon session will begin with a report from the Scientific and Statistical Committee (SSC). It will include an overview of the committee=s 2011 schedule, approval of an acceptable biological catch (ABC) recommendation for Gulf of Maine winter flounder as well as the NEFMC=s five-year Council research recommendations, a summary of the committee=s ongoing discussion of ABC control rules, and a comprehensive overview of the SSC=s white paper on Ecosystem-based Fisheries Management. NMFS Deputy Assistant Administrator for Regulatory Programs Sam Rauch will discuss coastal and marine spatial planning with the Council and the day will end with an Enforcement Committee report concerning recommendations for standardized fixed gear marking in the EEZ. The Council is not likely to take further action on these proposals until it consults with partner fishery management organizations and conducts a more public process to solicit further review and comment.

Wednesday, November 17, 2010

Throughout most of the day, the Council will discuss and take final action on Framework Adjustment 22 to the Atlantic Sea Scallop Fishery Management Plan. The primary purpose of the action is to set fishery specifications for the 2011–12 fishing years. Also included are measures to minimize the risk sea scallop gear/incidental encounters with sea turtles. Additionally, the Council will review and finalize scallop research recommendations that will apply to the fishery management plan's research set-aside program and approve measures that will affect the general category scallop fishery. During this report, the Council will discuss the yellowtail flounder sub annual catch limit that will be allocated to the scallop fleet through Framework Adjustment 45 to the Northeast Multispecies FMP. Before adjournment for the day, Council members will consider a change to its skate management measures based on a re-analysis of skate discards provided by the Skate Plan Development Team.

Thursday, November 18, 2010

The final day of the meeting will begin with initial action on Framework Adjustment 7 to the Monkfish Fishery Management Plan. Management measures will address revisions to the biomass reference points, as well as a revised ABC and a Northern Management Area annual catch target (ACT). In view of the new ACT, a range of new management alternatives also will be considered. Finally, the monkfish discussion will include a summary of the development of Amendment 6 to the FMP, which will center on a catch share program for the monkfish fishery. The remainder of the day will be spent on multipsecies groundfish management-related issues. This will involve final action on Framework Adjustment 45 to the Northeast Multispecies Fishery Management Plan (FMP). The major measures under consideration are: Possible adjustments to the yellowtail flounder sub annual catch limit as a result of action taken in Framework 22 to the Scallop FMP; modifications to the Georges Bank yellowtail flounder rebuilding strategy and accordingly, the ABC; alternatives for revised status determination criteria and adjustments to the ABCs for pollock and Gulf of Maine winter flounder; total allowable catches for stocks harvested in the U.S./Canada area for 2011; changes to the at-sea and dockside monitoring provisions in the FMP; elimination of the Great South Channel yellowtail flounder spawning closures for the general category scallop vessels; protection for spawning cod in an area off the New Hampshire coast; and authorization for additional sectors. The Council also will discuss the issue of state-operated permit banks.

Although other non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subjects of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided that the public has been notified of the Council's intent

to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (*see* **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: October 25, 2010.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2010–27247 Filed 10–27–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

Trade Mission to Mexico in Conjunction With Trade Winds Forum—The Americas

I. Mission Description

The United States Department of Commerce, International Trade Administration, U.S. and Foreign Commercial Service, is organizing a trade mission to Mexico, April 5–12, 2011, in conjunction with the *Trade Winds Forum—The Americas* business forum in Mexico City, Mexico. U.S. trade mission delegation members will arrive in Mexico City on or before April 5, 2011, to attend the opening ceremony of the *Trade Winds Forum—The Americas.* On April 11–12, 2011, trade mission participants will take part in business-to-business meetings in one (or two) of three select markets in Mexico: Mexico City, Guadalajara, and Monterrey.

The 2011 *Trade Winds Forum—The Americas* program is a 4-day event that includes a pan-American (North, Central and South) business forum consisting of regional and industry specific conference sessions as well as pre-arranged consultations with 14 U.S. Commercial Service Senior Commercial Officers representing commercial markets throughout the entire Western Hemisphere. The trade mission to Mexico will provide participants with the opportunity to conduct business-to-business meetings with firms in Mexico. The mission is open to U.S. companies from a cross section of industries with growing potential in Mexico, including, but not limited to, best prospects such as energy (mining, oil and gas, electric power generation, renewable), defense and aerospace, telecommunications and information technology, environmental technologies, medical equipment, safety and security equipment, automotive parts and service equipment, and logistics and transportation.

The combination of the *Trade Winds Forum—The Americas* business forum and the multi-sector trade mission to Mexico will provide participants with substantive knowledge and strategies for entering or expanding their business across Western Hemisphere markets and Mexico specifically.

II. Commercial Setting

As a neighboring country of the U.S. and member of North American Free Trade Agreement (NAFTA), Mexico is a natural market for U.S. exporters. U.S. trade with Mexico is increasing at a faster rate than our trade with many other important partners, including China. As outlined in the 2010 White House report to the President on the National Export Initiative (*http://www.whitehouse.gov/sites/default/files/nei_report_9–16–10_full.pdf*), Mexico is categorized as an immediate prospect for new to market companies in the next twelve months and beyond. Covering almost 1.2 million square miles, Mexico is one of the largest countries in Latin America. Its principal cities are: Mexico City, Monterrey, Guadalajara and Tijuana, all cities where the U. S. Commercial Service maintains offices to help American firms enter the Mexican market.

Mexico is the second largest market in the world for U.S. exports and the world's largest Spanish speaking country. Mexico has one of the highest GDPs in Latin America and the highest on a purchasing power basis among all the Spanish speaking countries of the western hemisphere. Given the magnitude of trade between the United States and Mexico, there are abundant opportunities for U.S. firms in Mexico. NAFTA, which was enacted in 1994 and created a free trade zone for Mexico, Canada and the United States, is the most outstanding feature in the U.S.-Mexico bilateral commercial relationship. In 2008, two-way U.S./Mexico trade exceeded $1 billion per day. U.S.-Mexico bilateral trade increased 317% from $88 billion in 1993 to $367 billion in 2008. While two way trade contracted by 17 percent in 2009 due to the global economic downturn, it has rebounded in the first half of 2010, up 32 percent from the same time period in 2009, and up 4.5 percent from the first half of 2008.

The Mexican economy contains rapidly developing modern industrial and service sectors, with increasing private ownership. Recent administrations have expanded competition in ports, railroads, telecommunications, electricity generation, natural gas distribution and airports, with the aim of upgrading infrastructure. As an export-oriented economy, more than 90% of Mexican trade is under free trade agreements (FTAs) with more than 40 countries, including the European Union, Japan, Israel, and much of Central and South America. Over fifty percent of Mexico's imports come from the United States.

The focus of the *Trade Winds Forum—The Americas* mission to Mexico will focus on three key industrialized cities in Mexico: Mexico City, Guadalajara and Monterrey. Under the direction of the Senior Commercial Officer and Regional Security Officer, precautions for security advisories will be monitored and addressed as deemed necessary.

Mexico City: Mexico City is one of the largest cities in the hemisphere and the world. Not only is this city of 20 million people the seat of the government, the capital is also Mexico's financial center, a manufacturing and distribution powerhouse and is centrally located in a major industrial area that includes Toluca, Puebla and Queretaro. Mexico City's Federal District produces 21.8% of the country's gross domestic product. According to a study conducted by PricewaterhouseCoopers, Mexico City had a GDP of $390 billion in 2008, ranking as the eighth richest city in the world after the greater areas of Tokyo, New York, Los Angeles, Chicago, Paris, London and Osaka/Kobe, and the richest in Latin America. Mexico City alone is the 30th largest economy in the world. There are opportunities in virtually every sector. Some of the most promising sectors in the Mexico City market include: Airport & ground support equipment, automotive parts & supplies, education & training services, environmental technologies & equipment, franchising, hotel & restaurant equipment, housing & construction, security & safety equipment, telecommunications equipment, transportation infrastructure equipment & services, and travel & tourism services.

Guadalajara: Mexico's second largest city is considered the "Silicon Valley" of Mexico and the de facto capital of western Mexico. In 2008, FDI Magazine ranked Guadalajara as the most business friendly city in Latin America. Guadalajara has the second largest economy and industrial infrastructure in Mexico, and contributes 37% to the state of Jalisco's total gross production. Its economic base is strong and well diversified. Guadalajara is the main producer of software, electronic and digital components in Mexico. Telecom and computer equipment from

Guadalajara accounts for about a quarter of Mexico's electronics exports. The U.S. Commercial Service in Guadalajara has responsibility for 7 states in western Mexico (Aguascalientes, Colima, Guanajuato, Jalisco, Michoacan, Nayarit and Sinaloa). Guadalajara is a dynamic commercial center and home to GE, IBM, Intel, HP, Oracle, Flextronics and Jabil. Leading sectors include: Electronic components, agribusiness and food processing equipment, industrial process control equipment, packaging equipment, furniture manufacturing equipment, and high end building finishing materials.

Monterrey: Located in the northern state of Nuevo Leon, Monterrey is home to Mexico's 10 largest conglomerates. Strategically situated on the principal industrial corridor connecting the U.S. with Mexico's interior, Monterrey is a key distribution center that supports major industries such as glass, steel, autos and cement. Monterrey, a city of approximately 3.8 million people, is known for its "North American" culture and openness to business. A total of 13,251 companies in Monterrey produce 9.4 percent of Mexico's manufactured products and 30% of Mexico's manufactured exports. Monterrey accounts for about 95% of the State of Nuevo Leon's GDP and 8.6% of Mexico's GDP. Imports into this area are very high due to the area's strong manufacturing base, and geographical proximity to the U.S. In 2009, imports were estimated at USD 20 billion in goods alone, approximately 74% of which are of U.S. origin. With more than 30,000 firms, Nuevo Leon is the production leader in many important sectors of the Mexican economy including the following sectors: Glass containers; cement production; natural, artificial, and synthetic fiber production; beer production; ceramics production; basic steel production; and household appliances.

III. Mission Goals

The goal of the mission is to help participating U.S. companies find potential partners, agents, distributors, and joint venture partners in Mexico, laying the foundation for successful long-term ventures. The delegation will have access to Senior Commercial Officers and Commercial Specialists during the mission, learn about the expansive business opportunities in Mexico, and gain first-hand market exposure. U.S. delegation members already doing business in Mexico will have opportunities to further advance business relationships and transactions in that market.

IV. Mission Scenario

The mission will include pre-screened individual appointments with potential business partners; industry and country market briefings; logistical support; networking with leading industry and government officials; and registration for the *Trade Winds Forum—The Americas,* April 5–9, 2011, including business forum materials and admission to all Business Forum sessions and networking events.

U.S. delegation members will arrive in Mexico City on or before April 5, 2011, to attend the opening ceremony of the *Trade Winds Forum—The Americas.* The final days of the Forum, April 8–9, 2011 will be devoted to market briefings and consultations with Western Hemisphere-based Senior Commercial Officers. On April 11–12, 2011, mission participants will take part in business-to-business meetings in one (or two) of three select markets in Mexico: Mexico City, Guadalajara, and Monterrey. Specific market selection and location of business-to-business meetings will be based on the recommendations of Commercial Service—Mexico and in consultation with mission participants. Mission participants seeking business-to-business meetings in more than one market in Mexico will register using the multi-stop participation fee.

V. Mission Timetable

April 5, 2011—Arrive Mexico City, Mexico.

(Tuesday)—*Trade Winds Forum—The Americas* registration/briefing.

April 6, 2011—*Trade Winds Forum—The Americas* business forum.

April 7, 2011—*Trade Winds Forum—The Americas* business forum.

April 8–9, 2011—*Trade Winds Forum—The Americas* pre-arranged consultations with U.S. Commercial Service Senior Commercial Officers.

April 10, 2011—*Trade Winds Forum—The Americas* travel day to respective locations for business-to-business meetings.

April 11–12, 2011—Trade Mission featuring one-on-one business appointments with pre-screened private-sector companies in select Mexico cities: Mexico City (TW Business Forum location), Guadalajara or Monterrey.

VI. Participation Requirements

All parties interested in participating in the U.S. and Foreign Commercial Service Trade Mission to Mexico must complete and submit an application package for consideration by the Department of Commerce. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A maximum of 50 companies will be selected to participate in the mission from the applicant pool on a first come, first served basis. U.S. companies already doing business with Mexico as well as U.S. companies seeking to enter Mexico for the first time may apply.

Fees and Expenses

After a company has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. For one market stop (choice of one of the following markets: Mexico City, Guadalajara, or Monterrey), the participation fee will be $1,650 for a small or medium-sized enterprise (SME)* and $2,550 for large firms*. For two market stops (choice of two of the following markets: Mexico City, Guadalajara, or Monterrey), the participation fee will be $2,350 for a small or medium-sized enterprise (SME)* and $3,750 for large firms*. For companies requesting three or more markets, a fee of $700 (plus costs for driver/translator) will be added for each additional market requested. The fee for each additional firm representative (large firm or SME) participating in the mission is $650. Expenses for travel, lodging, most meals, and incidentals (e.g., local transportation) will be the responsibility of each mission participant. The mission registration fee also includes the *Trade Winds Forum—The Americas* Business Forum registration fee of $650.

Conditions for Participation

- An applicant must submit a completed and signed mission application and supplemental application materials, including adequate information on the company's products and/or services, primary market objectives, and goals for participation. If the Department of Commerce receives an incomplete application, the Department may reject the application, request additional information, or take the lack of information into account when evaluating the applications.
- Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, marketed under the name of a U.S. firm and have at least 51 percent U.S. content of the value of the finished product or service.

Selection Criteria for Participation

Selection will be based on the following criteria:

- Relevance of a company's business line to trade mission goals.
- Company's potential for business in Mexico.
- An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations (see *http://www.sba.gov/services/contractingopportunities/sizestandardstopics/index.html*). Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing reflects the Commercial Service's user fee schedule that became effective May 1, 2008 (*see http://www.export.gov/newsletter/march2008/initiatives.html* for additional information).

Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and not considered during the selection process.

VII. Timeframe for Recruitment and Applications

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register,** posting on the Commerce Department trade mission calendar, and other Internet web sites, press releases to the general and trade media, direct mail and broadcast fax, notices by industry trade associations and other multiplier groups, and announcements at industry meetings, symposia, conferences, and trade shows.

Recruitment for the mission will begin immediately and conclude no later than February 11, 2011. After February 11, 2011, companies will be considered only if space and scheduling constraints permit.

U.S. Contact Information

Shannon Christenbury, U.S. Export Assistance Center—Charlotte, *shannon.christenbury@trade.gov,* Charlotte, NC 28202, 704–333–4886 tel ext. 225.

Leslie Drake, U.S. Export Assistance Center—Charleston, *Leslie.Drake@mail.doc.gov, Tel:* 304–347–5123/*Cell:* 304–550–7754.

Debora Sykes, U.S. Export Assistant Center—Trenton, *Debora.Sykes@mail.doc.gov, Tel:* 856–722–1032/*Cell:* 609–571–7525, Fax: 856–722–0716.

Mexico Contact Information

Ann Bacher, Minister Counselor for Commercial Affairs, U.S. Commercial Service—Mexico, *Ann.Bacher@trade.gov, Tel:* 52–55–5140–2601/*Fax:* 52–55–5705–0065.

Clarance E. Burden,

US & FCS Senior Budget Analyst, Commercial Service Trade Missions Program.

[FR Doc. 2010–27250 Filed 10–27–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

Transportation and Energy Products and Services Trade Mission; Doha, Qatar, and Abu Dhabi and Dubai, U.A.E.

I. Mission Description

The United States Department of Commerce's International Trade Administration U.S. and Foreign Commercial Service (US&FCS) is organizing an executive-led trade mission for multi-modal transportation and energy infrastructure development products and services to Qatar, Abu Dhabi, and Dubai, June 5–10, 2011. This mission will be led by an executive level trade official. The mission is designed to contribute to President Obama's National Export Initiative to achieve the goal of doubling exports over the next five years to support two million American jobs. This mission will support job creation by increasing exports of products and services that contribute to these infrastructure development projects in these locations.

This mission will allow U.S. executives to connect with key decision makers in the U.A.E. and Qatar, and form partnerships which will allow their companies to expand in to new markets. The mission will include, but is not limited to: Advanced vehicle technologies and intelligent transportation systems and related services and software; multimodal transportation systems, products and technologies, including port development, supply chain systems and strategies; energy products and services; smart grid technologies; mass transportation systems; and other relevant products and services.

Commercial Setting U.A.E.

The U.A.E. is the largest export market in the Middle East/North Africa region, and presents qualified American companies with opportunities to expand their products and services to a fast growing market. The 2009 GDP for the U.A.E. was $231.3 billion and the 2009 per capita income was $42,000. Despite last year's global financial crisis, the U.S. and the U.A.E. have continued their long-term trade and investment relationship. Exports between both countries have increased almost every year since 1971, when the U.A.E was established.

The U.S. exported over $12 billion worth of products to the U.A.E. in 2009, representing a 237 percent increase since 2002. The U.S. is the third largest exporter to the U.A.E. and enjoys a very large trade surplus and a strong trading and investment relationship. The U.A.E. has become the regional leader in the Middle East in terms of openness to international trade and investment and political stability. It is making major investments in infrastructure and in diversification of its economy away from oil and gas, resulting in significant export opportunities for U.S. firms. The U.A.E. is developing key transportation infrastructure projects including: Port Khalifa and industrial zone at Taweelah; the new $8 billion Union Railway project; the $6.7 billion expansion of Abu Dhabi International Airport; the construction of the new Maktoum Airport, which will eventually have five runways; and public transportation systems, such as the expansion of the Dubai metro and the construction of the Abu Dhabi metro and light rail. The need to develop the infrastructure necessary for the construction and profitable operation of these new systems, particularly those related to multi-modal freight and intelligent supply chain management, provides significant business opportunities in areas where U.S. companies excel.

U.S. products enjoy favorable tariffs that generally do not exceed five percent.[1] U.S. business opportunities also exist in alternative energy products and services. The government and private sector of Abu Dhabi have growing interest in sustainable energy production and established the Abu Dhabi Future Energy Company (Masdar). The U.A.E. has recognized the need to increase the use of non-fossil fuel based energy resources such as solar and nuclear. This will likely increase the need for alternative energy products and services.

Qatar

Qatar is an important export market for U.S. small and medium size businesses. The U.S. exported $2.7 billion worth of goods and services in 2009, making the U.S. the second largest exporter to the Emirates.

Qatar has a 2009 GDP of $57.69 billion and a GDP-per capita of $75,900, which is one of the highest per capita incomes in the world. This has led

[1] World Trade Organization: Latest Available MFN Applied Tariffs At HS 6 (2007).

foreign firms to increase their investment in Qatar's infrastructure and making it one of the most prosperous markets in the Middle East.

The current economic development environment in Qatar offers great opportunities for U.S. firms to expand their business. Qatar's transportation infrastructure is the main sector benefiting from the current domestic growth environment. Their mass transportation structure has been operating at capacity, with a strong need to expand the system. Qatar does not have any railroads, which is one of the major reasons for heavy road congestion throughout the country. There is a great opportunity for U.S. engineers and manufacturers to contribute in the effort to create a rail lines and improve traffic safety throughout the Emirate.

Qatar is a natural gas focused economy. Most natural gas projects are completed or will be in a short period of time. The U.S. presence in this sector is significant and the standards adopted by the country are all U.S. Qatar is on the radar screen of U.S. energy companies and Qatari companies go to the U.S. to source their needs for the energy sector. Major exceptions to opportunities in the energy sector in Qatar involve alternative energy products and services including nuclear, wind, and solar products and services, which are not included within the scope of this mission.

Other Products and Services

The foregoing analysis of export opportunities in the U.A.E. and Qatar is not intended to be exhaustive, but illustrative of the many opportunities in these markets available to U.S. businesses. Other products and services that contribute to the energy and infrastructure development of the U.A.E. and Qatar also may have great potential. Applications from companies selling products within the scope of this mission, but not specifically identified in this Mission Statement, will be considered and evaluated by the U.S. Department of Commerce, along with all other applications to participate in this mission. Companies whose products do not fit the scope of mission may contact their local U.S. Export Assistance Center (USEAC) to learn about other trade missions and services that may provide more targeted export opportunities. Companies may call 1–800–872–8723, or *e-mail: tic@trade.gov* to obtain such information. This information also may be found on the Department's Web site: *http://www.export.gov.*

II. Mission Goals

The trade mission's goal is to introduce U.S. exporters of transportation and energy products and services to potential end-users and partners, including potential agents, distributors, and licensees. The mission's goal is to facilitate business partnerships and provide participants with market information about the local infrastructure that will contribute to increasing U.S. exports to the U.A.E. and Qatar markets. The trade mission's purpose is to advance ITA's goal to broaden and deepen the U.S. exporter base and support the President's National Export Initiative by providing individual participants with business opportunities to achieve export success in these markets.

III. Mission Scenario

In each market, U.S. mission members will be presented with a briefing by the U.S. Embassy's Counselor for Commercial Affairs, the Senior Commercial Specialist for the energy, transportation, and infrastructure sectors and other key U.S. Government and corporate officials. Participants also will take part in business matchmaking appointments with pre-screened private-sector organizations. In addition, they will attend a networking event with multipliers. U.S. participants will be counseled before and after the mission by a domestic mission coordinator. This includes the following:

- Pre-travel briefing/webinars on subjects ranging from business practices in each market to security considerations involving mission related travel.
- Travel from Doha to Abu Dhabi will be by commercial air at traveler's expense. Mission participants will be notified which flight to reserve.
- On site staff assistance.

Exclusions: The mission fee does not include any personal travel expenses such as lodging, most meals, local ground transportation, except as stated above, and air transportation from the U.S. to the mission sites and return to the U.S. Business visas may be required. Government fees and processing expenses to obtain such visas are also not included in the mission costs. However, the U.S. Department of Commerce will provide instructions to each participant on the procedures required to obtain necessary business visas.

IV. Proposed Timetable

Mission participants are encouraged to arrive on or before June 4, 2011 and the mission program will proceed from June 5–10, 2011.

June 3 or 4 ...	Arrive in Doha, Qatar.
June 5	Doha, Qatar. Market briefings by U.S. Embassy, Doha and Qatar Government officials. One-on-one business matchmaking appointments. Networking reception.
June 6	Doha, Qatar. Matchmaking appointments. Travel to Abu Dhabi, U.A.E.
June 7	Abu Dhabi, U.A.E. Market briefings by U.S. Consulate Officials. One-on-one business matchmaking appointments. Networking reception.
June 8	Abu Dhabi, U.A.E. One-on-one business matchmaking appointments. Travel to Dubai, U.A.E. Possible networking reception in Dubai.
June 9	Dubai, U.A.E. One-on-one business matchmaking appointments. Possible networking reception.
June 10	Dubai, U.A.E. Follow-up meetings and appointments. Return Home.

V. Participation Requirements

All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. The mission is designed to select a minimum of 12 and a maximum of 18 companies to participate in the mission from the applicant pool. U.S. companies already doing business in the target markets, as well as U.S. companies seeking to enter these markets for the first time, are encouraged to apply.

Fees and Expenses: After a company has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required. The participation fee will be $4,400 for large firms and $3,500 for a small or medium-sized enterprise (SME) [2], which will cover one representative. The fee for each additional firm representative (large firm or SME) is $500. Expenses for travel, lodging, most meals, and

[2] An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations (*see http://www.sba.gov/services/contractingopportunities/sizestandardstopics/index.html*). Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing reflects the Commercial Service's user fee schedule that became effective May 1, 2008 (*see http://www.export.gov/newsletter/march2008/initiatives.html* for additional information).

incidentals will be the responsibility of each mission participant.

Conditions for Participation:

• An applicant must submit a completed and signed mission application and supplemental application materials, including adequate information on the company's products and/or services, primary market objectives, and goals for participation. If the U.S. Department of Commerce receives an incomplete application, the Department may reject the application, request additional information, or take the lack of information into account when evaluating the applications.

• Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, marketed under the name of a U.S. firm and have at least fifty-one percent U.S. content.

Recruitment activities will include, but not limited to Internet Web sites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows.

Selection Criteria for Participation

• Suitability of the company's products or services to the U.A.E and Qatar markets.

• Consistency of the applicant's goals and objectives with the scope and design of the mission.

• Applicant's potential for business in the U.A.E and Qatar, including likelihood of exports resulting from the mission.

Diversity of company size, type, location, and demographics also may be considered during the review process. Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and not considered during the selection process.

Selection Timeline

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar—*http://www.ita.doc.gov/doctm/tmcal.html*—and other Internet web sites, press releases to general and trade media, direct mail, broadcast fax, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows.

Recruitment for the mission will begin immediately, and conclude March 4, 2011, unless extended by the Department of Commerce. Applications received after March 4, 2011, will be considered only if space and scheduling constraints permit.

Contacts: Larry Brill, U.S. Commercial Service Domestic Contact: *Phone:* (202) 482–1856, *Fax:* (202) 482–2331, *E-mail: Lawrence.Brill@trade.gov.*

U.S. Commercial Service Qatar Contact: Dao Lee, U.S. Commercial Service, Doha, Qatar, *Tel:* 011- 974–488–4101/Fax: 011–974–488–4163, *E-mail: Dao.Lee@trade.gov.*

U.S. Commercial Service Qatar Contact: Ms. Laurie Farris, U.S. Commercial Service, Abu Dhabi, UAE, *Phone:* 011–971–2–414–2668, *Fax:* 011–971–2–414–2228, *E-mail: Laurie.Farris@trade.gov.*

Clarance E. Burden,

US & FCS Senior Budget Analyst, Commercial Service Trade Missions Program.

[FR Doc. 2010–27249 Filed 10–27–10; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of meeting.

DATE AND TIME: Friday, November 5, 2010; 9:30 a.m. EDT.

PLACE: 624 Ninth Street, NW., Room 540, Washington, DC 20425.

Meeting Agenda

This meeting is open to the public.

I. Approval of Agenda
II. Program Planning
- Approval of Project Outline and Discovery Plan for FY 2011 Enforcement Report
- Discussion of Possible Briefing Topics for FY 2011
- Update on Status of Briefing on Disparate Impact in School Discipline Policies

III. Management & Operations
- Expiration of Commissioner Terms

IV. State Advisory Committee Issues
- Wisconsin SAC

V. Approval of Minutes of October 29 Meeting
VI. Adjourn

CONTACT PERSON FOR FURTHER INFORMATION: Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8591. TDD: (202) 376–8116.

Persons with a disability requiring special services, such as an interpreter for the hearing impaired, should contact Pamela Dunston at least seven days prior to the meeting at 202–376–8105. TDD: (202) 376–8116.

Dated: October 26, 2010.

Martin Dannenfelser,

Staff Director.

[FR Doc. 2010–27451 Filed 10–26–10; 4:15 pm]

BILLING CODE 6335–01–P

COMMODITY FUTURES TRADING COMMISSION

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63169; File No. 265–26]

Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues

AGENCY: Commodity Futures Trading Commission ("CFTC") and Securities and Exchange Commission ("SEC").

ACTION: Notice of meeting of Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues.

SUMMARY: The Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues will hold a public meeting on November 5, 2010, from 9 a.m. to 12 p.m., at the CFTC's Washington, DC headquarters. At the meeting, the committee will:

(1) Receive a summary and recap from the staffs of the SEC and CFTC on the report issued September 30, 2010;

(2) Hear a report from the subcommittee on cross-market linkages;

(3) Hear a report from the subcommittee on pre-trade risk management; and

(4) Discuss potential recommendations and responses.

DATES: The meeting will be held on November 5, 2010 from 9 a.m. to 12 p.m. Members of the public who wish to submit written statements in connection with the meeting should submit them by November 4, 2010.

ADDRESSES: The meeting will take place in the first floor hearing room at the CFTC's headquarters, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

Written statements may be submitted to either the CFTC or the SEC; all submissions will be reviewed jointly by the two agencies. Please use the title "Joint CFTC–SEC Advisory Committee" in any written statement you may submit. Statements may be submitted to any of the addresses listed below. Please submit your statement to only one address.

E-mail

Jointcommittee@cftc.gov or *rule-comments@sec.gov.* If e-mailing to this

address, please refer to "File No. 265–26" on the subject line.

SEC's Internet Submission Form

http://www.sec.gov/rules/other.shtml.

Regular Mail

Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, attention Office of the Secretary or Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Mail Stop 1090, 100 F St., NE., Washington, DC 20549. Comments mailed to this address should be submitted in triplicate and should refer to File No. 265–26.

Fax

(202) 418–5521. Any statements submitted in connection with the committee meeting will be made available to the public.

FOR FURTHER INFORMATION CONTACT: Martin White, Committee Management Officer, at (202) 418–5129, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581; Ronesha Butler, Special Counsel, at (202) 551–5629, Division of Trading and Markets, Securities and Exchange Commission, 100 F St., NE., Washington, DC 20549; or Elizabeth M. Murphy, Committee Management Officer, at (202) 551–5400, Securities and Exchange Commission, 100 F St., NE., Washington, DC 20549

SUPPLEMENTARY INFORMATION: The meeting will be webcast on the CFTC's Web site, *http://www.cftc.gov.* Members of the public also can listen to the meeting by telephone. The public access call-in numbers will be announced at a later date. The CFTC and SEC are providing less than fifteen calendar days **Federal Register** notice of this meeting because of the urgency of the issues being addressed.

Authority: 5 U.S.C. app. 2 § 10(a)(2).

By the Commodity Futures Trading Commission.

Martin White,

Committee Management Officer.

By the Securities and Exchange Commission.

Dated: October 25, 2010.

Elizabeth M. Murphy,

Committee Management Officer.

[FR Doc. 2010–27315 Filed 10–27–10; 8:45 am]

BILLING CODE 6351–01–P; 8011–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

The following notice of scheduled meetings is published pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, 5 U.S.C. 552b.

AGENCY HOLDING THE MEETINGS: Commodity Futures Trading Commission.

TIMES AND DATES: The Commission has scheduled four meetings for the following dates:

November 10 from 1 p.m. to 4 p.m.

November 19 from 9:30 a.m. to 5:30 p.m.

November 30 from 9:30 a.m. to 12:30 p.m.

December 1 from 9:30 a.m. to 12:30 p.m.

PLACE: Three Lafayette Center, 1155 21st St., NW., Washington, DC, Lobby Level Hearing Room (Room 1000).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission has scheduled these meetings to consider the issuance of various proposed rules. Agendas for each of the scheduled meetings will be made available to the public and posted on the Commission's Web site at *http://www.cftc.gov* at least seven (7) days prior to the meeting. In the event that the times or dates of the meetings change, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site.

CONTACT PERSON FOR MORE INFORMATION: David A. Stawick, Secretary of the Commission, 202–418–5071.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–27473 Filed 10–26–10; 4:15 pm]

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DEPARTMENT OF EDUCATION

[Docket ID ED–2009–OESE–0010]

RIN 1810–AB06

School Improvement Grants; American Recovery and Reinvestment Act of 2009 (ARRA); Title I of the Elementary and Secondary Education Act of 1965, as Amended (ESEA)

ACTION: Final requirements for School Improvement Grants authorized under section 1003(g) of Title I of the ESEA.

SUMMARY: The U.S. Secretary of Education (Secretary) is adopting as final, without changes, interim final requirements for the School Improvement Grants (SIG) program authorized under section 1003(g) of Title I of the ESEA. These final requirements are needed to incorporate new authority included in the Consolidated Appropriations Act, 2010 (Pub. L. 111–117) applicable to fiscal year (FY) 2010 SIG funds and FY 2009 ARRA SIG funds. Specifically, the Consolidated Appropriations Act, 2010 expanded the group of schools that are eligible to receive SIG funds. In addition, the Consolidated Appropriations Act, 2010 raised the maximum amount of SIG funds that a State educational agency (SEA) may award to a local educational agency (LEA) for each participating school from $500,000 to $2,000,000. These final requirements amend the final requirements for the SIG program that were published on December 10, 2009.

DATES: These requirements are effective November 29, 2010.

FOR FURTHER INFORMATION CONTACT: Patricia McKee. *Telephone:* 202–260–0826 or by *e-mail*: *Patricia.McKee@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

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SUPPLEMENTARY INFORMATION: The Secretary published final requirements for the SIG program in the **Federal Register** on December 10, 2009 (74 FR 65618). Subsequently, on December 16, 2009, the President signed into law the Consolidated Appropriations Act, 2010, which contained FY 2010 appropriations for the Department, and which also included two provisions applicable to the use of both FY 2010 SIG funds and FY 2009 ARRA SIG funds. First, the Consolidated Appropriations Act, 2010 expanded eligibility for participation in the SIG program by permitting an SEA to award SIG funds for, and for an LEA to use those funds to serve, any school that is eligible to receive assistance under Title I, Part A and that: (1) Has not made adequate yearly progress (AYP) for at least two years; or (2) is in the State's lowest quintile of performance based on proficiency rates. With respect to secondary schools, the Consolidated Appropriations Act, 2010 gave priority to high schools with graduation rates

below 60 percent. Second, the Consolidated Appropriations Act, 2010 raised the maximum subgrant size for a participating school from $500,000 to $2,000,000.[1]

On January 21, 2010, the Secretary published interim final requirements for the SIG program in the **Federal Register** (75 FR 3375) to incorporate this new authority into the SIG final requirements that were published on December 10, 2009. The interim final requirements became effective February 8, 2010; however, at the time the interim final requirements were published, the Secretary invited public comment. During the public comment period, we received only one comment on the interim final requirements. That comment expressed general disagreement with the SIG final requirements published on December 10, 2009 but did not address the changes to those requirements made by the interim final requirements.

Absent any public comments addressing the changes to the December 10 SIG final requirements made in the January 21 interim final requirements, the Secretary has determined that no substantive changes to the interim final requirements are necessary; hence, with the exception of two technical changes described herein, there are no differences between the interim final requirements and these final requirements.

For the reasons explained in the preamble to the interim final requirements (75 FR 3375, 3376–80), the Secretary adopts as final the interim final requirements as follows:

1. *Section I.A.1—defining "greatest need":* The Secretary amends the definitions of Tier I, Tier II, and Tier III schools to incorporate the expanded eligibility provided for in the Consolidated Appropriations Act, 2010. The final requirements do not change the definition of "persistently lowest-achieving schools" as that definition is used to define Tier I and Tier II schools but permit an SEA, at its option, to identify additional schools in each tier.

With respect to Tier I, in addition to the Title I schools in improvement, corrective action, or restructuring that an SEA identifies as persistently lowest-achieving schools, the SEA may identify any elementary school that (1) is eligible to receive Title I, Part A funds (including schools that receive Title I, Part A funds and those that do not); (2) either has not made AYP for at least two consecutive years or is in the State's lowest quintile of performance based on proficiency rates on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and (3) is no higher achieving on the State's assessments combined than the highest-achieving Tier I school that the SEA has identified under paragraph (a)(1)(i) of the definition of "persistently lowest-achieving schools." These newly eligible schools may be Title I schools that are not identified for improvement, corrective action, or restructuring or schools eligible for, but not receiving, Title I, Part A funds, provided they meet the criteria in section I.A.1(a)(ii) of these final requirements.

With respect to Tier II, in addition to the secondary schools that are eligible for, but do not receive, Title I, Part A funds that an SEA identifies as persistently lowest-achieving schools, the SEA may identify any secondary school that (1) is eligible to receive Title I, Part A funds (including schools that receive Title I, Part A funds and those that do not); (2) either has not made AYP for at least two consecutive years or is in the State's lowest quintile of performance based on proficiency rates on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and (3) either is no higher achieving on the State's assessments combined than the highest-achieving Tier II school that the SEA has identified under paragraph (a)(2)(i) of the definition of "persistently lowest-achieving schools" or is a high school that has had a graduation rate that is less than 60 percent over a number of years. Tier II secondary schools that an SEA has identified as persistently lowest-achieving schools—*i.e.,* secondary schools that are eligible for, but do not receive, Title I, Part A funds—are eligible without the need for an SEA or LEA to obtain a waiver of section 1003(g)'s limitation on serving only Title I schools in improvement, corrective action, or restructuring. Tier II also may now include Title I secondary schools that are or are not in improvement, corrective action, or restructuring if those schools meet the criteria in section I.A.1(b)(ii) of these final requirements and are not already captured in Tier I.

With respect to Tier III, in addition to any Title I school in improvement, corrective action, or restructuring that is not a Tier I or Tier II school, an SEA may identify any school that (1) is eligible for Title I, Part A funds (including schools that receive Title I, Part A funds and those that do not); (2) has not made AYP for at least two years or is in the State's lowest quintile of performance based on proficiency rates on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and (3) does not meet the requirements to be a Tier I or Tier II school. Thus, a Tier III school may be a Title I school in improvement, corrective action, or restructuring, a school that receives Title I, Part A funds that is not in improvement, or a school that is eligible for, but does not receive, Title I, Part A funds, provided the school meets one of the two criteria in section I.A.1(c)(ii)(A) of these final requirements.

The Secretary makes a technical change in section I.A.1(c)(i) that was not in the interim final requirements to make clear that a Tier III school may be a Title I school in improvement, corrective action, or restructuring that is not a Tier I or a Tier II school. The addition of the phrase "or a Tier II" school in this section is necessary because a Title I secondary school in improvement, corrective action, or restructuring could be a newly eligible Tier II school at an SEA's option and, therefore, could not be a Tier III school.

2. *Section I.A.4—evidence of strongest commitment:* The Secretary amends section I.A.4 to refer to Tier I and Tier II schools rather than persistently lowest-achieving schools to reflect the possibility that an SEA has added newly eligible schools to Tier I and Tier II.

3. *Sections I.B.2 and I.B.3—waivers for Tier I and Tier II Title I participating schools:* The Secretary amends section I.B.2 to clarify that an SEA may seek a waiver of the school improvement timeline in section 1116(b) with respect to a Tier I or Tier II Title I participating school that implements a turnaround or restart model. The Secretary also amends section I.B.3 to clarify that an SEA may seek a waiver of the schoolwide program poverty threshold in section 1114(a) with respect to a Tier I or Tier II Title I participating school

[1] These two provisions apply only to FY 2009 ARRA SIG funds and FY 2010 SIG funds; they do not apply to SIG funds made available through the Consolidated Appropriations Act, 2009 (*i.e.,* the regular FY 2009 SIG funds). Therefore, prior to October 1, 2010, regular FY 2009 SIG funds may not be spent pursuant to the flexibility in these provisions. Regular FY 2009 SIG funds, however, become subject to the requirements applicable to FY 2010 SIG funds on October 1, 2010 when they become carryover funds. See section 421(b)(2)(A) of the General Education Provisions Act (20 U.S.C. 1225(b)(2)(A)). Accordingly, in order to ensure compliance with the Consolidated Appropriations Act, 2010, we will consider LEAs' obligations of SIG funds in the State as a whole prior to October 1, 2010 to come from the State's allocation of FY 2009 ARRA SIG funds, which we believe in every State will be more than sufficient to cover those obligations. Beginning October 1, 2010, LEAs may use all SIG funds, including regular FY 2009 SIG funds, pursuant to the flexibility in these provisions, consistent with the final requirements as amended.

below that threshold in order that the school may implement one of the school intervention models through a schoolwide program.

4. *Section I.B.4—waiver to serve non-Title I secondary schools:* The Secretary removes section I.B.4, which permitted an SEA to seek a waiver to enable an LEA to use SIG funds to serve secondary schools that are eligible for, but do not receive, Title I, Part A funds, because it is no longer needed.

5. *New section I.B.4 (formerly section I.B.5)—extending the period of availability:* In new section I.B.4, which permits an SEA to seek a waiver to extend the period of availability of SIG funds, the Secretary makes a technical change that was not in the interim final requirements to remove the phrase "beyond September 30, 2011". That phrase applied to FY 2009 SIG funds but is not applicable to FY 2010 SIG funds, which are available through September 30, 2012 without a waiver of the period of availability. We are removing the phrase to ensure there is no confusion about the period of availability of FY 2010 SIG funds. Thus, an SEA requesting a waiver to extend the period of availability for its FY 2010 SIG funds under this provision would be requesting a waiver for extension beyond September 30, 2012.

6. *Section II.A.1—LEA eligibility:* The Secretary amends section II.A.1 to make clear that an LEA may apply for a SIG grant if the LEA receives Title I, Part A funds and has one or more schools that qualify under the State's definition of a Tier I, Tier II, or Tier III school.

7. *Sections II.A.4 and II.A.5—LEA's budget:* The Secretary removes language that is no longer necessary from sections II.A.4 and II.A.5 regarding an LEA's budget because the Consolidated Appropriations Act, 2010 raised the maximum amount for each participating school from $500,000 to $2,000,000. Thus, an LEA's budget can reflect more accurately the actual amount needed to implement one of the four school intervention models in each Tier I and Tier II school the LEA commits to serve, and the LEA can budget more accurately for its Tier III schools without concern that they generate funds for the LEA's Tier I and Tier II schools.

8. *Section II.A.6—SIG funds are supplemental:* The Secretary adds section II.A.6, which requires an LEA that commits to serve one or more Tier I, Tier II, or Tier III schools that do not receive Title I, Part A funds to ensure that each of those schools receives all of the State and local funds it would have received in the absence of the SIG funds.

9. *Sections II.B.4 and II.B.7 (formerly II.B.8)—priority for funding Tier I and Tier II schools:* The Secretary amends sections II.B.4 and II.B.7 (as well as various other sections—*e.g.,* sections II.A.1, II.A.3) to give equal status to Tier I and Tier II schools. Accordingly, sections II.B.4 and II.B.7 make clear that an LEA that applies to serve either Tier I or Tier II schools receives priority before an LEA that applies to serve only Tier III schools. Moreover, as section II.B.7 makes clear, an SEA must award SIG funds to each LEA to serve the Tier I and Tier II schools that the SEA has approved the LEA to serve before awarding any funds to an LEA to serve a Tier III school. In other words, an SEA must ensure that all Tier I and Tier II schools are funded before it funds the Tier III schools identified in its LEAs' applications.

10. *Section II.B.5—size of LEA grant awards:* The Secretary amends section II.B.5 to clarify that the Consolidated Appropriations Act, 2010 raised the maximum amount an LEA may receive per year for each Tier I, Tier II, and Tier III school the LEA commits to serve from $500,000 to $2,000,000.

11. *Section II.B.6—allocating SIG funds to LEAs:* The Secretary removes section II.B.6, which governed the allocation of SIG funds to LEAs, because it is no longer needed after the Consolidated Appropriations Act, 2010 extended the maximum amount an LEA may receive for each school to $2,000,000.

12. *Section II.B.9 (formerly II.B.10)—2010 SIG appropriations:* The Secretary removes the phrase "(depending on the availability of appropriations)" in section II.B.9(a) and (b) because the Consolidated Appropriations Act, 2010 appropriated SIG funds for FY 2010.

13. *Section II.C—renewal for additional one-year periods:* These final requirements amend section II.C.1(a) to require Tier III schools that receive SIG funds to meet "goals established by the LEA and approved by the SEA."

Final Requirements

The Secretary adopts as final the interim final requirements (with the technical changes described herein) published in the **Federal Register** on January 21, 2010 (75 FR 3375). For the ease of the user of the final requirements, the Secretary has incorporated the changes made by these final requirements into the December 10, 2009 final requirements as published at 74 FR 65618 and is publishing a combined set of SIG final requirements as follows:

I. SEA Priorities in Awarding School Improvement Grants

A. *Defining key terms.* To award School Improvement Grants to its LEAs, consistent with section 1003(g)(6) of the ESEA, an SEA must define three tiers of schools, in accordance with the requirements in paragraph 1, to enable the SEA to select those LEAs with the greatest need for such funds. From among the LEAs in greatest need, the SEA must select, in accordance with paragraph 2, those LEAs that demonstrate the strongest commitment to ensuring that the funds are used to provide adequate resources to enable the lowest-achieving schools to meet the accountability requirements in this notice. Accordingly, an SEA must use the following definitions to define key terms:

1. *Greatest need.* An LEA with the greatest need for a School Improvement Grant must have one or more schools in at least one of the following tiers:

(a) *Tier I schools:* (i) A Tier I school is a Title I school in improvement, corrective action, or restructuring that is identified by the SEA under paragraph (a)(1) of the definition of "persistently lowest-achieving schools."

(ii) At its option, an SEA may also identify as a Tier I school an elementary school that is eligible for Title I, Part A funds that—

(A)(*1*) Has not made adequate yearly progress for at least two consecutive years; or

(*2*) Is in the State's lowest quintile of performance based on proficiency rates on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and

(B) Is no higher achieving than the highest-achieving school identified by the SEA under paragraph (a)(1)(i) of the definition of "persistently lowest-achieving schools."

(b) *Tier II schools:* (i) A Tier II school is a secondary school that is eligible for, but does not receive, Title I, Part A funds and is identified by the SEA under paragraph (a)(2) of the definition of "persistently lowest-achieving schools."

(ii) At its option, an SEA may also identify as a Tier II school a secondary school that is eligible for Title I, Part A funds that—

(A)(*1*) Has not made adequate yearly progress for at least two consecutive years; or

(*2*) Is in the State's lowest quintile of performance based on proficiency rates on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and

(B)(*1*) Is no higher achieving than the highest-achieving school identified by the SEA under paragraph (a)(2)(i) of the definition of "persistently lowest-achieving schools;" or

(*2*) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

(c) *Tier III schools:* (i) A Tier III school is a Title I school in improvement, corrective action, or restructuring that is not a Tier I or a Tier II school.

(ii) At its option, an SEA may also identify as a Tier III school a school that is eligible for Title I, Part A funds that—

(A)(*1*) Has not made adequate yearly progress for at least two years; or

(*2*) Is in the State's lowest quintile of performance based on proficiency rates on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and

(B) Does not meet the requirements to be a Tier I or Tier II school.

(iii) An SEA may establish additional criteria to use in setting priorities among LEA applications for funding and to encourage LEAs to differentiate among Tier III schools in their use of school improvement funds.

2. *Strongest Commitment.* An LEA with the strongest commitment is an LEA that agrees to implement, and demonstrates the capacity to implement fully and effectively, one of the following rigorous interventions in each Tier I and Tier II school that the LEA commits to serve:

(a) *Turnaround model:* (1) A turnaround model is one in which an LEA must—

(i) Replace the principal and grant the principal sufficient operational flexibility (including in staffing, calendars/time, and budgeting) to implement fully a comprehensive approach in order to substantially improve student achievement outcomes and increase high school graduation rates;

(ii) Using locally adopted competencies to measure the effectiveness of staff who can work within the turnaround environment to meet the needs of students,

(A) Screen all existing staff and rehire no more than 50 percent; and

(B) Select new staff;

(iii) Implement such strategies as financial incentives, increased opportunities for promotion and career growth, and more flexible work conditions that are designed to recruit, place, and retain staff with the skills necessary to meet the needs of the students in the turnaround school;

(iv) Provide staff ongoing, high-quality, job-embedded professional development that is aligned with the school's comprehensive instructional program and designed with school staff to ensure that they are equipped to facilitate effective teaching and learning and have the capacity to successfully implement school reform strategies;

(v) Adopt a new governance structure, which may include, but is not limited to, requiring the school to report to a new "turnaround office" in the LEA or SEA, hire a "turnaround leader" who reports directly to the Superintendent or Chief Academic Officer, or enter into a multi-year contract with the LEA or SEA to obtain added flexibility in exchange for greater accountability;

(vi) Use data to identify and implement an instructional program that is research-based and vertically aligned from one grade to the next as well as aligned with State academic standards;

(vii) Promote the continuous use of student data (such as from formative, interim, and summative assessments) to inform and differentiate instruction in order to meet the academic needs of individual students;

(viii) Establish schedules and implement strategies that provide increased learning time (as defined in this notice); and

(ix) Provide appropriate social-emotional and community-oriented services and supports for students.

(2) A turnaround model may also implement other strategies such as—

(i) Any of the required and permissible activities under the transformation model; or

(ii) A new school model (*e.g.,* themed, dual language academy).

(b) *Restart model:* A restart model is one in which an LEA converts a school or closes and reopens a school under a charter school operator, a charter management organization (CMO), or an education management organization (EMO) that has been selected through a rigorous review process. (A CMO is a non-profit organization that operates or manages charter schools by centralizing or sharing certain functions and resources among schools. An EMO is a for-profit or non-profit organization that provides "whole-school operation" services to an LEA.) A restart model must enroll, within the grades it serves, any former student who wishes to attend the school.

(c) *School closure:* School closure occurs when an LEA closes a school and enrolls the students who attended that school in other schools in the LEA that are higher achieving. These other schools should be within reasonable proximity to the closed school and may include, but are not limited to, charter schools or new schools for which achievement data are not yet available.

(d) *Transformation model:* A transformation model is one in which an LEA implements each of the following strategies:

(1) *Developing and increasing teacher and school leader effectiveness.*

(i) *Required activities.* The LEA must—

(A) Replace the principal who led the school prior to commencement of the transformation model;

(B) Use rigorous, transparent, and equitable evaluation systems for teachers and principals that—

(*1*) Take into account data on student growth (as defined in this notice) as a significant factor as well as other factors such as multiple observation-based assessments of performance and ongoing collections of professional practice reflective of student achievement and increased high school graduations rates; and

(*2*) Are designed and developed with teacher and principal involvement;

(C) Identify and reward school leaders, teachers, and other staff who, in implementing this model, have increased student achievement and high school graduation rates and identify and remove those who, after ample opportunities have been provided for them to improve their professional practice, have not done so;

(D) Provide staff ongoing, high-quality, job-embedded professional development (*e.g.,* regarding subject-specific pedagogy, instruction that reflects a deeper understanding of the community served by the school, or differentiated instruction) that is aligned with the school's comprehensive instructional program and designed with school staff to ensure they are equipped to facilitate effective teaching and learning and have the capacity to successfully implement school reform strategies; and

(E) Implement such strategies as financial incentives, increased opportunities for promotion and career growth, and more flexible work conditions that are designed to recruit, place, and retain staff with the skills necessary to meet the needs of the students in a transformation school.

(ii) *Permissible activities.* An LEA may also implement other strategies to develop teachers' and school leaders' effectiveness, such as—

(A) Providing additional compensation to attract and retain staff with the skills necessary to meet the needs of the students in a transformation school;

(B) Instituting a system for measuring changes in instructional practices resulting from professional development; or

(C) Ensuring that the school is not required to accept a teacher without the mutual consent of the teacher and principal, regardless of the teacher's seniority.

(2) *Comprehensive instructional reform strategies.*

(i) *Required activities.* The LEA must—

(A) Use data to identify and implement an instructional program that is research-based and vertically aligned from one grade to the next as well as aligned with State academic standards; and

(B) Promote the continuous use of student data (such as from formative, interim, and summative assessments) to inform and differentiate instruction in order to meet the academic needs of individual students.

(ii) *Permissible activities.* An LEA may also implement comprehensive instructional reform strategies, such as—

(A) Conducting periodic reviews to ensure that the curriculum is being implemented with fidelity, is having the intended impact on student achievement, and is modified if ineffective;

(B) Implementing a schoolwide "response-to-intervention" model;

(C) Providing additional supports and professional development to teachers and principals in order to implement effective strategies to support students with disabilities in the least restrictive environment and to ensure that limited English proficient students acquire language skills to master academic content;

(D) Using and integrating technology-based supports and interventions as part of the instructional program; and

(E) In secondary schools—

(*1*) Increasing rigor by offering opportunities for students to enroll in advanced coursework (such as Advanced Placement; International Baccalaureate; or science, technology, engineering, and mathematics courses, especially those that incorporate rigorous and relevant project-, inquiry-, or design-based contextual learning opportunities), early-college high schools, dual enrollment programs, or thematic learning academies that prepare students for college and careers, including by providing appropriate supports designed to ensure that low-achieving students can take advantage of these programs and coursework;

(*2*) Improving student transition from middle to high school through summer transition programs or freshman academies;

(*3*) Increasing graduation rates through, for example, credit-recovery programs, re-engagement strategies, smaller learning communities, competency-based instruction and performance-based assessments, and acceleration of basic reading and mathematics skills; or

(*4*) Establishing early-warning systems to identify students who may be at risk of failing to achieve to high standards or graduate.

(3) *Increasing learning time and creating community-oriented schools.*

(i) *Required activities.* The LEA must—

(*A*) Establish schedules and strategies that provide increased learning time (as defined in this notice); and

(*B*) Provide ongoing mechanisms for family and community engagement.

(ii) *Permissible activities.* An LEA may also implement other strategies that extend learning time and create community-oriented schools, such as—

(A) Partnering with parents and parent organizations, faith- and community-based organizations, health clinics, other State or local agencies, and others to create safe school environments that meet students' social, emotional, and health needs;

(B) Extending or restructuring the school day so as to add time for such strategies as advisory periods that build relationships between students, faculty, and other school staff;

(C) Implementing approaches to improve school climate and discipline, such as implementing a system of positive behavioral supports or taking steps to eliminate bullying and student harassment; or

(D) Expanding the school program to offer full-day kindergarten or pre-kindergarten.

(4) *Providing operational flexibility and sustained support.*

(i) *Required activities.* The LEA must—

(A) Give the school sufficient operational flexibility (such as staffing, calendars/time, and budgeting) to implement fully a comprehensive approach to substantially improve student achievement outcomes and increase high school graduation rates; and

(B) Ensure that the school receives ongoing, intensive technical assistance and related support from the LEA, the SEA, or a designated external lead partner organization (such as a school turnaround organization or an EMO).

(ii) *Permissible activities.* The LEA may also implement other strategies for providing operational flexibility and intensive support, such as—

(A) Allowing the school to be run under a new governance arrangement, such as a turnaround division within the LEA or SEA; or

(B) Implementing a per-pupil school-based budget formula that is weighted based on student needs.

3. *Definitions.*

Increased learning time means using a longer school day, week, or year schedule to significantly increase the total number of school hours to include additional time for (a) instruction in core academic subjects including English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography; (b) instruction in other subjects and enrichment activities that contribute to a well-rounded education, including, for example, physical education, service learning, and experiential and work-based learning opportunities that are provided by partnering, as appropriate, with other organizations; and (c) teachers to collaborate, plan, and engage in professional development within and across grades and subjects.[2]

Persistently lowest-achieving schools means, as determined by the State—

(a)(1) Any Title I school in improvement, corrective action, or restructuring that—

(i) Is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or

(ii) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years; and

(2) Any secondary school that is eligible for, but does not receive, Title I funds that—

[2] Research supports the effectiveness of well-designed programs that expand learning time by a minimum of 300 hours per school year. (See Frazier, Julie A.; Morrison, Frederick J. "The Influence of Extended-Year Schooling on Growth of Achievement and Perceived Competence in Early Elementary School." Child Development. Vol. 69 (2), April 1998, pp.495–497 and research done by Mass2020.) Extending learning into before- and after-school hours can be difficult to implement effectively, but is permissible under this definition with encouragement to closely integrate and coordinate academic work between in school and out of school. (*See* James-Burdumy, Susanne; Dynarski, Mark; Deke, John. "When Elementary Schools Stay Open Late: Results from The National Evaluation of the 21st Century Community Learning Centers Program." Educational Evaluation and Policy Analysis, Vol. 29 (4), December 2007, Document No. PP07–121.) (*http://www.mathematica-mpr.com/publications/redirect_PubsDB.asp?strSite=http://epa.sagepub.com/cgi/content/abstract/29/4/296*

(i) Is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or

(ii) Is a high school that has had a graduation rate as defined in 34 CFR 200.19(b) that is less than 60 percent over a number of years.

(b) To identify the lowest-achieving schools, a State must take into account both—

(i) The academic achievement of the "all students" group in a school in terms of proficiency on the State's assessments under section 1111(b)(3) of the ESEA in reading/language arts and mathematics combined; and

(ii) The school's lack of progress on those assessments over a number of years in the "all students" group.

Student growth means the change in achievement for an individual student between two or more points in time. For grades in which the State administers summative assessments in reading/language arts and mathematics, student growth data must be based on a student's score on the State's assessment under section 1111(b)(3) of the ESEA. A State may also include other measures that are rigorous and comparable across classrooms.

4. *Evidence of strongest commitment.* (a) In determining the strength of an LEA's commitment to ensuring that school improvement funds are used to provide adequate resources to enable Tier I and Tier II schools to improve student achievement substantially, an SEA must consider, at a minimum, the extent to which the LEA's application demonstrates that the LEA has taken, or will take, action to—

(i) Analyze the needs of its schools and select an intervention for each school;

(ii) Design and implement interventions consistent with these requirements;

(iii) Recruit, screen, and select external providers, if applicable, to ensure their quality;

(iv) Align other resources with the interventions;

(v) Modify its practices or policies, if necessary, to enable it to implement the interventions fully and effectively; and

(vi) Sustain the reforms after the funding period ends.

(b) The SEA must consider the LEA's capacity to implement the interventions and may approve the LEA to serve only those Tier I and Tier II schools for which the SEA determines that the LEA can implement fully and effectively one of the interventions.

B. Providing flexibility

1. An SEA may award school improvement funds to an LEA for a Tier I or Tier II school that has implemented, in whole or in part, an intervention that meets the requirements under section I.A.2(a), 2(b), or 2(d) of these requirements within the last two years so that the LEA and school can continue or complete the intervention being implemented in that school.

2. An SEA may seek a waiver from the Secretary of the requirements in section 1116(b) of the ESEA in order to permit a Tier I or Tier II Title I participating school implementing an intervention that meets the requirements under section I.A.2(a) or 2(b) of these requirements in an LEA that receives a School Improvement Grant to "start over" in the school improvement timeline. Even though a school implementing the waiver would no longer be in improvement, corrective action, or restructuring, it may receive school improvement funds.

3. An SEA may seek a waiver from the Secretary to enable a Tier I or Tier II Title I participating school that is ineligible to operate a Title I schoolwide program and is operating a Title I targeted assistance program to operate a schoolwide program in order to implement an intervention that meets the requirements under section I.A.2(a), 2(b), or 2(d) of these requirements.

4. An SEA may seek a waiver from the Secretary to extend the period of availability of school improvement funds so as to make those funds available to the SEA and its LEAs for up to three years.

5. If an SEA does not seek a waiver under section I.B.2, 3, or 4, an LEA may seek a waiver.

II. Awarding School Improvement Grants to LEAs

A. LEA Requirements

1. An LEA may apply for a School Improvement Grant if it receives Title I, Part A funds and has one or more schools that qualify under the State's definition of a Tier I, Tier II, or Tier III school.

2. In its application, in addition to other information that the SEA may require—

(a) The LEA must—

(i) Identify the Tier I, Tier II, and Tier III schools it commits to serve;

(ii) Identify the intervention it will implement in each Tier I and Tier II school it commits to serve;

(iii) Demonstrate that it has the capacity to use the school improvement funds to provide adequate resources and related support to each Tier I and Tier II school it commits to serve in order to implement fully and effectively one of the four interventions identified in section I.A.2 of these requirements;

(iv) Provide evidence of its strong commitment to use school improvement funds to implement the four interventions by addressing the factors in section I.A.4(a) of these requirements;

(v) Include a timeline delineating the steps the LEA will take to implement the selected intervention in each Tier I and Tier II school identified in the LEA's application; and

(vi) Include a budget indicating how it will allocate school improvement funds among the Tier I, Tier II, and Tier III schools it commits to serve.

(b) If an LEA has nine or more Tier I and Tier II schools, the LEA may not implement the transformation model in more than 50 percent of those schools.

3. The LEA must serve each Tier I school unless the LEA demonstrates that it lacks sufficient capacity (which may be due, in part, to serving Tier II schools) to undertake one of these rigorous interventions in each Tier I school, in which case the LEA must indicate the Tier I schools that it can effectively serve. An LEA may not serve with school improvement funds awarded under section 1003(g) of the ESEA a Tier I or Tier II school in which it does not implement one of the four interventions identified in section I.A.2 of these requirements.

4. The LEA's budget for each Tier I and Tier II school it commits to serve must be of sufficient size and scope to ensure that the LEA can implement one of the rigorous interventions identified in section I.A.2 of these requirements. The LEA's budget must cover the period of availability of the school improvement funds, taking into account any waivers extending the period of availability received by the SEA or LEA.

5. The LEA's budget for each Tier III school it commits to serve must include the services it will provide the school, particularly if the school meets additional criteria established by the SEA.

6. An LEA that commits to serve one or more Tier I, Tier II, or Tier III schools that do not receive Title I, Part A funds must ensure that each such school it serves receives all of the State and local funds it would have received in the absence of the school improvement funds.

7. An LEA in which one or more Tier I schools are located and that does not apply to serve at least one of these schools may not apply for a grant to serve only Tier III schools.

8. (a) To monitor each Tier I and Tier II school that receives school improvement funds, an LEA must—

(i) Establish annual goals for student achievement on the State's assessments in both reading/language arts and mathematics; and

(ii) Measure progress on the leading indicators in section III of these requirements.

(b) The LEA must also meet the requirements with respect to adequate yearly progress in section 1111(b)(2) of the ESEA.

9. If an LEA implements a restart model, it must hold the charter school operator, CMO, or EMO accountable for meeting the final requirements.

B. SEA requirements

1. To receive a School Improvement Grant, an SEA must submit an application to the Department at such time, and containing such information, as the Secretary shall reasonably require.

2. (a) An SEA must review and approve, consistent with these requirements, an application for a School Improvement Grant that it receives from an LEA.

(b) Before approving an LEA's application, the SEA must ensure that the application meets these requirements, particularly with respect to—

(i) Whether the LEA has agreed to implement one of the four interventions identified in section I.A.2 of these requirements in each Tier I and Tier II school included in its application;

(ii) The extent to which the LEA's application shows the LEA's strong commitment to use school improvement funds to implement the four interventions by addressing the factors in section I.A.4(a) of these requirements;

(iii) Whether the LEA has the capacity to implement the selected intervention fully and effectively in each Tier I and Tier II school identified in its application; and

(iv) Whether the LEA has submitted a budget that includes sufficient funds to implement the selected intervention fully and effectively in each Tier I and Tier II school it identifies in its application and whether the budget covers the period of availability of the funds, taking into account any waiver extending the period of availability received by either the SEA or the LEA.

(c) An SEA may, consistent with State law, take over an LEA or specific Tier I or Tier II schools in order to implement the interventions in these requirements.

(d) An SEA may not require an LEA to implement a particular model in one or more schools unless the SEA has taken over the LEA or school.

(e) To the extent that a Tier I or Tier II school implementing a restart model becomes a charter school LEA, an SEA must hold the charter school LEA accountable, or ensure that the charter school authorizer holds it accountable, for complying with these requirements.

3. An SEA must post on its Web site, within 30 days of awarding School Improvement Grants to LEAs, all final LEA applications as well as a summary of those grants that includes the following information:

(a) Name and National Center for Education Statistics (NCES) identification number of each LEA awarded a grant.

(b) Amount of each LEA's grant.

(c) Name and NCES identification number of each school to be served.

(d) Type of intervention to be implemented in each Tier I and Tier II school.

4. If an SEA does not have sufficient school improvement funds to award, for up to three years, a grant to each LEA that submits an approvable application, the SEA must give priority to LEAs that apply to serve Tier I or Tier II schools.

5. An SEA must award a School Improvement Grant to an LEA in an amount that is of sufficient size and scope to support the activities required under section 1116 of the ESEA and these requirements. The LEA's total grant may not be less than $50,000 or more than $2,000,000 per year for each Tier I, Tier II, and Tier III school that the LEA commits to serve.

6. If an SEA does not have sufficient school improvement funds to allocate to each LEA with a Tier I or Tier II school an amount sufficient to enable the school to implement fully and effectively the specified intervention throughout the period of availability, including any extension afforded through a waiver, the SEA may take into account the distribution of Tier I and Tier II schools among such LEAs in the State to ensure that Tier I and Tier II schools throughout the State can be served.

7. An SEA must award funds to serve each Tier I and Tier II school that its LEAs commit to serve, and that the SEA determines its LEAs have the capacity to serve, prior to awarding funds to its LEAs to serve any Tier III schools. If an SEA has awarded school improvement funds to its LEAs for each Tier I and Tier II school that its LEAs commit to serve in accordance with these requirements, the SEA may then, consistent with section II.B.9, award remaining school improvement funds to its LEAs for the Tier III schools that its LEAs commit to serve.

8. In awarding School Improvement Grants, an SEA must apportion its school improvement funds in order to make grants to LEAs, as applicable, that are renewable for the length of the period of availability of the funds, taking into account any waivers that may have been requested and received by the SEA or an individual LEA to extend the period of availability.

9. (a) If not every Tier I school in a State is served with FY 2009 school improvement funds, an SEA must carry over 25 percent of its FY 2009 funds, combine those funds with FY 2010 school improvement funds, and award those funds to eligible LEAs consistent with these requirements. This requirement does not apply in a State that does not have sufficient school improvement funds to serve all the Tier I schools in the State.

(b) If each Tier I school in a State is served with FY 2009 school improvement funds, an SEA may reserve up to 25 percent of its FY 2009 allocation and award those funds in combination with its FY 2010 funds consistent with these requirements.

10. In identifying Tier I and Tier II schools in a State for purposes of allocating funds appropriated for School Improvement Grants under section 1003(g) of the ESEA for any year subsequent to FY 2009, an SEA must exclude from consideration any school that was previously identified as a Tier I or Tier II school and in which an LEA is implementing one of the four interventions identified in these requirements using funds made available under section 1003(g) of the ESEA.

11. An SEA that is participating in the "differentiated accountability pilot" must ensure that its LEAs use school improvement funds available under section 1003(g) of the ESEA in a Tier I or Tier II school consistent with these requirements.

12. Before submitting its application for a School Improvement Grant to the Department, the SEA must consult with its Committee of Practitioners established under section 1903(b) of the ESEA regarding the rules and policies contained therein and may consult with other stakeholders that have an interest in its application.

C. Renewal for Additional One-Year Periods

1. If an SEA or an individual LEA requests and receives a waiver of the period of availability of school improvement funds, an SEA—

(a) Must renew the School Improvement Grant for each affected LEA for additional one-year periods commensurate with the period of availability if the LEA demonstrates that its Tier I and Tier II schools are meeting the requirements in section II.A.8, and that its Tier III schools are meeting the goals established by the LEA and approved by the SEA; and

(b) May renew an LEA's School Improvement Grant if the SEA determines that the LEA's schools are making progress toward meeting the requirements in section II.A.8 or the goals established by the LEA.

2. If an SEA does not renew an LEA's School Improvement Grant because the LEA's participating schools are not meeting the requirements in section II.A.8 or the goals established by the LEA, the SEA may reallocate those funds to other eligible LEAs, consistent with these requirements.

D. State Reservation for Administration, Evaluation, and Technical Assistance

An SEA may reserve from the school improvement funds it receives under section 1003(g) of the ESEA in any given year no more than five percent for administration, evaluation, and technical assistance expenses. An SEA must describe in its application for a School Improvement Grant how the SEA will use these funds.

E. A State Whose School Improvement Grant Exceeds the Amount the State May Award to Eligible LEAs

In some States in which a limited number of Title I schools are identified for improvement, corrective action, or restructuring, the SEA may be able to make School Improvement Grants, renewable for additional years commensurate with the period of availability of the funds, to each LEA with a Tier I, Tier II, or Tier III school without using the State's full allocation under section 1003(g) of the ESEA. An SEA in this situation may reserve no more than five percent of its FY 2009 allocation of school improvement funds for administration, evaluation, and technical assistance expenses under section 1003(g)(8) of the ESEA. The SEA may retain sufficient school improvement funds to serve, for succeeding years, each Tier I, II, and III school that generates funds for an eligible LEA. The Secretary may reallocate to other States any remaining school improvement funds from States with surplus funds.

III. Reporting and Evaluation

A. Reporting Metrics

To inform and evaluate the effectiveness of the interventions identified in these requirements, the Secretary will collect data on the metrics in the following chart. The Department already collects most of these data through ED*Facts* and will collect data on two metrics through SFSF reporting. Accordingly, an SEA must only report the following new data with respect to school improvement funds:

1. A list of the LEAs, including their NCES identification numbers, that received a School Improvement Grant under section 1003(g) of the ESEA and the amount of the grant.

2. For each LEA that received a School Improvement Grant, a list of the schools that were served, their NCES identification numbers, and the amount of funds or value of services each school received.

3. For any Tier I or Tier II school, school-level data on the metrics designated on the following chart as "SIG" (School Improvement Grant):

Metric	Source	Achievement indicators	Leading indicators
SCHOOL DATA			
Which intervention the school used (*i.e.,* turnaround, restart, closure, or transformation).	NEW SIG.		
AYP status	ED*Facts*	✓	
Which AYP targets the school met and missed	ED*Facts*	✓	
School improvement status	ED*Facts*	✓	
Number of minutes within the school year	NEW SIG		✓
STUDENT OUTCOME/ACADEMIC PROGRESS DATA			
Percentage of students at or above each proficiency level on State assessments in reading/language arts and mathematics (*e.g.,* Basic, Proficient, Advanced), by grade and by student subgroup.	ED*Facts*	✓	
Student participation rate on State assessments in reading/language arts and in mathematics, by student subgroup.	ED*Facts*		✓
Average scale scores on State assessments in reading/language arts and in mathematics, by grade, for the "all students" group, for each achievement quartile, and for each subgroup.	NEW SIG	✓	
Percentage of limited English proficient students who attain English language proficiency.	ED*Facts*	✓	
Graduation rate	ED*Facts*	✓	
Dropout rate	ED*Facts*		✓
Student attendance rate	ED*Facts*		✓

Metric	Source	Achievement indicators	Leading indicators
Number and percentage of students completing advanced coursework (*e.g.,* AP/IB), early-college high schools, or dual enrollment classes.	NEW SIG HS only		✓
College enrollment rates	NEW SFSF Phase II HS only.	✓	
STUDENT CONNECTION AND SCHOOL CLIMATE			
Discipline incidents	ED*Facts*		✓
Truants	ED*Facts*		✓
TALENT			
Distribution of teachers by performance level on LEA's teacher evaluation system	NEW SFSF Phase II		✓
Teacher attendance rate	NEW SIG		✓

4. An SEA must report these metrics for the school year prior to implementing the intervention, if the data are available, to serve as a baseline, and for each year thereafter for which the SEA allocates school improvement funds under section 1003(g) of the ESEA. With respect to a school that is closed, the SEA need report only the identity of the school and the intervention taken—*i.e.,* school closure.

B. Evaluation

An LEA that receives a School Improvement Grant must participate in any evaluation of that grant conducted by the Secretary.

Executive Order 12866

Under Executive Order 12866, the Secretary must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may (1) have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities in a material way (also referred to as an "economically significant" rule); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or local programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. The Secretary has determined that this regulatory action is not significant under section 3(f) of the Executive order.

We have also determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

We summarized the potential costs and benefits of these final requirements in the interim final requirements at 75 FR 3375, 3382.

Regulatory Flexibility Act Certification

The Secretary certifies that these final requirements will not have a significant economic impact on a substantial number of small entities for the reasons summarized in the interim final requirements at 75 FR 3375, 3382–3383.

Paperwork Reduction Act of 1995

These final requirements contain information collection requirements that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The Department received emergency approval for the information collections in the SIG final requirements published on December 10, 2009, under OMB Control Number 1810–0682. OMB approved changes described in the interim final requirements at 75 FR 3375, 3383 on January 20, 2010. On June 10, 2010, the Department submitted a request to OMB for regular approval of this collection and received approval on September 22, 2010, under the OMB control number 1810–0682, which lasts until September 30, 2013.

Intergovernmental Review

This program is not subject to Executive Order 12372 and the regulations in 34 CFR 79.

Electronic Access to This Document

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Dated: October 25, 2010.

Arne Duncan,

Secretary of Education.

[FR Doc. 2010–27313 Filed 10–27–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

October 21, 2010.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC11–11–000

Applicants: Champion Energy Marketing LLC, EDF Trading North America, LLC

Description: Section 203 Application of Champion Energy Marketing LLC and EDF Trading North America, LLC.

Filed Date: 10/20/2010

Accession Number: 20101020–5152

Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER97–1481–013
Applicants: Idaho Power Company
Description: Supplemental information to Idaho Power Company's June 30, 2010 triennial update to its market power analysis in support of its Market-Based Rates Tariff.
Filed Date: 10/19/2010
Accession Number: 20101019–5123
Comment Date: 5 p.m. Eastern Time on Tuesday, November 9, 2010

Docket Numbers: ER10–1774–001
Applicants: Carolina Power & Light Company
Description: Carolina Power & Light Company submits tariff filing per 35: Revised OATT Section 23 of Carolina Power and Light Co. per Order No. 739 to be effective 9/24/2010.
Filed Date: 10/21/2010
Accession Number: 20101021–5026
Comment Date: 5 p.m. Eastern Time on Friday, November 12, 2010

Docket Numbers: ER10–1775–002
Applicants: Florida Power Corporation
Description: Florida Power Corporation submits tariff filing per 35: Revised OATT Section 23 of Florida Power Corp. per Order No. 739 to be effective 9/24/2010.
Filed Date: 10/21/2010
Accession Number: 20101021–5027
Comment Date: 5 p.m. Eastern Time on Friday, November 12, 2010

Docket Numbers: ER10–3215–001
Applicants: Eagle Power Authority, Inc.
Description: Eagle Power Authority, Inc. submits tariff filing per 35.17(b): Eagle Power Authority Amendment Filing for ER10–3242 to be effective 10/19/2010.
Filed Date: 10/21/2010
Accession Number: 20101021–5041
Comment Date: 5 p.m. Eastern Time on Friday, November 12, 2010

Docket Numbers: ER11–40–002
Applicants: Arizona Public Service Company
Description: Arizona Public Service Company submits tariff filing per 35.17(b): Rate Schedule No. 217 Amendment to be effective 10/6/2010.
Filed Date: 10/21/2010
Accession Number: 20101021–5062
Comment Date: 5 p.m. Eastern Time on Friday, November 12, 2010

Docket Numbers: ER11–1841–000
Applicants: GenConn Energy LLC
Description: GenConn Energy LLC submits tariff filing per 35.15: Cancellation of Tariff and Duplicate Company Tariff ID to be effective 9/24/2010.
Filed Date: 10/20/2010
Accession Number: 20101020–5060
Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Docket Numbers: ER11–1842–000
Applicants: ISO New England Inc., New England Power Company
Description: ISO New England Inc. submits tariff filing per 35.12: RI Genco LGIA–Original Service Agreement No. LGIA–ISONE/NEP–10–03 to be effective 10/21/2010.
Filed Date: 10/20/2010
Accession Number: 20101020–5062
Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Docket Numbers: ER11–1843–000
Applicants: Ridgewind Power Partners, LLC
Description: Ridgewind Power Partners, LLC submits tariff filing per 35.12: Baseline Electric Market-Based Rates to be effective 11/30/2010.
Filed Date: 10/20/2010
Accession Number: 20101020–5067
Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Docket Numbers: ER11–1844–000
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): 10–20–10 to be effective 1/1/2011.
Filed Date: 10/20/2010
Accession Number: 20101020–5068
Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Docket Numbers: ER11–1845–000
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): Section 23.1 Filing to be effective 10/1/2010.
Filed Date: 10/20/2010
Accession Number: 20101020–5079
Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Docket Numbers: ER11–1846–000
Applicants: Direct Energy Services, LLC
Description: Direct Energy Services, LLC submits tariff filing per 35.12: Direct Energy Services, LLC Rate Schedule FERC No. 1 to be effective 10/20/2010.
Filed Date: 10/20/2010
Accession Number: 20101020–5080
Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Docket Numbers: ER11–1847–000
Applicants: Direct Energy Marketing Inc.
Description: Direct Energy Marketing Inc. submits tariff filing per 35.12: Direct Energy Marketing Inc. Rate Schedule FERC No. 1 to be effective 10/20/2010.
Filed Date: 10/20/2010
Accession Number: 20101020–5083
Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Docket Numbers: ER11–1848–000
Applicants: Energy America LLC
Description: Energy America LLC submits tariff filing per 35.12: Energy America LLC FERC Electric Tariff to be effective 10/20/2010.
Filed Date: 10/20/2010
Accession Number: 20101020–5084
Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Docket Numbers: ER11–1849–000
Applicants: PacifiCorp
Description: Cancellation of PacifiCorp Service Agreement FERC No. 475 for Ancillary Services Related to Short-Term Transmission between PacifiCorp and PPM Energy, Inc., predecessor to Iberdrola Renewables, Inc.
Filed Date: 10/20/2010
Accession Number: 20101020–5085
Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Docket Numbers: ER11–1850–000
Applicants: Direct Energy Business, LLC
Description: Direct Energy Business, LLC submits tariff filing per 35.12: Direct Energy Business, LLC Electric Rate Schedule FERC No. 1 to be effective 10/20/2010.
Filed Date: 10/20/2010
Accession Number: 20101020–5087
Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Docket Numbers: ER11–1851–000
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): Ameren-Kirkwood WDS to be effective 12/31/9998.
Filed Date: 10/20/2010
Accession Number: 20101020–5105
Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Docket Numbers: ER11–1852–000
Applicants: Alabama Power Company
Description: Alabama Power Company submits tariff filing per 35: Capacity Reassignment—Section 23.1 Compliance Filing to be effective 10/1/2010.
Filed Date: 10/20/2010
Accession Number: 20101020–5117
Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Docket Numbers: ER11–1853–000
Applicants: Fowler Ridge II Wind Farm LLC

Description: Fowler Ridge II Wind Farm LLC submits tariff filing per 35: Compliance Filing, Docket No. ER09–1650–001 and OA09–32–001 to be effective 12/31/9998.

Filed Date: 10/20/2010

Accession Number: 20101020–5123

Comment Date: 5 p.m. Eastern Time on Wednesday, November 10, 2010

Docket Numbers: ER11–1854–000

Applicants: NV Energy, Inc.

Description: NV Energy, Inc. submits a Compliance Filing for its FERC Electric Tariff, Volume No 1—Open Access Transmission Tariff, to be effective 10/21/2010.

Filed Date: 10/21/2010

Accession Number: 20101021–5007

Comment Date: 5 p.m. Eastern Time on Friday, November 12, 2010

Docket Numbers: ER11–1855–000

Applicants: Cleco Power LLC

Description: Cleco Power LLC submits revised OATT Section 23 for inclusion in its Open Access Transmission Tariff, to be effective 10/21/2010.

Filed Date: 10/21/2010

Accession Number: 20101021–5034

Comment Date: 5 p.m. Eastern Time on Friday, November 12, 2010

Docket Numbers: ER11–1856–000

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii): 2056 Broken Bow Wind, LLC GIA to be effective 9/27/2010.

Filed Date: 10/21/2010

Accession Number: 20101021–5042

Comment Date: 5 p.m. Eastern Time on Friday, November 12, 2010

Docket Numbers: ER11–1857–000

Applicants: NV Energy, Inc.

Description: NV Energy, Inc. submits tariff filing per 35: Order 739 Compliance Filing—Capacity Reassignment to be effective 10/1/2010.

Filed Date: 10/21/2010

Accession Number: 20101021–5049

Comment Date: 5 p.m. Eastern Time on Friday, November 12, 2010

Docket Numbers: ER11–1858–000

Applicants: NorthWestern Corporation

Description: NorthWestern Corporation submits tariff filing per 35: Market-Based Rate Tariff to be effective 10/21/2010.

Filed Date: 10/21/2010

Accession Number: 20101021–5053

Comment Date: 5 p.m. Eastern Time on Friday, November 12, 2010

Docket Numbers: ER11–1859–000

Applicants: Montana Generation, LLC

Description: Montana Generation, LLC submits tariff filing per 35: Market Based Tariff to be effective 10/21/2010.

Filed Date: 10/21/2010

Accession Number: 20101021–5054

Comment Date: 5 p.m. Eastern Time on Friday, November 12, 2010

Docket Numbers: ER11–1860–000

Applicants: Public Service Company of New Mexico

Description: Public Service Company of New Mexico submits tariff filing per 35: Baseline Filing of PNM–EPE Interconnection Agreement to be effective 10/21/2010.

Filed Date: 10/21/2010

Accession Number: 20101021–5056

Comment Date: 5 p.m. Eastern Time on Friday, November 12, 2010

Docket Numbers: ER11–1861–000

Applicants: PacifiCorp

Description: PacifiCorp submits tariff filing per 35: OATT Revised Section 23 to be effective 9/24/2010.

Filed Date: 10/21/2010

Accession Number: 20101021–5064

Comment Date: 5 p.m. Eastern Time on Friday, November 12, 2010

Docket Numbers: ER11–1862–000

Applicants: ISO New England Inc.

Description: ISO New England Inc. Resource Termination Filing.

Filed Date: 10/21/2010

Accession Number: 20101021–5100

Comment Date: 5 p.m. Eastern Time on Friday, November 12, 2010

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–27240 Filed 10–27–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9218–5]

Notice of a Project Waiver of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 (ARRA) to the Newport Borough Water Authority, Pennsylvania

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Regional Administrator of EPA Region 3 is hereby granting a project waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(2) [manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality] to the Newport Borough Water Authority (NBWA) for the purchase of membrane filtration cassettes, supplied by GE Water & Process Technologies (GE), that contains a primary component not manufactured in America, at its new Water Treatment Plant (WTP). NBWA indicates that the membrane filtration cassettes at its new WTP are necessary to replace groundwater wells that cannot meet the system demands during drought conditions and provide for the removal of Cryptosporidium and Giardia. The membrane cassettes under consideration are manufactured by a company located in Hungary and no United States manufacturer produces an

alternative that meets the NBWA's technical specifications. This is a project specific waiver and only applies to the use of the specified product for the ARRA funded project being proposed. Any other ARRA project that may wish to use the same product must apply for a separate waiver based on the specific project circumstances. The Regional Administrator is making this determination based on the review and recommendations of the EPA Region III, Water Protection Division, Office of Infrastructure and Assistance. The NBWA has provided sufficient documentation to support its request.

The Assistant Administrator of the EPA's Office of Administration and Resources Management has concurred on this decision to make an exception to Section 1605 of ARRA. This action permits the purchase of membrane filtration cassettes for the proposed project being implemented by the NBWA.

DATES: *Effective Date:* October 7, 2010.

FOR FURTHER INFORMATION CONTACT: Robert Chominski, Deputy Associate Director, (215) 814–2162, or David McAdams, Environmental Engineer, (215) 814–5764, Office of Infrastructure & Assistance (OIA), Water Protection Division, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103–2029.

SUPPLEMENTARY INFORMATION: In accordance with ARRA Sections 1605(c) and 1605(b)(2), EPA hereby provides notice that it is granting a project waiver of the requirements of Section 1605(a) of Public Law 111–5, Buy American requirements to the Newport Borough Water Authority (NBWA) for the acquisition of a "GE ZeeWeed® 500 D membrane cassettes." NBWA has been unable to find membrane filtration equipment that contains American-made membrane cassettes to meet its specific water requirements.

Section 1605 of the ARRA requires that none of the appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States unless a waiver is provided to the recipient by EPA. A waiver may be provided if EPA determines that (1) applying these requirements would be inconsistent with public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

EPA has determined that NBWA's waiver request may be treated as timely even though the request was made after the construction contract was signed. Consistent with the direction of the OMB Guidance at 2 CFR 176.120, EPA has evaluated the NBWA's request to determine if the request, though made after the contract date, can be treated as if it were timely made. EPA will generally regard waiver requests with respect to components that were specified in the bid solicitation or in a general/primary construction contract as "late" if submitted after the contract date. However, in this case EPA has determined that the NBWA's request may be treated as timely because the need for a waiver was not foreseeable at the time the contract was signed. The project was bid and the general contractor for the NBWA project submitted documentation that the equipment utilized in preparing their bid met the ARRA Buy American provisions. Contracts were awarded in December 2009. GE initially believed that its ZeeWeed® 500 D membrane cassettes, though manufactured outside of the United States, would fulfill the Buy American provisions through the Substantial Transformation test. In May 2010, GE sent a letter to the General Contractor stating that the membrane cassettes would not be substantially transformed in the United States. NBWA responded back to GE inquiring if the cassettes were the only piece of equipment in the ZeeWeed® 500 D ultra filtration membrane system that would require a Buy American waiver if the product was used. GE responded back on July 14, 2010 that only the cassettes required the Buy American waiver. The need for a waiver was not determined until after the contractor had completed their review of information provided by GE and had confirmed that there were no domestically made membrane cassettes available to meet project specifications. Accordingly, EPA will evaluate the request as a timely request.

NBWA's waiver request is to allow for the purchase of the GE ZeeWeed® 500 D ultra filtration membrane system with thirty-two membrane filtration cassettes, manufactured by GE Water & Process Technologies of Hungary, for use in a new WTP in Pennsylvania. The membrane filtration cassettes are an integral component of the ultra filtration membrane process because it achieves the 4 log removal of Cryptosporidium and Giardia from drinking water. After an engineering analysis of alternate treatment processes, the NBWA determined that the ultra filtration membrane system to be the most environmentally sound and cost effective solution. The ultra filtration membrane system is an advanced water treatment process which is designed to achieve 4 log removal of Cryptosporidium and Giardia. In addition, in anticipation of procuring the ultra filtration membrane system, the NBWA has already incorporated specific technical design requirements for installation of membrane filter cassettes with the ultra filtration membrane process at their WTP, including specific tankage footprint, geometry and configuration. To require NBWA to redesign its project would cause an unacceptable delay to the completion of the project.

The NBWA has provided information to the EPA demonstrating that there are no membrane filtration cassettes manufactured in the United States in sufficient and reasonable quantity and of a satisfactory quality to meet the required technical specification. Three companies were considered for the membrane filtration cassettes that either manufactured their membranes outside the United States or did not meet the specifications of the project. The NBWA has performed market research but was unsuccessful in its effort to locate any domestic manufacturers of membrane filtration cassettes for its WTP.

The April 28, 2009 EPA HQ Memorandum, Implementation of Buy American provisions of Public Law 111–5, the "American Recovery and Reinvestment Act of 2009," defines reasonably available quantity as "the quantity of iron, steel, or relevant manufactured good that is available or will be available at the time needed and place needed, and in the proper form or specification as specified in the project plans and design." The NBWA has incorporated specific technical design requirements for installation of membrane filtration cassettes at its WTP.

The purpose of the ARRA is to stimulate economic recovery in part by funding current infrastructure construction, not to delay projects that are "shovel ready" by requiring utilities, such as the NBWA, to revise their standards and specifications, institute a new bidding process, and potentially choose a more costly, less efficient project. The imposition of ARRA Buy American requirements on such projects otherwise eligible for State Revolving Fund assistance would result in unreasonable delay and thus displace the "shovel ready" status for this project. To further delay construction is in direct conflict with a fundamental

economic purpose of the ARRA, which is to create or retain jobs.

Based on additional research conducted by EPA's Office of Infrastructure and Assistance (OIA) in Region 3, and to the best of the Region's knowledge at the time of review, there do not appear to be other membrane filtration cassettes manufactured domestically that would meet the NBWA's technical specification. EPA's national contractor prepared a technical assessment report dated August 18, 2010 based on the waiver request submitted. This report included a detailed review intended to enable EPA to determine if any company could be considered to substantially transform these cassettes in the United States. However, sufficient information was not available or made available to establish either performance characteristics for any potential alternative product, or the substantial transformation of any such product in the United States. Accordingly, the report determined that the waiver request submittal was complete, that adequate technical information was provided, and that there were no significant weaknesses in the justification provided. The report confirmed the waiver applicant's claim that there are no American-made membrane filtration cassettes available from a domestic manufacturer in the proper form or specification as specified in the project plans and design, and the quality specified in the project plans and designs.

The OIA has reviewed this waiver request and to the best of our knowledge at the time of review has determined that the supporting documentation provided by the NBWA is sufficient to meet the criteria listed under Section 1605(b) and in the April 28, 2009, "Implementation of Buy American provisions of Public Law 111–5, the 'American Recovery and Reinvestment Act of 2009' Memorandum:" Iron, steel, and the manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality. The basis for this project waiver is the authorization provided in Section 1605(b)(2). Due to the lack of production of this product in the United States in sufficient and reasonably available quantities and of a satisfactory quality in order to meet the NBWA's technical specifications, a waiver from the Buy American requirement is justified.

The March 31, 2009 Delegation of Authority Memorandum provided Regional Administrators with the authority to issue exceptions to Section 1605 of ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant recipients. Having established both a proper basis to specify the particular good required for this project, and that this manufactured good was not available from a producer in the United States, the Newport Borough Water Authority is hereby granted a waiver from the Buy American requirements of Section 1605(a) of Public Law 111–5 for the purchase of thirty-two membrane filtration cassettes using ARRA funds as specified in the Newport Borough Water Authority's request of August 4, 2010. This supplementary information constitutes the detailed written justification required by Section 1605(c) for waivers "based on a finding under subsection (b)."

Authority: Pub. L. 111–5, section 1605.

Dated: October 7, 2010.

W.C. Early,

Acting Regional Administrator, U.S. Environmental Protection Agency, Region III.

[FR Doc. 2010–27279 Filed 10–27–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9218–4]

Notice of a Regional Waiver of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009 (ARRA) to the City of Kimberly (the City), ID

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Regional Administrator of EPA Region 10 is hereby granting a waiver of the Buy American requirements of ARRA Section 1605(a) under the authority of Section 1605(b)(2) [manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality] to the City for the purchase of three ABB ultra low harmonics (ULH) ACS800 Series, variable frequency drives (VFDs): 75–HP VFD, 100–HP VFD, and 150–HP VFD manufactured in Helsinki, Finland by ABB. This is a project specific waiver and only applies to the use of the specified products for the ARRA project being proposed. Any other ARRA recipient that wishes to use the same product must apply for a separate waiver based on project specific circumstances. The waiver applicant states that the project requires the ULH VFDs be installed because they do not require a separate harmonics filter and thus can be installed in smaller places. In addition, the waiver applicant provided a supplemental requirement from the local utility, Idaho Power. Idaho Power requires that harmonic distortion be minimized in accordance with the power quality standard, IEEE STD 519–1992. According to the waiver applicant's consulting engineer, the relevant requirement in IEEE STD 519–1992 is that the VFD generate 4% or less AC line harmonic distortion without additional filtration. There are no known domestic manufacturers of comparable VFDs that satisfactorily meet all aspects of the project specifications.

The Regional Administrator is making this determination based on the review and recommendations of the Drinking Water Unit. The City has provided sufficient documentation to support their request.

DATES: *Effective Date:* October 13, 2010.

FOR FURTHER INFORMATION CONTACT: Johnny Clark, DWSRF ARRA Program Management Analyst, Drinking Water Unit, Office of Water & Watersheds (OWW), (206) 553–0082, U.S. EPA Region 10 (OWW–136), 1200 Sixth Avenue, Suite 900, Seattle, WA 98101.

SUPPLEMENTARY INFORMATION:

In accordance with ARRA Section 1605(c), the EPA hereby provides notice that it is granting a project waiver of the requirements of Section 1605(a) of Public Law 111–5, Buy American requirements, to the City for the acquisition of three ABB ultra low harmonics (ULH) ACS800 Series variable frequency drives (VFDs): 75–HP VFD, 100–HP VFD, and 150–HP VFD manufactured in Helsinki, Finland by ABB. The applicant indicates that ABB ULH VFDs are the ideal components, based upon project specifications and there are no known U.S. manufacturers that manufacture comparable products. The ARRA funded project involves water system improvements in well house #7, and two water storage tanks. One 150–HP VFD is to be incorporated into the new Well House #7; one 100–HP VFD is to be incorporated into the existing Redwood Booster Station on an existing booster pump; and one 75–HP VFD is to be incorporated into the existing City Hall Booster Station on a new booster pump. The applicant indicates ULH VFDs do not require a separate harmonics filter and thus can be installed in smaller spaces. At the Redwood Booster Station, which the applicant explains has limited space and is located in a residential neighborhood, the ULH VFD could be installed inside of the building rather than installing a separate harmonics

filter outside of the building with another VFD. Harmonic filters are reportedly noisy and susceptible to damage if installed outside the building. The applicant also indicated that ULH VFDs are more efficient and require less maintenance than other VFDs, thus providing the City with long-term cost savings.

Within the requirements of the project specifications, there are critical elements, capability and requirements regarding the VFDs, to include the following:

(a) Employ microprocessor based inverter logic isolated from power circuits.

(b) Employ pulse width modulated inverter system.

(c) Employ switching power supply operating off DC link.

(d) Design for ability to operate controller with motor disconnected from output for testing and servicing.

(e) Design for drive output rotation to be independent of input rotation.

(f) Design to limit output voltage rate of rise to 500 volts per micro second (1–60HP) and 2000 volts per micro second (75HP+).

(g) Design to be self protected while running or at rest against:

1. Switching motor on drive output
2. Output line to line or line to ground short circuits
3. Drive overload

(h) Design to drive a 150–HP motor or 75–HP motor up to 40 feet away without exceeding the requirements of MGI–1993.

(i) Design to include electronic thermal overload protection without motor temperature feedback. Provide class 10 motor protection, with speed sensitive response.

(j) Design for speed regulation ±.5% of rated speed with a 10 to 90% load variation from 6 to 60 Hz.

(k) Design for three programmable skip frequencies.

In addition, the local utility, Idaho Power, requires that harmonic distortion be minimized in accordance with the power quality standard, IEEE STD 519–1992. According to the applicant's consulting engineer, the relevant requirement in IEEE STD 519–1992 is that the VFD will generate 4% or less AC line total harmonic distortion without additional filtration. An inquiry by EPA's national contractor (Cadmus) confirmed that no known domestic manufacturers of comparable VFDs meet all aspects of the project specification, which is supported by the available information. Based on available information, it is unlikely that other VFDs would function within the requirement of the project specifications. EPA finds these considerations as stated by the City provide ample functional justification for their specification of these ULH VFDs.

EPA has determined that the City's request can be processed as timely even though the request was made after the construction contract was signed. Consistent with direction of the Office of Management and Budget (OMB) Guidance at 2 CFR 176.120, EPA has evaluated the City's request to determine if the request constitutes a late request. EPA will generally regard waiver requests with respect to components that were specified in the bid solicitation or in a general/primary construction contract as "late" if submitted after the contract date. However, in this case EPA has determined that the City's request, though requested after the contract date, may be processed as if it were timely because the need for the waiver was not reasonably foreseeable. The local utility, Idaho Power, requires that harmonic distortion be minimized in accordance with the power quality standard, IEEE STD 519–1992. Although the design specifications were drafted to meet the Idaho Power requirements, it became known much later after the contract signing that domestic manufactured VFDs required additional space for installation of harmonic filters as compared to non-domestic manufactured VFDs. A domestic manufactured VFD requires the installation of a filter to minimize the harmonic distortion transferred to the utility from the drive; a non-domestic manufactured VFD is able to accomplish a harmonic minimalization without the addition of a separate filtering device; therefore, fitting in a smaller footprint.

The April 28, 2009 EPA HQ Memorandum, Implementation of Buy American provisions of Public Law 111–5, the "American Recovery and Reinvestment Act of 2009", defines "satisfactory quality" as the quality of iron, steel or the relevant manufactured good as specified in the project plans and design. The City has provided information to the EPA representing that there are currently no domestic manufacturers of the ULH VFDs that meet the project specification requirements. Based on additional research by EPA's consulting contractor (Cadmus) and to the best of the Region's knowledge at this time, there does not appear to be any other manufacturers capable of meeting the City's specifications.

Furthermore, the purpose of the ARRA provisions was to stimulate economic recovery by funding current infrastructure construction, not to delay projects that are already shovel ready by requiring entities, like the City, to revise their design and potentially choose a more costly and less effective project. The imposition of ARRA Buy American requirements on such projects eligible for DWSRF assistance would result in unreasonable delay and thus displace the "shovel ready" status for this project. To further delay construction is in direct conflict with the most fundamental economic purposes of ARRA; to create or retain jobs.

The Drinking Water Unit has reviewed this waiver request and has determined that the supporting documentation provided by the City is sufficient to meet the following criteria listed under Section 1605(b) and in the April 28, 2009, Implementation of Buy American provisions of Public Law 111–5, the "American Recovery and Reinvestment Act of 2009" Memorandum: Iron, steel, and the manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

The basis for this project waiver is the authorization provided in Section 1605(b)(2), due to the lack of production of this product in the United States in sufficient and reasonably available quantities and of a satisfactory quality in order to meet the City's design specifications.The March 31, 2009 Delegation of Authority Memorandum provided Regional Administrators with the authority to issue exceptions to Section 1605 of ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant recipients. Having established both a proper basis to specify the particular good required for this project, and that this manufactured good was not available from a producer in the United States, the City is hereby granted a waiver from the Buy American requirements of Section 1605(a) of Public Law 111–5 for the purchase three ABB ultra low harmonics (ULH) ACS800 Series variable frequency drives (VFDs): 75–HP VFD, 100–HP VFD, and 150–HP VFD manufactured in Helsinki, Finland by ABB in the City's request of July 21, 2010. This supplementary information constitutes the detailed written justification required by Section 1605(c) for waivers based on a finding under subsection (b).

Authority: Pub. L. 111–5, section 1605.

Dated: October 13, 2010.

Dennis J. Mclerran,

Regional Administrator, EPA, Region 10.

[FR Doc. 2010–27277 Filed 10–27–10; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE U.S.

[Public Notice 2010–0048]

Agency Information Collection Activities: Final Collection; Comment Request

AGENCY: Export-Import Bank of the U.S.

ACTION: Submission for OMB Review and Comments Request.

Form Title: Application for Short-Term Multi-Buyer Export Credit Insurance Policy.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

The Application for Short-Term Multi-Buyer Export Credit Insurance Policy will be used to determine the eligibility of the applicant and the transaction for Export-Import Bank assistance under its insurance program. Export-Import Bank customers will be able to submit this form on paper or electronically.

The Export-Import Bank has made changes to incorporate new information in the Certification and Notice sections of this form to clarify and expand to encompass broader anti-corruption certifications. In the Certification and Notice sections we rewrote some of the language for clarification, we corrected references to the debarment list, and we added references to the OFAC and the EPLS system. In addition, we clarified two questions about the amount of U.S. employment to be supported by this transaction and added a question to implement greater flexibility in our U.S. content requirements.

DATES: Comments should be received on or before November 29, 2010 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *http://www.regulations.gov* or by mail to Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20038 *Attn:* OMB 3048–0023.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 92–50 Application for Short-Term Multi-Buyer Export Credit Insurance Policy.

OMB Number: 3048–0023.

Type of Review: Regular.

Need and Use: The Application for Short-Term Multi-Buyer Export Credit Insurance Policy will be used to determine the eligibility of the applicant and the transaction for Export-Import Bank assistance under its insurance program.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2010–27252 Filed 10–27–10; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK OF THE U.S.

[Public Notice 2010–0046]

Agency Information Collection Activities: Final Collection; Comment Request

AGENCY: Export-Import Bank of the U.S.

ACTION: Submission for OMB Review and Comments Request.

Form Title: Application for Short Term Letter of Credit Export Credit Insurance Policy.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

The Application for Short Term Letter of Credit Export Credit Insurance Policy will be used to determine the eligibility of the applicant and the transaction for Export Import Bank assistance under its insurance program. Export Import Bank customers will be able to submit this form on paper or electronically.

The Export Import Bank has made changes to incorporate new information in the Certification and Notice sections of this form to clarify and expand to encompass broader anti-corruption certifications. In the Certification and Notice sections we rewrote some of the language for clarification, we corrected references to the debarment list, and we added references to the OFAC and the EPLS system.

DATES: Comments should be received on or before November 29, 2010 to be assured of consideration.

ADDRESSES: Comments maybe submitted electronically on *http://www.regulations.gov* or by mail to Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20038 attn: OMB 3048–0009.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 92–34 Application for Short Term Letter of Credit Export Credit Insurance Policy.

OMB Number: 3048–0009.

Type of Review: Regular.

Need and Use: The Application for Short Term Letter of Credit Export Credit Insurance Policy will be used to determine the eligibility of the applicant and the transaction for Export Import Bank assistance under its insurance program.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2010–27254 Filed 10–27–10; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK OF THE U.S.

[Public Notice 2010–0047]

Agency Information Collection Activities: Final Collection; Comment Request

AGENCY: Export-Import Bank of the U.S.

ACTION: Submission for OMB Review and Comments Request.

Form Title: Application for Issuing Bank Credit Limit (IBCL) under Letter of Credit Insurance Policy.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

The Application for Issuing Bank Credit Limit (IBCL) under Letter of Credit Insurance Policy will be used to determine the eligibility of the issuing bank and the transaction for Export Import Bank assistance under its insurance program. Export Import Bank customers will be able to submit this form on paper or electronically.

The Export Import Bank has made changes to incorporate new information in the Certification and Notice sections of this form to clarify and expand to encompass broader anti-corruption certifications. In the Certification and Notice sections we rewrote some of the language for clarification, we corrected references to the debarment list, and we added references to the OFAC and the EPLS system. In addition, we clarified two questions about the amount of U.S. employment to be supported by this transaction.

DATES: Comments should be received on or before November 29, 2010 to be assured of consideration.

ADRESSES: Comments maybe submitted electronically on *http://www.regulations.gov* or by mail to Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20038 Attn: OMB 3048–0016.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 92–36 Application for Issuing Bank Credit Limit under Letter of Credit Insurance Policy.

OMB Number: 3048–0016.

Type of Review: Regular.

Need and Use: The Application for Issuing Bank Credit Limit under Letter of Credit Insurance Policy will be used to determine the eligibility of the issuing bank and the transaction for Export Import Bank assistance under its insurance program.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2010–27253 Filed 10–27–10; 8:45 am]

BILLING CODE 6690–01–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 application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 22, 2010.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President), 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. Vogel Bancshares, Inc., Orange City, Iowa; to acquire up to 100 percent of the voting shares of Farmers Savings Bank, Remsen, Iowa.

B. Federal Reserve Bank of San Francisco (Kenneth Binning, Vice President, Applications and Enforcement), 101 Market Street, San Francisco, California 94105–1579:

1. Carpenter Fund Manager GP, LLC, Carpenter Fund Management Company, LLC, Carpenter Community Bancfund, L.P., Carpenter Community Bancfund—A, L.P., Carpenter Community Bancfund—CA, L.P., CGB Holdings, Inc., CCFW, Inc., and *SCJ, Inc.;* all of Irvine, California; to acquire 100 percent of the voting shares of Professional Business Bank, Pasadena, California, which will merge with California General Bank, Pasadena, California.

In connection with this Application, CGB Holdings, Inc., Irvine, California, has applied to acquire 100 percent of the voting shares of CGB Asset Management, Inc., Irvine, California, and thereby engage in extending credit and servicing loans, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, October 25, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–27280 Filed 10–27–10; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Meeting of the Presidential Commission for the Study of Bioethical Issues

AGENCY: Department of Health and Human Services, Office of the Assistant Secretary for Health, The Presidential Commission for the Study of Bioethical Issues.

ACTION: Notice of Meeting.

SUMMARY: The Presidential Commission for the Study of Bioethical Issues (PCSBI) will conduct its third meeting in November. At this meeting, the Commission will continue discussing the emerging science of synthetic biology, including its potential benefits and risks, and appropriate ethical boundaries and principles. The Commission will develop and finalize recommendations concerning any actions that the Federal Government should take to ensure that America reaps the benefits of this developing field of science while identifying appropriate ethical boundaries and minimizing risks. It will also identify suggestions for future study, if any.

DATES: The meeting will take place Tuesday, November 16, 2010, from 10:30 a.m. to approximately 4:15 p.m., and Wednesday, November 17, 2010, from 9 a.m. to approximately 11:30 a.m.

ADDRESSES: Emory Conference Center Hotel, 1615 Clifton Road, Atlanta, GA 30329. Phone 404–712–6000.

FOR FURTHER INFORMATION CONTACT: Judy Crawford, The Presidential Commission for the Study of Bioethical Issues, 1425 New York Avenue, NW., Suite C–100, Washington, DC 20005. Telephone: 202/233–3960. *E-mail: judy.crawford@bioethics.gov.* Additional information may be obtained by viewing the *Web site: http://www.bioethics.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, Public Law 92–463, as amended 5 U.S.C. App., notice is hereby given of the third meeting of the PCSBI. The meeting will be held from 10:30 a.m. to approximately 4:15 p.m. on Tuesday, November 16, 2010, and from 9 a.m. to approximately 11:30 a.m. on Wednesday, November 17, 2010, at the Emory Conference Center Hotel, Atlanta, GA. The meeting will be open to the public with attendance limited to space available. The meeting will also be Web cast at *http://www.bioethics.gov.*

Under authority of Executive Order 13521, dated November 24, 2009, the President established the PCSBI to serve as a public forum and advise him on bioethical issues generated by novel and emerging research in biomedicine and related areas of science and technology. The Commission is charged to identify and promote policies and practices that assure ethically responsible conduct of scientific research, healthcare delivery, and technological innovation. In undertaking these duties, the Commission will examine specific bioethical, legal, and social issues related to potential scientific and technological advances; examine diverse perspectives and explore possibilities for useful international collaboration on these issues, and recommend legal, regulatory, or policy actions as appropriate. The main agenda items for this third meeting involve further discussion of the opportunities and benefits to the public of the

emerging science of synthetic biology, the challenges and risks, and the ethical boundaries that may be important to formulation of public policy with regard to this advancing science. The Commission also will develop and finalize recommendations concerning any actions that the Federal Government should take to ensure that America reaps the benefits of this developing field of science while identifying appropriate ethical boundaries and minimizing risks. It will also identify suggestions for future study, if any. The draft meeting agenda and other information about PCSBI, including information about access to the Web cast, will be available at *http://www.bioethics.gov.*

The Commission welcomes input from anyone wishing to provide public comment on any issue before it. Individuals who would like to provide public comment at the meeting should notify Judy Crawford by telephone at 202–233–3960, or e-mail at *judy.crawford@bioethics.gov.* Anyone planning to attend the meeting who needs special assistance, such as sign language interpretation or other reasonable accommodations, should also notify Judy Crawford in advance of the meeting. The Commission will make every effort to accommodate persons who need special assistance.

Written comments will also be accepted. Please address written comments by e-mail to *info@bioethics.gov,* or by mail to the following address: Public Commentary, The Presidential Commission for the Study of Bioethical Issues, 1425 New York Ave. NW., Suite C–100, Washington, DC 20005. Comments will be publicly available, including any personally identifiable or confidential business information that they contain. Trade secrets should not be submitted.

Dated: October 22, 2010.

Valerie H. Bonham,

Executive Director, The Presidential Commission for the Study of Bioethical Issues.

[FR Doc. 2010–27233 Filed 10–27–10; 8:45 am]

BILLING CODE 4154–06–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, e-mail *paperwork@hrsa.gov* or call the HRSA Reports Clearance Officer at (301) 443–1129.

Comments are invited on: (a) The proposed collection of information for the proper performance of the functions of the agency; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Ryan White HIV/AIDS Treatment Extension Act of 2009: Program Allocation and Expenditure Forms (OMB No. 0915–0318)—Extension

The Ryan White HIV/AIDS Program Allocation and Expenditure Reports will enable the Health Resources and Services Administration's (HRSA) HIV/AIDS Bureau to track spending requirements for each program as outlined in the 2009 legislation. Grantees funded under Parts A, B, C, and D of the Ryan White HIV/AIDS Program (codified under Title XXVI of the Public Health Service Act) would be required to report financial data to HRSA at the beginning and end of the grant cycle.

All Parts of the Ryan White HIV/AIDS Program specify HRSA's responsibilities in the administration of grant funds. Accurate allocation and expenditure records of the grantees receiving Ryan White HIV/AIDS Program funding are critical to the implementation of the legislation and thus are necessary for HRSA to fulfill its responsibilities.

The forms would continue to require grantees to report on how funds are allocated and spent on core and non-core services, and on various program components, such as administration, planning and evaluation, and quality management. The two forms are identical in the types of information that are collected. However, the first report would track the *allocation* of the award at the beginning of the grant cycle and the second report would track actual *expenditures* (including carryover dollars) at the end of the grant cycle.

The primary purposes of these forms are to (1) provide information on the number of grant dollars spent on various services and program components, and (2) oversee compliance with the intent of Congressional appropriations in a timely manner. In addition to meeting the goal of accountability to the Congress, clients, advocacy groups, and the general public, information collected on these reports is critical for HRSA, State, and local grantees, and individual providers to evaluate the effectiveness of these programs. The annual estimate of burden is as follows:

Program under which grantee is funded	Number of grantee respondents	Responses per grantee	Total responses	Hours to complete each form	Total burden hours
Part A	56	2	112	8	896
Part B	59	2	118	12	1416
Part A MAI	56	2	112	4	448
Part B MAI	59	2	118	4	472
Part C	361	2	722	7	5054
Part D	90	2	180	7	1260
Total	681		1,362		9,546

E-mail comments to *paperwork@hrsa.gov* or mail the HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. Written comments should be received within 60 days of this Notice.

Dated: October 21, 2010.

Robert Hendricks,

Director, Division of Policy and Information Coordination.

[FR Doc. 2010–27286 Filed 10–27–10; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget (OMB), in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). To request a copy of the clearance requests submitted to OMB for review, e-mail *paperwork@hrsa.gov* or call the HRSA Reports Clearance Office on (301) 443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995.

Proposed Project: National Health Service Corps Information Follow-up Form—New

The National Health Service Corps (NHSC) of the Bureau of Clinician Recruitment and Service, HRSA, is committed to improving the health of the Nation's underserved by uniting communities in need with caring health professionals and by supporting communities' efforts to build better systems of care.

The NHSC Information Follow-up Form, which NHSC will use when exhibiting at national and regional conferences as well as when presenting on campuses to health profession students, is an optional form that a health profession student, licensed clinician, faculty member, or clinical site administrator can fill out. Individuals who submit the form to NHSC, may ask questions and/or sign up to receive periodic program updates and other general information regarding opportunities with the NHSC via e-mail. An individual is free to discontinue receiving communication from NHSC at anytime by e-mailing *NHSCupdate*@hrsa.gov. Completed forms will contain information such as, the names of the individuals, their email address(es), their city and state, their phone number, the organization where they are employed (or the school which they attend), the year they intend to graduate (if applicable), how they heard about NHSC, which NHSC programs they are interested in, etc. Assistance in completing the form will be given by the BCRS staff person (or BCRS representative) who is present at the event. Based on the FY10 exhibit and presentation schedule, NHSC could have gathered information from 2,400 individuals. Using this as a guide for future years, the estimated annual burden is as follows:

Form	Number of respondents	Responses per respondent	Total responses	Hours per response	Total burden hours
Information Follow-up Form	2400	1	2400	.025 (90 seconds).	60
Total	2400	1	2400	.025 (90 seconds).	60

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to the desk officer for HRSA, either by e-mail to *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. Please direct all correspondence to the "attention of the desk officer for HRSA."

Dated: October 20, 2010.

Robert Hendricks,

Director, Division of Policy and Information Coordination.

[FR Doc. 2010–27284 Filed 10–27–10; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Award of a Single-Source Grant to the Commonwealth Election Commission of Saipan, Commonwealth of the Northern Mariana Islands (CNMI)

AGENCY: Administration on Developmental Disabilities, ACF, HHS.

ACTION: Notice.

CFDA Number: 93.631.

Statutory Authority: This award will be made pursuant to Section 161 of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15081–15083).

Amount of Award: $100,000.

Project Period: 9/30/2010–9/29/2011.

SUMMARY: This notice announces that the Administration for Children and Families (ACF), Administration on Developmental Disabilities (ADD) has awarded a single-source grant to the Commonwealth Election Commission of Saipan, Commonwealth of the Northern Mariana Islands (CNMI).

In 2002, Congress enacted the Help America Vote Act (HAVA) [(Pub. L. 107–252] as a means of improving the administration of elections for Federal office. CNMI did not participate in Federal elections prior to the enactment of the Consolidated Natural Resources Act of 2008 (Pub. L. 110–229). CNMI has now elected a non-voting Delegate to the U.S. House of Representatives.

With its participation in Federal elections, CNMI's eligibility for funding under HAVA is now established and, to that end, ADD is funding this award for a project designed to (1) Explore accessibility of polling places; (2) provide training and technical assistance to election officials, poll workers, and election volunteers on the best methods to promote the access and participation of individuals with developmental disabilities in elections for Federal office; and (3) train voters on how to use voting equipment to include

various voting machines to allow for equal opportunity for access and participation in the voting process.

FOR FURTHER INFORMATION CONTACT: Ophelia McLain, Supervisory Program Specialist, Administration on Developmental Disabilities, 370 L'Enfant Promenade, SW., *Mail Stop:* HHH–405D, Washington, DC 20447. *Telephone:* 202–690–7025. *E-mail: ophelia.mclain@acf.hhs.gov*.

Dated: October 21, 2010.

Sharon Lewis,

Commissioner, Administration on Developmental Disabilities.

[FR Doc. 2010–27234 Filed 10–27–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0001]

Cellular, Tissue and Gene Therapies 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: Cellular, Tissue and Gene Therapies 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 November 19, 2010, from 8:30 a.m. to 5 p.m.

Location: Hilton Washington DC North/Gaithersburg 620 Perry Pkwy., Gaithersburg, MD 20877.

Contact Person: Gail Dapolito or Sheryl Clark, Center for Biologics Evaluation and Research (HFM–71), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–0314, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512389. Please call the Information Line for up-to-date information on this meeting. 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 and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On November 19, 2010, the Committee will discuss current FDA recommendations for Testing of Replication Competent Retrovirus (RCR)/Lentivirus (RCL) in Retroviral and Lentiviral Vector Based Gene Therapy Products.

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 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 November 12, 2010. Oral presentations from the public will be scheduled between approximately 2 p.m. to 3 p.m. Those desiring to make 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 November 4, 2010. 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 November 5, 2010.

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 Gail Dapolito 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: October 22, 2010.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2010–27229 Filed 10–27–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0553]

Pediatric 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: Pediatric Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

DATES: The meeting will be held on December 6, 2010, from 8 a.m. to 6 p.m.

FDA is opening a docket to allow for additional public comments to be submitted to the Agency on the issues before the Pediatric Advisory Committee. Submit either electronic or written comments by January 6, 2011.

ADDRESSES: The meeting will be held at the Bethesda Marriott, 5151 Pooks Hill Rd., Bethesda, MD 20814.

Submit electronic comments 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.

Contact Person: Walter Ellenberg, Office of Pediatric Therapeutics, Office of Special Medical Programs, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 5154, Silver Spring, MD 20993, 301–796–0885, or FDA

Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 8732310001. Please call the Information Line for up-to-date information on this meeting. 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 and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The Pediatric Advisory Committee (PAC) will meet to discuss donor and banked human milk. FDA is convening the meeting to obtain and discuss information and data that will provide the Agency with a better understanding of current practices, and potential benefits and risks associated with the donation and banking of human milk.

FDA recognizes the benefits associated with breastfeeding, and is focusing this meeting on issues related to banking human milk. Human milk is banked for use by infants in need of donated milk. The agenda for the meeting will include presentations and discussions on the benefits and risks of human milk banking practices as they relate to pre-term and term infant populations. Topics will include, but not be limited to, infectious disease risks, State regulations and current practices in donor and human milk banking.

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 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 November 29, 2010. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interesting 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 November 18, 2010. 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 November 19, 2010.

Comments: FDA is opening a docket to allow for additional public comments to be submitted to the Agency on the issues before the Pediatric Advisory Committee beginning October 28, 2010, and closing January 6, 2011. All comments received on or before November 29, 2010, will be provided to the committee members. All comments received after November 29, 2010, will be taken into consideration by the Agency. Interested persons are encouraged to use the docket to submit either electronic or written comments regarding this meeting (*see* **ADDRESSES**). Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management, Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. It is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed 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.

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 Walter Ellenberg, 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: October 25, 2010.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2010–27283 Filed 10–27–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0001]

Request for Notification From Industry Organizations Interested in Participating in the Selection Process for Nonvoting Industry Representatives on Public Advisory Committees and Panels and Request for Nonvoting Industry Representatives on Public Advisory Committees and Panels

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting that any industry organization interested in participating in the selection of nonvoting industry representatives to serve on the National Mammography Quality Assurance Advisory Committee (NMQAAC) and certain device panels of the Medical Devices Advisory Committee (MDAC) in the Center for Devices and Radiological Health (CDRH) notify FDA in writing. A nominee may either be self nominated or nominated by an organization to serve as a nonvoting industry representative. Nominations will be accepted for current vacancies effective with this notice.

DATES: Any industry organizations interested in participating in the selection of an appropriate nonvoting member to represent industry interests must send a letter stating that interest to the FDA by November 29, 2010, for the vacancies listed in this document. Concurrently, nomination materials for prospective candidates should be sent to FDA by November 29, 2010.

ADDRESSES: Send all letters of interest and nominations to Margaret J. Ames (*see* **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Margaret J. Ames, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5234, Silver Spring,

MD 20993, 301–796–5960, *e-mail: margaret.ames@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: The agency intends to add nonvoting industry representatives to the following advisory committees:

I. CDRH—Various Committees and Panels

A. National Mammography Quality Assurance Advisory Committee (NMQAAC)

The Mammography Quality Standards Reauthorization Act of 2004 (Pub. L. 108–365) requires the addition of at least two industry representatives with expertise in mammography equipment to the NMQAAC.

B. Medical Devices Advisory Committee (MDAC)

Section 520(f)(3) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360j(f)(3)), as amended by the Medical Device Amendments of 1976, provides that each medical device panel include one nonvoting member to represent the interests of the medical device manufacturing industry.

II. CDRH—Committee and Panels Functions

FDA is requesting nominations for nonvoting members representing industry interests for vacancies listed in table 1 of this document as follows:

TABLE 1—NOMINATIONS REQUESTED FOR NONVOTING MEMBERS REPRESENTING INDUSTRY INTERESTS ON PUBLIC ADVISORY COMMITTEES AND PANELS

Committee name or panel	Approximate date needed
NMQAAC	February 1, 2011.
Anesthesiology and Respiratory Therapy Devices Panel.	December 1, 2011.
General and Plastic Surgery Devices Panel.	September 1, 2011.

A. NMQAAC

The functions of the NMQAAC are to advise FDA on: (1) Developing appropriate quality standards and regulations for mammography facilities; (2) developing appropriate standards and regulations for bodies accrediting mammography facilities under this program; (3) developing regulations with respect to sanctions; (4) developing procedures for monitoring compliance with standards; (5) establishing a mechanism to investigate consumer complaints; (6) reporting new developments concerning breast imaging which should be considered in the oversight of mammography facilities; (7) determining whether there exists a shortage of mammography facilities in rural and health professional shortage areas and determining the effects of personnel on access to the services of such facilities in such areas; (8) determining whether there will exist a sufficient number of medical physicists after October 1, 1999; and (9) determining the costs and benefits of compliance with these requirements.

B. Certain Panels of the Medical Devices Advisory Committee

The medical device panels perform the following functions: (1) Review and evaluate data on the safety and effectiveness of marketed and investigational devices and make recommendations for their regulation; (2) advise the Commissioner of Food and Drugs (the Commissioner) regarding recommended classification or reclassification of these devices into one of three regulatory categories; (3) advise on any possible risks to health associated with the use of devices; (4) advise on formulation of product development protocols; (5) review premarket approval applications for medical devices; (6) review guidelines and guidance documents; (7) recommend exemption to certain devices from the application of portions of the FD&C Act; (8) advise on the necessity to ban a device; (9) respond to requests from the agency to review and make recommendations on specific issues or problems concerning the safety and effectiveness of devices; and (10) make recommendations on the quality in the design of clinical studies regarding the safety and effectiveness of marketed and investigational devices.

III. Selection Procedure

Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests should send a letter stating that interest to the contact person (*see* **FOR FURTHER INFORMATION CONTACT**) within 30 days of publication of this notice. Within the subsequent 30 days, FDA will send a letter to each organization that has expressed an interest, attaching a complete list of all such organizations, and a list of all nominees along with their current résumés. The letter will also state that it is the responsibility of the interested organizations to confer with one another and to select a candidate, within 60 days after the receipt of the FDA letter, to serve as the nonvoting member to represent industry interests for a particular committee or device panel. The interested organizations are not bound by the list of nominees in selecting a candidate. However, if no individual is selected within the 60 days, the Commissioner of Food and Drugs will select the nonvoting member to represent industry interests.

IV. Qualifications

A. NMQAAC

Persons nominated for membership as an industry representative on the NMQAAC must meet the following criteria: (1) Demonstrate expertise in mammography equipment; and (2) be able to discuss equipment specifications and quality control procedures affecting mammography equipment. The industry representative must be able to represent the industry perspective on issues and actions before the advisory committee, serve as liaison between the committee and interested industry parties, and facilitate dialogue with the advisory committee on mammography equipment issues.

B. MDAC

Persons nominated for the device panels should be full-time employees of firms that manufacture products that would come before the panel, or consulting firms that represent manufacturers, or have similar appropriate ties to industry.

V. Application Procedure

Individuals may self nominate and/or an organization may nominate one or more individuals to serve as a nonvoting industry representative. Within 30 days, the following information should be sent to the FDA contact person (*see* **FOR FURTHER INFORMATION CONTACT**): A current curriculum vitae of each nominee, current business and/or home address, telephone number, e-mail address, and the name of the committee or device panel of interest. FDA will forward all nominations to the organizations expressing interest in participating in the selection process for the committee or panel. (Persons who nominate themselves as nonvoting industry representatives will not participate in the selection process).

FDA has a special interest in ensuring that women, minority groups, individuals with physical disabilities, and small businesses are adequately represented on its advisory committees, and therefore, encourages nominations for appropriately qualified candidates from these groups.

This notice is issued under the Federal Advisory Committee Act (5

U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: *October 22, 2010.*

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2010–27230 Filed 10–27–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5383–N–23]

Notice of Proposed Information Collection for Public Comment; Exigent Health and Safety Deficiency Correction Certification

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments Due Date: December 27, 2010.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB Control number and should be sent to: Colette Pollard, Department Reports Management Officer, Office of the Chief Information Officer, Department of Housing and Urban Development, 451 7th Street, SW., Room 4160, Washington, DC 20410–5000; telephone 202.402.3400, (this is not a toll-free number) or email *Colette_Pollard@hud.gov.* Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339. (Other than the HUD USER information line and TTY numbers, telephone numbers are not toll-free.), or e-mail Ms. *Colette_Pollard@hud.gov.* Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339. (Other than the HUD USER information line and TTY numbers, telephone numbers are not toll-free.)

FOR FURTHER INFORMATION CONTACT: Arlette Mussington, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 Seventh Street, SW., (L'Enfant Plaza, Room 2206), Washington, DC 20410; *telephone:* 202–402–4109, (this is not a toll-free number) for copies of the proposed forms and other available documents.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Exigent Health and Safety Deficiency Correction Certification.

OMB Control Number: 2577–0241.

Description of the need for the information and proposed use: HUD's Uniform Physical Condition Standards (UPCS) regulation (24 CFR part 5, subpart G) provides that HUD housing must be decent, safe, sanitary, and in good repair. Public housing agencies (PHAs) must maintain housing in a manner that meets prescribed physical condition standards to be considered decent, safe, sanitary, and in good repair. The UPCS regulation also provides that all area and components of the housing must be free of health and safety hazards. HUD conducts physical inspections of the HUD-funded housing to determine if the UPCS standards are being met. Pursuant to the UPCS inspection protocol, at the end of the inspection (or at the end of each day of a multi-day inspection) the inspector provides the property representative with a copy of the "Notification of Exigent and Fire Safety Hazards Observed" form. Each exigent health and safety (EHS) deficiency that the inspector observed that day is listed on the form. The property representative signs the form acknowledging receipt. PHAs are to correct EHS deficiencies (i.e., emergency work orders) within 24 hours. PHAs are to notify HUD, using the electronic format, within three business days of the date of inspection, which is the date the PHA was provided notice of these deficiencies, that the deficiencies were corrected within the prescribed time frames.

Agency form number: None.

Members of affected public: Public Housing Agencies.

Estimation of the total number of hours needed to prepare the information collection including number of respondents: 1,236 respondents annually with one response per respondent. Average time per response is .44 hours and the total burden hours are 333.57.

Status of the proposed information collection: Extension of currently approved collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: October 21, 2010.

Merrie Nichols-Dixon,

Acting Deputy Assistant Secretary, Office of Policy, Program and Legislative Initiatives.

[FR Doc. 2010–27310 Filed 10–27–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5415–N–14]

Notice of Availability: Notice of Funding Availability (NOFA) for HUD's Fiscal Year 2010 Housing Choice Voucher Family Self-Sufficiency Program

AGENCY: Office of the Chief of the Human Capital Officer, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability on its Web site of the applicant information, submission deadlines, funding criteria, and other requirements for HUD's Fiscal Year (FY) 2010 Housing Choice Voucher Family Self-Sufficiency (HCV FSS) Program. The HCV FSS NOFA makes available approximately $60 million under the Consolidated Appropriations Act 2010. The purpose of the HCV FSS program is to promote the development of local strategies to coordinate the use of assistance under the HCV program with public and private resources to enable participating families to increase earned income and financial literacy, reduce or eliminate the need for welfare assistance, and make progress toward economic independence and self-sufficiency.

The notice providing information regarding the application process, funding criteria and eligibility requirements can be found using the Department of Housing and Urban Development agency link on the Grants.gov/Find Web site at *http://www.grants.gov/search/agency.do.* A link to Grants.gov is also available on the HUD Web site at *http://www.hud.gov/offices/adm/grants/fundsavail.cfm.* The Catalogue of Federal Domestic Assistance (CFDA) number for the HCV–FSS Program is 14.871. Applications must be submitted electronically through *Grants.gov.*

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to the agency contact identified in the program NOFA. Program staff will not be available to provide guidance on how to prepare the application. Questions regarding the 2010 General Section should be directed to the Office of Grants Management and Oversight at (202) 708–0667 or the NOFA Information Center at 800–HUD–8929 (toll free). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 800–877–8339.

Dated: October 22, 2010.

Barbara S. Dorf,

Director, Office of Departmental Grants Management and Oversight, Office of the Chief of the Human Capital Officer.

[FR Doc. 2010–27307 Filed 10–27–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5415–N–31]

Notice of Availability: Notice of Funding Availability (NOFA) for Fiscal Year 2010; Special Needs Assistance Programs (SNAPS) Technical Assistance; Request for Qualifications

AGENCY: Office of the Chief of the Human Capital Officer, HUD.

ACTION: Notice.

SUMMARY: HUD announces the availability of the applicant information, deadline information, and other requirements for the Fiscal Year (FY) 2010 Special Needs Assistance Programs Technical Assistance (SNAPS–TA) Program NOFA. The SNAPS–TA NOFA makes available up to $11.1 million for technical assistance; approximately $9.9 million under HUD McKinney-Vento Technical Assistance for homeless assistance programs, Homeless Management Information System (HMIS) data collection, reporting and research, including the Annual Homeless Assessment Report (AHAR) TA activities; and approximately $1.2 million under the American Recovery and Reinvestment Act for Homelessness Prevention and Rapid Re-Housing Program (HPRP) TA activities. Carried over or recaptured funds from previous fiscal years, if available, may be added to this amount.

The SNAPS–TA NOFA providing information regarding the application process, funding criteria and eligibility requirements can be found using the Department of Housing and Urban Development agency link on the Grants.gov/Find Web site at *http://www.grants.gov/search/agency.do.* A link to Grants.gov is also available on the HUD Web site at *http://www.hud.gov/offices/adm/grants/fundsavail.cfm.* The Catalogue of Federal Domestic Assistance (CFDA) numbers for the SNAPS–TA are: 14.261 McKinney-Vento Homeless Technical Assistance and 14.262 HPRP Technical Assistance. Applications must be submitted electronically through Grants.gov.

FOR FURTHER INFORMATION CONTACT: Questions regarding specific program requirements should be directed to the agency contact identified in the program NOFA. Questions regarding the 2010 General Section should be directed to the Office of Departmental Grants Management and Oversight at 202–708–0667 (this is not a toll-free number) or the NOFA Information Center at 1–800–HUD–8929 (toll-free). Persons with hearing or speech impairments may access these numbers via TTY by calling the Federal Information Relay Service at 1–800–877–8339.

Dated: October 22, 2010.

Barbara S. Dorf,

Director, Office of Departmental Grants Management and Oversight, Office of the Chief of the Human Capital Officer.

[FR Doc. 2010–27308 Filed 10–27–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket Number FR–5427–N–01]

Protecting Tenants at Foreclosure Act: Guidance on Notification Responsibilities Under the Act With Respect to Occupied Conveyance

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This notice provides additional guidance on the notice, entitled "Protecting Tenants at Foreclosure: Notice of Responsibilities Placed on Immediate Successors in Interest Pursuant to Foreclosure of Residential Property," published in the **Federal Register** on June 24, 2009. Specifically, today's notice advises on the relationship between the Federal Housing Administration's (FHA's) current regulations on occupied conveyance and the protections for existing tenants under the Protecting Tenants at Foreclosure Act of 2009 (PTFA). FHA's existing regulations provide that in cases where the Secretary will be accepting conveyance of an occupied property because of foreclosure of an FHA mortgage, the occupant is entitled to a 60-to-90 day notice prior to the date the mortgagee expects to acquire title to the property with an ability to obtain permission for continued occupancy from HUD only upon request and meeting specified conditions. The PTFA, on the other hand, provides that after foreclosure on an occupied property secured by a federally-related mortgage loan, any immediate successor in interest to the foreclosure must provide a tenant occupying the property under a bona fide lease with a minimum of at least 90 days advance notice before requiring the tenant to vacate the property. Additionally, the successor in interest to the foreclosure takes subject to any remaining term on the bona fide lease. Because there may be some confusion about the interplay between these two different notices, HUD issues this interpretive notice.

FOR FURTHER INFORMATION CONTACT: Vance Morris, Director, Office of Single Family Asset Management, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 9172, Washington, DC 20410–8000; telephone number 202–708–1672 (this is not a toll-free number). Persons with hearing or speech challenges may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background of PTFA

The Protecting Tenants at Foreclosure Act of 2009, Title VII of the Helping Families Save Their Homes Act of 2009 (Pub. L. 111–22, approved May 20, 2009) (codified at 12 U.S.C. 5220 note), requires that any immediate successor in interest take a foreclosed residential property subject to the existing lease

and provide tenants residing in the property with notice to vacate at least 90 days in advance of the date by which the successor, generally, the purchaser, seeks to have the tenants vacate the property. Except where the purchaser will occupy the property as the primary residence, the term of any bona fide lease entered into before the notice of foreclosure and extending beyond 90 days also remains in effect. The PTFA was enacted during a period when unprecedented numbers of foreclosures were occurring across the country. Often, tenants residing as leaseholders in residential properties become collateral victims in addition to homeowners when foreclosures occur, and are forced to vacate their leaseholds, often with minimal notice. The PTFA ensures that tenants receive appropriate notice of foreclosure and are not abruptly displaced.

Sections 702 and 703 of PTFA define the scope of PTFA's coverage over residential properties. The Section 702 requirements provide tenants with at least 90 days' advance notice to vacate and to preserve the term of any bona fide lease apply to foreclosures on all Federally related mortgage loans or on any dwelling or residential real property. Section 703 makes conforming changes consistent with the Section 702 requirements to the Section 8 rental voucher assistance provisions of the United States Housing Act of 1937 (1937 Act). The protections provided by PTFA sunset on December 31, 2014.

Section 1484 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, approved July 21, 2010) amended PTFA, and extended the PTFA protections to December 31, 2014. Section 1484 of the Dodd-Frank Wall Street Reform and Consumer Protection Act also defined when "date of notice of foreclosure" occurs. Section 1484 provides in relevant part as follows: "the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust, or security deed.

To fall under the Act, a bona fide lease must be entered into prior to the date of the notice of foreclosure, which is defined as "the date on which complete title to a property has been transferred to a successor entity or person as a result of an order of a court or pursuant to the provisions in a mortgage, deed of trust, or security deed." A bona fide lease is one in which: (1) The mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a Federal, State, or local subsidy. The requirements of the PTFA apply with respect to properties secured by FHA-insured mortgages as well as those in the Section 8 program.

The notice that HUD published on June 24, 2009, addressed the general applicability of PTFA protections to HUD programs. This notice addresses the interplay of the PTFA notice requirements with the notice requirements of FHA's occupied conveyance regulations.

II. FHA's Occupied Conveyance and Claims Regulations

Upon default of an FHA-insured mortgage, the mortgagee must engage in loss mitigation for the purpose of providing an alternative to foreclosure. Should such loss mitigation efforts be unsuccessful, the mortgagee will generally foreclose and convey the property to HUD in exchange for an FHA mortgage insurance claim. HUD generally requires the mortgagee to convey the property unoccupied, but in certain circumstances, as described in HUD's occupied conveyance regulations at 24 CFR 203.670–203.681, HUD will accept the property occupied. In cases where the regulations would not permit the occupied conveyance of the property, the mortgagee must evict the occupant before conveying the property to HUD. Various laws, usually state or local, but now also PTFA, affect eviction procedures and the length of time it takes to evict. HUD's claims regulations at 24 CFR 203.356(b) provide that the mortgagee must exercise "reasonable diligence" in prosecuting the foreclosure proceedings to completing and in acquiring title to and possession of the property. (Failure to foreclose and evict in accordance with this reasonable diligence time frame could lead to curtailment of debenture interest on the mortgagee's FHA insurance claim as described in section 203.402(k) of the regulations.) HUD publishes state-by-state reasonable diligence time frames by Mortgagee Letter. Most recently, Mortgagee Letter 2005–30 provided that an automatic extension of the reasonable diligence time frame will be allowed for the actual time necessary to complete the possessory action provided that the mortgagee begins such action promptly. Therefore, HUD regulations and Mortgagee Letters already provide mortgagees the additional time they may need to evict under the PTFA, i.e., in many cases at least an additional 90 days. As mortgagees may have been confused about the interaction between the PTFA and the occupied conveyance regulations, this Notice serves to confirm that: (1) HUD expects mortgagees to comply with the PTFA; and (2) the additional time needed to evict an occupant pursuant to the PTFA is automatically included in the reasonable diligence time frame.

Mortgagees should follow the procedures below:

1. The mortgagee should follow HUD's standard occupied conveyance procedures by sending out the standard occupied conveyance letters to the occupant 60–90 days before the mortgagee expects to acquire title.

2. If HUD (through its contractors) grants occupied conveyance, the mortgagee shall convey the property occupied under HUD's normal occupied conveyance procedures.

3. If HUD denies occupied conveyance, the mortgagee should determine whether the PTFA is applicable (*e.g.,* whether there is a bona fide lease or tenancy, etc.).

4. In cases where the mortgagee determines that the PTFA is applicable, the mortgagee must follow the PTFA before evicting the occupant. The additional time needed under the PTFA to evict the occupant is automatically added to the reasonable diligence time frame. The mortgagee must retain documentation in the claim file to evidence the applicability of the PTFA and the additional time needed to comply with the PTFA.

5. In cases where the occupant would have the right under the PTFA to remain in the property for more than 12 months after the foreclosure (*e.g.,* under the terms of a bona fide lease under section 702(a)(2)(A) of the PTFA), the mortgagee may contact the Mortgagee Compliance Manager for additional instructions.

In addition to this notice, FHA will issue additional guidance to FHA-approved mortgages.

Dated: October 22, 2010.

David H. Stevens,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2010–27309 Filed 10–27–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection for 30 CFR Part 874 (1029–0113)

AGENCY: Office of Surface Mining Reclamation and Enforcement.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing that the information collection request for 30 CFR part 874—General Reclamation Requirements, has been forwarded to the Office of Management and Budget (OMB) for review and approval. The information collection request describes the nature of the information collection and its expected burden and cost.

DATES: OMB has up to 60 days to approve or disapprove the information collection but may respond after 30 days. Therefore, public comments should be submitted to OMB by November 29, 2010, in order to be assured of consideration.

ADDRESSES: Submit comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Department of Interior Desk Officer, by telefax at (202) 395–5806 or via e-mail to *OIRA_Docket@omb.eop.gov.* Also, please send a copy of your comments to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Room 202 - SIB, Washington, DC 20240, or electronically to *jtrelease@osmre.gov.* Please refer to OMB control number 1029–0113 in your correspondence.

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection request contact John Trelease at (202) 208–2783 or via e-mail at *jtrelease@osmre.gov.*

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [*see* 5 CFR 1320.8(d)]. OSM has submitted a request to OMB to renew its approval for the collection of information found at 30 CFR part 874. OSM is requesting a 3-year term of approval for these information collection activities.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this collection of information is 1029–0 113, and may be found in OSM's regulations at 874.10. Responses are required to obtain a benefit.

As required under 5 CFR 1320.8(d), a **Federal Register** notice soliciting comments on the collection of information for part 874 was published on August 4, 2010 (75 FR 47024). No comments were received from that notice. This notice provides the public with an additional 30 days in which to comment on the following information collection activity:

Title: 30 CFR 874—General Reclamation Requirements.

OMB Control Number: 1029–0113.

Summary: Part 874 establishes land and water eligibility requirements, reclamation objectives and priorities and reclamation contractor responsibility. 30 CFR 874.17 requires consultation between the Abandoned Mine Land (AML) agency and the appropriate Title V regulatory authority on the likelihood of removing the coal under a Title V permit and concurrences between the AML agency and the appropriate Title V regulatory authority on the AML project boundary and the amount of coal that would be extracted under the AML reclamation project.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: State regulatory authorities and Indian tribes.

Total Annual Responses: 30.

Total Annual Burden Hours: 2,520.

Send comments on the need for the collection of information for the performance of the functions of the agency; the accuracy of the agency's burden estimates; ways to enhance the quality, utility and clarity of the information collection; and ways to minimize the information collection burdens on respondents, such as use of automated means of collection of the information, to the addresses listed under **ADDRESSES**. Please refer to OMB control number 1029–0113 in all correspondence.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: October 21, 2010.

John R. Craynon,

Chief, Division of Regulatory Support.

[FR Doc. 2010–27163 Filed 10–27–10; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–ES–2010–N216; 50120–1113–0000–C2]

Endangered and Threatened Wildlife and Plants; Assisting States, Federal Agencies, and Tribes in Managing White-Nose Syndrome in Bats; Draft National Plan

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability for review and comment.

SUMMARY: The U.S. Fish and Wildlife Service (FWS) announces the availability for public review of a draft national plan to assist States, Federal agencies, and tribes in managing white-nose syndrome in bats. This draft plan was prepared by representatives of the U.S. Department of Agriculture's Animal and Plant Health Inspection Service and Forest Service; U.S. Department of Defense's Army Corps of Engineers; U.S. Department of the Interior's Bureau of Land Management, National Park Service, and FWS; St. Regis Mohawk Tribe; Kentucky Department of Fish and Wildlife Resources; Missouri Department of Conservation; New York State Department of Environmental Conservation; Pennsylvania Game Commission; Vermont Department of Fish and Wildlife; and Virginia Department of Game and Inland Fisheries. The FWS is requesting review and comment on the draft plan from all interested parties.

DATES: Comments on the draft plan must be received on or before November 29, 2010.

ADDRESSES: An electronic copy of the draft plan is available at *http://www.fws.gov/WhiteNoseSyndrome/.* The document is also available by request from the U.S. Fish and Wildlife Service, New York Field Office, 3817 Luker Road, Cortland, NY 13045 (*phone:* 607–753–9334). Requests for copies of the draft plan and written comments regarding this plan should be addressed to Dr. Jeremy Coleman, National White-Nose Syndrome Coordinator, at the New York Field

Office. In addition, FWS is accepting electronic comments on the draft plan at the following e-mail address: *WhiteNoseBats@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Jeremy Coleman, National White-Nose Syndrome Coordinator, at the New York Field Office. See **ADDRESSES** above.

SUPPLEMENTARY INFORMATION: White-nose syndrome (WNS) is a fungal disease responsible for unprecedented mortality in hibernating bats in the northeastern United States. It has spread rapidly since its discovery in January 2007, and poses a potentially catastrophic threat to hibernating bats throughout North America, including several species listed as endangered or threatened under the Endangered Species Act (ESA). Listed bats include the Indiana bat (*Myotis sodalis*), Virginia big-eared bat (*Corynorhinus townsendii virginianus*), Ozark big-eared bat (*Corynorhinus townsendii ingens*), and gray bat (*Myotis grisescens*).

The mobility of bats, the potential for human-assisted transmission, and the severe consequences of WNS make it imperative that a national effort be mounted to avoid irreversible losses to bat populations and associated ecological impacts throughout North America. This effort requires collaboration among State, Federal, and tribal wildlife management agencies with stewardship responsibilities for bat populations and among nongovernmental organizations and the scientific community. Collaboration at the international level is also needed, because the threat of WNS crosses international borders.

In June of 2008, an effort to formalize a coordinated approach for addressing WNS was initiated among Federal and State wildlife management agencies. More recently, a multiagency WNS National Plan Writing Team was formed to prepare a draft national plan that details the elements that are critical to the investigation and management of WNS, identifies key actions to address stated goals, and outlines the roles of Federal and State agencies and other entities.

The WNS response strategy outlined in the draft national plan includes general practices, as well as seven program elements. These elements and their associated goals are:

1. *Communications:* Provide target audiences with relevant information about WNS as a wildlife health issue and the efforts taking place to control and manage WNS, including contact information for key team members and agency personnel.

2. *Scientific and Technical Information Dissemination:* Create a WNS database that can both be used by individual agencies and act as a central data repository.

3. *Diagnostics:* Develop diagnostic and sample quality standards, establish laboratory testing capacity, and report test results to resource management agencies.

4. *Disease Management:* Provide management recommendations to slow the spread of WNS, reduce morbidity and mortality rates to sustainable levels, and limit adverse impacts of management actions.

5. *Research Coordination:* Conduct a critical review of previous and ongoing research projects; investigate disease etiology, WNS pathogenesis and epidemiology, interaction of disease and host ecology, and human dimensions and ecological consequences of WNS; and disseminate research findings.

6. *Disease Surveillance:* Create a nationwide early detection program, coordinate sample collection and submission, and support epidemiological investigations.

7. *Conservation and Recovery of Affected Species:* Develop rapid assessment population monitoring techniques, establish criteria for prioritizing conservation activities, and determine best practices for maintaining and recovering populations.

The national plan will be followed by an implementation plan that will identify sub-actions, the agencies responsible for implementation of each action/sub-action, and cost estimates. Also, the national plan will help individual agencies develop response plans tailored to their WNS-related needs and circumstances.

Request for Public Comments: We request written comments on the draft national plan. All comments received by the date specified in **DATES** will be considered in preparing a final plan.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, the FWS cannot guarantee that we will be able to do so.

Authority: As a number of federally listed bat species are threatened by WNS, the FWS is issuing this notice primarily under the authority of the ESA of 1973 (16 U.S.C. 1531). This plan is intended to guide recovery of listed bats. It was developed so that it can be easily adopted or incorporated into existing or future recovery plans.

Dated: September 27, 2010.

Kyla J. Hastie,

Acting Regional Director, Region 5, U.S. Fish and Wildlife Service.

[FR Doc. 2010–27340 Filed 10–27–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

[USGS–GX11GG009950000]

Scientific Earthquake Studies Advisory Committee

AGENCY: U.S. Geological Survey.

ACTION: Notice of Meeting.

SUMMARY: Pursuant to Public Law 106–503, the Scientific Earthquake Studies Advisory Committee (SESAC) will hold its next meeting at the campus of the California Institute of Technology (Caltech), President's Board Room, Pasadena, California 91126. The Committee is comprised of members from academia, industry, and State government. The Committee shall advise the Director of the U.S. Geological Survey (USGS) on matters relating to the USGS's participation in the National Earthquake Hazards Reduction Program.

The focus of the meeting will be a review of the USGS Earthquake Hazard Program's activities in southern California, including the multi-hazards demonstration project and earthquake early warning prototype development. The committee will also discuss USGS monitoring activities, international work, and USGS role within the four-agency National Earthquake Hazards Reduction Program.

Although meetings of the Scientific Earthquake Studies Advisory Committee are open to the public, seating may be limited due to room capacity.

DATES: The meeting will be held November 4, 2010, beginning at 1 p.m. and ending approximately 5 p.m.; November 5, 2010, commencing approximately 9 a.m. and adjourning at 4 p.m.

Contact: Dr. David Applegate, U.S. Geological Survey, MS 905, 12201 Sunrise Valley Drive, Reston, Virginia 20192, (703) 648–6714, *applegate@usgs.gov.*

Dated: October 20, 2010.

William S. Leith,

Acting Associate Director for Natural Hazards.

[FR Doc. 2010–27248 Filed 10–27–10; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Colorado River Basin Salinity Control Advisory Council

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of public meeting.

SUMMARY: The Colorado River Basin Salinity Control Advisory Council (Council) was established by the Colorado River Basin Salinity Control Act of 1974 (Pub. L. 93–320) (Act) to receive reports and advise Federal agencies on implementing the Act. In accordance with the Federal Advisory Committee Act, the Bureau of Reclamation announces that the Council will meet as detailed below. The meeting of the Council is open to the public.

DATES: The Council will convene the meeting on Thursday, November 18, 2010, at 1 p.m. and recess at approximately 5 p.m. The Council will reconvene the meeting on Friday, November 19, 2010, at 8:30 a.m. and adjourn the meeting at approximately 10:30 a.m. Any member of the public may file written statements with the Council before, during, or up to 30 days after the meeting either in person or by mail. To the extent that time permits, the Council chairman will allow public presentation of oral comments at the meeting. To allow full consideration of information by Council members, written notice must be provided at least 5 days prior to the meeting. Any written comments received prior to the meeting will be provided to Council members at the meeting.

ADDRESSES: The meeting will be held at the Bahia Resort Hotel, 998 West Mission Bay Drive, San Diego, California 92109. Send written comments to Mr. Kib Jacobson, Bureau of Reclamation, Upper Colorado Regional Office, 125 South State Street, Room 6107, Salt Lake City, Utah 84138–1147; telephone (801) 524–3753; facsimile (801) 524–3826; e-mail at: *kjacobson@usbr.gov.*

FOR FURTHER INFORMATION CONTACT: Kib Jacobson, telephone (801) 524–3753; facsimile (801) 524–3826; e-mail at: *kjacobson@usbr.gov.*

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to discuss the accomplishments of Federal agencies and make recommendations on future activities to control salinity. Council members will be briefed on the status of salinity control activities and receive input for drafting the Council's annual report. The Bureau of Reclamation, Bureau of Land Management, U.S. Fish and Wildlife Service, and United States Geological Survey of the Department of the Interior; the Natural Resources Conservation Service of the Department of Agriculture; and the Environmental Protection Agency will each present a progress report and a schedule of activities on salinity control in the Colorado River Basin. The Council will discuss salinity control activities, the contents of the reports, and the Basin States Program created by Public Law 110–246, which amended the Act.

Public Disclosure

Before including a name, address, telephone number, e-mail address, or other personal identifying information in the comment, please be advised that the entire comment—including personal identifying information—may be made publicly available at any time. While it can be requested to withhold personal identifying information from public review, Reclamation cannot guarantee that this will happen.

Dated: *September 27, 2010.*

Brent Rhees,

Assistant Regional Director, Upper Colorado Region.

[FR Doc. 2010–27217 Filed 10–27–10; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CACA–048811, LLCAD060000, L51010000.FX0000, LVRWB09B2600]

Notice of Availability of the Record of Decision for the Blythe Solar Power Project and Associated Amendment to the California Desert Conservation Area Resource Management Plan, Riverside County, California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Land Management (BLM) announces the availability of the Record of Decision (ROD)/Approved Amendment to the California Desert Conservation Area (CDCA) Plan (the applicable Resource Management Plan (RMP) for the project site and the surrounding areas) located in the California Desert District. The Secretary of the Interior signed the ROD on October 22, 2010, which constitutes the final decision of the Department.

DATES: The ROD/Approved Plan Amendment are effective immediately upon publication of this notice.

ADDRESSES: Copies of the ROD/Approved Amendment to the CDCA Plan are available upon request from the Field Manager, Palm Springs-South Coast Field Office, Bureau of Land Management, 1201 Bird Center Drive, Palm Springs, California 92262 or via the internet at the following Web site: *http://www.blm.gov/ca/st/en/fo/palmsprings.html.*

FOR FURTHER INFORMATION CONTACT: Allison Shaffer, BLM Project Manager; telephone: (760) 833–7100; *mailing address:* Bird Center Drive, Palm Springs, California 92262; or *e-mail: capssolarblythe@blm.gov.*

SUPPLEMENTARY INFORMATION: Chevron Energy Solutions filed right-of-way (ROW) application CACA–048811 for the proposed Blythe Solar Power Project (BSPP). Chevron Energy Solutions entered into a development agreement with Solar Millennium and requested that the project be assigned to Palo Verde Solar I, LLC, a wholly owned subsidiary of Solar Millennium. The BSPP is a concentrated solar electrical generating facility using parabolic trough technology and facilities. The BSPP site is proposed on approximately 7,025 acres of BLM-managed lands in Riverside County, California, approximately 8 miles west of Blythe, California, 3 miles north of Highway I–10, and 1 mile north of the Blythe Regional Airport. In addition to the BSPP site, the project includes a distribution line, an electrical transmission line, fiber optic lines, a natural gas pipeline, and an access road. The double circuit 230-kilovolt (kV) transmission line will be constructed to interconnect to the Devers-Palo Verde II 500-kV transmission line at the Colorado River substation. The linear facilities will encumber approximately 43 acres onsite and 183 acres offsite.

The project site is in the California Desert District within the planning boundary of the CDCA Plan, which is the applicable RMP for the project site and the surrounding areas. The CDCA Plan, while recognizing the potential compatibility of solar generation facilities on public lands, requires that all sites associated with power generation or transmission not already identified in that Plan be considered through the BLM's land use plan amendment process. As a result, prior to approval of a ROW grant for the BSPP, the BLM must amend the CDCA Plan to allow the solar generating project on the site. The Approved Amendment to the CDCA Plan specifically revises the CDCA Plan to allow for the development of the BSPP project on the 7,025 acres of land managed by the BLM

with other ancillary structures and facilities.

The BLM preferred alternative would result in the building of 4 adjacent and independent power block units, capable of generating an approximate nominal capacity of 1000 megawatts (MW) of electricity, as well as all associated ancillary facilities. The 1000–MW alternative was evaluated in the Final Environmental Impact Statement (EIS). The Notice of Availability of the Final EIS for the BSPP and the proposed CDCA Plan amendment was published in the **Federal Register** on August 20, 2010 (75 FR 51480).

Publication of the Notice of Availability for the Final EIS initiated a 30-day protest period for the proposed amendment to the CDCA Plan and a 30-day public comment period for the Final EIS. At the close of the 30-day period on September 20, 2010, 4 timely and complete written protests and 16 comment letters were received. The BLM's responses to the comments are provided in Appendix 1 to this ROD. The proposed amendment to the CDCA Plan was not modified as a result of the protest resolution. Simultaneous to the protest period, the Governor of California conducted a 30-day consistency review of the proposed CDCA Plan amendment/Final EIS to identify any inconsistencies with the state or local plan, policies, or programs. The California Governor's office did not identify inconsistencies between the proposed amendment to the CDCA Plan/Final EIS and state or local plan, policies, or programs.

Because this decision is approved by the Secretary of the Interior, it is not subject to administrative appeal (43 CFR 4.410(a)(3)).

Authority: 40 CFR 1506.6.

Robert V. Abbey,

Director, Bureau of Land Management.

[FR Doc. 2010–27285 Filed 10–27–10; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Settlement Agreement Under the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act

Notice is hereby given that on October 20, 2010, a proposed Consent Decree and Settlement Agreement in the bankruptcy matter, *Motors Liquidation Corp, et al., f/k/a General Motors Corp., et al.,* Jointly Administered Case No. 09–50026 (REG), was lodged with the United States Bankruptcy Court for the Southern District of New York. The Parties to the Settlement Agreement are debtors Motors Liquidation Corporation, formerly known as General Motors Corporation, Remediation and Liability Management Company, Inc., and Environmental Corporate Remediation Company, Inc. (collectively, "Old GM"); the United States of America; the States of Delaware, Illinois, Indiana, Kansas, Michigan, Missouri, New Jersey, New York, Ohio, Virginia and Wisconsin; the Louisiana Department of Environmental Quality; the Massachusetts Department of Environmental Protection; the Department of Environmental Protection of the Commonwealth of Pennsylvania; the Saint Regis Mohawk Tribe; and EPLET, LLC, not individually but solely in its representative capacity as Administrative Trustee of the Environmental Response Trust. The Settlement Agreement resolves claims and causes of action of the Environmental Protection Agency ("EPA") against Old GM under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9601–9675 and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901–6992k, with respect to the following sites:

1. The GMNA Car—Wilmington Site in Delaware;
2. The GMPT—Danville Landfill Site in Illinois;
3. The Former GM Delco Plant Site in Indiana;
4. Various Bedford Town Sites (60 Properties) Indiana;
5. The Manual Transmission of Muncie Site in Indiana;
6. The Metal Fab—Indianapolis in Indiana;
7. The Delphi I—Anderson/Monroe Site in Indiana;
8. The Allison Gas Turbines Site in Indiana;
9. The Venture 2000 Property Site in Indiana;
10. The 1–Acre Fire Suppression Lot Site in Indiana;
11. The Fairfax I Plant Site in Kansas;
12. The Fairfax Parking Lot Site in Kansas;
13. The GMVM—Shreveport Assembly (exclude Stamping) Site in Louisiana;
14. The MCD—Framingham Landfill Site in Massachusetts;
15. The GMPT—Willow Run Site in Michigan;
16. The GMNA—Buick City Site in Michigan;
17. The Pontiac North Site in Michigan;
18. The GMPT Saginaw Malleable Site in Michigan;
19. The Saginaw Nodular Iron (PIMS297) Site in Michigan;
20. The GMNA Car (Fisher Body)—Lansing Site in Michigan;
21. The Midsize & Luxury Car—Willow Run Site in Michigan;
22. The Delphi C—Livonia Groundwater Site in Michigan;
23. The GMNA Car—Lansing Site in Michigan;
24. The GMNA Car—Lansing Site in Michigan;
25. The Delphi I—Coldwater Rd. (Landfill) Site in Michigan;
26. The Stamping—Grand Rapids Site in Michigan;
27. The GMPT Bay City Site in Michigan;
28. The Flint West—Flint River Site in Michigan;
29. The Vacant Land South of Van Born (68 acres) Site in Michigan;
30. The GMPT—Livonia Site in Michigan;
31. The Greenpoint Landfill Site in Michigan;
32. The Hemphill Lot Site in Michigan;
33. The Peregrine—Coldwater Rd. (Plant) Site in Michigan;
34. The Employee Development Center Site in Michigan;
35. The Chevrolet-Pontiac-Canada Pontiac Fiero Assembly Plant Site in Michigan;
36. The Davison Road Land Site in Michigan;
37. The Dort Highway Land Site in Michigan;
38. The -1 PCC—Validation Site in Michigan;
39. The Saginaw PLt 2 Landfill Site in Michigan;
40. The Pontiac Centerpoint Campus—West Site in Michigan;
41. The Powertrain—Romulus Engineering Center Site in Michigan;
42. The Former Howard W/H—Vacant Land Site in Michigan;
43. The Textile Road Land Site in Michigan;
44. The ACC—Penske Site in Michigan;
45. The Linden Road Landfill Site in Michigan;
46. The Windiate Park Lots Site in Michigan;
47. The Lot 8—6241 Cass Avenue at Amsterdam Ave. Site in Michigan;
48. The 6560 Cass Ave/GMNA New Center Complex Site in Michigan;
49. The GLTC land (Atherton Landfill/Die Lot Parking) Site in Michigan;
50. The Vacant Land (76 acres) Site in Michigan;
51. The Delphia C Livonia Coil & Bumper Site in Michigan;
52. The Land along Stanley Road Site in Michigan;

53. The Fiero Site (Powerhouse) Site in Michigan;
54. The Flint Flow-through Warehouse Site in Michigan;
55. The GMPT—Flint North #5/#10/#81 Site in Michigan;
56. The GMVM—Pontiac Assembly Site in Michigan;
57. The Midsize & Luxury Car Clark Street Site in Michigan;
58. The Delta Engine Plant Site in Michigan;
59. The 1831 Grondinwood (residence) Site in Michigan;
60. The 1394 Oak Hollow (residence) Site in Michigan;
61. The Pontiac Centerpoint Campus—Central Site in Michigan;
62. The Pontiac Centerpoint Campus—East Site in Michigan;
63. The Centerpoint Land (no Etkin ground lease) Site in Michigan;
64. The Centerpoint Land (Etkin ground lease) Site in Michigan;
65. The 652 Meadow Drive Site in Michigan;
66. The 642 Meadow Drive Site in Michigan;
67. The 631 Meadow Drive Site in Michigan;
68. The 607 Meadow Drive Site in Michigan;
69. The Willow Run Engineering Center Site in Michigan;
70. The PCC Validation Southern Parking Lot Site in Michigan;
71. The Former Leed's Assembly Plant—Northern Parcel Site in Michigan;
72. The Former Leed's Assembly Plant—Southern Parcel Site in Michigan;
73. The Hyatt Clark Industries Site in Michigan;
74. The Delphi Interior & Lighting Systems—Trenton Site in Michigan;
75. The General Motors (Central Foundry Division) Superfund Site, a/k/a the Massena Site, in New York;
76. The GM–IFG Syracuse Site in New York;
77. The Ley Creek PCB Dredging Site in New York;
78. The Tonawanda Engine Landfill Site in New York;
79. The Delphi Harrison—Moraine Site in Ohio;
80. The Delphi Interior—Elyria Site in Ohio;
81. The Stamping—Mansfield Site in Ohio;
82. The GMPT—Toledo 103C Landfill Site in Ohio;
83. The GMPT—Parma Complex Site in Ohio;
84. The Lordstown Excess Land Site in Ohio;
85. The Moraine Lagoon Site in Ohio;
86. The Moraine Assembly Site in Ohio;
87. The Metal Fab—Pittsburgh Site in Pennsylvania;
88. The GMPT—Fredericksburg Site in Virginia; and
89. The Janesville Training Center Site in Wisconsin.

Under the Settlement Agreement, Old GM will make a cash payment of $499,434,945 to an Environmental Response Trust established pursuant to an Environmental Response Trust Agreement to clean up these 89 sites. Old GM will also make an additional payment of $142,000,000 and transfer certain personalty and title to 88 real properties owned by Old GM to the environmental response trust to fund administrative expenses.

The Department of Justice will receive, for a period of thirty days from the date of this publication, comments relating to the Consent Decree and Settlement Agreement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either emailed to *pubcommentees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *In re Motors Liquidation Corp., et al.,* D.J. Ref. 90–11–3–09754. Commenters may request an opportunity for a public meeting in the affected area, in accordance with Section 7003(d) of RCRA, 42 U.S.C. 6973(d).

The Consent Decree and Settlement Agreement and the Environmental Response Trust Agreement may be examined at the Office of the United States Attorney, 86 Chambers Street, 3rd Floor, New York, New York 10007, and at the U.S. Environmental Protection Agency, Ariel Rios Building, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. During the public comment period, the Settlement Agreement and the Custodial Trust Agreement may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* Copies of the Consent Decree and Settlement Agreement and the Environmental Response Trust Agreement may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $42.75 (with exhibits) or $22.75 (without exhibits) (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, please forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–27265 Filed 10–27–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0049]

Regulations Containing Procedures for Handling of Retaliation Complaints; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits comments concerning its proposal to extend OMB approval of the information collection requirements for handling of retaliation complaints filed under various whistleblower protection statutes contained in regulations at: 29 CFR part 24, Procedures for the Handling of Retaliation Complaints under Federal Employee Protection Statutes; 29 CFR part 1977, Discrimination Against Employees Exercising Rights under the Williams-Steiger Occupational Safety and Health Act; 29 CFR part 1978, Procedures for the Handling of Retaliation Complaints under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982; 29 CFR part 1979, Procedures for Handling Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; 29 CFR part 1980, Procedures for Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act 2002; 29 CFR part 1981, Procedures for the Handling of Discrimination Complaints under Section 6 of the Pipeline Safety and Improvement Act of 2002; 29 CFR part 1982, Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act of 2007, Enacted as Section 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007, and the

Federal Railroad Safety Act, as Amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007; and 29 CFR part 1983, Procedures for the Handling of Retaliation Complaints Under Section 219 of the Consumer Product Safety Improvement Act of 2008. These regulations set forth procedures employees must use to file a complaint with OSHA alleging that their employer violated a whistleblower protection provision contained in certain statutes that prohibit retaliatory action by employers against employees who engage in activities protected by the statutes.

DATES: Comments must be submitted (postmarked, sent, or received) by December 27, 2010.

ADDRESSES: *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, and messenger or courier service: You must submit your comments and attachments to the OSHA Docket Office, OSHA Docket No. OSHA–2010–0049, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, and messenger or courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number for the Information Collection Request (ICR) (OSHA–2010–0049). All comments, including any personal information you provide, are placed in the public docket without change, and will be made available online at *http://www.regulations.gov.* For further information on submitting comments see the "Public Participation" heading in the section of this notice titled **SUPPLEMENTARY INFORMATION.**

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may obtain a copy of the ICR by contacting Theda Kenney or Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; *telephone:* (202) 693–2222.

FOR FURTHER INFORMATION CONTACT: Nilgun Tolek, Office of the Whistleblower Protection Program, Directorate of Enforcement Programs, OSHA, U.S. Department of Labor, Room N–3610, 200 Constitution Avenue, NW., Washington, DC 20210; *telephone:* (202) 693–2199.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*e.g.,* an employee filing a retaliation complaint) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate.

The Agency is responsible for investigating alleged violations of "whistleblower" provisions contained in a number of statutes. These whistleblower provisions prohibit retaliation by employers against employees who report alleged violations of certain laws or regulations. Accordingly, these provisions prohibit an employer from discharging or taking any other retaliatory action against an employee because the employee engages in any of the protected activities specified by the whistleblower provisions of the statutes.

These statutes are covered under the following regulations: 29 CFR part 24, Procedures for the Handling of Retaliation Complaints under Federal Employee Protection Statutes (29 CFR part 24 covers: Safe Water Drinking Act, 42 U.S.C. 300j–9(i); Federal Water Pollution Control Act, 33 U.S.C. 1367; Toxic Substances Control Act, 15 U.S.C. 2622; Solid Waste Disposal Act, 42 U.S.C. 6971; Clean Air Act, 42 U.S.C. 7622; Energy Reorganization Act of 1974, 42 U.S.C. 5851; and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610); 29 CFR part 1977, Discrimination Against Employees Exercising Rights under the Williams-Steiger Occupational Safety and Health Act (29 CFR part 1977 covers: the Occupational Safety and Health Act, 29 U.S.C. 660; the Asbestos Hazard Emergency Response Act, 15 U.S.C. 2651; and the International Safe Container Act, 46 U.S.C. 80507); 29 CFR part 1978, Procedures for the Handling of Retaliation Complaints under the Employee Protection Provision of the Surface Transportation Assistance Act of 1982; 29 CFR part 1979, Procedures for Handling Discrimination Complaints Under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; 29 CFR part 1980, Procedures for Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; 29 CFR part 1981, Procedures for the Handling of Discrimination Complaints under Section 6 of the Pipeline Safety and Improvement Act of 2002; 29 CFR part 1982, Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act of 2007, Enacted as Section 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007, and the Federal Railroad Safety Act, as Amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007; and 29 CFR part 1983, Procedures for the Handling of Retaliation Complaints Under Section 219 of the Consumer Product Safety Improvement Act of 2008. Information collection requirements contained in future regulations promulgated by the Agency with respect to a whistleblower provision of any other Federal law, except those that are assigned to another DOL agency, will be added to this information collection.

These regulations specify the procedures that an employee must use to file a complaint with OSHA alleging that their employer violated a whistleblower provision for which the Agency has investigative responsibility. Any employee who believes that such a violation occurred may file a complaint, or have the complaint filed on their behalf. Four of these regulations, 29 CFR parts 24, 1979, 1980 and 1981, require that complaints must be filed in writing, and should include a full statement of the acts and omissions, with pertinent dates, that are believed to constitute the violation. The other regulations, 29 CFR

parts 1977, 1978, 1982, and 1983, require no particular form of filing for complaints.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on individuals who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend its approval of the information collection requirements contained in the regulations containing procedures for handling retaliation complaints at 29 CFR parts 24, 1978, 1979, 1980, 1981, 1982, and 1983.[1] OSHA is proposing to increase the burden hours in the currently approved information collection request from 390 burden hours to 2,160 burden hours (a total increase of 1,770 hours). These information collection requirements are included in this extension. This increase is due to the Agency's determination that all of the Agency's regulations containing procedures for the investigation of retaliation complaints, regardless of the form used to file a complaint, contain information collection requirements associated with the initiation of the complaint. The increase is also due to updated information showing an increase in the annual number of complaints filed. The Agency will summarize the comments submitted in response to this notice, and will include this summary in the request to OMB.

Type of Review: Extension of a currently approved collection.

Title: Regulations Containing Procedures for Handling Retaliation Complaints.

OMB Number: 1218–0236.

Affected Public: Individuals.

Number of Respondents: 2,160.

Frequency of Recordkeeping: Once per complaint.

Average Time per Response: 1 hour.

Total Annual Hours Requested: 2,160.

Estimated Cost (Operation and Maintenance): $0.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other material must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2010–0049). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (see the section of this notice titled **ADDRESSES**). The additional materials must clearly identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, and messenger or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments and access the docket is available at the Web site's "User Tips" link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 4–2010 (75 FR 55355).

Signed at Washington, DC, on October 25, 2010.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2010–27264 Filed 10–27–10; 8:45 am]

BILLING CODE 4510–26–P

[1] Several of these regulations use the term "discrimination" or "discrimination complaints" in their titles. These terms are synonymous with "retaliation" and "retaliation complaints," respectively.

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2010–0263]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on July 29, 2010.

1. *Type of submission, new, revision, or extension:* Extension.
2. *The title of the information collection:* NRC Form 5, "Occupational Dose Record for a Monitoring Period."
3. *Current OMB approval number:* 3150–0006.
4. *The form number if applicable:* NRC Form 5.
5. *How often the collection is required:* Annually.
6. *Who will be required or asked to report:* NRC licensees who are required to comply with 10 CFR part 20.
7. *An estimate of the number of annual responses:* 4,042 (194 reporting responses plus 3,848 recordkeepers).
8. *The estimated number of annual respondents:* 194 (104 reactor licensees plus 90 materials licencees).

9. *An estimate of the total number of hours needed annually to complete the requirement or request:* 68,556 hours (6,790 reporting plus 61,766 recordkeeping).

10. *Abstract:* NRC Form 5 is used to record and report the results of individual monitoring for occupational radiation exposure during a monitoring (one calendar year) period to ensure regulatory compliance with annual radiation dose limits specified in 10 CFR 20.1201.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by November 29, 2010. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Christine J. Kymn, Desk Officer, Office of Information and Regulatory Affairs (3150–0006), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to *Christine.J.Kymn@omb.eop.gov* or submitted by telephone at (202) 395–4638.

The NRC Clearance Officer is Tremaine Donnell, (301) 415–6258.

Dated at Rockville, Maryland, this 18th day of October, 2010.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2010–27291 Filed 10–27–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2010–0262]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on July 29, 2010.

1. *Type of submission, new, revision, or extension:* Revision.

2. *The title of the information collection:* NRC Form 4, "Cumulative Occupational Dose History."

3. *Current OMB approval number:* 3150–0005.

4. *The form number if applicable:* NRC Form 4.

5. *How often the collection is required:* On occasion.

6. *Who will be required or asked to report:* NRC licensees who are required to comply with 10 CFR part 20.

7. *An estimate of the number of annual responses:* 3,848 (0 reporting responses plus 3,848 recordkeepers).

8. *The estimated number of annual respondents:* 3,848.

9. *An estimate of the total number of hours needed annually to complete the requirement or request:* 18,410 hours.

10. *Abstract:* NRC Form 4 is used to record the summary of a radiation worker's cumulative occupational radiation dose, including prior occupational radiation exposure and the current year's occupational radiation exposure. NRC Form 4 is used by licensees, and inspected by NRC, to ensure that occupational radiation doses do not exceed the regulatory limits specified in 10 CFR 20.1501.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by November 29, 2010. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Christine J. Kymn, Desk Officer, Office of Information and Regulatory Affairs (3150–0005), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to *Christine.J.Kymn@omb.eop.gov* or submitted by telephone at (202) 395–4638.

The NRC Clearance Officer is Tremaine Donnell, (301) 415–6258.

Dated at Rockville, Maryland, this 18th day of October, 2010.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2010–27290 Filed 10–27–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. NRC–2010–0142]

Agency Information Collection Activities: Submission for the Office of Management and Budget (OMB) Review; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on April 4, 2010.

1. *Type of submission:* Revision

2. *The title of the information collection:* NRC Form 212 "Qualifications Investigation, Professional, Technical, and Administrative Positions", and NRC Form 212A "Qualifications Investigation Secretarial/Clerical"

3. *Current OMB approval number:* 3150–0033 and 3150–0034

4. *The form number if applicable:* NRC Form 212 "Qualifications Investigation, Professional, Technical, and Administrative Positions", and NRC Form 212A "Qualifications Investigation Secretarial/Clerical"

5. *How often the collection is required:* The forms are collected for

every new hire to the U.S. Nuclear Regulatory Commission.

6. *Who will be required or asked to report:* References are collected for every new hire.

7. *An estimate of the number of annual responses:* NRC Form 212: 1,000 annual responses. NRC Form 212A: 400 annual responses.

8. *The estimated number of annual respondents:* NRC Form 212: 1,000 annual respondents. NRC Form 212A: 400 annual respondents.

9. *An estimate of the total number of hours needed annually to complete the requirement or request:* NRC Form 212: 500 hours. NRC Form 212A: 100 hours.

10. *Abstract:* Information requested on NRC Form 212, "Qualifications Investigation, Professional, Technical, and Administrative Positions (other than clerical positions)" and NRC Form 212A, "Qualifications Investigation, Secretarial/Clerical" is used to determine the qualifications and suitability of external applicants for employment with NRC. The completed forms may be used to examine, rate and/or assess the prospective employee's qualifications. The information regarding the qualifications of applicants for employment is reviewed by professional personnel of the Office of Human Resources, in conjunction with other information in the NRC files, to determine the qualifications of the applicant for appointment to the position under consideration.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, One White Flint North, 11555 Rockville Pike, Room O–1 F21, Rockville, MD 20852. OMB clearance requests are available at the NRC worldwide Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/index.html.* The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by November 29, 2010. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date. Christine J. Kymn, Desk Officer, Office of Information and Regulatory Affairs (3150–0033 and 3150–0034), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be e-mailed to *Christine.J.Kymn@omb.eop.gov* or submitted by telephone at (202) 395–4638.

The NRC Clearance Officer is Tremaine Donnell, (301) 415–6258.

Dated at Rockville, Maryland, this 21st day of October, 2010.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2010–27288 Filed 10–27–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–269, 50–270, and 50–287; NRC–2010–0334]

Duke Energy Carolinas, LLC; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (NRC, the Commission) is considering issuance of an amendment to Renewed Facility Operating License Nos. DPR–38, DPR–47, and DPR–55 issued to Duke Energy Carolinas, LLC (the licensee) for operation of the Oconee Nuclear Station, Units 1, 2, and 3, (ONS) located in Oconee County, South Carolina.

The proposed amendment would approve the transition of the fire protection licensing basis at ONS from Title 10 of the *Code of Federal Regulations* (10 CFR) Section 50.48(b) to 10 CFR 50.48(c), *National Fire Protection Association* (NFPA) 805.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

(1) Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Operation of ONS in accordance with the proposed amendment does not increase the probability or consequences of accidents previously evaluated. The Updated Final Safety Analysis Report (UFSAR) documents the analyses of design basis accidents (DBA) at ONS. The proposed amendment does not adversely affect accident initiators nor alter design assumptions, conditions, or configurations of the facility and does not adversely affect the ability of structures, systems, and components (SSCs) to perform their design function. SSCs required to safely shut down the reactor and to maintain it in a safe shutdown (SSD) condition will remain capable of performing their design functions.

The purpose of this amendment is to permit ONS to adopt a new fire protection (FP) licensing basis which complies with the requirements in 10 CFR 50.48(a) and (c) and the guidance in Revision 1 of Regulatory Guide (RG) 1.205. The NRC considers that National Fire Protection Association (NFPA) 805 provides an acceptable methodology and performance criteria for licensees to identify FP systems and features that are an acceptable alternative to the Appendix R FP features (69 FR 33536, June 16, 2004). Engineering analyses, in accordance with NFPA 805, have been performed to demonstrate that the risk-informed, performance-based (RI–PB) requirements per NFPA 805 have been met.

NFPA 805, taken as a whole, provides an acceptable alternative to 10 CFR 50.48(b) and satisfies 10 CFR 50.48(a) and General Design Criterion (GDC) 3 of Appendix A to 10 CFR Part 50 and meets the underlying intent of the NRC's existing FP regulations and guidance, and achieves defense-in-depth (DID) and the goals, performance objectives, and performance criteria specified in Chapter 1 of the standard. The small increases in core damage frequency associated with this LAR submittal are consistent with the Commission's Safety Goal Policy. Additionally 10 CFR 50.48(c) allows self approval of fire protection program changes post-transition. If there are any increases post-transition in core damage frequency (CDF) or risk, the increase will be small and consistent with the intent of the Commission's Safety Goal Policy.

Based on this, the implementation of this amendment does not significantly increase the probability of any accident previously evaluated. Equipment required to mitigate an accident remains capable of performing the assumed function. Therefore, the consequences of any accident previously evaluated are not significantly increased with the implementation of this amendment.

(2) Does the proposed amendment create the possibility of a new or different kind of accident from any kind of accident previously evaluated?

Response: No.

Operation of ONS in accordance with the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated. Any scenario or previously analyzed accident with offsite dose was included in the evaluation of DBAs documented in the UFSAR. The proposed change does not alter the requirements or

function for systems required during accident conditions. Implementation of the new FP licensing basis which complies with the requirements in 10 CFR 50.48(a) and (c) and the guidance in Revision 1 of RG 1.205 will not result in new or different accidents.

The proposed amendment does not adversely affect accident initiators nor alter design assumptions, conditions, or configurations of the facility. The proposed amendment does not adversely affect the ability of SSCs to perform their design function. SSCs required to safely shut down the reactor and maintain it in a safe shutdown condition remain capable of performing their design functions.

The purpose of this amendment is to permit ONS to adopt a new FP licensing basis which complies with the requirements in 10 CFR 50.48(a) and (c) and the guidance in Revision 1 of RG 1.205. The NRC considers that NFPA 805 provides an acceptable methodology and performance criteria for licensees to identify FP systems and features that are an acceptable alternative to the Appendix R FP features (69 FR 33536, June 16, 2004).

The requirements in NFPA 805 address only FP and the impacts of fire on the plant have already been evaluated. Based on this, the implementation of this amendment does not create the possibility of a new or different kind of accident from any kind of accident previously evaluated. The proposed changes do not involve new failure mechanisms or malfunctions that can initiate a new accident. Therefore, the possibility of a new or different kind of accident from any kind of accident previously evaluated is not created with the implementation of this amendment.

(3) Does the proposed amendment involve a significant reduction in the margin of safety?

Response: No.

Operation of ONS in accordance with the proposed amendment does not involve a significant reduction in the margin of safety. The proposed amendment does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed amendment does not adversely affect existing plant safety margins or the reliability of equipment assumed to mitigate accidents in the UFSAR. The proposed amendment does not adversely affect the ability of SSCs to perform their design function. SSCs required to safely shut down the reactor and to maintain it in a safe shutdown condition remain capable of performing their design functions.

The purpose of this amendment is to permit ONS to adopt a new FP licensing basis which complies with the requirements in 10 CFR 50.48(a) and (c) and the guidance in Revision 1 of RG 1.205. The NRC considers that NFPA 805 provides an acceptable methodology and performance criteria for licensees to identify FP systems and features that are an acceptable alternative to the Appendix R FP features (69 FR 33536, June 16, 2004). Engineering analyses, which may include engineering evaluations, probabilistic safety assessments, and fire modeling calculations, have been performed to demonstrate that the performance-based methods do not result in a significant reduction in the margin of safety.

Based on this, the implementation of this amendment does not significantly reduce the margin of safety. The proposed changes are evaluated to ensure that risk and safety margins are kept within acceptable limits. Therefore, the transition does not involve a significant reduction in the margin of safety.

NFPA 805 continues to protect public health and safety and the common defense and security because the overall approach of NFPA 805 is consistent with the key principles for evaluating license basis changes, as described in RG 1.174, is consistent with the defense-in-depth philosophy, and maintains sufficient safety margins.

Margins previously established for the ONS FP program in accordance with 10 CFR 50.48(b) and Appendix R to 10 CFR 50 are not significantly reduced. Therefore, this LAR does not result in a reduction in a margin of safety

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules, Announcements and Directives Branch (RADB), TWB–05–B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be faxed to the RADB at 301–492–3446. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate Order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible

effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and

(2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov*, or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North,

11555 Rockville Pike, Rockville, Maryland, 20852, *Attention:* Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants.

Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

For further details with respect to this license amendment application, see the application for amendment dated May 30, 2008, as supplemented by letters dated October 31, 2008, January 30, February 9, February 23, May 31, August 3, September 29, and November 30, 2009. By letter dated April 14, 2010, the licensee resubmitted the application which superseded the content of the application letters dated May 30, 2008, and October 31, 2008. This resubmitted application, however, does not supersede previous responses to request for additional information submitted by letters dated January 30, February 9, February 23, May 31, August 3, September 29, and November 30, 2009, which are available for public inspection at the Commission's PDR, located at One White Flint North, File Public Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

Attorney for licensee: Lara S. Nichols, Associate General Counsel, Duke Energy Corporation, 526 South Church Street—EC07H, Charlotte, NC 28202

Dated at Rockville, Maryland, this 21st day of October 2010.

For the Nuclear Regulatory Commission.

Jon Thompson,

Acting Project Manager, Plant Licensing Branch II–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–27275 Filed 10–27–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–272, 50–311, and 50–354; NRC–2009–0390 and NRC–2009–0391]

Notice of Availability of the Draft Supplement 45 to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants, and Public Meetings for the License Renewal of Hope Creek Generating Station and Salem Nuclear Generating Station, Units 1 and 2

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC or Commission) has published a draft plant-specific supplement to the Generic Environmental Impact Statement for License Renewal of Nuclear Plants (GEIS), NUREG–1437, regarding the renewal of operating licenses DPR–70, DPR–75, and NPF–57, for an additional 20 years of operation for Salem Nuclear Generating Station (Salem), Units 1 and 2, and Hope Creek Generating Station (HCGS). Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources.

Any interested party may submit comments on the draft supplement to the GEIS for consideration by the NRC staff. To be considered, comments on the draft supplement to the GEIS and the proposed action must be received by December 17, 2010; the NRC staff is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Please include Docket ID NRC–2009–0390 or NRC–2009–0391 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site Regulations.gov. 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.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2009–0390 or NRC–2009–0391. Address questions about NRC dockets to Carol Gallagher at 301–492–3668 or by e-mail at *Carol.Gallagher@nrc.gov.*

Mail comments to: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Division of Administrative Services, Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Faxes are to be sent to RADB at 301–492–3446.

You can access publicly available documents related to this notice using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in

accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* The Accession Numbers for the draft Supplement 45 to the GEIS are ML102940169 and ML102940267.

Federal Rulemaking Web site: Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2009–0390 or NRC–2009–0391.

In addition, a copy of the draft supplement to the GEIS is available to local residents near the site at the Salem Free Library, 112 West Broadway, Salem, New Jersey 08079. Comments received after the due date will be considered only if it is practical to do so.

Also, electronic comments may be submitted to the NRC by e-mail at *SalemEIS@nrc.gov* or *HopeCreekEIS@nrc.gov.* All comments received by the Commission, including those made by Federal, State, local agencies, Native American Tribes, or other interested persons, will be made available electronically at the Commission's PDR in Rockville, Maryland, and through ADAMS.

The NRC staff will hold public meetings prior to the close of the public comment period to present an overview of the draft plant-specific supplement to the GEIS and to accept public comments on the document. Two meetings will be held at Salem County Emergency Services Building, Woodstown, NJ, on Wednesday, November 17, 2010. The first session will convene at 1:30 p.m. and will continue until 4:30 p.m., as necessary. The second session will convene at 7 p.m. and will continue until 10 p.m., as necessary. The meetings will be transcribed and will include: (1) A presentation of the contents of the draft plant-specific supplement to the GEIS, and (2) the opportunity for interested government agencies, organizations, and individuals to provide comments on the draft report. Additionally, the NRC staff will host informal discussions one hour prior to the start of each session at the same location. No comments on the draft supplement to the GEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meeting or in writing. Persons may pre-register to attend or present oral comments at the meeting by contacting Ms. Leslie Perkins, the NRC Environmental Project Manager, at 1–800–368–5642, extension 2375 or by e-mail at *Leslie.Perkins@nrc.gov,* no later than Wednesday, November 3, 2010. Members of the public may also register to provide oral comments within 15 minutes of the start of each session. Individual, oral comments may be limited by the time available, depending on the number of persons who register. If special equipment or accommodations are needed to attend or present information at the public meeting, the need should be brought to Ms. Perkins' attention no later than November 3, 2010, to provide the NRC staff adequate notice to determine whether the request can be accommodated.

FOR FURTHER INFORMATION CONTACT: Ms. Leslie Perkins, Projects Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Mail Stop O–11F1, Washington, DC 20555–0001. Ms. Perkins may be contacted at the aforementioned telephone number or e-mail address.

Dated at Rockville, Maryland, this 21st day of October 2010.

For the Nuclear Regulatory Commission.

Bo Pham,

Chief, Projects Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–27278 Filed 10–27–10; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[Docket No. 50–346; NRC–2010–0298]

FirstEnergy Nuclear Operating Company; Notice of Intent To Prepare an Environmental Impact Statement and Conduct the Scoping Process for Davis-Besse Nuclear Power Station, Unit 1

FirstEnergy Nuclear Operating Company (FENOC) has submitted an application for renewal of Facility Operating License No. NPF–003 for an additional 20 years of operation at Davis-Besse Nuclear Power Station, Unit 1 (DBNPS). DBNPS is located in Oak Harbor, Ohio.

The current operating license for DBNPS expires on April 22, 2017. The application for renewal, dated August 27, 2010, was submitted pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) Part 54, which included an environmental report (ER). A separate notice of receipt and availability of the application was published in the **Federal Register** on September 20, 2010 (75 FR 57299). A notice of acceptance for docketing of the application and opportunity for hearing regarding renewal of the facility operating license is also being published in the **Federal Register**. The purpose of this notice is to inform the public that the U.S. Nuclear Regulatory Commission (NRC) will be preparing an environmental impact statement (EIS) related to the review of the license renewal application and to provide the public an opportunity to participate in the environmental scoping process, as defined in 10 CFR 51.29.

As outlined in 36 CFR 800.8, "Coordination with the National Environmental Policy Act," the NRC plans to coordinate compliance with Section 106 of the National Historic Preservation Act (NHPA) in meeting the requirements of the National Environmental Policy Act of 1969 (NEPA). Pursuant to 36 CFR 800.8(c), the NRC intends to use its process and documentation for the preparation of the EIS on the proposed action to comply with Section 106 of the NHPA in lieu of the procedures set forth at 36 CFR 800.3 through 800.6.

In accordance with 10 CFR 51.53(c) and 10 CFR 54.23, FENOC submitted the ER as part of the application. The ER was prepared pursuant to 10 CFR Part 51 and is publicly available at the NRC Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, or from the NRC's Agencywide Documents Access and Management System (ADAMS). The ADAMS Public Electronic Reading Room is accessible at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. The ADAMS Accession Number for the DBNPS ER is ML102450572. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR reference staff by telephone at 800–397–4209 or 301–415–4737 or by e-mail at *pdr.resource@nrc.gov.* The ER may also be viewed on the Internet at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications/seabrook.html.* In addition, paper copies of the ER are available to the public near the site at the Ida Rupp Public Library, 310 Madison Street, Port Clinton, OH 43452 and the Toledo-Lucas County Public Library, 325 North Michigan Street, Toledo, OH 43604.

Public comments and supporting materials related to this notice can be found at the Federal Rulemaking Web site, *http://www.regulations.gov,* by searching on Docket ID NRC–2010–0298.

This notice advises the public that the NRC intends to gather the information

necessary to prepare a plant-specific supplement to the NRC's "Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants," (NUREG–1437) related to the review of the application for renewal of the DBNPS operating license for an additional 20 years.

Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources. The NRC is required by 10 CFR 51.95 to prepare a supplement to the GEIS in connection with the renewal of an operating license. This notice is being published in accordance with NEPA and the NRC's regulations found at 10 CFR Part 51.

The NRC will first conduct a scoping process for the supplement to the GEIS and, as soon as practicable thereafter, will prepare a draft supplement to the GEIS for public comment. Participation in the scoping process by members of the public and local, State, Tribal, and Federal government agencies is encouraged. The scoping process for the supplement to the GEIS will be used to accomplish the following:

a. Define the proposed action, which is to be the subject of the supplement to the GEIS;

b. Determine the scope of the supplement to the GEIS and identify the significant issues to be analyzed in depth;

c. Identify and eliminate from detailed study those issues that are peripheral or that are not significant;

d. Identify any environmental assessments and other ElSs that are being or will be prepared that are related to, but are not part of, the scope of the supplement to the GEIS being considered;

e. Identify other environmental review and consultation requirements related to the proposed action;

f. Indicate the relationship between the timing of the preparation of the environmental analyses and the Commission's tentative planning and decision-making schedule;

g. Identify any cooperating agencies and, as appropriate, allocate assignments for preparation and schedules for completing the supplement to the GEIS to the NRC and any cooperating agencies; and

h. Describe how the supplement to the GEIS will be prepared and include any contractor assistance to be used.

The NRC invites the following entities to participate in scoping:

a. The applicant, FENOC;

b. Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved or that is authorized to develop and enforce relevant environmental standards;

c. Affected State and local government agencies, including those authorized to develop and enforce relevant environmental standards;

d. Any affected Indian tribe;

e. Any person who requests or has requested an opportunity to participate in the scoping process; and

f. Any person who has petitioned or intends to petition for leave to intervene.

In accordance with 10 CFR 51.26, the scoping process for an EIS may include a public scoping meeting to help identify significant issues related to a proposed activity and to determine the scope of issues to be addressed in an EIS. The NRC has decided to hold public meetings for the DBNPS license renewal supplement to the GEIS. The scoping meetings will be held on November 4, 2010, and there will be two sessions to accommodate interested parties. The first session will convene at 1:30 p.m. and will continue until 3:30 p.m. The second session will convene at 7 p.m. with a repeat of the overview portions of the meeting and will continue until 9 p.m., as necessary. Both sessions will be held at the Camp Perry Conference Center, Port Clinton, OH 43452.

Both meetings will be transcribed and will include: (1) An overview by the NRC staff of the NEPA environmental review process, the proposed scope of the supplement to the GEIS, and the proposed review schedule; and (2) the opportunity for interested government agencies, organizations, and individuals to submit comments or suggestions on the environmental issues or the proposed scope of the supplement to the GEIS. Additionally, the NRC staff will host informal discussions one hour prior to the start of each session at the same location. No formal comments on the proposed scope of the supplement to the GEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meetings or in writing, as discussed below.

Persons may register to attend or present oral comments at the meetings on the scope of the NEPA review by contacting the NRC Project Manager, Mrs. Paula Cooper, by telephone at 800–368–5642, extension 2223, or by e-mail at *Paula.Cooper@nrc.gov* no later than November 2, 2010. Members of the public may also register to speak at the meeting within 15 minutes of the start of each session. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak if time permits. Public comments will be considered in the scoping process for the supplement to the GEIS. Mrs. Cooper will need to be contacted no later than October 28, 2010, if special equipment or accommodations are needed to attend or present information at the public meeting so that the NRC staff can determine whether the request can be accommodated.

ADDRESSES: You may submit comments by any one of the following methods. Please include Docket ID NRC–2010–0298 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site *Regulations.gov.* 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.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2010–0298. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*

Mail comments to: Cindy Bladey, Chief, Rules, Announcements and Directives Branch (RADB), Division of Administrative Services, Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by fax to RADB at (301) 492–3446. To be considered in the scoping process, written comments should be postmarked by December 27, 2010. Comments will be available electronically and accessible through ADAMS at *http://www.nrc.gov/reading-rm/adams.html.*

You can access publicly available documents related to this notice using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint

North, 11555 Rockville Pike, Rockville, Maryland.

Federal Rulemaking Web site: Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2010–0298.

Participation in the scoping process for the supplement to the GEIS does not entitle participants to become parties to the proceeding to which the supplement to the GEIS relates. Matters related to participation in any hearing are outside the scope of matters to be discussed at this public meeting.

Dated at Rockville, Maryland, this 20th day of October 2010.

For the Nuclear Regulatory Commission.

Bo Pham,

Chief, Projects Branch 1, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–27276 Filed 10–27–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on AP1000; Revision to October 21, 2010, ACRS Meeting Federal Register Notice

The **Federal Register** Notice for the AP1000 Subcommittee Meeting is being revised to notify the following:

This meeting will be held on Wednesday, November 17, 2010, Thursday, November 18, 2010, and Friday, November 19, 2010 from 8:30 a.m. until 5 p.m.

The notice of this meeting was previously published in the **Federal Register** on Thursday, October 21, 2010, [75 FR 65036–65037]. All other items remain the same as previously published.

Further information regarding this meeting can be obtained by contacting Weidong Wang, Designated Federal Office (Telephone 301–415–6279, *E-mail: Weidong.Wang@nrc.gov* between 7:30 a.m. and 5:15 p.m. (ET)).

Dated: October 21, 2010.

Antonio F. Dias,

Chief, Reactor Safety Branch B, Advisory Committee on Reactor Safeguards.

[FR Doc. 2010–27273 Filed 10–27–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on U.S. Advanced Pressurized-Water Reactor (US–APWR); Notice of Meeting

The ACRS Subcommittee on US–APWR will hold a meeting on November 29, 2010, Room T–2B1, 1545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance with the exception for portions that may be closed to protect proprietary information pursuant to 5 U.S.C. 552b(c)(4).

The agenda for the subject meeting shall be as follows:

Monday, November 29, 2010—8:30 A.M. Until 5 P.M.

The Subcommittee will review Chapters 8 and 13 of the Safety Evaluation report (SER) associated with the US–APWR design certification. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Neil Coleman (Telephone 301–415–7656 or *E-mail: Neil.Coleman@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be e-mailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 14, 2009 (74 FR 58268–58269).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

Date: October 21, 2010.

Antonio Dias,

Chief, Reactor Safety Branch B, Advisory Committee on Reactor Safeguards.

[FR Doc. 2010–27281 Filed 10–27–10; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63162; File No. 4–443]

Joint Industry Plan; Notice of Filing and Immediate Effectiveness of Amendment to the Plan for the Purpose of Developing and Implementing Procedures To Facilitate the Listing and Trading of Standardized Options To Add C2 Options Exchange, Incorporated as a Sponsor

October 22, 2010.

Pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 608 thereunder,[2] notice is hereby given that on October 7, 2010, C2 Options Exchange, Incorporated ("C2" or "Exchange") filed with the Securities and Exchange Commission ("Commission") an amendment to the Plan for the Purpose of Developing and Implementing Procedures to Facilitate the Listing and Trading of Standardized Options ("OLPP").[3] The amendment proposes to

[1] 15 U.S.C. 78k–1(a)(3).

[2] 17 CFR 242.608.

[3] On July 6, 2001, the Commission approved the OLPP, which was proposed by the American Stock Exchange LLC ("Amex"), Chicago Board Options Exchange, Incorporated ("CBOE"), International Securities Exchange LLC ("ISE"), Options Clearing Corporation ("OCC"), Philadelphia Stock Exchange, Inc. ("Phlx"), and Pacific Exchange, Inc. ("PCX") (n/k/a NYSE Arca). *See* Securities Exchange Act Release No. 44521, 66 FR 36809 (July 13, 2001). On February 5, 2004, Boston Stock Exchange, Inc. ("BSE") was added as a Sponsor to OLPP. *See* Securities Exchange Act Release No. 49199, 69 FR 7030 (February 12, 2004). On March 21, 2008, the Nasdaq Stock Market, LLC ("Nasdaq") was added as a Sponsor to the OLPP. *See* Securities Exchange Act Release No. 57546, 73 FR 16393 (March 27, 2008). On February 17, 2010, BATS Exchange, Inc. ("BATS") was added as a Sponsor to the OLPP. *See* Securities Exchange Act Release No. 61528, 75 FR 8415 (February 24, 2010).

add C2 as a Sponsor of the OLPP. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Description and Purpose of the Amendment

The current Sponsors of the OLPP are BATS, BOX, CBOE, ISE, NYSE Amex, NYSE Arca, OCC, Phlx and Nasdaq. The proposed amendment to the OLPP would add C2 as a Sponsor of the OLPP. A national securities exchange may become a Sponsor if it satisfies the requirement of Section 7 of the OLPP. Specifically an Eligible Exchange [4] may become a Sponsor of the OLPP by: (i) Executing a copy of the OLPP, as then in effect; (ii) providing each current Plan Sponsor with a copy of such executed Plan; and (iii) effecting an amendment to the OLPP, as specified in Section 7(ii) of the OLPP.

Section 7(ii) of the OLPP sets forth the process by which an Eligible Exchange may effect an amendment to the OLPP. Specifically, an Eligible Exchange must: (a) Execute a copy of the OLPP with the only change being the addition of the new sponsor's name in Section 8 of the OLPP; and (b) submit the executed OLPP to the Commission. The OLPP then provides that such an amendment will be effective at the later of either the amendment being approved by the Commission or otherwise becoming effective pursuant to Section 11A of the Act. C2 has submitted a signed copy of the OLPP to the Commission in accordance with the procedures set forth in the OLPP regarding new Plan Sponsors.

II. Effectiveness of the Proposed Linkage Plan Amendment

The foregoing proposed OLPP amendment has become effective pursuant to Rule 608(c)(3)(iii) [5] because it involves solely technical or ministerial matters. At any time within sixty days of the filing of this amendment, the Commission may summarily abrogate the amendment and require that it be refiled pursuant to paragraphs (b)(1) of Rule 608,[6] if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed amendment 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 e-mail to *rule-comments@sec.gov*. Please include File Number 4–443 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 4–443. This file number should be included on the subject line if e-mail 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 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at C2's principal office. 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 No. 4–443 and should be submitted on or before November 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27241 Filed 10–27–10; 8:45 am]

BILLING CODE 8011–01–P

[4] The OLPP defines an "Eligible Exchange" as a national securities exchange registered with the Commission pursuant to Section 6(a) of the Exchange Act, 15 U.S.C. 78f(a), that (1) has effective rules for the trading of options contracts issued and cleared by the OCC approved in accordance with the provisions of the Exchange Act and the rules and regulations thereunder and (2) is a party to the Plan for Reporting Consolidated Options Last Sale Reports and Quotation Information (the "OPRA Plan"). C2 has represented that it has met both the requirements for being considered an Eligible Exchange.

[5] 17 CFR 242.608(b)(3)(iii).

[6] 17 CFR 242.608(b)(1).

[7] 17 CFR 200.30–3(a)(29).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63155; File No. SR–CBOE–2010–096]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Expand the Range of Strike Price Intervals for VIX Options

October 21, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on October 19, 2010, the Chicago Board Options Exchange, Incorporated ("CBOE"or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend Rule 24.9.01(e), *Terms of Index Option Contracts,* to expand the range of strike price intervals for options on the CBOE Volatility Index ("VIX"). The text of the rule proposal is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule filing is to amend Rule 24.9.01(e), *Terms of Index Option Contracts,* to expand the range of strike price intervals for options on the CBOE Volatility Index ("VIX"). Currently, Rule 24.9.01(e) permits the Exchange to list series at $1 or greater strike price intervals for each VIX expiration. Dollar strikes for VIX options, however, are centered around a limited range based on VIX futures prices. Specifically, the Exchange may open up to five option series above and five option series below the current index level, which is based on VIX futures prices. As the current index level moves, the Exchange may open additional series within the same range (*i.e.,* five above/below). This filing proposes to eliminate the band that limits the number of $1 strikes that may be listed in VIX options.

In support of this modification, the Commission has already addressed the policy issue raised by this filing, *i.e.,* broader range of $1 strikes for vehicles to trade S&P 500 volatility, and the Commission has already approved $1 strikes for VIX options.[5] The Exchange notes since the strike setting parameters for VIX options were first established, other products have been introduced that compete with VIX options, but do not have similar strike adding restrictions. For example, $1 or greater strike price intervals (where the strike price is less then $200) are permitted for options on the iPath S&P 500 VIX Short-Term Futures Index ETN ("VXX") and on the iPath S&P 500 VIX Mid-Term Futures Index ETN ("VXZ").

VXX and VXZ are exchange traded notes that "are linked to the performance of an underlying index that is designed to provide investors with exposure to one or more maturities of futures contracts on the VIX Index, which reflect implied volatility of the S&P 500 Index at various points along the volatility forward curve."[6] The futures contracts on the VIX level that the VXX and VXZ notes are linked to are listed for trading on the CBOE Futures Exchange, LLC ("CFE"). VIX options traded on CBOE overlie the same index on which CFE lists futures contracts. As a result, options on VIX, VXX and VXZ are competing listed vehicles to trade volatility and market participants may use the products interchangeably. In addition, CFE launched Weekly Options on VIX futures on September 28, 2010, and $0.50 or greater strike price intervals are permitted.

CBOE notes that the Commission has previously permitted similar $1 strike setting regimes for other index options that compete with physically-settled options. Specifically, $1 strikes are permitted for options on the Mini-Russell 2000 Index ("RMN")[7] and for options on the iShares Russell 2000 Index Fund ("IWM").[8] Similarly, $1 strikes are permitted for options on the Mini S&P 500 Index ("Mini SPX")[9] and for options on the Standard and Poor's Depositary Receipts Trust ("SPY").[10]

In addition, the Exchange states that it has received requests to add strikes so that market participants may be able to "roll" expiring positions; that is, trade out of an expiring VIX option with a certain strike and re-establish a new position in the next month's VIX option with the same strike. Because the strike setting regime for volatility index options is tied to futures prices, certain strikes may not be available for listing, thus creating the situation in which rolling cannot be accomplished.

In order to be able to compete effectively and provide market participants with products that can be used to hedge other products already trading in the market, CBOE believes that untying the addition of $1 or greater strikes to the "current index level" will provide investors with greater flexibility by allowing them to establish positions that are better tailored to meet their investment objectives.

Capacity

CBOE has analyzed its capacity and represents that it believes the Exchange and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the expanded range of strike price intervals for VIX options.

2. Statutory Basis

Because the current proposed is limited to VIX options for which $1 strikes are already permitted and because the series could be added without presenting capacity problems, the Exchange believes the rule proposal is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act.[11] Specifically, the Exchange believes that the proposed rule change is consistent with the Section 6(b)(5) Act[12] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6) thereunder.[14] At any time within 60

[5] *See* Securities Exchange Act Release Nos. 61696 (March 12, 2010), 75 FR 13174 (March 18, 2010) (SR–CBOE–2010–005) (order approving $1 strikes for options on index-linked securities) and No. 54192 (July 21, 2006), 71 FR 43251 (July 31, 2006) (SR–CBOE–2006–27) (order approving $1 strikes for VIX options).

[6] *See* Pricing Supplement to the Barclay's iPath Prospectus, dated August 31, 2010, at PS–1, which is available at: http://ipathetn.com/pdf/vix-prospectus.pdf.

[7] *See* Rule 24.9.01(k).

[8] *See* Rule 5.5.06.

[9] *See* Rule 24.9.11.

[10] *See* Rule 5.5.06.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change,

Continued

days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2010–096 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–096. This file number should be included on the subject line if e-mail 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2010–096 and should be submitted on or before November 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27232 Filed 10–27–10; 8:45 am]

BILLING CODE 8011–01–P

at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63164; File No. SR–C2–2010–005]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Rule 6.12

October 22, 2010.

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 October 14, 2010, C2 Options Exchange, Incorporated ("Exchange" or "C2") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the wording of Rule 6.12 relating to the C2 matching algorithm. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Exchange's Office of the Secretary, at the Commission's Public Reference Room, and on the Commission's Web site at *http://www.sec.gov*.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, C2 included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

In 2009, C2 was registered as a national securities exchange under Section 6 of the Exchange Act.[5] C2 has yet to commence trading options, however a launch is anticipated in October 2010. The central purpose of this filing is to streamline Rule 6.12 relating to order execution and priority. Currently Rule 6.12 allows C2 to select a base matching algorithm and subsequently overlay certain priorities over the selected base algorithm. There are currently two base algorithms: price-time (often referred to as first in, first out or FIFO) in which trading interest at a given price point is ranked based on time priority, and pro-rata in which trading interest at a given price point is ranked based on the size of each order/quote at that price. The priority overlays allowed under Rule 6.12 are public customer priority (priority to non-broker-dealer orders), trade participation right priority (priority, up to a designated percentage, for qualifying Preferred Market-Makers), and market turner priority (priority, up to a designated percentage, for participants that are first to improve the market price on C2).

C2 seeks to simplify Rule 6.12 to allow for 3 choices of matching algorithms: price-time, pro-rata, and price-time with first priority going to public customers and second priority pursuant to the trade participation right. The first two of these options are unchanged. C2 believes that adding the third, which is achievable under existing C2 Rule 6.12 and which is the intended algorithm of choice for the C2 launch, makes C2 matching rules clearer for C2 users. Thus, the filing is not in

[5] *See* Exchange Act Release No. 61152 (Dec. 10, 2009), 74 FR 66699 (Dec. 16, 2009).

any way adding new matching functionality, it is streamlining the wording of Rule 6.12 (in the process, it is eliminating certain matching "options" available under the current rule, but C2 has no intention to use a matching algorithm other than the three set forth in the revised rule). Further, as proposed, the new Rule would continue to allow for a market turner overlay. The Exchange represents that market turner priority would only be applicable and would only be utilized when the pro-rata algorithm is in place. This is because the market turner overlay gives priority to the participant that is first in time at an improved price point, something that price-time priority already accomplishes.

The filing also proposes to correct two mistaken references in the definitions of Professional and Voluntary Professional in Rule 1.1. Specifically those definitions mistakenly reference Rule 6.13(c)(5) as 6.13(c)(v).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") [6] and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.[7] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [8] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. Streamlining the C2 matching rules will assist users seeking to better understand the matching alternatives available on C2.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposal.

[6] 15 U.S.C. 78s(b)(1).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(6) thereunder.[10]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–C2–2010–005 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2010–005. This file number should be included on the subject line if e-mail 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–C2–2010–005 and should be submitted on or before November 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27242 Filed 10–27–10; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. C2 has satisfied this requirement.

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63161; File No. SR–EDGA–2010–15]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGA Rule 11.5

October 22, 2010.

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 October 20, 2010, the EDGA Exchange, Inc. (the "Exchange" or the "EDGA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend EDGA Rule 11.5(a)(2) to provide system functionality that will cancel any portion of a market order submitted to the Exchange that would execute at a price that is more than $0.50 or 5 percent worse than last sale at the time the order initially reaches the Exchange, whichever is greater. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.directedge.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to protect market participants from executions at prices that are significantly worse than the last sale at the time of order entry by providing Exchange system functionality that will cancel any portion of a market order (as defined in Rule 11.5(a)(2)) that would execute at a price that is 50 cents or 5 percentage points worse than the consolidated last sale, whichever is greater. Any portion of a market order that would otherwise execute outside of these thresholds will be immediately cancelled back to the User.[3] The Exchange believes that Users who submit market orders to the Exchange generally intend to receive executions for the full size of their orders at or near the consolidated last sale and are not always aware that there may not be enough liquidity at that price to fill the entire size of their orders. The Exchange believes that the market order thresholds proposed in this rule filing will help avoid executions of market orders at prices that are significantly worse than the consolidated last sale and avoid potentially creating clearly erroneous situations.

Those Users who intend to trade against liquidity at multiple price points from the consolidated last sale beyond the market order thresholds proposed in this rule filing can clearly and unambiguously specify that intent by submitting a marketable limit order to the Exchange.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[4] which requires the rules of an exchange 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 proposed rule change also is designed to support the principles of Section 11A(a)(1)[5] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it seeks to promote transparency for how order flow will be handled during a trading pause.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6) thereunder.[7]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[8] However, Rule 19b–4(f)(6)[9] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative upon filing. The Commission notes (i) the proposal is similar to existing thresholds on market orders adopted by The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., BATS Exchange, Inc., and NYSE Arca, Inc; (ii) it presents no novel issues; and (iii) it may provide a benefit to market participants. For these reasons, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay, and hereby grants such waiver.[10]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File

[3] As defined in Exchange Rule 1.5(cc).

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78k–1(a)(1).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6). In addition, EDGA has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date on which the Exchange filed the proposed rule change, or such shorter time as designated by the Commission.

[8] 17 CFR 240.19b–4(f)(6)(iii).

[9] *Id.*

[10] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Number SR–EDGA–2010–15 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGA–2010–15. This file number should be included on the subject line if e-mail 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 website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission,[11] 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 website 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGA–2010–15 and should be submitted on or before November 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27243 Filed 10–27–10; 8:45 am]

BILLING CODE 8011–01–P

[11] The text of the proposed rule change is available on Exchange's Web site at *http://www.directedge.com,* on the Commission's Web site at *http://www.sec.gov,* at EDGA, and at the Commission's Public Reference Room.

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63166; File No. SR–NYSEArca–2010–90]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To Amend Rule 6.47 To Describe New Procedures for Executing a Cross Transaction

October 22, 2010.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on October 21, 2010, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 6.47 to describe new procedures for executing a cross transaction. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Arca proposes to modify Rule 6.47(a) to describe new procedures for Floor Brokers wishing to execute a Non-Facilitation cross transaction.[4] Currently, after requesting a market, Floor Brokers are required to disclose the terms of a cross, after which Market Makers are allowed to revise their bids and offers to block the cross.

NYSE Arca proposes that Market Makers, after being informed of a potential cross, should provide their best bid and best offer, but not be allowed to step ahead of subsequently disclosed trading interest. The Exchange intends for Market Makers to make markets and not prevent better priced trading interests from interacting with each other.

The proposed rule change would allow a Floor Broker to request, after revealing the size of the orders, a final quote for a cross from the Trading Crowd, and then to cross above the highest bid, or below the lowest offer, and, if not on a price provided by the Crowd, to execute the cross in its entirety. If the cross were to take place on the price provided by the Crowd, the Floor Broker would be obligated to trade with that interest prior to crossing the orders. The cross would be required to be within the National Best Bid/Offer, and would also be obligated to satisfy any bids or offers in the Consolidated Book equal to or better than the crossing price.

For example, if the prices of the orders to be crossed allowed for a range of possible crossing prices, and the Trading Crowd provided a final quote that was two or more Minimum Price Variations ("MPV") wide, the Floor Broker could bid above the Trading Crowd's bid and consummate the cross without trading on a final quote price.

If, alternatively, the final quote was only one MPV wide, (*i.e.,* 3.10 bid for 20 contracts at 3.20 offer for 50 contracts) the Floor Broker could not meet the obligation to the orders without trading on a final quote price. In this case, the Floor Broker would bid above the final quote bid (*i.e.,* bid 3.20) or offer below the final quote offer (*i.e.,* offer at 3.10), each instance of which is equal to a final quote price. The Floor Broker would then be obligated to trade with the final quote interest at that price (*i.e.,* buy 50 at 3.20 or sell 20 at 3.10) before crossing the balance of the orders.

Additionally, if, because of movement in the markets while the order was being brought to the crowd, the limit on one of the orders only allowed for a cross to be effected at a final quote price, regardless of the width of the final quote, the Floor Broker would be

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Facilitation Crosses are governed by Rule 6.47(b), and are not affected by this proposal.

required to bid above the final quote bid or offer below the final quote offer yet still be at a final quote price. Again, the Floor Broker would be obligated to trade with the final quote interest at that price before crossing the balance of the orders. For instance, the electronic market in the series is 3.00 bid offered at 3.30, and the Floor Broker receives orders to cross at 3.10 or 3.20. When the Floor Broker requests a Final Quote, the crowd responds with a market of 3.20 bid at 3.30. In order to meet the obligation to execute the order, the Floor Broker would have to offer at 3.20, fill the bids in the crowd at 3.20, and then cross the balance of the orders.

Additionally, the Exchange proposes to add two commentaries to Rule 6.47. Commentary .02 would allow an OTP Holder to submit an order that has been solicited prior to transmittal to the Floor, but would not allow the new procedures to be used to circumvent limitations on principal transactions as described in Rule 6.47A, nor allow the OTP Holder to solicit a contra order from an NYSE Arca Market Maker assigned to the class of options to trade against an agency order.

Commentary .03 would state it is a violation of a Floor Broker's duty for best execution to cancel an agency order to avoid execution at a better price.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act, in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change will provide encouragement for Market Makers to provide their best prices earlier, upon the initial presentation of trading interest to the crowd, and the broker will be required to better the crowd's price in order to execute the cross transaction. The proposed new process should thus increase the possibility of price improvement for Customer orders.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period 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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2010–90 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–90. This file number should be included on the subject line if e-mail 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange.[5] All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–90 and should be submitted on or before November 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27266 Filed 10–27–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63163; File No. SR–EDGX–2010–14]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGX Rule 11.5

October 22, 2010.

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 October 20, 2010, the EDGX Exchange, Inc. (the "Exchange" or the "EDGX") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[5] The text of the proposed rule change is available on the Commission's Web site at *www.sec.gov.*

[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend EDGX Rule 11.5(a)(2) to provide system functionality that will cancel any portion of a market order submitted to the Exchange that would execute at a price that is more than $0.50 or 5 percent worse than last sale at the time the order initially reaches the Exchange, whichever is greater. The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.directedge.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to protect market participants from executions at prices that are significantly worse than the last sale at the time of order entry by providing Exchange system functionality that will cancel any portion of a market order (as defined in Rule 11.5(a)(2)) that would execute at a price that is 50 cents or 5 percentage points worse than the consolidated last sale, whichever is greater. Any portion of a market order that would otherwise execute outside of these thresholds will be immediately cancelled back to the User.[3] The Exchange believes that Users who submit market orders to the Exchange generally intend to receive executions for the full size of their orders at or near the consolidated last sale and are not always aware that there may not be enough liquidity at that price to fill the entire size of their orders. The Exchange believes that the market order thresholds proposed in this rule filing will help avoid executions of market orders at prices that are significantly worse than the consolidated last sale and avoid potentially creating clearly erroneous situations.

Those Users who intend to trade against liquidity at multiple price points from the consolidated last sale beyond the market order thresholds proposed in this rule filing can clearly and unambiguously specify that intent by submitting a marketable limit order to the Exchange.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[4] which requires the rules of an exchange 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 proposed rule change also is designed to support the principles of Section 11A(a)(1)[5] of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it seeks to promote transparency for how order flow will be handled during a trading pause.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6) thereunder.[7]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[8] However, Rule 19b–4(f)(6)[9] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative upon filing. The Commission notes (i) the proposal is similar to existing thresholds on market orders adopted by The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., BATS Exchange, Inc., and NYSE Arca, Inc; (ii) it presents no novel issues; and (iii) it may provide a benefit to market participants. For these reasons, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay, and hereby grants such waiver.[10]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–EDGX–2010–14 on the subject line.

[3] As defined in Exchange Rule 1.5(cc).

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78k–1(a)(1).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6). In addition, EDGX has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date on which the Exchange filed the proposed rule change, or such shorter time as designated by the Commission.

[8] 17 CFR 240.19b–4(f)(6)(iii).

[9] *Id.*

[10] For the purposes only of waiving the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–EDGX–2010–14. This file number should be included on the subject line if e-mail 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,[11] 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–EDGX–2010–14 and should be submitted on or before November 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27244 Filed 10–27–10; 8:45 am]

BILLING CODE 8011–01–P

[11] The text of the proposed rule change is available on Exchange's Web site at *http://www.directedge.com,* on the Commission's Web site at *http://www.sec.gov,* at EDGX, and at the Commission's Public Reference Room.

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63165; File No. SR–ISE–2010–102]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Sales Value Fee

October 22, 2010.

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 October 14, 2010, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt ISE Rule 212 (Sales Value Fee). The text of the proposed rule change is available on the Exchange's Web site *http://www.ise.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to Section 31 of the Securities Act and Rule 31 thereunder,[3] national securities exchanges and associations (collectively, "SROs") are required to pay a transaction fee to the Commission that is designed to recover the costs related to the government's supervision and regulation of the securities markets and securities professionals. To offset this obligation, the Exchange Members are assessed charges in connection with satisfaction of the Exchange's payment obligations under Section 31. The fee is collected indirectly from Exchange Members through their clearing firms by the Options Clearing Corporation ("OCC") on behalf of the Exchange with respect to options sales and options exercises. The fee is collected by billing the Member's designated clearing firm for the amount owed by the member to the Exchange.

The Exchange is now proposing to codify this process by adopting proposed Rule 212 (Sales Value Fee). Proposed ISE Rule 212 defines the Sales Value Fee ("Fee") as the fee assessed by ISE to each member for sales of securities on ISE with respect to which ISE is obligated to pay a fee to the Commission under Section 31 of the Exchange Act. Proposed ISE Rule 212 provides that, to the extent the Exchange may collect more from Members under ISE Rule 212 than is due to from the Exchange to the Commission under Section 31 of the Exchange Act, for example due to rounding differences, the excess monies collected may be used by the Exchange to fund its general operating expenses.

Proposed ISE Rule 212 explains that the transactions to which the Fee applies are sales of options (other than options on a security index) and sales of securities resulting from the exercise of physical-delivery options traded on ISE. As discussed above, the proposed rule specifies that the Fee is collected indirectly from Exchange Members through their clearing firms by the OCC on behalf of the Exchange with respect to options sales and options exercises. Proposed ISE Rule 212 also sets forth the formula for calculating the Fee with respect to covered options transactions, which is equal to (a) the Commission's Section 31 fee rate multiplied by (b) the Member's aggregate dollar mount [sic] of covered sales resulting from options transactions occurring on the Exchange during any computational period.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[4] in general, and furthers the objectives of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.31.

[4] 15 U.S.C. 78f(f).

Section 6(b)(4),[5] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The proposed rule is simply codifying a practice currently employed by Exchange and the OCC to ensure that the Exchange is compliant with Section 31 of the Exchange Act. By adopting this rule, the Exchange is providing Members with a description of the Fee and the process by which the Fee is collected.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Act[6] and Rule 19b–4(f)(2) thereunder[7] because it establishes a due, fee, or other charge imposed on its members by ISE. 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 e-mail to *rule-comments@sec.gov.* Please include File Number SR–ISE–2010–102 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2010–102. This file number should be included on the subject line if e-mail 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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2010–102 and should be submitted on or before November 18, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–27245 Filed 10–27–10; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

[8] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new and/or currently approved information collection.

DATES: Submit comments on or before December 27, 2010.

ADDRESSES: Send all comments regarding whether this information collection is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collection, to Edsel Brow, Director, Office of Technology, Small Business Administration, 409 3rd Street, 6th Floor, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: George Solomon, Office of Senior Policy, 202–205–7343 *edsel.brown@sba.gov* Curtis B. Rich, Management Analyst, 202–205–7030 *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION: This data will be used by SBA to maintain information about the SBIR and STTR awards issued through the two programs. This data will also be used to track performance of the SBIR/STTR programs as a whole and at specific agencies.

Title: "Small Business Innovation Research (SBIR) and Small Business Technology (STTR) Tech-Net Database".

Description of Respondents: All Firms or Individuals applying for a Phase 1 or Phase II award from the SBIR or STTR program.

Form Number: N/A.

Annual Responses: 30,000.

Annual Burden: 15,000.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 2010–27271 Filed 10–27–10; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Small Entity Compliance Guide: Women-Owned Small Business Program

AGENCY: Small Business Administration.

ACTION: Notice: Availability of Compliance Guide.

SUMMARY: The Small Business Administration (SBA) is announcing the availability of a compliance guide for the Women-Owned Small Business (WOSB) Program. This guide sets forth in plain language the requirements for participation in the WOSB program, and is intended to help small businesses understand the regulation and how it affects them.

FOR FURTHER INFORMATION CONTACT: Diane Heal, Assistant Director, Office of Contract Assistance, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416. For information about the WOSB Program visit the Web site at *http://www.sba.gov/wosb.*

SUPPLEMENTARY INFORMATION:

I. Background

On October 7, 2010 (75 FR 62258), the Small Business Administration (SBA) issued a final rule amending 13 CFR part 127, entitled "The Women-Owned Small Business Federal Contract Assistance Procedures," and implementing procedures authorized by the Small Business Act (Pub. L. 85–536, as amended) to help ensure a level playing field on which Women-Owned Small Businesses (WOSBs) can compete for Federal contracting opportunities.

In particular, the final rule: Identifies 83 industries by four digit North American Industry Classification System codes in which WOSBs are underrepresented or substantially underrepresented; allows WOSBs and EDWOSBs to self-certify their status as long as adequate documents are provided to support the certification; allows WOSBs or EDWOSBs to be certified by approved third-party certifiers, including Federal agencies; sets forth the criteria to determine eligibility for the program; sets forth the contracting requirements for the program; and explains and expands the protest and eligibility examination process to ensure the eligibility of WOSBs or EDWOSBs for the program.

The SBA also stated in the rule that it is effective February 4, 2011 because the agency is in the process of working with the Federal Acquisition Regulatory Council to implement this program in the Federal Acquisition Regulations. In addition, the SBA is working with the Integrated Acquisition Environment to make changes to the various Federal procurement data systems, which will be affected by this rule.

Further, in the final rule the SBA examined the economic implications of the rule as required by the Regulatory Flexibility Act (5 U.S.C. 601–612) and determined that the rule would have a significant economic impact on a substantial number of small entities. In compliance with section 212 of the Small Business Regulatory Enforcement Fairness Act (Pub. L. 104–121), SBA is making available this Small Entity Compliance Guide, which explains in plain language the legal requirements of the WOSB Program, as set forth in the final rule.

II. Paperwork Reduction Act of 1995

This compliance guide refers to a new collection of information that is necessitated by the WOSB program regulations. This collection of information has been submitted to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Approval is currently pending.

III. Electronic Access

Persons with access to the Internet may obtain the document at: *http://www.sba.gov/wosb.*

Dated: October 21, 2010.

Karen Hontz,

Director, Office of Government Contracting.

[FR Doc. 2010–27272 Filed 10–27–10; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 7219]

60-Day Notice of Proposed Information Collection: DS–156, Nonimmigrant Visa Application, OMB Control Number 1405–0018

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Nonimmigrant Visa Application.
- *OMB Control Number:* 1405–0018.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs (CA/VO).
- *Form Number:* DS–156.
- *Respondents:* Nonimmigrant visa applicants.
- *Estimated Number of Respondents:* 800,000.
- *Estimated Number of Responses:* 800,000.
- *Average Hours per Response:* 1 hour.
- *Total Estimated Burden:* 800,000 hours per year.
- *Frequency:* Once per respondent.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

DATES: The Department will accept comments from the public up to 60 days from December 27, 2010.

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

- *E-mail: VisaRegs@state.gov* (Subject line must read DS–156 Reauthorization).
- *Mail (paper, disk, or CD–ROM submissions):* Chief, Legislation and Regulation Division, Visa Services—DS–156 Reauthorization, 2401 E. Street, NW., Washington, DC 20520–30106.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Stefanie Claus of the Office of Visa Services, U.S. Department of State, 2401 E. Street, NW., L–603, Washington, DC 20522, who may be reached at (202) 663–2910.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of Proposed Collection

Form DS–156 is required by regulation of all nonimmigrant visa applicants who do not use the Online Application for Nonimmigrant Visa (Form DS–160). Posts will use the DS–156 to elicit information necessary to determine an applicant's visa eligibility.

Methodology

The DS–156 is completed by applicants online or, in exceptional circumstances, applicants may submit a paper application to posts abroad. The applicant prints the application and a 2–D barcode. When the applicant appears at the interview the barcode is scanned and the information electronically received.

Dated: October 19, 2010.

Ellen M. Conway,

Deputy Assistant Secretary, Acting, Bureau of Consular Affairs, Department of State.

[FR Doc. 2010–27300 Filed 10–27–10; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice 7218]

30-Day Notice of Proposed Information Collection: Exchange Programs Alumni Web Site Registration, DS–7006

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the following information collection request to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Exchange Programs Alumni Website Registration.
- *OMB Control Number:* None.
- *Type of Request:* Existing collection in use without OMB control number.
- *Originating Office:* Bureau of Educational and Cultural Affairs, ECA–IIP/EX.
- *Form Number:* DS–7006.
- *Respondents:* Exchange program alumni and current participants of U.S. government-sponsored exchange programs, Americans who hosted or programmed an exchange participant, or employees of a program agency administering an exchange program.
- *Estimated Number of Respondents:* 15,000.
- *Estimated Number of Responses:* 15,000.
- *Average Hours per Response:* 10 minutes.
- *Total Estimated Burden: 2,*500 hours.
- *Frequency:* One-time per registrant.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

DATES: Submit comments to the Office of Management and Budget (OMB) for up to 30 days from October 28, 2010.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *E-mail: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. *Attention:* Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from Michael Quizon, Program Analyst, ECA–IIP/EX; State Department; SA–5, Room 4–V01; Washington, DC 20522–0504, who may be reached on 202–632–3357 or at *quizonmd@state.gov.*

SUPPLEMENTARY INFORMATION:

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary to properly perform our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond.

Abstract of Proposed Collection

The Exchange Programs Alumni Web site requires information to process users' voluntary requests for participation in the Web site. Other than contact information, which is required for website registration, all other information is provided on a voluntary basis. Participants also have the option of restricting access to their information.

Respondents to this registration form include: U.S. government-sponsored exchange program participants and alumni, hosts, and guests. Alumni Affairs collects data from users to not only verify their status or participation in a program, but to also connect alumni with other alumni and aid embassy staff in their alumni outreach.

Methodology

Information provided for registration is collected electronically via the Alumni website, *alumni.state.gov.*

Additional Information

The registration form is dynamic, presenting certain questions according to the user type. The Exchange Programs Alumni Web site is also secure and encrypted.

Dated: October 21, 2010.

Julianne Paunescu,

Acting Director, Office of Policy and Evaluation, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2010–27299 Filed 10–27–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 7214]

Bureau of Educational and Cultural Affairs (ECA) Request for Grant Proposals: FY 2012 Fulbright Scholar Program

Announcement Type: New Cooperative Agreement.

Funding Opportunity Number: ECA/A/E–12–01.

Catalog of Federal Domestic Assistance Number: 19.401.

Key Dates:

Application Deadline: February 18, 2011.

Executive Summary: The Office of Academic Programs, Bureau of Educational and Cultural Affairs (ECA), U.S. Department of State announces an open competition for a cooperative agreement to assist in the FY 2012 administration of the worldwide Fulbright Scholar Program. The Fulbright Scholar Program is a major component of the overall Fulbright Program, which also includes the Fulbright Student Program.

For more than 60 years, the Fulbright Scholar Program has offered awards for college and university faculty, as well as for non-academic professionals (such as lawyers, artists, and journalists) and independent scholars, to lecture and conduct research abroad. Tens of thousands of U.S. and non-U.S. scholars and professionals have participated in these exchanges since the Fulbright Program's inception in 1946.

The Fulbright Scholar Program currently sends approximately 1,300 qualified U.S. scholars and professionals abroad to lecture, conduct research, and provide academic consulting at overseas institutions for long- and short-term programs. Conversely, the program brings approximately 900 visiting (non-U.S.) participants from approximately 150 countries to the United States for similar activities.

Responsibility for the management of the Fulbright Scholar Program is shared between the U.S. Department of State in Washington, DC, fifty bilateral Fulbright commissions, approximately 100 U.S. embassies overseas, and a private sector, cooperating agency in the United States. Overall policy guidelines for the Fulbright Scholar Program are determined by the Presidentially appointed J. William Fulbright Foreign Scholarship Board (FSB).

The organization that is awarded the cooperative agreement under this competition will be responsible for recruitment, selection, placement, facilitation of enrichment activities for

participants, program promotion, disbursement of funds, and recordkeeping for both the U.S. and Visiting Fulbright Scholar Programs. This work will be supervised by the Bureau of Educational and Cultural Affairs of the Department of State.

I. Funding Opportunity Description

Authority

Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87–256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." The funding authority for the program above is provided through legislation. The Fulbright Program also receives significant annual funding and other support from partner governments and private donors worldwide.

The Bureau of Educational and Cultural Affairs, as sponsor and manager of the Fulbright Scholar Program, plays a significant role in the planning and implementation of all program initiatives, publicity, promotion, and enrichment activities, as well as liaison with overseas field partners. The Bureau will work closely with the recipient organization on participant selection procedures, development of selection panels, and stipend and benefit issues. Regular ongoing contacts with Bureau managers will be required throughout the program year. Through this Request for Grant Proposals (RFGP), the Department seeks new ideas to develop effective responses to changing recruitment conditions, to improve the outreach of the program in the U.S. and overseas, and to introduce new models for scholarly exchange.

Purpose

The Department of State will provide funding to the successful applicant organization to assist in the administration of both the U.S. and Visiting Fulbright Scholar Program.

The Fulbright Program was created by the U.S. Congress at the end of the World War II to provide the opportunity for future leaders to observe and better comprehend the political, economic, and cultural institutions and societies of other countries and people. In the intervening years, the Fulbright Program has evolved into the premier educational exchange program sponsored by the people of the United States through their federal government, and an important element in the conduct of U.S. foreign affairs. The Fulbright Program, which now extends to more than 150 foreign countries and involves approximately 8,000 participants per year, has helped to form and inform tens of thousands of the world's leaders in every academic and professional field.

The Scholar portion of the Fulbright Program will engage approximately 2,400 scholars and professionals in FY 2012.

The hallmark of the Fulbright Program is binationalism. The United States Government and foreign governments, educational institutions and other public and private entities are all partners in this enterprise. In many countries of the world, financial contributions from governments or public/private sources match or exceed those of the United States. Because of its binational nature, the profile of the Fulbright Program worldwide reflects a range of objectives and interests.

Under the auspices of the J. William Fulbright Foreign Scholarship Board, approximately 800 U.S. citizens are awarded one or two semester Fulbright Scholar grants each year through a merit-based, competitive process, to teach undergraduate or graduate courses at host universities overseas, collaborate with foreign colleagues on projects, pursue individual research, conduct seminars, consult with foreign government ministries and educational institutions, advise on curriculum development and guest lecture at foreign universities other than their host institutions.

All grant opportunities are determined overseas by binational Fulbright commissions and U.S. embassies in coordination with the Department of State's Bureau of Educational and Cultural Affairs in Washington, DC. The cooperative organization administering the Fulbright Scholar Program is responsible for advertising and recruiting applicants in the U.S. and for managing an academic peer review process to recommend candidates for participation in the program.

Similarly, approximately 900 foreign scholars and professionals receive grants each year for research, teaching, guest lecturing and academic consulting in the United States. These participants are chosen through open, merit-based competitions in each country, which are conducted by a bilateral Fulbright commission or, in the absence of a commission, by a U.S. embassy.

Additionally, the Fulbright Scholar Program offers a range of activities in response to changing conditions and requirements within the U.S. academic community and varying circumstances and emerging needs in overseas academic environments. The cooperating organization should be prepared to offer expertise, intellectual input and creative thinking on current research, pedagogical, administrative, institutional, and other academic issues and concerns to promote the relevance, quality and effectiveness of the Fulbright Scholar Program in the U.S. and abroad. The cooperating organization should be prepared to advise the Bureau on international higher education policy issues that are addressed by the Bureau in Fulbright and other contexts.

While maintaining its core long-term activities, the program now includes shorter-term grant opportunities for both U.S. and foreign scholars, new opportunities for collaborative research and support for follow-on activities to build lasting links between U.S. and foreign academic institutions. These initiatives have made the Scholar program more responsive to academic environments and more relevant in supporting long-term U.S. national interests as well as world-wide concerns. The Department continues to seek new program models that respond to changing circumstances in the U.S. and overseas. The cooperating organization will need to demonstrate flexibility to respond quickly to changing priorities and global circumstances when administering and developing programs.

The Fulbright Specialist Program provides short-term (two to six weeks) opportunities for up to 500 U.S. academic specialists annually to work with overseas, post-secondary institutions on projects ranging from lecturing and participation in teaching seminars to collaboration on curriculum and course design.

Through the Scholar-in-Residence component of the Fulbright program, the Bureau brings foreign scholars and professionals for an academic semester or academic year to U.S. campuses that do not often house foreign scholars. These campuses are selected through a competition managed by the cooperating agency.

The Bureau sponsors collaborative research through the global New Century Scholars Program and

comparable regional research programs, involving approximately 30 U.S. and foreign scholars working in thematically based cohorts for approximately one year.

These programs require close collaboration between the Bureau, the cooperating agency in the U.S., Fulbright commissions and U.S. embassies overseas. Based on this program's direct relevance to current world issues, the cooperating organization is expected to provide expertise on how academic research collaboration can most effectively address international policy issues and encourage academic and other private sector involvement and support to supplement government funds.

The cooperating agency will also be responsible for other special projects as directed by the Office of Academic Exchange Programs, Bureau of Educational and Cultural Affairs of Department of State, including seminars for Community College and International Education Administrators, and other professional development opportunities for groups of scholars from selected countries.

The Bureau welcomes proposals from applicant organizations proposing additional new scholarly exchange activities consistent with Fulbright principles that are relevant to changing circumstances in the global academic community.

In FY 2012, the Bureau of Educational and Cultural Affairs will continue to seek to strengthen exchanges in parts of the world which have been under-represented in academic exchange programs. The Bureau seeks innovative recruitment approaches and creative strategies to attract U.S. Scholars to these regions.

In a cooperative agreement, ECA/A/E is substantially involved in program activities above and beyond routine monitoring. ECA activities and responsibilities for this program are as follows:

- Participating in the design and direction of program activities;
- Approving of key personnel;
- Approving and providing input on program timelines, agendas and administrative procedures;
- Providing guidance in execution of all program components;
- Reviewing and approving all program publicity and recruitment materials;
- Providing approval of participating scholars, in cooperation with Fulbright commissions and U.S. embassies, subject to final selection by the Fulbright Board;
- Providing approval of changes to scholars proposed field, program, or institution;
- Providing approval of decisions related to special circumstances or problems throughout the duration of program;
- Assisting with non-immigration status and other SEVIS-related issues;
- Assisting with participant emergencies;
- Providing liaison with relevant U.S. embassies,
- Fulbright commissions and country desk officers at the State Department.

II. Award Information

Type of Award: Cooperative Agreement. ECA's level of involvement in this program is listed under number I above.

Fiscal Year Funds: 2012.

Approximate Total Funding: $7,800,000.

Approximate Number of Awards: One.

Approximate Average Award: $7,800,000.

Floor of Award Range: $7,800,000.

Ceiling of Award Range: $7,800,000.

Anticipated Award Date: Pending availability of funds, October 1, 2011.

Anticipated Project Completion Date: September 30, 2015.

Additional Information: Pending successful implementation of this program and the availability of funds in subsequent fiscal years, it is ECA's intent to renew this cooperative agreement for at least four additional fiscal years, before openly competing it again.

III. Eligibility Information

III.1. Eligible applicants

Applications may be submitted by public and private non-profit organizations meeting the provisions described in Internal Revenue Code section 26 USC 501(c)(3).

III.2. Cost Sharing or Matching Funds

There is no minimum or maximum percentage required for this competition.

However, the Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, you must maintain written records to support all costs which are claimed as your contribution, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event you do not provide the minimum amount of cost sharing as stipulated in the approved budget, ECA's contribution will be reduced in like proportion. The successful recipient organization will be expected to continue to provide cost-sharing in future renewal applications at levels comparable to those provided in the initial competition.

III.3. Other Eligibility Requirements

(a.) Bureau grant guidelines require that organizations with less than four years experience in conducting international exchanges be limited to $60,000 in Bureau funding. ECA anticipates making one award, in an amount up to $7,800,000 to support program and administrative costs required to implement this exchange program. Therefore, organizations with less than four years experience in conducting international exchanges are ineligible to apply under this competition. The Bureau encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

(b.) Technical Eligibility: All proposals must comply with the technical eligibility requirements specified in the Proposal Submission Instructions (PSI) and the Project Objectives, Goals, and Implementation (POGI) document. Failure to do so will result in your proposal being declared technically ineligible and given no further consideration in the review process.

IV. Application and Submission Information

Note: Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1 Contact Information To Request an Application Package

Please contact the Office of Academic Exchange Programs, ECA/A/E, SA–5, 4th Floor, U.S. Department of State, 2200 C Street, NW., Washington, DC 20037, telephone (202) 632–3233, fax (202) 632–6490 to request a Solicitation Package. Please refer to the Funding

Opportunity Number ECA/A/E–12–01 when making your request.

Alternatively, an electronic application package may be obtained from grants.gov. *Please see* section IV.3f for further information.

The Solicitation Package contains the Proposal Submission Instruction (PSI) document which consists of required application forms, and standard guidelines for proposal preparation.

It also contains the Project Objectives, Goals and Implementation (POGI) document, which provides specific information, award criteria and budget instructions tailored to this competition.

Please specify Ms. Michelle Johnson and refer to the Funding Opportunity Number ECA/A/E–12–01 on all other inquiries and correspondence.

IV.2. To Download a Solicitation Package Via Internet

The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/grants/open2.html,* or from the Grants.gov Web site at *http://www.grants.gov*.

Please read all information before downloading.

IV.3. Content and Form of Submission

Applicants must follow all instructions in the Solicitation Package. The application should be submitted per the instructions under IV.3f. "Application Deadline and Methods of Submission" section below.

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. Please ensure that your DUNS number is included in the appropriate box of the SF–424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget.

Please refer to the solicitation package. It contains the mandatory Proposal Submission Instructions (PSI) document and the Project Objectives, Goals and Implementation (POGI) document for additional formatting and technical requirements.

IV.3c. You must have nonprofit status with the IRS at the time of application. **Please note:** Effective January 7, 2009, all applicants for ECA federal assistance awards must include in their application the names of directors and/or senior executives (current officers, trustees, and key employees, regardless of amount of compensation). In fulfilling this requirement, applicants must submit information in one of the following ways:

(1) Those who file Internal Revenue Service Form 990, "Return of Organization Exempt From Income Tax," must include a copy of relevant portions of this form.

(2) Those who do not file IRS Form 990 must submit information above in the format of their choice.

In addition to final program reporting requirements, award recipients will also be required to submit a one-page document, derived from their program reports, listing and describing their grant activities. For award recipients, the names of directors and/or senior executives (current officers, trustees, and key employees), as well as the one-page description of grant activities, will be transmitted by the State Department to OMB, along with other information required by the Federal Funding Accountability and Transparency Act (FFATA), and will be made available to the public by the Office of Management and Budget on its USASpending.gov Web site as part of ECA's FFATA reporting requirements.

If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1 Adherence to all regulations governing the J visa. The Bureau of Educational and Cultural Affairs places critically important emphases on the security and proper administration of the Exchange Visitor (J visa) Programs and adherence by award recipients and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of the Exchange Visitor Programs as set forth in 22 CFR part 62, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of forms, record-keeping, reporting and other requirements.

The award recipient will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: Office of Designation, Private Sector Programs Division, U.S. Department of State, ECA/EC/D/PS, SA–5, 5th Floor, 2200 C Street, NW., Washington, DC 20037.

Please refer to Solicitation Package for further information.

IV.3d.2 Diversity, Freedom and Democracy Guidelines. Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content.

Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into your proposal. Public Law 104–319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries." Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

IV.3d.3. Program Monitoring and Evaluation. Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives. The Bureau expects that the recipient organization will track participants or partners and be able to respond to key evaluation questions, including satisfaction with the program, learning as a result of the program,

changes in behavior as a result of the program, and effects of the program on institutions (institutions in which participants work or partner institutions). The evaluation plan should include indicators that measure gains in mutual understanding as well as substantive knowledge.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your project's objectives, your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are "smart" (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the goals of the program described in this RFGP.

Your monitoring and evaluation plan should clearly distinguish between program *outputs* and *outcomes. Outputs* are products and services delivered, often stated as an amount. Output information is important to show the scope or size of project activities, but it cannot substitute for information about progress towards outcomes or the results achieved. Examples of outputs include the number of people trained or the number of seminars conducted. *Outcomes,* in contrast, represent specific results a project is intended to achieve and is usually measured as an extent of change. Findings on outputs and outcomes should both be reported, but the focus should be on outcomes.

We encourage you to assess the following four levels of outcomes, as they relate to the program goals set out in the RFGP (listed here in increasing order of importance):

1. Participant satisfaction with the program and exchange experience.
2. Participant learning, such as increased knowledge, aptitude, skills, and changed understanding and attitude. Learning includes both substantive (subject-specific) learning and mutual understanding.
3. Participant behavior, concrete actions to apply knowledge in work or community; greater participation and responsibility in civic organizations; interpretation and explanation of experiences and new knowledge gained; continued contacts between participants, community members, and others.
4. Institutional changes, such as increased collaboration and partnerships, policy reforms, new programming, and organizational improvements.

Please note: Consideration should be given to the appropriate timing of data collection for each level of outcome. For example, satisfaction is usually captured as a short-term outcome, whereas behavior and institutional changes are normally considered longer-term outcomes.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (i.e., surveys, interviews, or focus groups). (Please note that evaluation plans that deal only with the first level of outcomes [satisfaction] will be deemed less competitive under the present evaluation criteria.)

Recipient organizations will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV.3d.4. Describe your plans for: i.e. sustainability, overall program management, staffing, coordination with ECA and PAS or any other requirements etc.

IV.3e. Please take the following information into consideration when preparing your budget:

IV.3e.1. Applicants must submit SF–424A—"Budget Information—Non-Construction Programs" along with a comprehensive budget for the entire program. Depending on the availability of funds, up to $7,800,000 in U.S. Government funding will be available to support the administration of the Fulbright Scholar Program worldwide in FY 2012. In addition, a program budget totaling approximately $45,000,000 for the global Fulbright Scholar Program will be transferred to the recipient organization at regular intervals to cover individual participant costs. There must be a summary budget as well as breakdowns reflecting administrative budget categories.

IV.3e.2. Allowable costs for the program include the following:

(1) staff salaries and benefits;

(2) rent, furniture, and equipment;

(3) travel;

(4) communications, printing, and publishing;

(5) and other fees associated with the normal administration of exchange programs.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

IV.3f. APPLICATION DEADLINE AND METHODS OF SUBMISSION:

Application Deadline Date: February 18, 2011

Reference Number: ECA/A/E–12–01

Methods of Submission: Applications may be submitted in one of two ways:

(1.) In hard-copy, via a nationally recognized overnight delivery service (*i.e.,* Federal Express, UPS, Airborne

(2.) Express, or U.S. Postal Service Express Overnight Mail, etc.), or

(3.) Electronically through *http://www.grants.gov.*

Along with the Project Title, all applicants must enter the above Reference Number in Box 11 on the SF–424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3f.1 Submitting Printed Applications. Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will not notify you upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages may not be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Important note: When preparing your submission please make sure to include one extra copy of the completed SF–424 form and place it in an envelope addressed to "ECA/EX/PM".

The original and 8 copies of the application should be sent to: Program Management Division ECA–IIP/EX/PM, Ref.: ECA/A/E–12–01, SA–5, Floor 4, Department of State, 2200 C Street, NW., Washington, DC 20037.

IV.3f.2—Submitting Electronic Applications. Applicants have the option of submitting proposals electronically through Grants.gov

(*http://www.grants.gov*). Complete solicitation packages are available at Grants.gov in the "Find" portion of the system.

Please Note: ECA bears no responsibility for applicant timeliness of submission or data errors resulting from transmission or conversion processes for proposals submitted via Grants.gov.

Please follow the instructions available in the 'Get Started' portion of the site (*http://www.grants.gov/GetStarted*).

Several of the steps in the Grants.gov registration process could take several weeks. Therefore, applicants should check with appropriate staff within their organizations immediately after reviewing this RFGP to confirm or determine their registration status with Grants.gov.

Once registered, the amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your internet connection. In addition, validation of an electronic submission via Grants.gov can take up to two business days.

Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.

The Grants.gov Web site includes extensive information on all phases/aspects of the Grants.gov process, including an extensive section on frequently asked questions, located under the "For Applicants" section of the Web site. ECA strongly recommends that all potential applicants review thoroughly the Grants.gov Web site, well in advance of submitting a proposal through the Grants.gov system. ECA bears no responsibility for data errors resulting from transmission or conversion processes.

Direct all questions regarding Grants.gov registration and submission to: Grants.gov Customer Support,

Contact Center Phone: 800–518–4726,

Business Hours: Monday–Friday, 7 a.m.–9 p.m. Eastern Time,

E-mail: support@grants.gov.

Applicants have until midnight (12 a.m.), Washington, DC time of the closing date to ensure that their entire application has been uploaded to the Grants.gov site. There are no exceptions to the above deadline. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the grants.gov system, and will be technically ineligible.

Please refer to the Grants.gov Web site, for definitions of various "application statuses" and the difference between a submission receipt and a submission validation. Applicants will receive a validation e-mail from grants.gov upon the successful submission of an application. Again, validation of an electronic submission via Grants.gov can take up to two business days. Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov. ECA will not notify you upon receipt of electronic applications.

It is the responsibility of all applicants submitting proposals via the Grants.gov web portal to ensure that proposals have been received by Grants.gov in their entirety, and ECA bears no responsibility for data errors resulting from transmission or conversion processes.

Optional—IV.3f.3 You may also state here any limitations on the number of applications that an applicant may submit and make it clear whether the limitation is on the submitting organization, individual program director or both.

IV.3g. Intergovernmental Review of Applications: Executive Order 12372 does not apply to this program.

V. Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for assistance awards (cooperative agreements) resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Program planning:* Detailed agenda and relevant work plan should demonstrate substantive undertakings and logistical capacity. Agenda and plan should adhere to the program overview and guidelines described above.

2. *Ability to achieve program objectives:* Objectives should be reasonable, feasible, and flexible. Proposals should clearly demonstrate how the applicant will meet the program's objectives and plans, while demonstrating innovation and a commitment to academic excellence. Proposals should demonstrate a capacity for flexibility in the management of the program.

3. *Support of Diversity:* Proposals should demonstrate the recipient's commitment to promoting the awareness and understanding of diversity.

4. *Institutional Capacity:* Proposed personnel and institutional resources should be adequate and appropriate to achieve Fulbright Scholar Program goals in all respects. Applicants should demonstrate well-established links to the scholarly and professional community in the U.S. and knowledge of other educational environments as they apply to academic and professional exchange programs.

5. *Institution's Record/Ability:* Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Bureau awards (grants or cooperative agreements) as determined by the Bureau's Office of Contracts. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants.

6. *Project Evaluation:* Proposals should include a plan to evaluate the activity's success, both as the activities unfold and at the end of the program. The Bureau recommends that the proposal include a draft survey questionnaire or other technique plus description of a methodology to use to link outcomes to original project objectives. Award-receiving organizations/institutions will be expected to submit intermediate reports after each project component is concluded or quarterly, whichever is less frequent.

7. *Cost-effectiveness and Cost-sharing:* The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. The proposal should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

VI. Award Administration Information

VI.1a. Award Notices

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicants will receive an Federal Assistance Award (FAA) from the Bureau's Grants Office. The FAA and the original proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The FAA will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

All awards made under this competition must be executed according to all relevant U.S. laws and policies regarding assistance to the Palestinian Authority, and to the West Bank and Gaza. Organizations must consult with relevant Public Affairs Offices before entering into any formal arrangements or agreements with Palestinian organizations or institutions.

Note: To assure that planning for the inclusion of the Palestinian Authority complies with requirements, please contact Donna Ives, Branch Chief for Middle East Programs, 202–632–6050 for additional information.

VI.2 Administrative and National Policy Requirements

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A–122, "Cost Principles for Nonprofit Organizations."

Office of Management and Budget Circular A–21, "Cost Principles for Educational Institutions."

OMB Circular A–87, "Cost Principles for State, Local and Indian Governments".

OMB Circular No. A–110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.

OMB Circular No. A–102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A–133, Audits of States, Local Government, and Non-profit Organizations.

Please reference the following Web sites for additional information: *http://www.whitehouse.gov/omb/grants. http://fa.statebuy.state.gov.*

VI.3. Reporting Requirements

You must provide ECA with a hard copy original plus one copy of the following reports:

A final program and financial report no more than 90 days after the expiration of the award;

(1.) A concise, one-page final program report summarizing program outcomes no more than 90 days after the expiration of the award. This one-page report will will be transmitted to OMB, and be made available to the public via OMB's USAspending.gov Web site—as part of ECA's Federal Funding Accountability and Transparency Act (FFATA) reporting requirements.

(2.) A SF–PPR, "Performance Progress Report" Cover Sheet with all program reports.

(3.) Additional reporting requirements as outlined in the POGI document.

Award recipients will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. (*Please refer* to IV. Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

VII. Agency Contacts

For questions about this announcement, contact: Michelle Johnson, U.S. Department of State, Office of Academic Exchange Programs, ECA/A/E, SA–5, 4th Floor, 2200 C Street, NW., Washington, DC 20037, tel. (202) 632–3233 and fax (202) 632–6490, *JohnsonML3@state.gov.*

All correspondence with the Bureau concerning this RFGP should reference the above title and number ECA/A/E–12–01.

Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Dated: October 21, 2010.

Ann Stock,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 2010–27301 Filed 10–27–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 7217]

Culturally Significant Objects Imported for Exhibition Determinations: "Object of Devotion: Medieval English Alabaster Sculpture From the Victoria and Albert Museum"

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000, I hereby determine that the objects to be included in the exhibition "Object of Devotion: Medieval English Alabaster Sculpture from the Victoria and Albert Museum," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Society of the Four Arts, Palm Beach, FL, from on or about December 2, 2010, until on or about January 16, 2011; at Bowdoin College Museum of Art, Brunswick, ME, from on or about February 5 until on or about May 15, 2011; at Tyler Museum of Art, Tyler, TX, from on or about September 3 until on or about November 13, 2011; at Princeton University Art Museum, Princeton, NJ, from on or about December 3, 2011, until on or about February 12, 2012; at Kalamazoo Institute of Arts, Kalamazoo, MI, from on or about March 3, until on or about May 13, 2012; and at Museum of Art,

Brigham Young University, Provo, UT, from on or about June 2 to on or about November 11, 2012, and at possible additional exhibitions or venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (*telephone:* 202/632–6473). The address is U.S. Department of State, SA–5, L/PD, Fifth Floor, Washington, DC 20522–0505.

Dated: October 21, 2010.

Ann Stock,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2010–27298 Filed 10–27–10; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 7169]

U.S. Department of State Advisory Committee on Private International Law (ACPIL): Online Dispute Resolution (ODR) Study Group

The Department of State, Office of Legal Adviser, Office of Private International Law would like to give notice of a public meeting to discuss upcoming work in UNCITRAL on the development of legal instruments regarding online dispute resolution for resolving both business to business (B2B) and business to consumer (B2C) disputes, as well as the U.S. ODR initiative pending in the OAS through the Seventh Inter-American Specialized Conference on Private International Law (CIDIP–VII). The meeting of the ODR Study Group will take place on Monday, November 22, 2010 from 10 a.m. to 12:30 p.m. EST at the Department of State, Office of Private International Law, 1800 N. Kent Street, Suite 4095, Arlington, VA. This is not a meeting of the full Advisory Committee but rather a meeting of one of its study groups.

The meeting of the new UNCITRAL working group on ODR will take place December 13–17 in Vienna. *See* the following link for the annotated provisional agenda for that meeting: *http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html.*

Please see the following link for the report on the UNCITRAL colloquium on ODR held last spring in Vienna. The relevant report is number A/CN.9/707: *http://www.uncitral.org/uncitral/commission/sessions/43rd.html.*

You can also use the following link for the U.S. ODR initiative pending in the OAS for CIDIP–VII: *http://www.oas.org/dil/esp/CIDIP-VII_doc_trabajo_gt_proteccion_consumidor_anexo_A__Borrador_Ley_Marco_Cooperativo_Modelo_Solucion_Electro.pdf.* This initiative provides for electronic resolution of cross-border B2C e-commerce contract disputes on the basis of a state-sponsored cooperative framework and model rules.

Time and Place: The public meeting of the ODR Study Group will take place on Monday, November 22, 2010 from 10 a.m. to 12:30 p.m. EST at the Department of State, Office of Private International Law, 1800 N. Kent Street, Suite 4095, Arlington, VA (Rosslyn). If you are unable to attend the public meeting and would like to participate from a remote location, teleconferencing will be available.

Public Participation: This study group meeting is open to the public, subject to the capacity of the meeting room. Access to the meeting building is controlled; persons wishing to attend should contact Trisha Smeltzer or Niesha Toms of the Department of State Legal Adviser's Office at *SmeltzerTK@state.gov* or *TomsNN@state.gov* and provide your name, affiliation, e-mail address, and mailing address to get admission into the meeting. Persons who cannot attend but who wish to comment are welcome to do so by e-mail to Michael Dennis at *DennisMJ@state.gov* or Hugh Stevenson at *hstevenson@ftc.gov*. A member of the public needing reasonable accommodation should advise those same contacts not later than November 15th. Requests made after that date will be considered, but might not be able to be fulfilled. If you are unable to attend the public meeting and you would like to participate by teleconferencing, please contact Tricia Smeltzer or Niesha Toms at 703–812–2382 to receive the conference call-in number and the relevant information.

Dated: October 13, 2010.

Keith Loken,

Assistant Legal Adviser, Office of Private International Law, Office of the Legal Adviser, Department of State.

[FR Doc. 2010–27297 Filed 10–27–10; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF TRANSPORTATION

ITS Joint Program Office; IntelliDrive[SM] Mobility and Environment Workshop; Notice of Workshop

AGENCY: Research and Innovative Technology Administration, U.S. Department of Transportation.

ACTION: Notice.

The U.S. Department of Transportation ITS Joint Program Office (ITS JPO) will host a free two-day public workshop to discuss the IntelliDrive[SM] Real-Time Data Capture and Management and Dynamic Mobility Applications (DMA) research programs on November 30 and December 1, 2010 at the George Mason University Arlington Campus. The goal of this listening session is to inform and communicate with stakeholders interested in the data capture and dynamic mobility components of the IntelliDrive program. IntelliDrive is a multimodal research initiative that is based on wireless Vehicle to Vehicle, (V2V), Vehicle to Infrastructure (V2I) communications which will improve traffic safety and mobility while helping the environment.

The public meeting will feature background on the IntelliDrive Real-Time Data Capture and Management and DMA programs; information about the IntelliDrive program's concepts, organization, schedule, projects, procurements, and products; and how the IntelliDrive program plans to engage stakeholders in the future. Additional discussions will include cross-cutting policy issues; details of the IntelliDrive program's open data environment and its open source mobility applications; results of a recent request for information where stakeholders submitted the top dynamic mobility application concepts; information about upcoming procurements and other opportunities to participate in the development of IntelliDrive; and an opportunity to discuss how improved mobility and efficient travel can support the environment and mitigate pollution.

Please contact Nicole Oliphant at *noliphant@itsa.org* by November 26, 2010 to complete your free registration. Additional information, including meeting times and agenda details may be found at the ITS JPO Web site: *http://www.its.dot.gov/press/announcement/mobility_workshop.htm.*

Issued in Washington, DC, on the 21st day of October 2010.

John Augustine,

Managing Director, ITS Joint Program Office.

[FR Doc. 2010–27256 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–HY–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35434]

HC Railroad, LLC—Acquisition and Operation Exemption—Honey Creek Railroad, Inc.

HC Railroad, LLC (HC), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire from the Honey Creek Railroad (HCR), and to operate 6.4 miles of HCR's rail line, extending from milepost 17.4 to milepost 23.8,[1] in Rush County, Ind.[2]

The transaction is expected to be consummated on or after November 11, 2010 (30 days after the exemption was filed).

HC certifies that its projected annual revenues as a result of this transaction will not result in HC becoming a Class II or Class I rail carrier. HC further certifies that its projected annual revenues upon becoming a Class III carrier will not exceed $5 million.

If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than November 4, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35434, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Andrew P. Goldstein, McCarthy, Sweeney & Harkaway, P.C., 1825 K Street, NW., Suite 700, Washington, DC 20006.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: October 25, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2010–27270 Filed 10–27–10; 8:45 am]

BILLING CODE 4915–01–P

[1] The line connects with CSX Transportation at Rushville, Ind., near milepost 23.8.

[2] HC states that the subject trackage only serves one shipper, Morristown Grain Company, Inc., which will be separately purchased by an affiliate of HC.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collections and their expected burden. The **Federal Register** Notice with a 60-day comment period was published on July 16, 2010 (75 FR 41565).

DATES: Comments must be submitted on or before November 29, 2010.

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance (NVS–223), National Highway Traffic Safety Administration, West Building—4th Floor—Room W43–481, 1200 New Jersey Avenue, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

National Highway Traffic Safety Administration

Title: Importation of Vehicles and Equipment Subject to the Federal Motor Vehicle Safety, Bumper, and Theft Prevention Standards.

OMB Number: 2127–0002.

Type of Request: Extension of a Currently Approved Collection.

Abstract: The National Highway Traffic Safety Administration (NHTSA) has requested OMB to extend that agency's approval of the information collection that is incident to NHTSA's administration of the regulations at 49 CFR parts 591, 592, and 593 that govern the importation of motor vehicles and motor vehicle equipment. The information collection includes declarations that are filed (on the HS–7 Declaration form) with U.S. Customs and Border Protection (CBP) upon the importation of motor vehicles or motor vehicle equipment that is subject to the Federal motor vehicle safety, bumper, and theft prevention standards administered by NHTSA. The information collection also includes the Department of Transportation (DOT) conformance bond that is furnished to CBP (on form HS–474) for each motor vehicle offered for importation that does not conform to all applicable Federal motor vehicle safety standards (FMVSS). The bond ensures that such vehicles are brought into conformity with those standards within 120 days from the date of entry or are exported from, or abandoned to, the United States. The information collection also includes paperwork that must be submitted to NHTSA and in some instances retained by registered importers (RIs) of motor vehicles that were not originally manufactured to comply with all applicable FMVSS. These items include information that a person or business entity must submit to NHTSA to be registered as an RI and to retain that status. The paperwork also includes the statement of conformity that an RI must submit to NHTSA following the completion of conformance modifications on an imported nonconforming vehicle to obtain release of the DOT conformance bond furnished for the vehicle at the time of entry. Also included is the petition that an RI or manufacturer may submit to NHTSA for the agency to decide that a vehicle that was not originally manufactured to comply with all applicable FMVSS is capable of being modified to conform to those standards and is therefore eligible for importation under 49 U.S.C. 30141. The information collection also includes applications that are filed with NHTSA for permission to import nonconforming vehicles for purposes of research, investigations, demonstrations, training, competitive racing events, and show or display, as well as applications requesting the agency to recognize vehicles manufactured for racing purposes as being qualified to be imported as vehicles that were not primarily manufactured for use on public roads, precluding the need for those vehicles to comply with the FMVSS. This information collection is necessary to ensure that motor vehicles and motor vehicle equipment subject to the Federal motor vehicle safety, bumper, and theft prevention standards are lawfully imported into the United States and that RIs and applicants for RI status are capable of meeting their obligations under the statutes and regulations governing the importation of nonconforming vehicles.

Affected Public: Individuals and commercial entities that import motor vehicles or motor vehicle equipment subject to the FMVSS and vehicles that are not primarily manufactured for use on public roads, as well as applicants for RI status and existing RIs.

Estimated Total Annual Burden: 40,764 hours; $1,591,243.

ADDRESSES: Send comments, within 30 days, to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: NHTSA Desk Officer.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

A Comment to OMB is most effective if OMB receives it within 30 days of publication.

Issued on October 18, 2010.

Daniel C. Smith,

Associate Administrator for Enforcement.

[FR Doc. 2010–27239 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Aviation Medical Examiner Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The collection of information is for the purpose of obtaining essential information concerning the applicants' professional and personal qualifications. The FAA uses the information to screen and select the designees who serve as aviation medical examiners.

DATES: Written comments should be submitted by December 27, 2010.

FOR FURTHER INFORMATION CONTACT: Carla Scott on (202) 267–9895, or by e-mail at: *Carla.Scott@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0604.

Title: Aviation Medical Examiner Program.

Form Numbers: FAA Form 8520–2.

Type of Review: Renewal of an information collection.

Background: The collection of information is currently accomplished by use of FAA Form 8520–2, Aviation Medical Examiner Designation Application. The information is necessary to determine the qualifications of those physicians applying to become aviation medical examiners. The information is also used to develop the AME directories used by approximately 620,000 airmen who must undergo periodic examinations by AMEs in order to obtain medical certificates.

Respondents: Approximately 450 aviation medical examiner applicants.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 30 minutes.

Estimated Total Annual Burden: 225 hours.

ADDRESSES: Send comments to the FAA at the following address: Ms. Carla Scott, Room 712, Federal Aviation Administration, IT Enterprises Business Services Division, AES–200, 800 Independence Ave., SW., Washington, DC 20591.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on October 21, 2010.

Carla Scott,

FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2010–27255 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Medical Standards and Certification

AGENCY: Federal Aviation Administration (FAA), DOT

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The information collected is used to determine if applicants are medically qualified to perform the duties associated with the class of airman medical certificate sought.

DATES: Written comments should be submitted by December 27, 2010.

FOR FURTHER INFORMATION CONTACT: Carla Scott on (202) 267–9895, or by e-mail at: *Carla.Scott@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0034.

Title: Medical Standards and Certification.

Form Numbers: FAA forms 8500–7, 8500–8, 8500–14, 8500–20.

Type of Review: Renewal of an information collection.

Background: The Secretary of Transportation collects this information under the authority of 49 U.S.C. 40113; 44701; 44510; 44702; 44703; 44709; 45303; and 80111. Airman medical certification program is implemented by Title 14 Code of Federal Regulations (CFR) parts 61 and 67 (14 CFR parts 61 and 67). Using four forms to collect information, the Federal Aviation Administration (FAA) determines if applicants are medically qualified to perform the duties associated with the class of airman medical certificate sought.

Respondents: Approximately 380,000 applicants for airman medical certificates.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 1.5 hours.

Estimated Total Annual Burden: 573,076 hours.

ADDRESSES: Send comments to the FAA at the following address: Ms. Carla Scott, Room 712, Federal Aviation Administration, IT Enterprises Business Services Division, AES–200, 800 Independence Ave., SW., Washington, DC 20591.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be

minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on October 21, 2010.

Carla Scott,

FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2010–27262 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Seventh Meeting: RTCA Special Committee 223: Airport Surface Wireless Communications

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

ACTION: Notice of RTCA Special Committee 223: Airport Surface Wireless Communications meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 223: Airport Surface Wireless Communications.

DATES: The meeting will be held November 16–17, 2010 from 9 a.m.–5 p.m.

ADDRESSES: The meeting will be held at RTCA Inc., 1828 L Street, NW., Suite 805, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a RTCA Special Committee 223: Airport Surface Wireless Communications meeting.

Agenda

Tuesday, November 16, 2010

- Tuesday Morning
- Welcome, Introductions, Administrative Remarks by Special Committee Leadership
- Designated Federal Official (DFO): Mr. Brent Phillips
- Co-Chair: Mr. Aloke Roy, Honeywell International
- Co-Chair: Mr. Ward Hall, ITT Corporation
- Review/Approve prior Plenary minutes and action item status
- AeroMACS Profile Working Group Status
- AeroMACS User Services and Applications Ad-Hoc Working Group Status
- Introduction of MOPS Working group leader
- Technical Presentations
- Tuesday Afternoon
- Technical Presentations (continued)
- Form MOPS Working Group
- Profiles WG Breakout Session

Wednesday, November 17, 2010

- Wednesday Morning—User Services and Applications (USAS) Breakout Session
- User Services and Applications Definition
- Wednesday Afternoon—Reconvene Plenary
- Profiles WG Status Report and Plenary Guidance
- USAS WG Status Report and Plenary Guidance
- Establish Agenda, Date and Place for the next plenary meeting
- Review of Meeting summary report
- Adjourn—Expected by 3 p.m. on November 17th

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on October 25, 2010.

Kathy L. Hitt,

RTCA Advisory Committee.

[FR Doc. 2010–27314 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–1998–3637; FMCSA–1999–6156; FMCSA–2000–7006; FMCSA–2000–7165; FMCSA–2000–8203; FMCSA–2002–12294; FMCSA–2004–18885; FMCSA–2007–27897; FMCSA–2008–0106; FMCSA–2008–0266]

Qualification of Drivers; Exemption Applications; Vision

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

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 13 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to, or greater than, the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective November 9, 2010. Comments must be received on or before November 29, 2010.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–1998–3637; FMCSA–1999–6156; FMCSA–2000–7006; FMCSA–2000–7165; FMCSA–2000–8203; FMCSA–2002–12294; FMCSA–2004–18885; FMCSA–2007–27897; FMCSA–2008–0106; FMCSA–2008–0266, using any of the following methods.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement

page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 13 individuals who have requested renewal of their exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 13 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Jack E. Benjamin
Todd A. Chapman
Gerald L. Culverwell
Richard B. Eckert
Gary R. Evans
Harlan L. Gunter
Steven H. Heidorn
Danny E. Hillier
Gary L. Killian
Elvis E. Rogers, Jr.
Gary R. Setters
Jimmy E. Settle
Hubert Whittenburg

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year, (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 13 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (63 FR 30285; 63 FR 196; 64 FR 54948; 65 FR 159; 67 67234; 69 FR 62741; 71 FR 62147; 73 FR 74565; 65 FR 20245; 65 FR 57230; 67 FR 57266; 67 FR 67234; 65 FR 33406; 65 FR 57234; 65 FR 66293; 67 FR 46016; 67 FR 57267; 69 FR 53493; 69 FR 62742; 71 FR 62148; 72 FR 39879; 72 FR 52419; 73 FR 75194; 73 FR 48273; 73 FR 51689; 73 FR 63047). Each of these 13 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the standard specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption standards. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by November 29, 2010.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 13 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: October 22, 2010.

Charles A. Horan, III,

Office Director, Bus and Truck Standards and Operation.

[FR Doc. 2010–27293 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2000–7165; FMCSA–2004–17984; FMCSA–2006–24783]

Qualification of Drivers; Exemption Renewals; Vision

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

ACTION: Notice of final disposition.

SUMMARY: FMCSA previously announced its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 10 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemptions will provide a level of safety that will be equivalent to, or greater than, the level of safety maintained, Director, Medical Programs, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, without the exemptions for these commercial motor vehicle (CMV) drivers.

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The statute also allows the Agency to renew exemptions at the end of the 2-year period. The comment period ended on October 18, 2010 (75 FR 57105).

Discussion of Comments

FMCSA received no comments in this proceeding.

Conclusion

The Agency has not received any adverse evidence on any of these drivers that indicates that safety is being compromised. Based upon its evaluation of the 10 renewal applications, FMCSA renews the Federal vision exemptions for Robert L. Aurandt, Harry R. Brewer, Joseph H. Fowler, Kelly R. Konesky, Gregory T. Lingard, Hollis J. Martin, Kevin C. Palmer, Charles O. Rhodes, Gordon G. Roth, and Daniel A. Sohn.

In accordance with 49 U.S.C. 31136(e) and 31315, each renewal exemption will be valid for 2 years unless revoked earlier by FMCSA. The exemption will be revoked if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136 and 31315.

Issued on: October 22, 2010.

Charles A. Horan III,

Office Director, Bus and Truck, Standards and Operation.

[FR Doc. 2010–27292 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2010–0124]

Pipeline Safety: Request for Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA); DOT.

ACTION: Notice.

SUMMARY: Pursuant to the Federal Pipeline Safety Laws, PHMSA is publishing this notice of a special permit request we have received from Gulf South Pipeline Company, LP, a natural gas pipeline operator, seeking relief from compliance with certain requirements in the Federal Pipeline Safety Regulations. This notice seeks public comments on this request, including comments on any safety or environmental impacts. At the conclusion of the 30-day comment period, PHMSA will evaluate the request and determine whether to grant or deny a special permit.

DATES: Submit any comments regarding this special permit request by November 29, 2010.

ADDRESSES: Comments should reference the docket number for this specific special permit request and may be submitted in the following ways:

- *E-Gov Web Site: http://www.Regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System: 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:* Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: You should identify the docket number for the special permit request you are commenting on at the beginning of your comments. If you submit your comments by mail, please submit two copies. To receive confirmation that PHMSA has received your comments, please include a self-addressed stamped postcard. Internet users may submit comments at *http://www.Regulations.gov.*

Note: Comments are posted without changes or edits to *http://www.Regulations.gov*, including any personal information provided. There is a privacy statement published on *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT:

General: Dana Register by telephone at 202–366–0490; or, e-mail at *dana.register@dot.gov*.

Technical: Ken Lee by telephone at 202–366–2694; or, e-mail at *kenneth.lee@dot.gov*.

SUPPLEMENTARY INFORMATION:

PHMSA has received this request for a special permit from Gulf South Pipeline Company, LP (GSPC) seeking relief from compliance with certain pipeline safety regulations. GSPC's request includes a technical analysis. This request can be found at *http://www.Regulations.gov*, under docket number PHMSA–2010–0124. We invite interested persons to participate by reviewing this special permit request at *http://www.Regulations.gov*, and by submitting written comments, data or other views. Please include any comments on potential environmental impacts that may result if this special permit is granted.

Before acting on this special permit request, PHMSA will evaluate all comments received on or before the comments closing date. Comments will be evaluated after this date if it is possible to do so without incurring additional expense or delay. PHMSA will consider each relevant comment we receive in making our decision to grant or deny a request.

PHMSA has received the following special permit request:

Docket No.	Requester	Regulation	Nature of special permit
PHMSA–2010–0124	Gulf South Pipeline Company, LP.	49 CFR 192.611	To authorize GSPC to engage in an alternative approach to conduct risk control activities based on Integrity Management Program principles rather than lowering the Maximum Allowable Operating Pressure (MAOP) or replacing the subject pipe segment. This application is for three segments of GSPC Line TPL–880 in Mobile County, Alabama. These segments have changed from Class 1 and 2 locations to Class 3. The pipeline is 30-inches in diameter and has a MAOP of 1,073 psig. The segments that have changed Class Locations are 2,763 feet in length. The three segments are located at Station Number 318+78 ft. to Station Number 322+14 ft., Station Number 435+63 ft. to Station Number 454+65 ft., and Station Number 455+85 ft. to Station Number 461+08 ft.

Authority: 49 U.S.C. 60118 (c)(1) and 49 CFR 1.53.

Issued in Washington, DC on October 20, 2010.

Linda Daugherty,

Deputy Associate Administrator for Policy and Programs.

[FR Doc. 2010–27238 Filed 10–27–10; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Determination of Foreign Exchange Swaps and Forwards

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Commodity Exchange Act ("CEA"), as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"),[1] permits the Secretary of the Treasury to issue a written determination exempting foreign exchange swaps, foreign exchange forwards, or both, from the definition of a "swap" under the CEA. The Secretary has made no determination whether an exemption is warranted. Although not required under the Dodd-Frank Act, the Department of the Treasury invites comment on whether such an exemption for foreign exchange swaps, foreign exchange forwards, or both, is warranted and on the application of the factors that the Secretary must consider in making a determination regarding these instruments.

DATES: Written comments must be received on or before November 29, 2010, to be assured of consideration.

ADDRESSES: *Submission of Comments:* Please submit comments electronically through the Federal eRulemaking Portal—"Regulations.gov." Go to *http://www.regulations.gov* to submit or view public comments. The "How to Use this Site" and "User Tips" link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period. Please include your name, affiliation, address, e-mail address and telephone number(s) in your comment. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Office of Financial Institutions Policy, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, (202) 622–2730, *ofip@do.treas.gov*.

SUPPLEMENTARY INFORMATION: Section 721 of the Dodd-Frank Act[2] amends section 1a of the CEA which, in relevant part, defines the term "swap" under the CEA. Section 1a(47)(E) of the CEA authorizes the Secretary of the Treasury to make a written determination that "foreign exchange swaps"[3] or "foreign exchange forwards,"[4] or both, should not be regulated as swaps under the CEA,[5] as amended by the Dodd-Frank Act, and are not structured to evade the Dodd-Frank Act in violation of any rule promulgated by the Commodity Futures Trading Commission ("CFTC").[6]

In making the determination whether to exempt foreign exchange swaps and/or foreign exchange forwards,[7] the Secretary of the Treasury must consider the following factors:

(1) Whether the required trading and clearing of foreign exchange swaps and foreign exchange forwards would create systemic risk, lower transparency, or threaten the financial stability of the United States;

(2) Whether foreign exchange swaps and foreign exchange forwards are already subject to a regulatory scheme that is materially comparable to that established by the CEA for other classes of swaps;

(3) The extent to which bank regulators of participants in the foreign exchange market provide adequate supervision, including capital and margin requirements;

(4) The extent of adequate payment and settlement systems; and

(5) The use of a potential exemption of foreign exchange swaps and foreign exchange forwards to evade otherwise applicable regulatory requirements.[8]

The Treasury Department is soliciting comments on the above factors, and any relevant information that may bear on the regulation of foreign exchange swaps and foreign exchange forwards as "swaps" under the CEA, to assist in the Secretary's consideration of whether to issue a determination under section 1a(47) of the CEA.

In addition, the Treasury Department is particularly interested in comments on the questions set forth below:

(1) Are foreign exchange swaps and/or foreign exchange forwards qualitatively different from other classes of swaps in a way that makes them ill-suited for regulation as "swaps" under the CEA?[9] Are there similarities

[1] Public Law 111–203, 124 Stat. 1376 (2010).

[2] Public Law 111–203, 124 Stat. 1376 (2010).

[3] 7 U.S.C. 1a(25) ("a transaction that solely involves—(A) an exchange of 2 different currencies on a specific date at a fixed rate that is agreed upon on the inception of the contract covering the exchange; and (B) a reverse exchange of the 2 currencies described in subparagraph (A) at a later date and at a fixed rate that is agreed upon on the inception of the contract covering the exchange.").

[4] 7 U.S.C. 1a(24) ("a transaction that solely involves the exchange of 2 different currencies on a specific future date at a fixed rate agreed upon on the inception of the contract covering the exchange.").

[5] 7 U.S.C. 1(a)(47)(E)(i)(I).

[6] 7 U.S.C. 1(a)(47)(E)(i)(II).

[7] Notwithstanding any such determination by the Secretary of the Treasury, all foreign exchange swaps and forwards must be reported to a swap data repository, and swap dealers and major swap participants that are parties to foreign exchange swaps and forwards transactions must conform to business conduct standards pursuant to the requirements of the Dodd-Frank Act and implementing regulations thereunder.

[8] 7 U.S.C. 1b(a).

[9] 7 U.S.C. 1b(b)(1).

between foreign exchange swaps and/or foreign exchange forwards and other products not defined as swaps under the CEA?

(2) Are there objective differences between swaps and foreign exchange swaps and/or foreign exchange forwards that warrant an exemption for either or both of these instruments? [10]

(3) Are there objective differences between long-dated and short-dated foreign exchange forwards and swaps such that one class may be less suited to regulation as "swaps" under the CEA than the other? Is the same true for dealer to dealer transactions versus transactions where one counterparty is a non-dealer? Similarly, does one or more of the above-referenced, five statutory factors support the application of certain requirements set forth in the CEA, but not others (*e.g.,* centralized clearing, but not exchange trading), to foreign exchange swaps and/or foreign exchange forwards?

(4) What are the primary risks in the foreign exchange swaps and forwards market, how significant are these risks, and how are these risks currently managed by market participants? Would centralized clearing and exchange trading address these risks? To what extent do current payment-versus-payment settlement arrangements address settlement risk?

(5) To what extent is counterparty credit risk a significant concern in the foreign exchange swaps and forwards markets? If so, to what extent do current market practices (including netting and bilateral collateral support arrangements) mitigate these risks? What evidence, particularly during the period between 2007 and present, illustrate how current market practices have either addressed, or failed to respond, to these risks?

(6) Are there ways to mitigate the risks posed by the trading of foreign exchange swaps or foreign exchange forwards without subjecting these instruments to regulation under the CEA?

(7) Are there existing safeguards or systems that should be enhanced in order to protect against systemic or other risks in the foreign exchange swaps and forwards markets? What considerations are relevant to the application of Title VIII of the Dodd-Frank Act to the foreign exchange swaps and forwards markets, specifically to enhance supervision, strengthen risk management, and lower systemic risk?

(8) Given that the Dodd-Frank Act requires all foreign exchange swaps and forwards be reported to a swap data repository, what is the current standard or practice in the foreign exchange market for reporting trades?

(9) What would be the likely effects of mandatory U.S. clearing of foreign exchange swaps and/or forwards on foreign exchange market liquidity in the U.S. dollar? What would be the impact on the operations of U.S. end-users and U.S. dealers?

(10) What other factors should the Secretary of the Treasury consider in determining whether to exempt foreign exchange swaps and/or forwards pursuant to section 1a(47) of the CEA?

In addition, commenters are encouraged to submit supporting materials, including relevant transactional data, that would assist the Secretary's consideration of the issues relating to an exemption for foreign exchange swaps or foreign exchange forwards, or both, under section 1a(47) of the CEA.

Dated: October 19, 2010.

Mary J. Miller,

Assistant Secretary for Financial Markets.

[FR Doc. 2010–27274 Filed 10–27–10; 8:45 am]

BILLING CODE 4810–25–P

[10] 7 U.S.C. 1b(b)(2).

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 13551

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 13551, Application to Participate in the IRS Acceptance Agent Program.

DATES: Written comments should be received on or before December 27, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to Gerald Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe, (202) 622–3179, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Application to Participate in the IRS Acceptance Agent Program.

OMB Number: 1545–1896.

Form Number: 13551.

Abstract: Form 13551 is used to gather information to determine applicant's eligibility in the Acceptance Agent Program.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit organizations, not-for-profit institutions, and Federal, state, local or tribal government.

Estimated Number of Respondents: 12,825.

Estimated Time per Respondent: 30 minutes.

Estimated Total Annual Burden Hours: 6,413.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 21, 2010.

Gerald Shields,

IRS Supervisory Tax Analyst.

[FR Doc. 2010–27223 Filed 10–27–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form CT–2

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form CT–2, Employee Representative's Quarterly Railroad Tax Return.

DATES: Written comments should be received on or before December 27, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to Gerald Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe, (202) 622–3179, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Employee Representative's Quarterly Railroad Tax Return.

OMB Number: 1545–0002.

Form Number: Form CT–2.

Abstract: Employee representatives file Form CT–2 quarterly to report compensation on which railroad retirement taxes are due. The IRS uses this information to ensure that employee representatives have paid the correct tax. Form CT–2 also transmits the tax payment.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 112.

Estimated Time per Respondent: 1 hr., 8 min.

Estimated Total Annual Burden Hours: 127.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 21, 2010.

Gerald Shields,

IRS Supervisory Tax Analyst.

[FR Doc. 2010–27224 Filed 10–27–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8945

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning the PTIN Supplemental Application For U.S. Citizens Without A Social Security Number Due To Conscientious Reasons.

DATES: Written comments should be received on or before December 27, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to Gerald Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe, (202) 622–3179, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: PTIN Supplemental Application For U.S. Citizens Without A Social Security Number Due To Conscientious Reasons.

OMB Number: 1545–2188.

Form Number: 8945.

Abstract: Most individuals applying for a Preparer Tax Identification Number (PTIN) will have a social security number, which will be used to help establish their identity. However, there exists a population of U.S. residents that are religious objectors and do not have social security numbers. Form 8945 is being created to assist that population in establishing their identity while applying for a PTIN.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 500.

Estimated Time per Respondent: 5 hrs., 43 min.

Estimated Total Annual Burden Hours: 2,860.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be

retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 21, 2010.

Gerald Shields,

IRS Supervisory Tax Analyst.

[FR Doc. 2010–27221 Filed 10–27–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–104924–98]

Proposed Collection; Comment Request for Regulation Project REG–104924–98

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing notice of proposed rulemaking, REG–104924–98, Mark-to-Market Accounting for Dealers in Commodities and Traders in Securities or Commodities (§§ 1.475(e)–1 and 1.475 (f)–2).

DATES: Written comments should be received on or before December 27, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to Gerald Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Elaine Christophe, (202) 622–3179, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Elaine.H.Christophe@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Mark-to-Market Accounting for Dealers in Commodities and Traders in Securities or Commodities.

OMB Number: 1545–1640.

Regulation Project Number: REG–104924–98.

Abstract: The collection of information in this proposed regulation is required by the Internal Revenue Service to determine whether an exemption from mark-to-market treatment is properly claimed. This information will be used to make that determination upon audit of taxpayers' books and records.

Current Actions: There is no change to this existing proposed regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organization and Individuals.

Estimated Number of Recordkeepers: 1,000.

Estimated Time per Recordkeeper: 1 hour.

Estimated Total Annual Burden Recordkeeping Hours: 1,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 21, 2010.

Gerald Shields,

IRS Supervisory Tax Analyst.

[FR Doc. 2010–27222 Filed 10–27–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8946

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning the PTIN Supplemental Application For Foreign Persons Without a Social Security Number.

DATES: Written comments should be received on or before December 27, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to Gerald Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe, (202) 622–3179, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington DC 20224, or through the Internet, at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: PTIN Supplemental Application For Foreign Persons Without a Social Security Number.

OMB Number: 1545–2189.

Form Number: 8946.

Abstract: Most individuals applying for a Preparer Tax Identification Number (PTIN) will have a social security number, which will be used to help establish their identity. However, paid preparers that are nonresident aliens and cannot get a social security number will need to establish their identity prior to getting a PTIN. Form 8946 is being created to assist that population in establishing their identity while applying for a PTIN.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 20,000.

Estimated Time per Respondent: 5 hrs., 28 min.

Estimated Total Annual Burden Hours: 109,600.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 21, 2010.

Gerald Shields,

IRS Supervisory Tax Analyst.

[FR Doc. 2010–27226 Filed 10–27–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Foreign Based Importer Non-Filers Questionnaire

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning the Foreign Based Importer Non-Filers Questionnaire.

DATES: Written comments should be received on or before December 27, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to Gerald Shields, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Elaine Christophe, (202) 622–3179, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Elaine.H.Christophe@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Foreign Based Importer Non-Filers Questionnaire.

OMB Number: 1545–2084.

Form Number: N/A.

Abstract: Foreign corporations are subject to U.S. Income Tax on income that is effectively connected with a U.S. trade or business and are required to file a U.S. Income tax return reporting taxable income. However, based on the public information available, it is not readily determinable without further research that U.S. Income Tax compliance has been fulfilled. Therefore, IDRS will be utilized to determine if filing compliance has been met. This contact letter is sent to taxpayers who appear to have a U.S. trade or business and have not filed a U.S. Income Tax return or filed a protective 1120–F.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 30.

Estimated Time per Respondent: 1 hour.

Estimated Total Annual Burden Hours: 30.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 21, 2010.

Gerald Shields,

IRS Supervisory Tax Analyst.

[FR Doc. 2010–27225 Filed 10–27–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Request for Applications for the IRS Advisory Committee on Tax Exempt and Government Entities

AGENCY: Internal Revenue Service (IRS); Tax Exempt and Government Entities Division, Treasury.

ACTION: Notice and request for applicants or nominations.

SUMMARY: The IRS is requesting applications for membership to serve on the Advisory Committee on Tax Exempt and Government Entities (ACT). Applications will be accepted for the following vacancies, which will occur in June 2011: Two (2) employee plans; two (2) exempt organizations; two (2) Indian tribal governments; one (1) tax exempt bonds; and three (3) federal, state and local governments. To ensure appropriate balance of membership, final selection from qualified candidates will be determined based on experience, qualifications, and other expertise. Members of the ACT may not be federally registered lobbyists.

DATES: Written applications or nominations must be received on or before December 1, 2010.

ADDRESSES: Send all applications and nominations to: Steven J. Pyrek; Director TE/GE Communications and Liaison; 1111 Constitution Ave., NW.,—SE:T:CL, Penn Bldg; Washington, DC 20224; FAX: (202) 283–9956 (not a toll-free number); e-mail: *steve.j.pyrek@irs.gov.*

Application: Applicants may use the ACT Application Form on the IRS Web site (IRS.gov) or may send an application by letter with the following information: Name; Other Name(s) Used and Date(s) (required for FBI check); Date of Birth (required for FBI check); City and State of Birth (required for FBI Check); Current Address; Telephone and Fax Numbers; and e-mail address, if any. Applications should also describe and document the proposed member's qualifications for membership on the ACT. Applications should also specify the vacancy for with they wish to be considered.

FOR FURTHER INFORMATION CONTACT: Steven Pyrek (202) 283–9966 (not a toll-free number) or by e-mail at *steve.j.pyrek@irs.gov.*

SUPPLEMENTARY INFORMATION: The Advisory Committee on Tax Exempt and Government Entities (ACT), governed by the Federal Advisory Committee Act, Public Law 92–463, is an organized public forum for discussion of relevant employee plans, exempt organizations, tax-exempt bonds, and federal, state, local, and Indian tribal government issues between officials of the IRS and representatives of the above communities. The ACT also enables the IRS to receive regular input with respect to the development and implementation of IRS policy concerning these communities. ACT members present the interested public's observations about current or proposed IRS policies, programs, and procedures, as well as suggest improvements. ACT members shall be appointed by the Department of the Treasury and shall serve for two-year terms. Terms can be extended for an additional year. ACT members will not be paid for their time or services. ACT members will be reimbursed for their travel-related expenses to attend working sessions and public meetings, in accordance with 5 U.S.C. 5703.

The Department of the Treasury invites those individuals, organizations, and groups affiliated with employee plans, exempt organizations, tax exempt bonds, and federal, state, local and Indian tribal governments, to nominate individuals for membership on the ACT. Nominations should describe and document the proposed member's qualifications for ACT membership, including the nominee's past or current affiliations and dealings with the particular community or segment of the community that he or she wishes to represent (such as, employee plans). Nominations should also specify the vacancy for which they wish to be considered. The Department of the Treasury seeks a diverse group of members representing a broad spectrum of persons experienced in employee plans, exempt organizations, tax-exempt bonds, and federal, state, local and Indian tribal governments.

Nominees must go through a clearance process before selection by the Department of the Treasury. In accordance with the Department of the Treasury Directive 21–03, the clearance process includes, among other things, pre-appointment and annual tax checks, and an FBI criminal and subversive name check, fingerprint check, and security clearance.

Dated: October 22, 2010.

Steven J. Pyrek,

Designated Federal Official, Tax Exempt and Government Entities.

[FR Doc. 2010–27220 Filed 10–27–10; 8:45 am]

BILLING CODE 4830–01–P

Federal Register

Thursday,
October 28, 2010

Part II

Environmental Protection Agency

40 CFR Parts 86 and 98

Mandatory Reporting of Greenhouse Gases; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 86 and 98

[EPA–HQ–OAR–2010–0109; FRL–9213–5]

RIN 2060–A079

Mandatory Reporting of Greenhouse Gases

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is amending specific provisions in the 2009 Final Mandatory Greenhouse Gas Reporting rule to correct certain technical and editorial errors that have been identified since promulgation and to clarify and update certain provisions that have been the subject of questions from reporting entities. These final changes include additional information to better or more fully understand compliance obligations, corrections to data reporting elements so they more closely conform to the information used to perform emission calculations, and other corrections and amendments.

DATES: The final rule amendments are effective on November 29, 2010. The incorporation by reference of certain publications listed in the final rule amendments are approved by the director of the **Federal Register** as of November 29, 2010.

ADDRESSES: EPA has established a docket under Docket ID No. EPA–HQ–OAR–2010–0109 for this action. All documents in the docket are listed on 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, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at EPA's Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER GENERAL INFORMATION CONTACT: Carole Cook, Climate Change Division, Office of Atmospheric Programs (MC–6207J), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* (202) 343–9263; *fax number:* (202) 343–2342; *e-mail address: GHGReportingRule@epa.gov.* For technical information and implementation materials, please go to the Greenhouse Gas Reporting Program Web site *http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.* To submit a question, select Rule Help Center, followed by Contact Us.

SUPPLEMENTARY INFORMATION:

Regulated Entities. The Administrator determined that this action is subject to the provisions of Clean Air Act (CAA) section 307(d). *See* CAA section 307(d)(1)(V) (the provisions of section 307(d) apply to "such other actions as the Administrator may determine"). These are final amendments to existing regulations. These amended regulations affect owners or operators of certain fossil fuel suppliers, direct emitters of greenhouse gases, and manufacturers of highway heavy-duty vehicles. Regulated categories and entities include those listed in Table 1 of this preamble:

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY

Category	NAICS	Examples of affected facilities
Adipic Acid Production	325199	Adipic acid manufacturing facilities.
Cement Production	327310	Portland cement manufacturing plants.
Ferroalloy Production	331112	Ferroalloys manufacturing facilities.
Glass Production	327211	Flat glass manufacturing facilities.
	327213	Glass container manufacturing facilities.
	327212	Other pressed and blown glass and glassware manufacturing facilities.
HCFC–22 Production and HFC–23 Destruction.	325120	Chlorodifluoromethane manufacturing facilities.
Hydrogen Production	325120	Hydrogen manufacturing facilities.
Iron and Steel Production	331111	Integrated iron and steel mills, steel companies, sinter plants, blast furnaces, basic oxygen process furnace shops.
Lime Production	327410	Calcium oxide, calcium hydroxide, dolomitic hydrates manufacturing facilities.
Nitric Acid Production	325311	Nitric acid manufacturing facilities.
Phosphoric Acid Production	325312	Phosphoric acid manufacturing facilities.
Soda Ash Manufacturing	325181	Alkali and chlorine manufacturing facilities.
	212391	Soda ash, natural, mining and/or beneficiation.
Titanium Dioxide Production	325188	Titanium dioxide manufacturing facilities.
Zinc Production	331419	Primary zinc refining facilities.
	331492	Zinc dust reclaiming facilities, recovering from scrap and/or alloying purchased metals.
Municipal Solid Waste Landfills	562212	Solid Waste Landfills.
	221320	Sewage Treatment Facilities.
Suppliers of Coal Based Liquids Fuels	211111	Coal liquefaction at mine sites.
Suppliers of Natural Gas and NGLs	221210	Natural gas distribution facilities.
	211112	Natural gas liquid extraction facilities.

Table 1 of this preamble is not intended to be exhaustive, but rather provides a guide for readers regarding facilities likely to be affected by this action. Table 1 of this preamble lists the types of facilities that EPA is now aware could be potentially affected by the reporting requirements. Other types of facilities than those listed in the table could also be subject to reporting requirements. To determine whether you are affected by this action, you should carefully examine the applicability criteria found in 40 CFR part 98, subpart A or the relevant criteria in the sections related to fossil fuel suppliers, direct emitters of GHGs, and manufacturers of highway heavy-

duty vehicles. If you have questions regarding the applicability of this action to a particular facility, consult the person listed in the preceding **FOR FURTHER GENERAL INFORMATION CONTACT** section.

Judicial Review. Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final rule is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit (the Court) by December 27, 2010. Under CAA section 307(d)(7)(B), only an objection to this final rule that was raised with reasonable specificity during the period for public comment can be raised during judicial review. Section 307(d)(7)(B) of the CAA also provides a mechanism for EPA to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, Environmental Protection Agency, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to the person listed in the preceding **FOR FURTHER GENERAL INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Note, under CAA section 307(b)(2), the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

Acronyms and Abbreviations. The following acronyms and abbreviations are used in this document.

AFPC Association of Fertilizer and Phosphate Chemists
AOD argon-oxygen decarburization
API American Petroleum Institute
ASTM American Society for Testing and Materials
C&D construction and demolition
CAA Clean Air Act
CaO calcium oxide
CBI confidential business information
CEMS continuous emission monitoring system
CFR Code of Federal Regulations
CH_4 methane
CKD cement kiln dust
CO_2 carbon dioxide
DE destruction efficiency
DOC degradable organic carbon
EAF electric arc furnace
EF emission factor
EIA Energy Information Administration
EPA U.S. Environmental Protection Agency
FR **Federal Register**
GHG greenhouse gas
HHV higher heating value
ID identification
kg kilograms
lb pound
LNG liquefied natural gas
LMPs lime manufacturing plants
MCF Methane Correction Factor
MgO magnesium oxide
Mscf thousand standard cubic feet
MSW municipal solid waste
MSWLF municipal solid waste landfill
N_2O nitrous oxide
NAICS North American Industry Classification System
NGLs natural gas liquids
NO_X nitrogen oxides
NTTAA National Technology Transfer and Advancement Act
OMB Office of Management and Budget
QA/QC quality assurance/quality control
RCRA Resource Conservation and Recovery Act
RFA Regulatory Flexibility Act
SBREFA Small Business Regulatory Enforcement Fairness Act
SWDS solid waste disposal site
TSCA Toxic Substances Control Act (TSCA)
U.S. United States
UMRA Unfunded Mandates Reform Act of 1995
VOD vacuum oxygen decarburization

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I. Background

A. How is this preamble organized?

The first section of this preamble contains the basic background information about the origin of these rule amendments. This section also discusses EPA's use of our legal authority under the CAA to collect data under the mandatory GHG reporting rule.

The second section of this preamble describes in detail the rule changes that are being promulgated to correct technical errors, to provide clarification, and to address implementation issues identified by EPA and others. This section also presents a summary and EPA's response to the major public comments submitted on the proposed rule amendments, and significant changes, if any, made since proposal in response to those comments.

Finally, the last (third) section of the preamble discusses the various statutory and executive order requirements applicable to this final rulemaking.

B. Background on This Action

The final Mandatory Reporting of Greenhouse Gases Rule (40 CFR part 98 or Part 98) was signed by EPA Administrator Lisa Jackson on September 22, 2009 and published in the **Federal Register** on October 30, 2009 (74 FR 56260, October 30, 2009). Part 98, which became effective on December 29, 2009, included reporting of greenhouse gas (GHG) information from facilities and suppliers, consistent with the 2008 Consolidated Appropriations Act.[1] These source categories capture approximately 85 percent of U.S. GHG emissions through reporting by direct emitters as well as suppliers of fossil fuels and industrial

[1] Consolidated Appropriations Act, 2008, Public Law 110–161, 121 Stat. 1844, 2128.

gases and manufacturers of mobile sources.

EPA published a notice proposing amendments to Part 98 to, among other things, correct certain technical and editorial errors that have been identified since promulgation and clarify or propose amendments to certain provisions that have been the subject of questions from reporting entities. The proposal was published on June 15, 2010 (75 FR 33950). The public comment period for the proposed rule amendments ended on July 30, 2010. EPA did not receive any requests to hold a public hearing.

In addition to the notice published on June 15, 2010 (75 FR 33950), EPA published a second proposal on August 11, 2010 (75 FR 48744). The second notice proposed to correct certain technical and editorial errors in Part 98 that were identified since promulgation and clarify or propose amendments to certain provisions that were the subject of questions from reporting entities, primarily to subparts not addressed in the June 15, 2010 proposal. The August 11, 2010 proposal complements the proposal published on June 15, 2010.

C. Legal Authority

EPA is promulgating these rule amendments under its existing CAA authority, specifically authorities provided in CAA sections 114 and 208.

As stated in the preamble to the final Part 98 (74 FR 56260), CAA sections 114 and 208 provide EPA broad authority to require the information mandated by this rule because such data will inform and are relevant to EPA's carrying out a wide variety of CAA provisions. As discussed in the preamble to the initial proposed Part 98 (74 FR 16448, April 10, 2009) CAA section 114(a)(1) authorizes the Administrator to require emissions sources, persons subject to the CAA, manufacturers of process or control equipment, and persons whom the Administrator believes may have necessary information to monitor and report emissions and provide such other information the Administrator requests for the purposes of carrying out any provision of the CAA (except for a provision of title II with respect to manufacturers of new motor vehicles or new motor vehicle engines [2]). Section 208 of the CAA provides EPA with similar broad authority regarding the manufacturers of new motor vehicles or new motor vehicle engines, and other persons subject to the requirements of parts A and C of title II. For further information about EPA's legal authority, *see* the preambles to the proposed and final Part 98.[3]

D. How will these amendments apply to 2011 reports?

With two exceptions, we have determined that it is feasible for reporters to implement these changes for the 2010 reporting year because the revisions primarily provide additional clarifications regarding the existing regulatory requirements, generally do not affect the type of information that must be collected and do not substantially affect how emissions are calculated. Our rationale for this determination is explained in the preamble to the proposed rule amendments.[4]

In summary, these amendments, with the two exceptions described below, do not require any additional monitoring or information collection above what was already included in Part 98. Therefore, we have determined that reporters can use the same information that they have been collecting for each subpart to calculate and report GHG emissions for 2010 and submit reports in 2011 under the amended subparts.

The first exception is for reporting CO_2 emissions from certain types of decarburization vessels at iron and steel sources under subpart Q. EPA has determined, based on public comments, that it is necessary to allow a delay in reporting from certain decarburization vessels until the 2011 data collection year (and the subsequent annual GHG emissions reports submitted to EPA by March 31, 2012). The delay in implementation was determined to be necessary because although the 2009 final rule was clear that emissions from argon oxygen-decarburization vessels were required to be reported, the inclusion of other types of decarburization vessels was not clear. A more detailed description of the affected decarburization vessels and our rationale is available in Section II.I of this preamble.

The second exception is related to crude oil reporting requirements in subpart MM. We are providing reporters some flexibility in defining a batch of crude oil for purposes of reporting crude oil data for reporting year 2010. A more detailed description of the type of flexibility we are providing and our rationale is available in Section II.R of this preamble. EPA notes that crude oil data does not impact the CO_2 calculations for 2010 or for any other reporting year.

II. Final Amendments and Responses to Public Comments

We are amending 40 CFR part 86 to appropriately incorporate the regulatory text into the regulations at 40 CFR 86.1844–01.

In 40 CFR Part 98, we are amending various subparts to correct errors in the regulatory language that were identified as a result of working with affected industries to implement the various subparts of Part 98. We are also amending certain rule provisions to provide greater clarity. The amendments to 40 CFR Part 98 include the following types of changes:

- Changes to correct cross references within and between subparts.
- Additional information to better or more fully understand compliance obligations in a specific provision, such as the reference to a standardized method that must be followed.
- Amendments to certain equations to better reflect actual operating conditions.
- Corrections to terms and definitions in certain equations.
- Corrections to data reporting requirements so that they more closely conform to the information used to perform emission calculations.
- Other amendments related to certain issues identified as a result of working with the reporters during rule implementation and outreach.

The final amendments promulgated by this action reflect EPA's consideration of the comments received on the proposal. The major public comments and EPA's responses for each subpart are provided in this preamble. Our responses to additional significant public comments on the proposal are presented in a comment summary and response document available in Docket ID No. EPA–HQ–OAR–2010–0109.

A. Mobile Sources

1. Summary of Final Amendments and Major Changes Since Proposal

Manufacturers of highway heavy-duty vehicles, as well as manufacturers of highway heavy-duty engines, are subject to GHG reporting requirements. EPA inadvertently omitted the regulatory text covering manufacturers of highway heavy-duty vehicles. We are amending 40 CFR part 86 to correct that error by incorporating the appropriate language into the regulations at 40 CFR 86.1844–01.

2. Summary of Comments and Responses

EPA did not receive any comments on the proposed amendments to 40 CFR

[2] Although there are exclusions in CAA section 114(a)(1) regarding certain title II requirements applicable to manufacturers of new motor vehicles and motor vehicle engines, CAA section 208 authorizes the gathering of information related to those areas.

[3] 74 FR 16448 (April 10, 2009) and 74 FR 56260 (October 30, 2009).

[4] 75 FR 33952–33953 (June 15, 2010).

part 86 and is finalizing the amendments as proposed.

B. Subpart A—General Provisions

1. Summary of Final Amendments and Major Changes Since Proposal

We are adding and changing several definitions to subpart A to clarify terms used in other subparts of Part 98. Similarly, we are amending 40 CFR 98.7 (incorporation by reference) to accommodate changes in the standard methods that are allowed by other subparts of Part 98.

We are amending the following definitions in 40 CFR 98.6:

- Carbonate-based mineral.
- Carbonate-based mineral mass fraction.
- Carbonate-based raw material.
- Crude oil.
- Decarburization vessel.
- Gas collection system or landfill gas collection system.
- Mscf.
- Non-crude feedstocks.

We are amending the definitions of "carbonate-based mineral," "carbonate-based mineral mass fraction," and "carbonate-based raw material" in order to include barium carbonate, potassium carbonate, lithium carbonate, and strontium carbonate, because these carbonates are consumed in the glass industry subject to subpart N.

We are amending the definition of "crude oil" in 40 CFR 98.6 so that it is consistent with the definition in the Energy Information Administration's (EIA) *Definitions of Petroleum Products and Other Terms (Revised January 2010)*[5], with one additional provision to accommodate the needs of this program to ensure complete reporting of petroleum products, including the unique circumstances that have been raised in comments. We are adding a crude oil reporting requirement in subpart MM (40 CFR 98.396 (a)(22)) to accommodate this provision.

We are amending the definition of "decarburization vessel" in 40 CFR 98.6 to include vessels that are used to further refine molten steel with the primary intent of reducing the carbon content of the steel.

We are amending the definition of "gas collection system or landfill gas collection system," in 40 CFR 98.6 to clarify that the *passive* vents/flares are not considered part of a landfill gas collection system for purposes of subpart HH, to state that such a system collects gas actively by means of a fan or similar mechanical draft equipment, versus collecting gas passively. Based on a comment received, we are also clarifying that a single landfill may have more than one gas collection system.

We are also amending the definition of "Mscf" in 40 CFR 98.6 to indicate that "Mscf" means *thousand* standard cubic feet.

We are also amending the definition of "non-crude feedstocks" in 40 CFR 98.6 to remove the phrase "as a feedstock" in order to avoid confusion with the definition of "feedstock." Under subpart MM, refiners must calculate annual CO_2 emissions that would result from the complete combustion or oxidation of each non-crude feedstock. Our intention in subpart MM is to capture all petroleum products and natural gas liquids that enter a refinery to be further refined or otherwise used on site. By removing the term "as a feedstock" from the definition of "non-crude feedstocks" we are aligning the definition to the original intent of subpart MM.

We are also incorporating by reference ASTM D6349–09, "Standard Test Method for Determination of Major and Minor Elements in Coal, Coke, and Solid Residues from Combustion of Coal and Coke by Inductively Coupled Plasma—Atomic Emission Spectrometry" for subpart N.

Major changes since proposal are identified in the following list. The rationale for these and any other significant changes can be found in this preamble or the Response to Comments: Technical Corrections, Clarifying and Other Amendments (*see* EPA–HQ–OAR–2010–0109).

- In the definitions of "carbonate-based mineral," "carbonate-based mineral mass fraction," and "carbonate-based raw material," adding lithium carbonate and strontium carbonate, as well as the proposed additions of barium carbonate and potassium carbonate.
- Expanding the proposed definition of crude oil to include petroleum products injected into a crude supply or reservoir.
- Narrowing the definition of *decarburization vessel* to include only vessels for which the primary intent is reducing the carbon content of the steel.
- Incorporating by reference ASTM D6349–09, "Standard Test Method for Determination of Major and Minor Elements in Coal, Coke, and Solid Residues from Combustion of Coal and Coke by Inductively Coupled Plasma—Atomic Emission Spectrometry" for subpart N.

2. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. Several comments were received on this subpart. Responses to additional significant comments received can be found in Response to Comments: Technical Corrections, Clarifying and Other Amendments (see EPA–HQ–OAR–2010–0109).

Comment: One commenter responded to EPA's question regarding whether other carbonates not listed in the proposed definitions are consumed in glass production, and the commenter noted that they consume lithium carbonate and strontium carbonate.

Response: EPA appreciates the clarification and has added these carbonates to the definitions of carbonate-based materials in 40 CFR 98.6 and to Table N–1 to subpart N.

Comment: EPA received several comments on our proposal to amend the definition of crude oil. Two commenters supported the proposed definition of crude oil because it is identical to the definition used for reporting to the Energy Information Administration (EIA) and it will be easier for reporters to calculate and report the same data for both agencies' crude oil reporting requirements. One commenter suggested that EPA expand it even further by adding the word "nitrogen" to describe non-hydrocarbons, referencing atmospheric conditions rather than just atmospheric pressure, removing the requirement that hydrocarbon liquids must be comingled with a crude stream, and including natural gas processing plant liquids captured by gravity separation. Therefore, the commenter did not support using a definition of crude oil that is identical to the definition used by EIA. Two commenters submitted information about situations where a petroleum product is re-injected into a crude supply line or back into a reservoir. One of these two commenters reported that they inject a mixture of products, some of which meet the proposed definition of crude and some of which do not, and specifically requested clarification on how to treat such a mixture with respect to crude oil and petroleum product reporting.

Response: In today's final rule, EPA is retaining the amendatory text proposed for the definition of crude oil and making amendments beyond what was proposed to address the comments received and improve technical accuracy.

EPA agrees with commenters that a definition of crude oil for Part 98 that is identical to the EIA definition makes it easier for refineries to comply with both agencies' reporting requirements. However, EPA considered comments requesting amendments to the crude oil definition in an effort to ensure the definition is technically accurate and to allow for complete reporting.

[5] *http://www.eia.doe.gov/pub/oil_gas/petroleum/survey_forms/psmdefs_2010.pdf.*

EPA considered including natural gas processing plant liquids captured by gravity separation in the crude oil definition, but concluded that doing so would create ambiguity in the regulatory text. EPA has always required natural gas liquids (NGLs) received by the refinery to be reported as non-crude feedstock because the vast majority is being reported by fractionators as product supplied under subpart NN, and EPA does not want these volumes to be double counted across the industry. Because refiners would be unable to physically distinguish NGLs from gravity separation from NGLs reported as product by fractionators under subpart NN, EPA does not concur that such an edit is an improvement to the proposed definition and has not made the suggested change in the definition.

EPA agrees with the comment that specifying atmospheric conditions (temperature and pressure), rather than just atmospheric pressure, is technically more accurate and has made this change in the final definition. This change allows for conditions under which liquids may drop out because of lower temperatures that may not have dropped out in warmer temperatures and atmospheric pressure. EPA has concluded that adding "nitrogen" as an example of non-hydrocarbons does not improve technical accuracy and is not necessary since it is clear that nitrogen is a non-hydrocarbon. Therefore, EPA has not made this change to the final definition.

EPA considered removing the qualification that hydrocarbon liquids must be comingled with a crude stream to meet the crude oil definition and concluded that removing that qualification would create ambiguity. EPA determined that it may be difficult for refineries to distinguish between such hydrocarbon liquids (which commenters suggested should be treated as crude oil) and natural gas liquids or petroleum products (which EPA required be treated as non-crude feedstock) when received and to, therefore, determine how to comply with the rule. EPA has concluded that we cannot delete such text from the crude oil definition unless we specifically seek comment on the impact of such a revision to reporters. Therefore, such an amendment is outside of the scope of this rulemaking.

Finally, EPA is expanding the proposed definition of crude oil to include petroleum products that are received or produced at a refinery and subsequently injected into a crude supply or reservoir by the same refinery owner or operator. EPA is making this addition because, in these situations, petroleum products will be comingled with crude oil to the point of being indistinguishable from crude oil. Whenever a refinery receives the comingled crude oil downstream they will report it as crude oil to EPA. Therefore, this addition is needed to prevent double-counting among reporters under subpart MM. EPA has concluded that the additions to the definition beyond what is used by EIA will only apply to a small minority of refineries that face the unique circumstances presented by commenters and that all other refineries will be able to report to EPA according to the same definition that they use to report to EIA.

With this amendment in place, EPA will need data on the volume injected into a crude supply or reservoir from this small minority of refineries in order to conduct effective verification on the full set of data submitted under subpart MM. Therefore, we are making a harmonizing amendment to subpart MM to require reporting on the volume of any crude oil injected into a crude supply or reservoir under a new paragraph 40 CFR 98.396(a)(22).

Comment: One commenter noted that the Phosphate Mining States Methods Used and Adopted by the Association of Fertilizer and Phosphate Chemists (AFPC) Manual 10th Edition—Version 1.9 had been updated to the version 1.92, which includes a protocol for collecting grab samples of phosphate rock to be tested for chemical composition.

Response: EPA agrees that it is important to allow phosphoric acid facilities to follow the latest standard protocol for grab samples of phosphate rock. In light of this, EPA has finalized requirements to use an industry consensus standard or industry standard practice for collecting grab samples. As an example, the Association of Fertilizer and Phosphate Chemists (AFPC) Manual 10th Edition—Version 1.92 and future versions of that manual would be an acceptable standard.

C. Subpart E—Adipic Acid Production

1. Summary of Final Amendments and Major Changes Since Proposal

We are amending Equation E–1, Equation E–2 and Equation E–3 in 40 CFR 98.53. First, we are amending these equations so that the calculation equations are internally consistent. Currently, the equations do not correctly address situations in which a facility has more than one production unit or process line with separate N_2O control or abatement technology on the separate production units or process lines, and the technologies are not operated 100 percent of the time. In these circumstances, the current equations will not provide an accurate calculation of N_2O emissions. We are amending the equations so that emissions are calculated separately for each production unit or process line (or groups of units or lines) that has a separate control or abatement technology, and then the emissions for all such units or lines are summed to determine the overall N_2O emissions for the facility. For consistency with these amendments, we are also amending 40 CFR 98.54(a), 98.56(j), and 98.57(c) for monitoring and QA/QC, reporting, and recordkeeping, respectively.

We are amending 40 CFR 98.53(b)(1) to address performance testing when a group of adipic acid production units share a common abatement technology or emission point.

We are amending Equation E–3 of subpart E to accommodate N_2O abatement technology located after the emission test (sampling) point and re-designating it as Equation E–3a of subpart E. There are three ways in which abatement technology can be employed. Equation E–3a of subpart E is for one N_2O abatement technology. We are amending Equation E–3a of subpart E further so that the annual adipic acid produced by adipic acid unit "z" (P_z) is used rather than annual adipic acid produced by unit(s) for which N_2O abatement technology "N" is operating ($P_{a,N}$). Also, the summation was removed.

We are adding Equation E–3b of subpart E to accommodate multiple N_2O abatement technologies in series and we are adding Equation E–3c of subpart E to accommodate multiple N_2O abatement technologies in parallel. We are also adding a new Equation E–3d of subpart E for facilities that do not have any N_2O abatement technology located after the test (sampling) point.

We are adding Equation E–4 of subpart E to sum the emissions from Equations E–3a through E–3d of subpart E for each adipic acid production unit "z".

We are amending the language in 40 CFR 98.54(a)(3) and 98.56(k) regarding the Administrator approved alternative method to clarify that this alternative method is for determining N_2O emissions rather than N_2O concentration. Also, we are amending the language in 40 CFR 98.54(a)(1), (e) and (f) to clarify the location of the test (sampling) point used for the performance test and to clarify that the performance test should be conducted when the process is operating normally. As promulgated, the language can be

misconstrued that EPA is requiring the facility to shut down any N_2O abatement technology during the performance testing. This was not intended because many, if not all, of the N_2O abatement technologies in use must be operated at all times that the adipic acid facility is operated to control emissions of NO_X in order to comply with state and federal regulations limiting NO_X emissions. The amendments clarify that testing can occur before or after N_2O abatement technology as long as the destruction efficiency of the N_2O abatement technology is properly accounted for and adipic acid production is quantified while abatement equipment is operating. Finally, we are clarifying under 40 CFR 98.57(f) that facilities should retain records of all data collected during performance tests, not just the calculated emission factor. This clarification is consistent with the general recordkeeping requirements in 40 CFR 98.3(g)(2)(ii).

Major changes since proposal are identified in the following list. The rationale for these and any other significant changes can be found in this preamble or the Response to Comments: Technical Corrections, Clarifying and Other Amendments (*see* EPA–HQ–OAR–2010–0109).

- Language was added to 40 CFR 98.53(b)(1) to address performance testing when multiple adipic acid production units exhaust to a common emission point.
- Changed the emission factor in Equation E–1 of subpart E from $EF_{N_2O,N}$ to $EF_{N_2O,z}$ to eliminate confusion.
- Changed the description of the emission factor, $EF_{N_2O,z}$ from "Average facility-specific N_2O emission factor for each adipic acid production unit (lb N_2O generated/ton adipic acid produced)" to "Average facility-specific N_2O emission factor for each adipic acid production unit "z" (lb N_2O/ton adipic acid produced)."
- Changed the terms "waste gas stream" and "air stream" to "vent stream" at 40 CFR 98.53(b)(1) and 98.53(g)(1).
- Edited Equation E–1 and Equation E–3a of subpart E to include changes above.
- Added Equation E–3b, Equation E–3c, Equation E–3d and Equation E–4 of subpart E.

2. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. Several comments were received on this subpart. Responses to additional significant comments received can be found in Response to Comments: Technical Corrections, Clarifying and Other Amendments (*see* EPA–HQ–OAR–2010–0109).

Comment: One commenter raised the issue that there are situations where multiple adipic acid production units exhaust to a common abatement technology or emission point and should be addressed during the performance test.

Response: EPA has added language at 40 CFR 98.53(b)(1) to address performance testing for a group of adipic acid production units exhausting to a common abatement technology or emission point and for other possible situations that were not accurately addressed by the proposed Equation V–3a of subpart V (abatement technologies used in series and backup abatement technologies operated periodically. We are aware of at least one facility where multiple units exhaust through a common abatement technology.

Comment: One commenter suggested that the subscript letter "N" in the term $EF_{N_2O,N}$ used in Equation E–1 of subpart E be explained and changed to avoid confusion with the term "N" in Equations E–2 and E–3a. The commenter also suggested that the word "generated" be struck from the definition of $EF_{N_2O,N}$ in Equation E–1 of subpart E to reflect that the emission factor may now be determined either before or after abatement. If measured after abatement, $EF_{N_2O,N}$ represents the controlled emission rate instead of the amount of N_2O generated. The commenter suggested a similar change to Equations E–3a and E–3b of subpart E where the terms $EF_{N_2O,N}$ and EF_{N_2O} respectively, are used.

Response: EPA agrees that the subscript letter "N" in the term $EF_{N_2O,N}$ used in Equation E–1 of subpart E could be confused with the term "N" used in Equations E–2 and E–3a of subpart E. Therefore, the subscript "N" has been changed to subscript "z" in Equation E–1 of subpart E. EPA also agrees that $EF_{N_2O,N}$ represents the controlled emission rate instead of the amount of N_2O generated, if the test point is located after the abatement technology. Therefore, the definition of $EF_{N_2O,z}$ has been revised to be the average facility-specific N_2O emission factor for each adipic acid production unit "z", in units of lb N_{N_2O}/ton adipic acid produced.

EPA also removed the word "generated" in Equations E–3a and E–3b of subpart E for the definitions of the terms $EF_{N_2O,N}$ and EF_{N_2O}, respectively.

Comment: One commenter agreed with the proposed amendments to correctly calculate emissions in which an abatement technology is not operated 100 percent of the time. The commenter requested that additional changes be made to Equation E–3a in 40 CFR 98.53(g)(1). The commenter suggested the use of P_a (annual adipic acid produced for unit a) instead of P_{aN} (annual adipic acid produced by unit(s) for which N_2O abatement technology "N" is operating), and noted that the summation over the range of 1 to N should include only the term $(1-(DF_N*AF_N))$, to accurately represent the effect of multiple abatement devices on each unit.

Response: EPA agrees that annual adipic acid produced from unit "z" (P_z) should be used rather than annual adipic acid produced by unit(s) for which N_2O abatement technology "N" is operating ($P_{a,N}$). These changes have been made in the final rule.

D. Subpart H—Cement Production

1. Summary of Final Amendments and Major Changes Since Proposal

We are amending 40 CFR 98.84(b) to correct the most recent ASTM standard, to ASTM C114–09 rather than C114–07, for determining the weight fraction of magnesium oxide (MgO) and calcium oxide (CaO) in clinker. In addition we have learned through questions from reporters, that for some facilities it is more efficient to sample clinker for the weight fraction of total MgO and CaO as it exits the kiln rather than from bulk storage. Some facilities do perform this analysis on clinker on a daily basis. We are amending the rule to allow facilities the option to determine a monthly value based on the arithmetic average of the daily samples.

Through reporters we have also learned that facilities use direct measurement in conjunction with other factors (e.g., kiln feed) to determine clinker production. These procedures are verified periodically for accuracy. We are amending 40 CFR 98.84(d) to allow facilities to use these existing procedures for measuring clinker produced and verify those on a monthly basis. Facilities are already required to measure clinker on a monthly basis. Concurrent with this change, we are amending 40 CFR 98.86(b) so that facilities that do not estimate combined process and combustion emissions using continuous emission monitoring systems (CEMS) will be required to report the kiln specific feed-to-kiln ratios used to calculate clinker produced for EPA verification of emissions associated with clinker production. For consistency, we are clarifying 40 CFR 98.84(e) to allow similar flexibility in determination of cement kiln dust produced.

Further, we understand from facilities' questions that an analysis of the organic carbon contents of raw materials could be determined from a composite sample of the kiln feed or from sampling each raw material in the

kiln feed depending on the existing sampling methods and raw material storage procedures at the facility. We are amending the calculation and monitoring procedures in 40 CFR 98.83(d)(3) and 98.84(c) to allow facilities the option to use either sampling procedure for estimating carbon dioxide (CO_2) emissions from raw materials.

We are also correcting and clarifying the recordkeeping requirements under 40 CFR 98.87(a) and (b) for facilities with CEMS and for facilities without CEMS. In Part 98, the recordkeeping requirements listed under 40 CFR 98.87(a)(1) and (a)(2) should have been listed under 40 CFR 98.87(b). Facilities using CEMS to estimate combined process and combustion CO_2 emissions from kilns do not need to calculate process emissions using the clinker based emissions methodology provided in Subpart H and, therefore, would not have the relevant records requested in 40 CFR 98.87(a)(1) and (a)(2).

Major changes since proposal are identified in the following list. The rationale for these and any other significant changes can be found in this preamble or the Response to Comments: Technical Corrections, Clarifying and Other Amendments document (see EPA–HQ–OAR–2010–0109).

- Clarifying the cement kiln dust (CKD) monitoring requirements in 40 CFR 98.84(e);
- Changing cement production reporting requirements under 40 CFR 98.86 to require annual, facility-wide cement production instead of monthly, kiln-specific cement production; and

2. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. Several comments were received on this subpart. Responses to additional significant comments received can be found in Response to Comments: Technical Corrections, Clarifying and Other Amendments document (*see* EPA–HQ–OAR–2010–0109).

Comment: One commenter expressed concern that the monthly verification of the feed-to-clinker ratio, required under 40 CFR 98.94(d), is unduly burdensome. The commenter suggested that EPA change subpart H to require quarterly verification instead of monthly.

Response: Because subpart H requires cement manufacturers to report clinker production on a monthly basis, we are requiring facilities that estimate clinker production using a feed-to-clinker ratio to verify the accuracy of that ratio also on a monthly basis. We provided cement manufacturers the option to use a feed-to-clinker ratio instead of direct clinker measurement to provide flexibility and consistency with current industry practices. We note the commenter's concern regarding the burden of monthly verification. However, other industry comments generally support this requirement.

Comment: One commenter stated that the CKD measurement requirements under 40 CFR 98.84(e) should be revised to be consistent with the clinker measurement requirements under 40 CFR 98.84(d). Specifically, 40 CFR 98.84(d) allows facilities to determine monthly clinker quantities by either reconciling weigh hopper or belt weigh feeder measurements against inventory measurements, or by direct weight measurement of raw feed and applying a feed-to-clinker ratio. Meanwhile, 40 CFR 98.84(e) requires facilities to determine quarterly CKD quantities by direct weight measurement. The commenter points out that the CKD quantity has a lesser impact on CO_2 emission calculations than the clinker quantity. Therefore, the rule should not have more stringent measurement requirements for CKD than for clinker. The commenter also states that direct weight measurement devices should not be required to be installed if they are currently not being utilized at the facility, and requests that facilities be permitted to use the same methods currently in place for accounting purposes to determine the quantity of CKD not recycled to the kiln.

Response: The rule currently allows for the type of flexibility that the commenter is requesting. The rule lists direct weight measurement as an example technique that may be used; however, the examples provided in the rule are not an exhaustive list. Facilities should determine the quantity of CKD not recycled to the kiln for each kiln using the same plant techniques used for accounting purposes. We have revised the language in 40 CFR 98.84(e) to clarify this flexibility.

Comment: Two commenters noted that reporting requirements in 40 CFR 98.86(a)(2) and 98.86(b)(3) require cement manufacturers to report monthly cement production from each kiln at the facility. The commenters pointed out that cement kilns produce clinker—not cement. The clinker from each cement kiln is subsequently sent to a mill and pulverized into a fine powder, and mixed with other ingredients to produce cement. Plants that operate multiple kilns may combine the clinker from all kilns and store the combined clinker before feeding it to the cement mill. Because of the variability of the amount of clinker produced by different kilns, and the varying methods of storage, the commenters proposed that EPA require cement manufacturers to report the total quantity of cement produced by the facility on an annual rather than monthly, kiln-specific basis.

Response: EPA agrees with the commenter that the requirements in 40 CFR 98.86(a)(2) and 98.86(b)(3) are inconsistent with cement plant manufacturing practices, and should not be required on a kiln-specific basis. In addition, we agree that due to the variations in storage time between clinker production and cement production, cement production data are not needed on a monthly basis. This reporting requirement was added for verification of reported emissions, not calculating emissions. Therefore, we have revised the rule to require facilities to report cement production on an annual, facility-wide basis.

E. Subpart K—Ferroalloy Production

1. Summary of Final Amendments and Major Changes Since Proposal

We are amending 40 CFR 98.112(a) to be consistent with the requirement described in 40 CFR 98.113(d) to calculate methane (CH_4) emissions from an electric arc furnace (EAF) used for the production of all ferroalloys for which an applicable CH_4 emission factor is provided in the rule. These alloys and the associated CH_4 emission factors are listed in Table K–1 to subpart K. Subpart K in Part 98 contained calculation and reporting procedures for quantifying process CH_4 emissions from all ferroalloys listed in Table K–1 to subpart K, but CH_4 was inadvertently not included in the *GHGs to Report* section.

We are also amending the introductory language for 40 CFR 98.113 to clarify the applicability of the procedures for calculating CO_2 and CH_4 emissions in that section. Finally, we are amending the language in 40 CFR 98.116 to clarify that the data reporting requirements in 40 CFR 98.116(b) are for each EAF and those in 40 CFR 98.116(d)(1) and (e)(1) are for any ferroalloy product identified in 40 CFR 98.110. We are also amending 40 CFR 98.116(d) to correct an incorrect cross-reference to 40 CFR 98.36.

2. Summary of Comments and Responses

EPA did not receive any comments on the proposed amendments to subpart K and is finalizing the amendments to this subpart as proposed.

F. Subpart N—Glass Production

1. Summary of Final Amendments and Major Changes Since Proposal

We are amending subpart N to add CO_2 emission factors to Table N–1 to subpart N for barium carbonate, potassium carbonate, lithium carbonate, and strontium carbonate. These raw materials were not included in Part 98, but EPA has since learned that they are also used by the glass industry. EPA is also amending 40 CFR 98.144(b) to allow for an additional method for determining the carbonate mineral mass fraction of raw materials used in glass production. Specifically, in addition to ASTM D3682–01, reporters can also use ASTM D6349–09, "Standard Test Method for Determination of Major and Minor Elements in Coal, Coke, and Solid Residues from Combustion of Coal and Coke by Inductively Coupled Plasma—Atomic Emission Spectrometry." We are also amending the introductory language to 40 CFR 98.146(a) to correct an incorrect cross-reference to 40 CFR 98.36 and to clarify in 40 CFR 98.146(a)(2) that reporting of glass production is by furnace and from all furnaces combined, consistent with the calculation methods. We are amending 40 CFR 98.146(b)(7) and (9) to correct typographical errors.

Major changes since proposal are identified in the following list. The rationale for these changes can be found in this preamble.

- Added an emission factor for lithium carbonate.
- Added an emission factor for strontium carbonate.
- Removed the requirement for analysis by an "independent certified laboratory." When the final subpart N was published on October 30, 2009, EPA agreed with commenters that analyses do not have to be performed by an independent certified laboratory, but this language inadvertently remained in subpart N.

2. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. One comment letter was received on this subpart.

Comment: One commenter asked that emission factors for lithium carbonate and strontium carbonate be added to subpart N, in addition to those being added for barium carbonate and potassium carbonate.

Response: EPA has added these two compounds to the final subpart N. EPA was not previously aware of use of these carbonates in glass production in the United States during the initial proposal of the rule. While less common, these carbonates are used in glass production to add different properties to glass products and EPA therefore agrees that these emission factors should be included in the final rule.

G. Subpart O—HCFC–22 Production and HFC–23 Destruction

1. Summary of Final Amendments and Major Changes Since Proposal

We are amending 40 CFR 98.154(k), the requirement to monitor HFC–23 emitted from process vents, to refer to Equation O–7 of subpart O rather than Equation O–6 of subpart O. In 40 CFR 98.154(k), (l), and (o) and in 40 CFR 98.156(b), we are amending the language so that the term "destruction device" is used rather than the narrower term "thermal oxidizer."

We are amending the reporting requirements in 40 CFR 98.156(c) and (d) to clarify that only facilities that are required to recalculate the destruction efficiency of their destruction device under 40 CFR 98.154(l) must report the flow rate of HFC–23 being fed into the destruction device, the flow rate at the outlet of the destruction device, and the emission rate of the device. In addition, such facilities will be required to report the newly calculated DE of the device, the HFC–23 concentration measurement used in the DE calculation, and whether 40 CFR 98.154(l)(1) or (l)(2) was used for the calculation. Under these two paragraphs, other HFC–23 destruction facilities will be required to report only the results of their annual measurement of the HFC–23 concentration at the outlet of the destruction device.

We are amending the reporting requirements in 40 CFR 98.156(e) to clarify that the one-time report for HFC–23 destruction facilities is due by March 31, 2011 or within 60 days of commencing HFC–23 destruction. The amendment was necessary because it was not clear when the one-time report must be submitted. The amendment will make the due date in 40 CFR 98.156(e) consistent with the due date for a similar report required in Subpart OO.

In general, these amendments to the reporting requirements for HFC–23 destruction facilities make them consistent with the monitoring requirements for these facilities. The due dates for the one-time report are consistent with those elsewhere in Part 98 for the source categories that are required to begin monitoring in 2010.

2. Summary of Comments and Responses

EPA did not receive any comments on the proposed amendments to subpart O and is finalizing the amendments to this subpart as proposed.

H. Subpart P—Hydrogen Production

1. Summary of Final Amendments and Major Changes Since Proposal

We are amending the definition of the source category in 40 CFR 98.160(c) to clarify that hydrogen production facilities located within other facilities are also included in the source category if they are not owned by, or under the direct control of, the other facility's owner and operator. This clarification was necessary to correct a misunderstanding that the original rule text limited the source universe to hydrogen production facilities located within petroleum refineries.

Broadly, we are amending subpart P to remove several references to "process" CO_2 emissions. EPA received information from industry indicating that the use of the term "process" in the context of calculating and reporting CO_2 emissions resulted in confusion in differentiating between process and combustion emissions. We are clarifying the text in the rule by removing references to the term "process" from the rule language.

We are removing the requirements in 40 CFR 98.162(b) for owners or operators to report CO_2, CH_4 and N_2O combustion emissions from each hydrogen production process unit using the emissions calculation methods in subpart C. This provision results in double counting of combustion-related emissions from hydrogen production process units, as these combustion emissions are already accounted for when following the calculation methods in 40 CFR 98.163(a) or (b). CO_2 emissions will still be reported under 40 CFR 98.162(a) using the procedures in 40 CFR 98.163(a) or 98.163(b).

We are also amending language describing the calculation of GHG emissions from gaseous, liquid and solid fuels and feedstocks in 40 CFR 98.163. The clarified language specifies that each gaseous, liquid or solid fuel and feedstock will need to be calculated based on its respective equations detailed in the rule language. This removes the concern that the language was unclear as to which fuel and feedstock stream should be used to calculate CO_2 emissions.

Lastly, we are amending 40 CFR 98.166(c) to strike "quarterly" and "kg" (kilogram). Some facilities subject to subpart P may also be subject to subpart PP—Suppliers of Carbon Dioxide. Quarterly reporting of CO_2 quantities (in kilograms) was not consistent with subpart PP.

2. Summary of Comments and Responses

All comments received on the proposed amendments to subpart P were supportive and EPA is finalizing the amendments to this subpart as proposed.

I. Subpart Q—Iron and Steel Production

1. Summary of Final Amendments and Major Changes Since Proposal

We are amending the subpart Q requirements regarding emissions from flares to clarify the requirements and correct certain deficiencies in the rule pertaining to flares burning off-gases from argon-oxygen decarburization (AOD) and other decarburization processes. Section 98.172(b) of Part 98 required reporting of CO_2 emissions from flares using procedures from subpart Y (Petroleum Refineries), without distinguishing flares burning off-gases from AOD or other decarburization processes from other types of flares.

The referenced equations in subpart Y and the further instructions in 40 CFR 98.172(b) are applicable to estimating emissions from burning coke oven gas or blast furnace gas, but are not applicable for estimating emissions from flares burning the off-gases from AOD or other decarburization processes. We are, therefore, amending the language in 40 CFR 98.172(b) to clarify that for subpart Q facilities, flare emissions must be estimated for flares burning blast furnace gas or coke oven gas. Similarly, we are amending the introductory text in 40 CFR 98.175 to specify that the missing data procedures in subpart Y (Petroleum Refineries) at 40 CFR 98.255(b) must be followed for flares burning coke oven gas or blast furnace gas. We are also amending the introductory text for the data reporting requirements in 40 CFR 98.176 to include flares burning coke oven gas or blast furnace gas.

Subpart Q in Part 98 also referenced incorrect equations from subpart Y. We are amending and correcting the references in 40 CFR 98.172(b) to the subpart Y flare equations. Equations Y–2 and Y–3 of subpart Y are the correct equations; the promulgated subpart Q of subpart Q incorrectly referenced Equation Y–1 of subpart Y.

We are amending the reporting requirements in 40 CFR 98.176(e)(3) to clarify that fuel consumption needs to be reported separately for each type of fuel and other process input and output material. We are also adding paragraphs (g) and (h) to 40 CFR 98.176. Paragraph (g) requires facilities to report the annual amount of coal charged to coke ovens because it is used to estimate CO_2 emissions from coke pushing. Paragraph (h) incorporates the same reporting requirements specified in 40 CFR 98.256(e) of subpart Y (Petroleum Refineries) for flares burning coke oven gas or blast furnace gas.

We are amending the recordkeeping requirements in 40 CFR 98.177(d) to clarify the units and processes for which annual operating hours need to be recorded.

We are also amending the requirements in the promulgated rule to estimate GHG emissions from AOD vessels to clarify that they also apply to any other type of vessel used with the primary intent of removing carbon from molten steel (decarburization), such as vacuum oxygen decarburization. Because of the clarification noted above to include all types of decarburization vessels used primarily to remove carbon, we are replacing the term "argon-oxygen decarburization vessels" with the term "decarburization vessels" throughout subpart Q and replacing the definition of "argon-oxygen decarburization vessels" with a definition for "decarburization vessels" in order to maintain reporting of the CO_2 emissions from these vessels.

In response to comments, we are clarifying the definition of "decarburization vessels" to include only those decarburization vessels, such as AOD and vacuum oxygen decarburization vessels, used with the primary intent of removing carbon from the steel. We are also delaying the reporting of GHG emissions from decarburization vessels that are not AOD vessels until reports submitted in 2012, instead of requiring reporting with the first reports submitted to EPA in March 2011.

Major changes since proposal are identified in the following list. The rationale for these and any other significant changes can be found in this preamble or the Response to Comments: Technical Corrections, Clarifying and Other Amendments document (see EPA–HQ–OAR–2010–0109).

- Clarifying the definition of "decarburization vessels" to include only those decarburization vessels used with the primary intent of removing carbon from the steel.
- Delaying the reporting of GHG emissions from decarburization vessels that are not AOD vessels until reports submitted in 2012.

2. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. Several comments were received on this subpart. Responses to additional significant comments received can be found in Response to Comments: Technical Corrections, Clarifying and Other Amendments document (see EPA–HQ–OAR–2010–0109).

Comment: We received three comments on our proposal to clarify the definition of decarburization vessels to include all decarburization vessels rather than just argon-oxygen decarburization (AOD). Two commenters noted that the proposal was not merely a technical correction or clarification, but was instead a substantive change to subpart Q as promulgated. According to the commenters, the new definition of decarburization vessel, which includes a list of the covered processes and the phrase "or other decarburization vessels," was too broad and inclusive. The commenters noted that most steel plants, whether integrated or electric arc furnace producers, employ several different kinds of refining processes to improve the quality of the steel produced, and some of these refining processes, such as AODs, are primarily intended to reduce carbon. However, the commenters stated that other processes, such as vacuum degassing, electro-slag remelting, and vacuum-arc remelting, are primarily intended to reduce dissolved gases such as hydrogen, nitrogen, and oxygen in the molten steel, and carbon reduction is only incidental. According to the commenters, making these processes subject to subpart Q would require facilities to make numerous adjustments to their monitoring plans and conduct additional sampling. For these reasons, the commenters believe that the proposed amendment would add significant new requirements and represent a substantive change rather than being merely a clarification. One commenter argued that the time and effort to verify GHG emissions from vacuum degassing would be burdensome, estimating that it would increase the resources needed to comply with subpart Q by 50 percent. The commenter stated that the added burden of data collection, measurements, recordkeeping, and reporting of these emissions is not justified by the addition of vacuum degassing and other refining operations to the reporting requirements.

Two of the commenters estimated that the additional processes included in the proposed amendment contribute "substantially less than 1 percent" of the emissions from the sector. Another commenter estimated they contributed only 0.02 percent of the emissions. The same commenter argued that because these emissions are relatively

insignificant and would be extremely difficult to quantify for reporting purposes, they should continue to be excluded from reporting obligations. The commenter also rejected the rationale that emissions from all decarburization vessels should be reported because EPA is also proposing to limit reporting of emissions from flares to those burning coke oven gas or blast furnace gas only (an amendment that the commenter supports), which would obviate reporting of vacuum degasser flare emissions. The commenter estimated that the emissions are so low they would be difficult to detect, and measuring such emissions through either the carbon-mass balance approach or a site-specific emission factor would be burdensome and potentially infeasible. The commenter concluded that EPA has not provided a rational basis for inclusion of decarburization vessels within the GHG Reporting Program.

Two commenters recommended that if EPA proceeds by adding a definition for "decarburization vessel," the definition should be revised. One commenter suggested that the definition be clarified such that it includes only vessels for which the primary purpose is decarburization. The other commenter asked that it be revised to read "any vessel used to further refine molten steel with the primary intent of reducing carbon content of the steel that also requires flaring the off-gas to oxidize CO to CO_2."

All three commenters stated that if EPA chooses to include all decarburization vessels as proposed, they should not be included in the reports submitted to EPA in 2011. Two commenters explained that making this change retroactive to data collection in 2010 is untenable because companies were obligated to develop comprehensive GHG Monitoring Plans in early 2010 and to begin recordkeeping in January 2010 in order to be able to report for the entire 2010 reporting year by March 2011.

One commenter stated that by expanding the decarburization vessel definition in Subpart Q to include vacuum degassing and other refining operations beyond AODs, facilities with these operations will need to make adjustments to their monitoring plans, conduct additional sampling of inputs and outputs for these operations, make programmatic modifications to tracking software, and re-train employees. The commenter claimed that it will be impossible to collect the necessary samples of steel and dust or sludge and perform analyses representative of the months that have elapsed since the beginning of 2010 in order to perform a mass balance, and it is also unrealistic to expect companies to consider the option of establishing a site-specific emission factor for these units because of all of activities that would be required to perform testing. The commenter recommended that EPA follow the course set in its July 12, 2010 final rule notice adding four new source categories to Part 98 (75 FR 39735). The commenter said that EPA recognized in that notice that it would be unrealistic to require those operations to report emissions for 2010 and made these new rules effective with the data collection in 2011.

Two commenters recommended that if EPA proceeds with the proposed changes, those requirements should be effective no sooner than 2011 and should be reportable in March 2012. One commenter argued that by amending a rule to include data acquisition and management after a reporting period has already begun is arbitrary and capricious and will significantly add to the burden the regulated community faces when attempting to collect meaningful data. The commenter stated that any such amendment should be prospective in nature and not impact calculations and sampling already underway.

Response: After consideration of these comments, we agree that the proposed new definition of "decarburization vessels" was too broad and would include certain steel refining processes that were not intended (i.e., those whose primary purpose is not removal of carbon). Some of the additional processes cited by the commenters have a primary purpose to remove dissolved gases, and although some carbon may be incidentally removed, the CO_2 emissions from these processes are a small percent of total GHG emissions from iron and steel making. Because the change in carbon content of the steel is so small, it is difficult to accurately quantify the emissions by a carbon balance, and it is problematic to measure them because of the sampling and other difficulties mentioned by the commenters. Consequently, we are revising the definition of "decarburization vessels" to include those for which the primary purpose is removal of carbon, including but not limited to AOD and vacuum oxygen decarburization (VOD). We are not adding the suggested revision that the definition should include only those decarburization vessels equipped with flares because not all AOD and VOD vessels are equipped with flares. The revised definition makes the amendment a technical clarification that is more consistent with the final rule as originally promulgated.

We also agree that additional time would be required to gather the data to report emissions from decarburization vessels other than AOD vessels, and we are amending the reporting requirements so that these emissions are reported beginning in March 2012 for the year 2011. However, the final amendments will not require a delay in the reporting period for AOD vessels because facilities with AOD vessels have known since the original promulgation of subpart Q that these decarburization vessels would be included in the reporting for 2010.

J. Subpart S—Lime Manufacturing

1. Summary of Final Amendments and Major Changes Since Proposal

We are amending the cross reference to 40 CFR 98.193(b)(1) in the introductory language to 40 CFR 98.195; it incorrectly referenced 40 CFR 98.193(b)(2).

We are also amending the terminology used throughout subpart S to clarify whether the calculation and reporting requirements are referring to calcined byproducts and waste materials by adding the word "calcined" to the lime byproduct and waste terminology, as needed. We are also amending the terminology in the subpart to clarify when the calculation and reporting requirements apply to lime products that are produced at the facility.

2. Summary of Comments and Responses

EPA did not receive any comments on the proposed amendments to subpart S and is finalizing the amendments to this subpart as proposed.

K. Subpart V—Nitric Acid Production

1. Summary of Final Amendments and Major Changes Since Proposal

We are amending 40 CFR 98.223 and 98.224 to clarify how N_2O emissions are to be measured if a facility has an N_2O abatement device. The first amendment clarifies the location of the test (sampling) point used for the performance test in several paragraphs in 40 CFR 98.223. As promulgated, the language could be misconstrued to require the nitric acid facility to shut down any N_2O abatement technology during the performance testing. This was not the intention as many, if not all, of the N_2O abatement technologies in use must be operated at all times that the nitric acid facility is operated to control emissions of NO_X in order to comply with state and federal regulations limiting NO_X emissions. The

amendments will clarify that testing can occur before or after N_2O abatement technology as long as the testing properly accounts for destruction efficiency.

We are amending Equation V–3 of subpart V to accommodate N_2O abatement technology located after the emission test (sampling) point, and re-designating it as Equation V–3a of subpart V. Equation V–3a is also corrected so that the term on the left-hand side of the equation is changed from EF_{N_2Ot} to E_{N_2Ot}.

There are three ways in which abatement technology can be employed. Equation V–3a of subpart V is for one N_2O abatement technology. We are adding Equation V–3b of subpart V to accommodate multiple N_2O abatement technologies in series and we are adding Equation V–3c of subpart V to accommodate multiple N_2O abatement technologies in parallel.

We are also including a new Equation V–3d of subpart V for facilities that do not have N_2O abatement technology located after the test (sampling) point.

In addition, we are clarifying in 40 CFR 98.223 that the annual performance test must be conducted for each nitric acid train, consistent with the equations in 40 CFR 98.223. Additional changes were made to the monitoring requirements in 40 CFR 98.224 to conform to the changes in the calculation methods in 40 CFR 98.223. We are amending 40 CFR 98.224(a)(1) to clarify when during a nitric acid production campaign facilities must conduct the performance test.

We are also amending the language concerning the Administrator-approved alternative method for determining N_2O emissions in 40 CFR 98.223(a)(2)(ii), 98.224(a)(3), and 98.226(n). The alternative method is for determining N_2O emissions rather than N_2O concentration or an N_2O emission factor. The language has been changed to correct this point.

We are amending the data reporting requirements in 40 CFR 98.226(g) and (m) to be consistent with the calculation methods which are for each nitric acid train, not the facility.

Major changes since proposal are identified in the following list. The rationale for these and any other significant changes can be found in this preamble or the Response to Comments: Technical Corrections, Clarifying and Other Amendments document (see EPA–HQ–OAR–2010–0109).

- Changed the description of the emission factor, EF_{N_2Ot} from "lb N_2O generated/ton nitric acid produced, 100 percent acid basis" to "lb N_2O/ton nitric acid produced, 100 percent acid basis."
- Changed the term "air stream" to "vent stream" at 40 CFR 98.223(g)(1).
- Added Equations E–3b and E–3c of subpart E.

2. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. Two sets of comments were received on this subpart. Responses to additional significant comments received can be found in Response to Comments: Technical Corrections, Clarifying and Other Amendments document (see EPA–HQ–OAR–2010–0109).

Comment: One commenter noted that the regulation for Adipic Acid is similar to the regulation for Nitric Acid and asked that EPA compare the clarifications made to each of these subparts for consistency.

Response: EPA agrees that there are similarities between the two subparts. Although the commenter did not provide specific examples for subpart V, EPA reviewed the commenter's suggested clarifications for subpart E and made the following comparable changes to subpart V:

EPA agrees with the change to the term "air stream." The term has been changed to "vent stream" in 40 CFR 98.223(g)(1) as this is more consistent with terminology used to identify testing locations at current facilities.

EPA agrees that there could be situations at nitric acid facilities where multiple trains exhaust to a common abatement technology. Language has been added to 98.223(b)(1) to add flexibility for facilities that have a group of trains that exhaust to the same abatement equipment. Further, the equations do not correctly address situations in which a facility has separate N_2O control or abatement technology on the separate train or process lines, back-up controls in parallel on a single train, and these technologies are not operated 100 percent of the time (i.e., operated during maintenance operations on primary controls). We have learned that some facilities could have existing controls (e.g., NSCR) and may apply additional controls during the production process (e.g secondary catalysts in oxidation reactor) in the future.

In these circumstances, the current equations will not provide an accurate calculation of N_2O emissions. To address the three ways in which abatement technology can be employed EPA has revised 40 CRR 98.223 to include calculation methods to accurately account for these possible abatement applications. The current Equation V–3a of subpart V is for one N_2O abatement technology. EPA has added Equation V–3b and V–3c to accommodate situations where multiple N_2O abatement technologies operate in series and or multiple abatement technologies in parallel, respectively. Equation V–3d of subpart V addresses the situation when facilities that do not have N_2O abatement technology.

Comment: According to one commenter, facilities do not have information to determine a point during the campaign which is representative of the average emissions over the entire campaign. The commenter requested that 40 CFR 98.224(a)(1) be modified to ensure that performance tests are conducted during representative operations while enabling operating facilities to document and demonstrate compliance with this objective.

Response: The purpose of this language was to capture emissions data when the process was operating normally. This requirement is to ensure that the emission factor developed through this performance test is an accurate depiction of the quantity of N_2O emitted per quantity of nitric acid produced over the course of an entire year. A campaign was used as a reference due to concerns that N_2O rates from nitric acid plants are somewhat below average at the beginning of a campaign and above average at the end of a campaign. Testing during either of those times could result in an emission factor developed during non-representative conditions. For example, at the end of a campaign, the age of the catalyst may influence emissions. As long as the choice of the timing of the testing is documented and the methods used to determine the timing are documented, this requirement is met. EPA has clarified "average emissions over the entire campaign" to "average emissions rate from nitric acid campaigns" as it is the emissions rate that is obtained during the performance test and a facility may run more than one production campaign over a reporting year. EPA does not agree that the additional changes recommended are needed.

The rule offers flexibility in determining the timing of the performance testing. Facilities may refer to literature and continuous monitoring data from similar facilities in other countries. This literature and data could be used to determine an appropriate test point from a representative or typical nitric acid campaign. The rule provides facilities flexibility on methods to determine this testing point. Further, facilities can also apply to EPA to use alternative methods for determining N_2O emissions.

L. Subpart Z—Phosphoric Acid Production

1. Summary of Final Amendments and Major Changes Since Proposal

We are renumbering Equation Z–1 as Z–1a of subpart Z and adding a new Equation Z–1b of subpart Z. Equation Z–1b will be used to calculate CO_2 emissions when the method used to analyze phosphate rock provides a direct estimate of CO_2 emissions instead of just inorganic carbon content.

We have learned from facilities that the "Phosphate Mining States Methods Used and Adopted by the Association of Fertilizer and Phosphate Chemists AFPC Manual 10th Edition—Version 1.9" (AFPC manual) does not currently contain a procedure for obtaining a representative grab sample of rock for testing. A recently updated version of the AFPC manual, Version 1.92, does contain the appropriate sampling procedures. To add flexibility to the rule, we are amending 40 CFR 98.264(a) to allow facilities to use the appropriate industry consensus standards or industry standard practices currently available. We are also amending 40 CFR 98.264(a) to clarify that the grab sample must be collected prior to entering the mill for accurate analysis of inorganic carbon contents.

We are amending 40 CFR 98.266 to correct a cross reference in the introductory text of that section, and to revise paragraph (c) to clarify that the annual arithmetic average percent inorganic carbon in phosphate rock is to be reported as the percent by weight, expressed as a decimal fraction. We are also adding a new paragraph (f)(9) to 40 CFR 98.266 to specify that facilities need to report the total annual process CO_2 emissions from the phosphoric acid production facility, in metric tons. Facilities must calculate these emissions already in 40 CFR 98.263(b)(2) using Equation Z–2 of subpart Z.

Major changes since proposal are identified in the following list. The rationale for these and any other significant changes can be found in this preamble or the Response to Comments: Technical Corrections, Clarifying and Other Amendments document (see EPA–HQ–OAR–2010–0109).

- Renumbered Equation Z–1 as Equation Z–1a of subpart Z.
- Added a new Equation Z–1b of subpart Z.
- Revised 98.364(a) and (b) to allow facilities to use the appropriate industry consensus standard or industry standard practice.

2. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. Several comments were received on this subpart. Responses to additional significant comments received can be found in Response to Comments: Technical Corrections, Clarifying and Other Amendments document (see EPA–HQ–OAR–2010–0109).

Comment: One commenter requested that Equation Z–1 be revised to accurately reflect the output of the AFPC Manual's method for the analysis of phosphate rock. Regarding the inorganic carbon determinations, the equation assumes that the AFPC Manual's test is for inorganic carbon and the equation provides for calculation of CO_2 emissions using inorganic carbon content as an input. However, the AFPC Manual's test is for CO_2 directly, making Equation Z–1 of subpart Z inapplicable as written to the AFPC Manual's test output. The commenter suggested a technical amendment to correct this minor misalignment by removing the factor to convert inorganic carbon to CO_2 from Equation Z–1.

Response: EPA agrees that this change is warranted. However, EPA has decided not to replace Equation Z–1 but to renumber Equation Z–1 as Equation Z–1a and to add the revised equation as Equation Z–1b. This subpart would still allow facilities to use other methods (e.g., sampling inorganic carbon content) to determine carbon content in addition to using analytic methods to directly measure CO_2 emissions. Therefore, EPA is maintaining this flexibility by retaining the previous equation and adding a new one that can be used with the AFPC Manual.

M. Subpart CC—Soda Ash Manufacturing

1. Summary of Final Amendments and Major Changes Since Proposal

We are amending the data reporting requirements in 40 CFR 98.296(b)(3) to clarify that the annual soda ash production is reported for each line, and to make the reporting requirements consistent with the calculation requirements in 40 CFR 98.293(b)(1) through (b)(3). The units in 40 CFR 98.296(a)(1) and 40 CFR 98.296(b)(6) are corrected from metric tons to short tons for consistency with other similar data reporting requirements. This change is also consistent with how facilities collect these data.

We are also amending 40 CFR 98.296(b)(10) to clarify that the information in that paragraph is reported for each manufacturing line or stack, when using a site specific emission factor, and to clarify that the elements required by 40 CFR 98.296(b)(10)(i), (ii), and (iv) are for the periods during the performance test. We are also deleting 40 CFR 98.296(b)(11)(iv), (v), and (vi) because those paragraphs describe missing data procedures for elements during the site-specific emission factor performance test which are not allowed to be missing per 40 CFR 98.296(c).

2. Summary of Comments and Responses

EPA did not receive any comments on the proposed amendments to subpart CC and is finalizing the amendments to this subpart as proposed.

N. Subpart EE—Titanium Dioxide Production

1. Summary of Final Amendments and Major Changes Since Proposal

We are amending the monitoring and QA/QC reporting requirements in 40 CFR 98.314(e) to clarify that the quantity of carbon-containing waste generated from each titanium dioxide production line is determined on a monthly basis, consistent with the calculation procedures in 40 CFR 98.313(b)(3). In addition, we are amending the data reporting requirements under 40 CFR 98.316(b)(9) to be consistent with the calculation and monitoring alternative requirements of 40 CFR 98.313(b)(2) and 40 CFR 98.314(c) by removing the restriction that the carbon content factor for petroleum coke can only be from the supplier. We are also amending the data reporting requirements under 40 CFR 98.316(b)(11) to clarify that they apply to each process line, consistent with the calculation and monitoring alternative requirements of 40 CFR 98.313(b)(3) and 40 CFR 98.314(f).

2. Summary of Comments and Responses

EPA did not receive any comments on the proposed amendments to subpart EE and is finalizing the amendments to this subpart as proposed.

O. Subpart GG—Zinc Production

1. Summary of Final Amendments and Major Changes Since Proposal

We are amending the definitions of the terms for $(\text{Electrode})_k$ and $(C_{\text{Electrode}})_k$ in Equation GG–1 of subpart GG to remove the references to kilns because electrodes are only used in electrothermic furnaces and are not used in Waelz kilns. We are also amending 40 CFR 98.336(a) to correct a

cross reference to subpart C, and to amend 40 CFR 98.336(b)(1) to clarify that identification numbers need to be reported for both Waelz kilns and electrothermic furnaces.

We are amending the data reporting requirements in 40 CFR 98.336(b)(7) and (10) to clarify that the carbon content of each input to a kiln or furnace should be reported as a calculation parameter regardless of whether the data are collected from the supplier or by self measurement. In 40 CFR 98.336, paragraphs (b)(8) and (11) already require facilities to report whether carbon contents were determined through self measurement or based on reports from the supplier.

2. Summary of Comments and Responses

EPA did not receive any comments on the proposed amendments to subpart GG and is finalizing the amendments to this subpart as proposed.

P. Subpart HH—Municipal Solid Waste Landfills

1. Summary of Final Amendments and Major Changes Since Proposal

We are making numerous clarifying amendments and technical corrections to subpart HH to address questions EPA has received about the rule's requirements and to correct known errors. Amendments to the rule are also being made to address some of the more significant questions that were the result of the level of detail provided in the 2009 final rule.

Source Category Definition. We are amending 40 CFR 98.340(b) to read, "This source category does not include Resource Conservation and Recovery Act (RCRA) Subtitle C or Toxic Substances Control Act (TSCA) hazardous waste landfills, construction and demolition waste landfills, or industrial waste landfills." We are adding definitions within 40 CFR 98.348 for the terms "construction and demolition waste landfills" and "industrial waste landfills."

Equation HH–1. We are making the following technical amendments to Equation HH–1 in 40 CFR 98.343:

- Replace the term L_0 (CH_4 generating potential) with the terms, "$MCF \times DOC \times DOC_F \times F \times 16/12$," (where MCF is the CH_4 correction factor; DOC is the degradable organic content; DOC_F is the fraction of DOC dissimilated; and F is the fraction by volume of CH_4 in landfill gas) and remove the definition of the term L_0 from the definitions for Equation HH–1 of subpart HH.
- Revise the definition of "S" to read, "Start year of calculation. Use the year 1960 or the opening year of the landfill, whichever is more recent."
- Revise the definition of Wx to include "measurement data" as follows: "Quantity of waste disposed of in the landfill in year x from measurement data, tipping fee receipts, or other company records (metric tons, as received (wet weight)."
- Revise the definition of "MCF" to read "Methane correction factor (fraction). Use the default value of 1 unless there is active aeration of waste within the landfill during the reporting year. If there is active aeration of waste within the landfill during the reporting year, either use the default value of 1 or select an alternative value no less than 0.5 based on site-specific aeration parameters."
- Revise the definition of "DOC_f" to read, "Fraction of DOC dissimilated (fraction). Use the default value of 0.5."
- Revise the definition of "F" as follows: "Fraction by volume of CH_4 in landfill gas from measurement data on a dry basis, if available (fraction); default is 0.5."
- Revise the definition of "k" to read, "Rate constant from Table HH–1 to subpart HH (yr-1). Select the most applicable k value for the majority of the past 10 years (or operating life, whichever is shorter)."

We are also amending 40 CFR 98.343(a)(2) to replace "use the bulk waste parameter values for k and L_0 in Table HH–1 to subpart HH" with "use the bulk waste parameter values for k and DOC in Table HH–1 to subpart HH.".

Measuring Waste Quantity. We are amending 40 CFR 98.343(a) by adding a new paragraph (a)(3) to provide the necessary detail and clarification on the requirements for measuring the quantity of waste disposed in the landfill beginning with the first reporting year, and re-designating the existing 40 CFR 98.343(a)(3) as (a)(4). The amended waste measurement requirements for the reporting years require the use of scales when scales are in-place for all vehicles or containers delivering waste, except passenger vehicles and light duty pick-up trucks or waste loads that cannot be measured using the scales due to physical limitations (load cannot physically access or fit on the scale) and/or operational limitations of the scale (load exceeds the limits or sensitivity range of the scale).

When scales are present at the MSW landfill, they must be used, (except for passenger vehicles and light duty pick-up trucks or waste loads that cannot be measured using scales due to physical and/or operational limitations). Two options for the use of scales are included in the amendments. One option is to directly weigh each vehicle/container load as it enters the landfill and weigh each vehicle/container after the waste has been off-loaded, and calculate the mass of waste disposed as the difference in the two measurements. The second option requires the landfill owner or operator to determine tare weights (empty vehicle weights) for representative vehicle types. In this option, the landfill owner or operator must weigh the incoming vehicles and containers and calculate the mass of waste disposed based on the difference of the incoming vehicle weight and the tare weight of that vehicle type.

When scales are not in place, the working capacity or the mass of waste per type of vehicle or container must be determined. These measurements may include determining the volumetric capacity of representative containers and the average density of the waste as received. Wheel-load scales or portable axle-load scales may be used for these density determinations or measures of the mass of waste received by type of load. The landfill owner or operator must record the number and type of vehicles that haul waste to the landfill and use the working capacity of the containers to calculate the quantity of waste landfilled.

In addition to redesignating paragraph (a)(3) of 40 CFR 98.343 to (a)(4), we are amending that paragraph and the sub-paragraphs to clarify that measurement data can be used for historical years when the data are available. We are clarifying that the "Historical waste disposal quantities should only be determined once, as part of the first annual report, and the same values should be used for all subsequent annual reports, supplemented by the next year's data on new waste disposal." We are also amending 40 CFR 98.343(a)(4)(i) to read, "Assume all prior year's waste disposal quantities are the same as the waste quantity in the first year for which waste quantities are available." We are amending 40 CFR 98.343(a)(4)(iii) by revising the phrase, "i.e., from first accepting waste * * *" with "i.e., from the first year accepting waste * * *"

In related amendments, we are also amending 40 CFR 98.344(a) to state that "Mass measurement equipment used to determine the quantity of waste landfilled on or after January 1, 2010 must meet the requirements for weighing equipment as described in "Specifications, Tolerances, and Other Technical Requirements For Weighing and Measuring Devices," NIST Handbook 44 (2009) (incorporated by reference, *see* 40 CFR 98.7)." We are also amending 40 CFR 98.346(a) to require reporting of " * * an indication of whether scales are present at the landfill," and to amend 40 CFR 98.346(b) to require reporting of the waste quantities that were determined using scales according to the requirements in 40 CFR 98.343(a)(3)(i)

and the waste quantities determined using vehicle counts and load capacities. We are also amending 40 CFR 98.347 to specifically require that records be maintained of all measurements used to determine vehicle tare weights or working capacities.

Equations HH–2, HH–3, and HH–4. We are making the following technical amendments to Equation HH–2 in 40 CFR 98.343:

- Replace the term "WGR_X" with "WDR_X" and remove the term "%SWDS."
- Replace the definition of the term "WGR_X" with "WDR_X = Average per capita waste disposal rate for year x from Table HH–2 to this subpart (metric tons per capita per year, wet basis; tons/cap/yr)."
- Delete the definition of the term "%SWDS."
- Delete the word "of" from the definition of "POP_X."

We are making the following technical amendments to Equation HH–3 in 40 CFR 98.343:

- Replace the term "WDR_X" with "W_X."
- Replace the definition of the term "WDR_X" with "W_X" = quantity of waste place in the landfill in year x (metric tons/wet basis)."
- Replace the definition of LFC with "Landfill capacity or, for operating landfills, capacity of the landfill used (or the total quantity of waste-in-place) at the end of the year prior to the year when waste disposal data are available from design drawings or engineering estimates (metric tons)."

We are making the following technical amendments to Equation HH–4 and the related 40 CFR 98.343(b):

- Amend Equation HH–4 of subpart HH and the terms in that equation to allow for daily averages (365 or 366 per year) from a continuous CH_4 monitoring system, or from weekly sampling (with 52 measurement periods).
- Amend the definitions of the terms $(T)_n$ and $(P)_n$ in Equation HH–4 to allow for averaging of measurements.
- In 40 CFR 98.343(b)(2), delete "* * * at least weekly * * *"
- In 40 CFR 98.343(b)(2)(ii), (iii)(A), and (iii)(B), replace "no less than weekly" with "at least once each calendar week; if only one measurement is made each calendar week, there must be at least three days between measurements."
- In 40 CFR 98.343(c), replace "Calculate * * *" with "For all landfills, calculate * * *"

Moisture Content Measurement. In addition to the other amendments to Equation HH–4 of subpart HH discussed above, we revised the definition of $(V)_n$ to be the cumulative volume for the measurement period (rather than the volumetric flow rate), eliminated the 1,440 conversion factor for minutes per day, and revised the reference to "day" in the definition of equation terms with "measurement period." We are also amending Equation HH–4 to replace the moisture correction term, $[1-(f_{H_2O})_n]$, with a moisture correction factor, K_{MC}. K_{MC} is defined as "Moisture correction term for the measurement period, volumetric basis," for three different measurement scenarios:

$K_{MC} = 1$ if $(V)_n$ and $(C)_n$ are both measured on a dry basis or if both are measured on a wet basis.

$KMC = 1-(f_{H_2O})_n$ if $(V)_n$ is measured on a wet basis and $(C)_n$ is measured on a dry basis.

$KMC = 1/[1-(f_{H_2On}]$ if $(V)_n$ is measured on a dry basis and $(C)_n$ is measured on a wet basis.

We are similarly amending 40 CFR 98.343(b)(2)(iii)(B) to indicate that moisture content is needed "[i]f the CH_4 concentration is determined on a dry basis and flow is determined on a wet basis or CH_4 concentration is determined on a wet basis and flow is determined on a dry basis, * * *".

We are amending 40 CFR 98.344(d) and (e) to include reference to moisture content monitors. Specifically, we are amending 40 CFR 98.344(d) to read: "All temperature, pressure, and if necessary, moisture content monitors must be calibrated using the procedures and frequencies specified by the manufacturer." We are also amending the first sentence in 40 CFR 98.343(d) to read, "The owner or operator shall document the procedures used to ensure the accuracy of the estimates of disposal quantities and, if applicable, gas flow rate, gas composition, temperature, pressure, and moisture content measurements." We are amending 40 CFR 98.346(i)(3) to require reporting of both temperature and pressure (not just temperature) and to amend 40 CFR 98.346(i)(4) to require reporting of the moisture content measurements.

"*Active*" *and* "*Passive*" *Gas Collection Systems.* We are amending the definition of "gas collection system" in 40 CFR 98.6 as described in Section II.B of this preamble and we are adding a reporting requirement in 40 CFR 98.346(h) and (i)(7) for reporters to provide "an indication of whether passive vents and/or passive flares (vents or flares that are not considered part of the gas collection system as defined in 40 CFR 98.6) are present at this landfill."

Other Technical Corrections. We are making other technical corrections for subpart HH to correct typographical errors, to correct equations, and to provide minor clarifications.

We are making the following technical corrections to 40 CFR 98.344(b):

- Delete the word "install."
- In 40 CFR 98.344(b)(6)(ii), add "at the routine sampling location."
- Revise 40 CFR 98.344(b)(6)(ii)(A) to read "Take a minimum of three grab samples of the landfill gas with a minimum of 20 minutes between samples and determine the methane composition of the landfill gas using one of the methods specified in paragraphs (b)(1) through (b)(5) of this section."
- In 40 CFR 98.344(b)(6)(iii), delete "that is collected and routed to a destruction device (before and treatment equipment)."
- In 40 CFR 98.344(b)(6)(ii)(B), add "for use in Equation HH–4 of this subpart" to the definition of the term CH_4 as follows "Methane concentration in the landfill gas (volume %) for use in Equation HH–4 of this subpart."

In 40 CFR 98.344(c), we are revising the language to read, "Each gas flow meter shall be recalibrated either biennially (every 2 years) or at the minimum frequency specified by the manufacturer. Except as provided in 40 CFR 98.343(b)(2)(i), each gas flow meter must be capable of correcting for the temperature and pressure and, if necessary, moisture content." We are making the following technical corrections to 40 CFR 98.346:

- Revise the language in 40 CFR 98.346(a) regarding leachate recirculation to read "an indication of whether leachate recirculation is used during the reporting year and its typical frequency of use over the past 10 years (*e.g.,* used several times a year for the past 10 years, used at least once a year for the past 10 years, used occasionally but not every year over the past 10 years, not used)."
- Revise 40 CFR 98.346(c) to read "Waste composition for each year required for Equation HH–1 of this subpart, in percentage by weight, for each waste category listed in Table HH–1 to this subpart that is used in Equation HH–1 of this subpart to calculate the annual modeled CH_4 generation."
- In 40 CFR 98.346(d)(1), replace the term, "Degradable organic carbon (DOC) value used in the calculations," with "Degradable organic carbon (DOC), methane correction factor (MCF), and fraction of DOC dissimilated (DOC_F) values used in the calculations."
- In 40 CFR 98.346(d)(1) add "If an MCF value other than the default of 1 is used, provide an indication of whether active aeration of the waste in the landfill was conducted during the reporting year, a description of the aeration system, including aeration blower capacity, the fraction of the landfill containing waste affected by the aeration, the total number of hours during the year the aeration blower was operated, and other factors used as a basis for the selected MCF value."
- Revise 40 CFR 98.346(f) to read, "The surface area of the landfill containing waste (in square meters), identification of the type of cover material used (as either organic cover, clay cover, sand cover, or other soil mixtures). If multiple cover types are used, the surface area associated with each cover type."
- Add "for the reporting year" to 40 CFR 98.346(i)(1) as follows: "Total volumetric

flow of landfill gas collected for destruction for the reporting year (cubic feet at 520°R or 60°F and 1 atm)."

- Add "Annual average" to 40 CFR 98.346(i)(2)as follows: "Annual average CH_4 concentration of landfill gas collected for destruction (percent by volume)."
- In 40 CFR 98.346(i)(7), replace the parenthetical "(manufacture, capacity, number of wells, etc.)" with "(manufacturer, capacity, and number of wells)."

We are also adding the following definitions within 40 CFR 98.348 of subpart HH: "destruction device"; "solid waste"; and "working capacity."

We are amending Table HH–1 to subpart HH to delete the default value for L_o, to provide additional DOC and k-values including those for inerts, *e.g.,* glass, plastics, metal, concrete, and to provide additional DOC and k-values to provide additional options for categorizing waste when applying Equation HH–1 in 40 CFR 98.343(a). We are also amending Table HH–1 to subpart HH to provide a more reasoned approach for determining the decay rate constant, k, when only a small quantity of leachate is recirculated and/or when leachate recirculation is used rarely (not every year). The leachate recirculation rate will be calculated as the total volume of leachate recirculated during the year divided by the area of the portion of the landfill containing waste. No direct measurement of volume of leachate recirculated is required; engineering estimates may be used. This leachate recirculation rate (in inches/year) is added to the precipitation rate and the sum used to determine what decay rate constant is appropriate. Alternatively, landfills that use leachate recirculation can elect to use the higher k value rather than calculating the recirculated leachate rate. The footnotes for Table HH–1 to subpart HH have been revised accordingly.

We are amending Table HH–2 to subpart HH to provide directly the waste disposal factors rather than the waste generation rates and percent disposed of in solid waste disposal sites (% to SWDS) and correcting an error in the waste generation rates included in Table HH–2 to subpart HH from 1989 to 2006. We are also adding waste disposal rates for 2007, 2008, and 2009.

We are amending Table HH–3 to subpart HH to delete the references to the average depth of waste within an area (H2, H3, H4, and H5). We are also amending Table HH–3 to subpart HH to clarify what is considered a "final soil cover." The description for A5 is revised to read, "Area with a final soil cover of 3 feet or thicker of clay and/or geomembrane cover system and active gas collection." The description for A4 is revised to read, "Area with an intermediate soil cover, or a final soil cover not meeting the criteria for A5 below, and active gas collection."

Major changes since proposal are identified in the following list. The rationale for these and any other significant changes can be found in this preamble or the Response to Comments: Technical Corrections, Clarifying and Other Amendments (see EPA–HQ–OAR–2010–0109).

- Deleted the word "dedicated" from the phrase "dedicated construction and demolition waste landfill" in 40 CFR 98.340(b) and replaced the proposed definition of "dedicated construction and demolition waste landfill" with a definition of "construction and demolition waste landfill" taken from 40 CFR part 257.2.
- Revised the definition of MCF term in Equation HH–1 to allow landfills with active aeration to select an MCF value less than 1, but no lower than 0.5 and added reporting requirements to 40 CFR 98.346(d)(1) for facilities using an MCF value other than 1.
- Revised Table HH–1 to subpart HH to include DOC and k values for additional waste categories to provide an additional option for characterizing waste materials when applying Equation HH–1 of subpart HH.
- Revised the footnotes to Table HH–1 to subpart HH to allow the use of the greater k value in a given range when recirculation is used without the need to calculate the recirculated leachate quantity in inches per year.
- Revised 40 CFR 98.343(a)(3) to account for those loads that cannot be measured using scales due to their physical and/or operational limitations.

2. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. Several comments were received on this subpart. Responses to additional significant comments received can be found in Response to Comments: Technical Corrections, Clarifying and Other Amendments (*see* EPA–HQ–OAR–2010–0109).

Comment: Several commenters stated that the new definition of "dedicated construction and demolition (C&D) waste landfills" is problematic and inappropriate because it is inconsistent with the C&D landfill definition already long-established in 40 CFR 257.2, "Criteria for the Classification of Solid Waste Disposal Facilities and Practices," it represents a significant material change to the subpart HH applicability requirements, and it changes the data collection requirements for landfills retroactively. The RCRA Subtitle D definition 40 CFR 257.2 is:

"Construction and demolition (C&D) landfill means a solid waste disposal facility subject to the requirements of subparts A or B of this part that receives construction and demolition waste and does not receive hazardous waste (defined in § 261.3 of this chapter) or industrial solid waste (defined in § 258.2 of this chapter). Only a C&D landfill that meets the requirements of subpart B of this part may receive conditionally exempt small quantity generator waste (defined in § 261.5 of this chapter). A C&D landfill typically receives any one or more of the following types of solid wastes: Roadwork material, excavated material, demolition waste, construction/renovation waste, and site clearance waste."

According to the commenters, a dedicated C&D landfill, as defined in the proposal, rarely exists and most states allow C&D landfills to accept yard waste and other forms of household trash, pointing to the use of the word "typically" with regard to the types of wastes received, and suggesting that site clearance waste includes yard waste among other materials. The commenters urged EPA to delete the new C&D landfill definition in 40 CFR 98.348 and replace it with the definition found in 40 CFR 257.2. On the other hand, one commenter expressed concern with excluding "dedicated C&D waste landfills" even with the proposed definition and requested EPA to quantify the methane emissions from these C&D landfills.

Response: We generally agree with commenters that the RCRA Subtitle D definition in 40 CFR 257.2 is appropriate and should be used in preference to the proposed definition of "dedicated C&D waste landfills." However, we are concerned with some of the assertions made by the commenters that a "C&D waste landfill" could accept some yard wastes and possibly other household wastes. Yard waste and household solid wastes are clearly included in the definition of "municipal solid waste or MSW" in 40 CFR 98.6. The definition of "MSW landfill" in 40 CFR 98.6 "means an entire disposal facility * * * where household waste is placed in or on land." It is our interpretation and intent that any landfill in which household wastes, including household yard wastes or other MSW materials, are placed is a MSW landfill and is subject to the reporting requirements of subpart HH. As we did not change or alter the definition of MSW or MSW landfill, we do not agree with commenters that interpret the RCRA Subtitle D definition of C&D landfills in 40 CFR 257.2 to somehow supersede the definitions and intent of subpart HH. Furthermore, the definition of MSW landfill (MSWLF) unit in 40 CFR 257.2 specifies that "a C&D waste landfill that receives residential lead-based paint waste and

does not receive any other household waste is not a MSWLF unit." The converse of the statement clearly suggests that a C&D waste landfill that receives any household waste other than residential lead-based paint waste is a MSWLF unit. Thus, while we are revising the definition of C&D landfill to more closely follow the definition at 40 CFR 257.2, we do not agree that we materially altered the rule by providing a definition of dedicated C&D waste landfill and strongly object to the supposition that landfills that receive even small quantities of household wastes (other than residential lead-based paint wastes) are anything other than MSW landfills. Therefore, to clarify our intent, we have revised slightly the language adapted from the RCRA definition to specifically state that a C&D waste landfill does not receive MSW. We also deleted the sentence regarding conditionally exempt waste as superfluous to the requirements of this definition in subpart HH. The final definition reads "*Construction and demolition (C&D) waste landfill* means a solid waste disposal facility subject to the requirements of subparts A or B of part 257 of this chapter that receives construction and demolition waste and does not receive hazardous waste (defined in 40 CFR 261.3 of this chapter) or industrial solid waste (defined in 40 CFR 258.2 of this chapter) or municipal solid waste (defined in 40 CFR 98.6) other than residential lead-based paint waste. A C&D waste landfill typically receives any one or more of the following types of solid wastes: roadwork material, excavated material, demolition waste, construction/renovation waste, and site clearance waste."

While we have adopted, for the most part, the RCRA subtitle D definition for C&D waste landfills, we maintain that the inclusion of a definition of C&D waste landfills is not a material change in the rule because it does not alter the definition of MSW landfill or the applicability of the rule to MSW landfills. As the final definition of C&D waste landfills expressly includes site clearance wastes, which could include trees and other materials that have significant organic content, we agree that additional evaluation is needed to assess the methane generation potential of C&D waste landfills. Consequently, we are taking this comment under advisement; we will determine whether or not reporting requirements should be proposed for C&D waste landfills at a future time based on the results of the additional evaluations of C&D waste materials and their methane generation potential.

Comment: Several commenters expressed support for the amended definition of "gas collection systems or landfill gas collection systems," intended to clarify that passive vents/flares are not considered part of a landfill gas collection system for purposes of subpart HH. However, these commenters opposed the proposed reporting requirement to provide an indication of whether passive vents and/or passive flares that are not considered part of the gas collection system as defined in 40 CFR 98.6 are present at the landfill. The commenters argued that this represents a new data element that would require significant additional burden to contact landfill engineers to collect this new information. The commenters recommended that EPA finalize this data element, but delay its collection to January 1, 2011, and delay its reporting to March 31, 2012 and thereafter. On the other hand, one commenter expressed concerned that EPA's decision to exempt "passive" gas collection systems from flow meter reporting may inadvertently exempt substantial emissions sources. The commenter noted that the number of landfills with passive vent controls is uncertain and argued that the cumulative emissions from these passive collection systems could be significant. The commenter requested EPA include any data on this point in the record for the final rulemaking and include passive gas collection systems fully in the rule if warranted.

Response: The monitoring requirements for gas collection systems within the final rule were developed considering forced ventilation systems and those monitoring requirements are inappropriate for passive gas collection systems. However, we agree with the commenter who suggested that EPA must obtain more data on the prevalence of these systems in order to properly understand and account for the impact these systems may have on the GHG emissions from MSW landfills. We find that "an indication" (essentially answering a yes/no question to indicate whether or not a passive gas collection system is present) is not a significant additional reporting burden. As this reporting requirement requires no monitoring or other activities that might be considered a retroactive requirement, we conclude that this reporting requirement is appropriate and necessary for the 2010 reporting year.

Comment: A few commenters indicated that the requirement to use a methane correction factor (MCF) of 1 will overestimate methane generation from landfills that are actively aerated and recommended that facilities be allowed to use alternative MCF values based on site-specific conditions (*e.g.,* the use of in-situ aeration).

Response: To the extent some MSW landfills actively aerate the waste within the landfill, we agree that alternative MCF values should be allowed for actively aerated landfills. Supplying air to the waste within the landfill will reduce the fraction of carbon that is degraded anaerobically, which is represented by the MCF value. However, additional reporting requirements are needed to verify the MCF value selected. These include the basis of the alternative value, such as an indication of whether active aeration is used, a description of the aeration system, including aeration blower capacity, the fraction of the landfill containing waste affected by the aeration, the total number of hours during the year the aeration blower was operated, and other factors used as a basis for the selected MCF value. Based on other comments received (*e.g.,* comments described above on reporting of the presence of passive gas collection systems), the inclusion of these additional reporting requirements would likely be objectionable. However, we have conditioned these additional reporting requirements to be applicable only for facilities electing not to use an MCF value of 1. As the reporting requirements for facilities that use an MCF value of 1 have not changed, and because all facilities can choose to use the default value of 1 (including the relatively few landfills that use active aeration), we find that we have not significantly altered the reporting requirements of the final rule. Facilities electing to use an MCF other than 1 must have active aeration and must provide information regarding the aeration system to justify the lower MCF value.

Comment: One commenter noted that the new defaults for inert wastes in Table HH–1 to subpart HH are designated for use only by those landfills capable of segregating and measuring the waste they accept by composition using EPA's prescribed waste categories, which include: food waste, garden, paper, wood and straw, textiles, diapers, sewage sludge and, now, inerts. According to commenters, U.S. MSW landfills do not use these categories to categorize waste receipts, and few if any MSW landfills will be able to adjust for large quantities of inerts that may be disposed of at a specific landfill. The commenter noted that the MSW landfill sector in the U.S.

typically records waste type receipts using the broad categories of MSW bulk waste, construction and demolition (C&D) bulk waste, inert waste, sewage sludge, and yard and garden waste. The commenter recommended that the inert defaults be included in Table HH–1 to subpart HH for the "Bulk Waste Option" to allow landfills to take large shipments of bulk inert wastes into account in their landfill gas generation models.

Response: The bulk DOC and k values were determined based on monitored landfill gas generation rates and the total quantity of waste disposed (annual average waste acceptance rates). We reviewed the C&D waste acceptance policies of these landfills, as C&D waste can largely be comprised of inert materials, and determined that each landfill accepted C&D wastes. While we do not have a breakdown of the relative quantities of different categories of wastes in these landfills, we maintain that the default "bulk waste" DOC and k values are representative of typical or average MSW landfill operations in the U.S. However, we also acknowledge that there is significant variability in the methane generation rates (per ton of waste disposed) at individual landfills. We provided the waste composition option to account for this variability, but this option needs a default value for inert materials in order to be more comprehensive and therefore reflective of waste composition at U.S. landfills. With regard to the bulk waste option, which is applicable when a landfill cannot breakdown their waste quantities at all, it is not appropriate to allow the use of inert default parameters, because values provided for this option already consider that there will be some amount of inerts in the overall waste quantity. Therefore, this option remains as it appeared in the October 2009 Final rule. However, we consider it reasonable to provide an alternative bulk MSW option that allows landfills to characterize their waste quantities into categories that the MSW landfill industry more typically monitors and records. We reviewed available MSW waste characterization data to develop default bulk MSW model parameters excluding inerts and C&D wastes, and determined that an appropriate DOC value for this waste category is 0.31 with a k value similar to that for bulk waste. Therefore, we have included in the final rule an additional option for characterizing waste materials. In this "bulk MSW" option, there are three waste categories: bulk MSW excluding inerts and C&D wastes; inert wastes; and C&D wastes. This new option provides a means for individual landfills to better estimate the methane generation rates to account for significant quantities of inert materials or C&D wastes without needing to classify the wastes into the detailed categories of the waste composition option. For more information on the bulk MSW option, please see "Modified Bulk MSW Option" in docket EPA–HQ–OAR–2010–0109.

Given these amendments to Table HH–1 to subpart HH, we are also revising the reporting requirements in 40 CFR 98.346(c) to clarify that the waste compositions should be reported only for the waste categories in Table HH–1 to subpart HH that are used in the calculation of methane generation using Equation HH–1 of subpart H. This amendment is needed to avoid confusion with the "municipal" category currently listed in 40 CFR 98.346(c) and the bulk waste and bulk MSW categories.

Comment: A few commenters indicated that the amendment to the Table HH–1 to subpart HH regarding leachate recirculation imposes substantial new data collection requirements that would require significant operational changes to implement. According to the commenters, most landfills that recirculate leachate do not measure and track the volume that is recirculated during each event and would not be able to provide these data for the 2010 calendar year. Furthermore, the commenter suggested that landfills would incur significant expense to install appropriate leachate measurement devices and ancillary equipment for a nominal impact on landfill GHG emissions calculation accuracy.

Response: We proposed the modifications to Table HH–1 to subpart HH to address questions that arose concerning the use of the highest k value in the range when leachate recirculation was used sporadically or only in limited amounts. We did not specify any monitoring requirements for the quantity of leachate recirculated; we anticipated that most landfills would use company records or engineering estimates to determine the quantity of leachate recirculated. We have revised the first footnote to Table HH–1 to subpart HH to clarify this point. Additionally, we have revised the footnotes to allow facilities to use the highest k value in the range when leachate recirculation is used. As such, the final amendments are effectively equivalent to those proposed, but give reporters some flexibility to use high-range default k values if leachate recirculation is used, but leachate recirculation rates are unknown or otherwise not estimated. The use of the higher k values may overestimate methane generation, but it will not result in any additional monitoring or reporting burden for reporters. Further, not all landfills use leachate recirculation and we expect that some of the landfills that do use leachate recirculation will have records that document the amount of leachate that is recirculated. Therefore, we expect that only a small subset of landfills would default to the higher k-value when a lower k-value might be more appropriate and that there will not be a significant bias in overall emissions from landfills.

Comment: Several commenters discussed the amendments in 40 CFR 98.343(a)(3) requiring landfills to use scales when scales are in-place for all vehicles or containers delivering waste, except passenger vehicles and light-duty pick-up truck. The commenters stated that this requirement is problematic because it is not possible to physically weigh all loads entering the landfill because their weight may exceed the scales' capability or the dimensions of the waste may not allow the waste load to pass through the physical constraints of the scale and scale-house. Some commenters noted that state and local requirements may require accounting of certain waste types on a volumetric basis despite the landfill having scales. The commenters suggested that having to maintain two sets of records in order to comply with all established regulatory requirements is an unnecessary burden and contrary to acceptable accounting practices. One commenter suggested that the clarification to require all waste loads to be weighed via a scale to be a substantial material change because the final MMR could be interpreted to allow tipping fee receipts or company years for 2010 and beyond and not just direct measurement. The commenters generally recommended that 40 CFR 98.343(a)(3) be revised so that waste loads can be measured by using either methodologies as appropriate for the waste type disposed even though scales are present at the landfill. Some of the commenters suggested EPA allow facilities to estimate the weight/volume of the delivered waste material using methods and factors allowed or required by state or local agencies or other methods documented in the relevant facility's GHG Monitoring Plan.

Response: We originally intended that scales be installed and direct mass measurements be used for the year 2010 and beyond; the allowance of tipping

fee receipts or other company records was intended for years prior to the first emissions reporting year. While states and local jurisdictions may require measurement by volume, Equation HH–1 of subpart HH, which is the foundation for determining methane generation from the landfill, requires the waste quantity in units of mass. Section 98.343(a)(2) of subpart HH specifically requires these waste quantities [in units of mass] to be determined daily, and 40 CFR 98.344(a) states that "[t]he quantity of waste landfilled must be determined using mass measurement equipment * * *" EPA answered numerous questions regarding this requirement and communicated the above interpretation to the industry in webinars and other outreach materials. Consequently, we do not consider the proposed amendments in 40 CFR 98.343(a)(3) to be a substantial material change in the requirements of the rule published on October 30, 2009. However, we recognize that some reporters did not believe that the rule language was explicit with respect to these requirements. Additionally, we reconsidered our original position that scales must be installed. The proposed amendments addressed both of these issues.

We had not considered that there would be physical limitations to accessing the scale. We also anticipated that the scales would cover the range of sizes and weights received at the site. As we no longer require the installation of permanent scales at a facility, we certainly do not intend to require facilities to have to replace existing scales to accommodate unusually sized or heavy loads. As such, we conclude that it is reasonable to allow facilities to use the methods in 40 CFR 98.343(a)(3)(ii) for certain waste loads even though scales are present at the facility. However, because the mass of waste is a critical input to Equation HH–1 and we desire accurate measurements of this waste, the methods outlined in 40 CFR 98.343(a)(3)(ii) are limited to waste loads that cannot be measured using the scales due to physical and operational limitations of the scale. Physical limitations refers to the shape or size of the load so that it cannot access the scale or does not fit on the scale. Operational limitations refers to the weight of the load exceeding the limits or sensitivity range of the scale. Operational limitations are not intended to consider waiting times to access the scale. For all other types of waste loads (other than passenger vehicles or light duty trucks), the direct mass measurement methods in 40 CFR 98.343(a)(3)(i) must be used.

Q. Subpart LL—Suppliers of Coal-Based Liquid Fuels

1. Summary of Final Amendments and Major Changes Since Proposal

First, we are amending 40 CFR 98.386(a)(5) and (6) to clarify that fossil-fuel products that enter the facility will not be reported when exiting the facility if they are not further refined or otherwise used on site (e.g. products stored in a tank). It was not EPA's intent that such products be reported.

Second, we are amending 40 CFR 98.386(a)(3), (a)(7), (b)(3), and (c)(3) to harmonize the reporting requirements with the amendments in 40 CFR 98.393 of today's rule to account for denaturant in ethanol. Third, we are replacing a comma with the words "that were" in 40 CFR 98.386(a)(16) and (a)(17) and adding a paragraph at 40 CFR 98.386(d) to harmonize the reporting requirements with the amendment in 40 CFR 98.393(i) of today's rule to provide an optional method for calculating GHG emissions from blended feedstock and products. Since subpart LL reporters follow subpart MM methodologies for calculating GHG emissions, these amendments are necessary to ensure complete reporting of subpart LL data.

2. Summary of Comments and Responses

EPA did not receive any comments on the proposed amendments to subpart LL and is finalizing the amendments to this subpart as proposed.

R. Subpart MM—Suppliers of Petroleum Products

1. Summary of Final Amendments and Major Changes Since Proposal

We are adding a definition of "batch" in 40 CFR 98.398 to clarify the crude oil reporting requirements in 40 CFR 98.396(a)(20) and to minimize administrative burden. Under this final rule, a batch of crude oil means either a volume that enters a refinery or a component of such volume (*e.g.,* the volumes of different crude streams that are blended together and then delivered to a refinery). The batch volume is dependent upon what a refiner knows about the crude oil it receives and is the first appropriate tier in the following list:

(1) Up to an annual volume of a type of crude oil identified by an EIA crude stream code,[6] if the EIA crude stream code is known.

(2) Up to an annual volume of a type of crude oil identified by a generic name for the crude stream and an appropriate EIA two-letter country or state and production area code[7] if the generic name and EIA two-letter code are known but no appropriate EIA crude stream code exists.

(3) Up to a calendar month volume from a single known foreign country of origin if the crude stream name is unknown.

(4) Up to a calendar month volume from the United States if the crude stream name and production area are unknown.

(5) Up to a calendar month volume if the country of origin is unknown.

For example, if refiners know the EIA crude stream code of a volume of crude oil that they receive, they must report the API gravity and sulfur content of up to an annual volume of this type of crude oil. If refiners only know the country of origin of a volume of foreign crude oil (but not the crude stream name), they must report the API gravity and sulfur content of up to a calendar month volume from that country.

For data collection in 2010 only, a refiner that knows the information that we require them to report under a specific tier of the batch definition, but does not have the necessary data collection and management in place to readily report this information, can use the next most appropriate tier of the batch definition for reporting batch information in 40 CFR 98.396(a)(20).

With this definition of "batch", we are requiring refiners to report on crude oil volumes in 40 CFR 98.396(a)(20) using the best data they are collecting as part of normal business practices. For example, refiners must use data on the American Petroleum Institute (API) gravity and sulfur content of crude oil that they, or a third party, currently collect as part of normal business practices, including data refiners use to report monthly weighted average API gravity and sulfur content to EIA. As another example, refiners must use data that they currently collect on the EIA crude stream code or country of origin for the components of a blended crude oil.

[6] The *EIA crude stream code* is the numeric code used to identify the type of domestic crude oil in Form EIA–182 (Domestic Crude Oil First Purchase Report) and the alpha numeric code used to identify the type of foreign crude oil in Form EIA–856 (Monthly Foreign Crude Oil Acquisition Report).

[7] *EIA country code* means the two-letter code identifying the country associated with the alpha numeric crude stream codes used to identify the type of foreign crude oil in Form EIA–856 and is traditionally found in Appendix A of the form. The *EIA state and production area code* is the two-letter code used to identify the source of domestic crude oil in Form EIA–182 is traditionally found in Appendix A of the instructions.

We are making harmonizing amendments to 40 CFR 98.396(a)(20) to allow refiners to report the country of origin, EIA crude stream code and name, or the generic name of the crude stream and associated production area code for a given batch as appropriate, if known.

To better align the API gravity and sulfur content reporting requirements with normal business practices, we are also amending the recordkeeping requirements in 40 CFR 98.397 so that refiners will no longer be required to maintain laboratory reports, calculations and worksheets used in the measurement of API gravity and sulfur content of crude oil. Instead, refiners must maintain sufficient records to support the information they report to EPA (as required by 40 CFR 98.397(a) and (b)).

We are also amending 40 CFR 98.394(d) and 40 CFR 98.396(a)(20) to clarify that we are seeking the weighted average API gravity and sulfur content from representative samples of each batch.

To ensure that refiners can report readily available data in 40 CFR 98.386(a)(20) on the volume and associated characteristics of components of a blended crude oil, we are amending the requirements for determining quantity of crude oil in 40 CFR 98.394(a)(1) so that they only apply to volumes of crude oil that refiners measure on site (e.g., the total volume rather than the components of such volume). Refiners may now use an industry standard practice to determine volumes of crude oil that are not measured on site, even if an appropriate standard method published by a consensus-based standards organization exists, as specified in a new paragraph, 40 CFR 98.394(a)(3). We are also amending the recordkeeping requirements associated with quantity determination in 40 CFR 98.397(b) so that refiners will not be required to maintain metering and gauging records for quantities of crude oil that they do not measure on site, including the date of initial calibration and frequency of recalibration for associated measurement equipment. We are also amending 98.394(d) to give refiners the option of following an industry standard practice to measure API gravity and sulfur content of crude oil.

We are amending the definition of $Product_i$ (annual volume of product "i" produced, imported, or exported) in Equation MM–1 in 40 CFR 98.393(a)(1) and (2) to make it clear that GHG emissions should not be calculated for products leaving the refinery if those products had entered the refinery but were not further refined or otherwise used on site (*e.g.,* products stored in a tank). As a harmonizing change, we are amending 40 CFR 98.396(a)(5) and (6) to clarify that these products are not reported.

We are amending the procedure in 40 CFR 98.393(f)(1) for calculating emission factors for solid products when using Calculation Method 1. The amendments will clarify that reporters should multiply the default carbon share factor in column B of Table MM–1 to subpart MM by 44/12 (the ratio of the molecular weight of CO_2 to the atomic weight of carbon) to convert the amount of carbon in the product to CO_2. Due to an oversight, 44/12 was not included in the original formula. This amendment is necessary because otherwise reporters would calculate the emissions of carbon instead of carbon dioxide.

We are amending Equation MM–9 in 40 CFR 98.393(h)(2) to correct a typographical error. The correct emission factor (EF) term in the equation is EF_j not EF_i.

We are adding an optional method for reporters in 40 CFR 98.393(i) to calculate CO_2 emissions that would result from the complete oxidation or combustion of a blended product or blended non-crude feedstock. The procedures in the existing rule require reporters to calculate CO_2 emissions for blended products either by selecting the default emission factor for the product listed in Table MM–1 to subpart MM that resembles most closely the blended product (Calculation Method 1) or by sampling and testing the blended product (Calculation Method 2). If a reporter applies the former method, the CO_2 emissions calculation for the blended product will likely reflect the CO_2 content of only one blend component. In such a case, the CO_2 from the blended product will not be as accurately accounted for in Equation MM–4 of subpart MM. The optional method we are adding allows reporters to account for the CO_2 emissions of a blended product or blended non-crude feedstock in the summary calculation of total facility CO_2 by calculating the emissions of the blend's individual components using appropriate default factors listed in Table MM–1 to subpart MM. This increases flexibility for facilities that receive and supply blends. This also improves accuracy of the summary calculation of total refinery CO_2 because it ensures that the same quantities and emission factors are used for blend components coming in to the refinery as for blended products going out.

The optional method is not available for a product that is biomass-based because such biomass-based products are subject to paragraph (h) of 40 CFR 98.393.

To align the existing regulatory text with the optional method for blends, we are amending paragraphs (a)(1) and (b)(1) of 40 CFR 98.393 and paragraphs (a)(16) and (a)(17) of 40 CFR 98.396. We are also adding paragraph (d) of 40 CFR 98.396 to create new data reporting requirements for blends.

We are amending the calculation procedures in 40 CFR 98.393(h) for blended biomass-based fuels. Part 98 (as finalized in 70 CFR 56260, October 30, 2009) directed refineries that supply a petroleum product that was produced by blending a petroleum-based product with denatured ethanol to report emissions from the denaturant leaving the refinery but not the denaturant in the ethanol that enters the refinery as a feedstock. This resulted in over-reporting of GHG emissions across subpart MM reporters because the blending refinery accounted for the CO_2 from denaturant in its GHG emissions calculation even though the original refinery that produced the denaturant ex-refinery gate already accounted for the CO_2 in its GHG emission calculation. To address the over-reporting for refineries using Calculation Method 1 for petroleum products or non-crude petroleum feedstocks that contain denatured ethanol, we are amending Equations MM–8 and MM–9 of subpart MM to exclude denaturant from the term "%vol", respectively.

To address this over-reporting for refineries using Calculation Method 2 for petroleum products that were produced by blending a petroleum-based product with denatured ethanol on site, we are adding a new Equation MM–10a of subpart MM. Equation MM–10a requires refineries to sample the petroleum-based products prior to blending them with denatured ethanol and use the resulting emissions factor and the volume of the petroleum-based product to calculate emissions for the ultimate petroleum products that leave the refinery. This new equation is necessary and Equation MM–10 is incorrect for such situations because the term for the biomass default emission factor in Equation MM–10 is applied to the whole volume of biomass received for blending (which for ethanol includes denaturant), even though the default factor for ethanol does not account for denaturant. We are splitting 40 CFR 98.393(h)(3) into paragraphs (i) and (ii) so that Equation MM–10 remains in (i) for petroleum products blended with

biomass other than denatured ethanol while Equation MM–10a appears in (ii) for petroleum products blended with denatured ethanol. We are amending Equation MM–10 to exclude denaturant from the term "%vol."

Together, these amendments ensure that the denaturant present in ethanol is not accounted for in the calculation of CO_2 that would result from the complete combustion or oxidation of the biomass-blended product or feedstock. We have concluded that these amendments simplify reporting for reporters while maintaining the level of data quality and accuracy required by EPA for subpart MM because we would expect any denaturant in ethanol that enters the refinery in a feedstock to leave the refinery in a product and therefore the CO_2 emissions from the denaturant would be a net of zero.

We cannot identify a situation, nor did any commenters, in which a refinery would want to use Calculation Method 2 for a non-crude feedstock that contains denatured ethanol or an importer or exporter would want to use Calculation Method 2 for products containing denatured ethanol. Therefore, we are splitting 40 CFR 98.393(h)(4) into paragraphs (i) and (ii) so that Equation MM–11 of subpart MM remains in (i) for non-crude feedstocks blended with biomass other than denatured ethanol while directions to use Calculation Method 1 appear in (ii) for non-crude feedstocks blended with denatured ethanol by refineries. We are also adding directions in 40 CFR 98.393(h)(3)(ii) for importers and exporters of petroleum products blended with denatured ethanol to use Calculation Method 1. We are amending Equation MM–11 to exclude denaturant from the term "%vol."

We are amending 40 CFR 98.396(a)(3), (a)(7), (b)(3), and (c)(3) to align the reporting requirements with the amendments to account for denaturant in ethanol.

Major changes since the proposal are identified in the following list. The rationale for these and any other significant changes can be found in Response to Comments: Technical Corrections, Clarifying and Other Amendments (see EPA–HQ–OAR–2010–0109).

- We expanded on the proposed definition of "batch" to require refiners to report up to an annual volume of a type of crude oil identified by an EIA crude stream code (or the generic crude stream name and production area code if no appropriate EIA crude stream code exists) if refiners know this information. If refiners do not know this information, refiners must report according to the proposed definition of batch (*e.g.,* up to a calendar month volume from a single country of origin or, if refiners do not know the country of origin, up to a total calendar month volume).
- We clarified that "batch" can mean either the volume that enters a refinery or the components of such volume. We amended 40 CFR 98.394(a) to allow refiners to use industry standard practices to determine crude oil volumes that they do not measure on site, rather than standard methods published by a consensus-based standard, if desired. We also amended the recordkeeping requirements associated with quantity determination in 40 CFR 98.397(b) so that refiners are not required to maintain metering and gauging records for quantities of crude oil that they do not measure on site.
- We amended 40 CFR 98.394(d) to allow refiners to use industry standard practices to measure API gravity and sulfur content of crude oil, rather than standard methods published by a consensus-based standards organization, if desired.
- For reporting year 2010 only, we are providing reporters some flexibility in defining a batch of crude oil. A refiner that knows the information under a specific tier of the batch definition, but does not have the necessary data collection and management in place to readily report this information, can use the next most appropriate tier of the batch definition for reporting batch information in 40 CFR 98.396(a)(20).
- As a harmonizing amendment with the final definition of crude oil (as discussed in Section II.B, Subpart A—General Provisions, of this preamble), we added a reporting requirements for refineries in 40 CFR 98.396(a). Refiners are now required to report on the volume of crude oil that they inject into a crude supply or reservoir under a new paragraph (22).

2. Summary of Comments and Responses

This section contains a brief summary of major comments and responses. Several comments were received on this subpart. Responses to additional significant comments received can be found in Response to Comments: Technical Corrections, Clarifying and Other Amendments (see EPA–HQ–OAR–2010–0109).

Comment: We received three comments related to our proposed amendments regarding the treatment of denatured ethanol. Two comments supported the proposed change. The third commented that reporting of gasoline-ethanol blends (*i.e.,* a petroleum product that contains denatured ethanol and is a blended biomass-based fuel) was burdensome and suggested that only the petroleum portion of these blends should be reported. That commenter stated that the blending of ethanol with gasoline should not be considered "to be further refined or otherwise used on site" (40 CFR 98.396(a)(1)) and that therefore, ethanol should not have to be reported.

Response: We are finalizing our proposed amendments related to denaturant in ethanol in today's rule.

When finalizing subpart MM, (74 FR 56260, October 30, 2009), EPA concluded that reporting the total volume of gasoline-ethanol blends ex refinery gate as well as the percentage of that volume that is petroleum-based is not unnecessarily burdensome to reporters. The changes to 40 CFR Part 98.396(a) that would be necessary to remove biomass reporting as suggested by the commenter are outside the scope of the specific amendments proposed for public comment in the **Federal Register** notice of June 15, 2010. The proposed changes to 40 CFR 98.396(a) only addressed how the denaturant in ethanol should be treated, and EPA did not seek comment on removing reporting on biomass entirely.

As a result of the comments we received, we have concluded that there has been confusion regarding how ethanol should be reported when it leaves the facility. When ethanol leaves a facility covered by subpart MM, it is generally being blended with finished gasoline as it is being loaded into a truck. We are clarifying here that EPA considers the ethanol and the gasoline to be leaving the facility separately if they are leaving through different "spigots" and being blended in the truck. Under these circumstances, there is no gasoline-ethanol blend on site at the facility. The gasoline is the petroleum product that must be reported as leaving the facility. The denatured ethanol is not part of a petroleum product leaving the facility and, as a result of the technical correction being made in this rule for how to treat the denaturant in ethanol, need not be reported as entering or leaving the facility under these circumstances.

The phrase "to be further refined or otherwise used on site" only applies to petroleum products, including blended biomass-based fuels, and natural gas liquids. EPA has clarified through guidance that a petroleum product or natural gas liquid that stays in the same container or vessel while on site and that is not blended with any other product is not "otherwise used on site" and that blending is considered "otherwise used on site". If refiners blend ethanol with a petroleum product on site—for example, a refiner blends gasoline and ethanol on site and stores the blend in a tank before it leaves the facility—then the total volume of the ethanol-gasoline blend as well as the percentage of that volume that is petroleum-based must be reported when the blend leaves the facility. The

volume of ethanol entering the facility need not be reported.

Comment: In the proposal, we sought comment on defining a "batch" to help clarify crude oil reporting requirements in 40 CFR 98.396(a)(20) and reduce administrative burden, while continuing to collect adequate crude oil data to support the purposes of subpart MM.

We received several comments on our proposed definition of batch and potential alternatives. One commenter supported defining a batch as the annual volume of a type of crude oil characterized by an EIA crude stream code (rather than monthly volumes) if EPA maintains the requirement to report API gravity, sulfur content, and country of origin of crude oil. One commenter expressed support for the proposed definition of batch but cautioned that it would limit refiners to report the country of origin as "unknown" when the crude oil batch is a blend of crude oil from several known countries. The commenter therefore advised EPA to allow refiners to report on the components in a crude oil blend and to amend the quantity determination requirements so that refiners can use information obtained from normal business practices on blend component volumes. The commenter further opined that, similar to the problem of reporting a single country of origin, refiners receiving a crude oil blend would be unable to report a single EIA crude stream code. Therefore the commenter recommended that EPA include annual crude volumes by EIA crude stream codes in the definition of batch only if it is presented as one of multiple options. Two commenters advocated that EPA limit the definition of batch to the annual volume of each EIA crude stream code category and remove the requirement to report API gravity, sulfur content, and country of origin for every batch. One commenter expressed concern about limiting the definition of batch to the annual volume of each EIA crude stream code category if it means losing data on API gravity. That commenter urged EPA to require refiners to report the sample data they already collect for EIA reporting. The commenter also asked that EPA define "batch" in a way that captures the differences in crude oil originating from the same country since different crude streams from the same country can have different API gravity and sulfur contents.

Response: In today's rule we are finalizing a definition of "batch" that builds on our proposed definition by adding two additional features. First, we are requiring refiners to define a batch as up to an annual volume of a type of crude oil identified by an EIA crude stream code (or a generic crude stream name and production area code) if refiners know this information. Second, we are defining batch as either the total volume of crude oil that enters a refinery or the components of such volume so that refiners will be able to report representative data they currently collect on all three crude parameters—(1) API gravity, (2) sulfur content, and (3) country of origin or crude stream name and production area—for the components in a blended crude volume instead of having to report the third parameter as unknown. These amendments were generally supported by commenters and we concluded that they would result in better data and be less burdensome than the proposed definition.

With regard to comments on defining a batch as a monthly versus annual volume of crude, we determined that API gravity and sulfur content of specific crude streams do not vary enough to warrant requiring batch to be defined as only up to a monthly volume. On the other hand, API gravity and sulfur content can vary significantly between different crude streams coming from the same country of origin (or multiple countries of origin). Therefore, we determined that monthly reporting outlined in the proposed definition of "batch" would be necessary in those cases where refiners only know the country of origin of their crude volume (rather than the crude stream name and production area) or when they do not know the country of origin. We did not conclude that reporting batches more frequently than a monthly basis would be necessary in any situation.

We considered eliminating the requirement that refiners report API gravity and sulfur content if they report the EIA crude stream code associated with the batch, but we determined that there were too many EIA crude stream codes without corresponding API gravity and sulfur content values and that even when present these values, while illustrative, were based on limited information and would not always be representative of the characteristics of the crude oil used at a refinery. Furthermore, refiners already collect data on the API gravity and sulfur content of their crude oil in order to report this information to EIA on a monthly basis, and it is our understanding, based on an industry comment, that refiners also track this information to determine how well the physical characteristics of the crude oil align with the processing capability of their refineries.

Comment: In the proposal, we sought comment on other technical amendments (besides defining "batch") that would help clarify crude oil reporting requirements in 40 CFR 98.396(a)(20) and reduce administrative burden. In particular, we sought comment on ways to better align the provisions related to crude oil reporting with normal business practices.

We received two comments with input on ways to better align the monitoring and QA/QC provisions related to crude oil reporting with normal business practices. According to the two commenters, it is normal business practice for refiners to maintain data on crude batch volumes and other parameters required in 40 CFR 98.396(a)(20). They described a number of different sources they use to identify the sulfur content and API gravity of crude oil batches (including components of blended crude oil volumes) such as grab samples, contract laboratory records, crude assay reports, invoices, and pipeline receipt tickets. They explained that the data contained in these sources are often collected outside of the refinery under normal business practices, which may be inconsistent with the current requirements in the rule to use standard methods to measure these data (resulting in the need to collect the data again inside the refinery). In addition, one of the two commenters explained that they maintain data on the components of blended crude volumes but they may not be able to determine the volume of the components of blended crude according to the quantity determination requirements in 40 CFR 98.394(a)(1) since the components arrive at the refinery already blended. Therefore, they will be forced to report the total volume of the blended crude oil and the country of origin (or EIA crude stream code) as "unknown" even though they know information about the volume components.

We also received two comments in support of the proposed elimination of recordkeeping requirements in 40 CFR 98.397 related to the measurement of API gravity and sulfur content of crude oil because it would support the use of data collected in normal business records. We received one comment that objected to EPA's deletion of specific recordkeeping requirements for API gravity and sulfur content measurements on the basis that these records were important verification tools.

Response: In response to comments, we are retaining our proposed amendment to eliminate the recordkeeping requirements in 40 CFR

98.397 related to the measurement of API gravity and sulfur content of crude oil. We are also making several additional amendments to improve the flexibility of the QA/QC and recordkeeping requirements in the rule to facilitate the reporting of similar and, in many cases, better quality data on API gravity, sulfur content, and geographic origin of crude oil batches while reducing administrative burden. We are amending 40 CFR 98.394(d) to allow refiners to use industry standard practices to determine the API gravity and sulfur content of crude oil. We are amending the quantity determination monitoring and QA/QC requirements in 40 CFR 98.394(a) so that refiners can use industry standard practices to determine the volume of components of a blended crude batch (which are never directly measured on site at a refinery). Therefore, refiners will be able to report representative data they currently collect on all three crude parameters—(1) API gravity, (2) sulfur content, and (3) country of origin or crude stream name and production area—of the components in a blended crude volume instead of having to report the third parameter as unknown. We are also making a harmonizing amendment to 40 CFR 98.397(b) to eliminate the requirement that refiners maintain metering and gauging records for crude oil batch volumes that they do not measure on site. Together, these amendments will allow refiners to report crude characteristics contained in crude assay reports, third party laboratory reports, or pipeline receipt tickets if the characteristics are representative of the crude oil used at the refinery and it is an industry standard practice to use these sources. We have determined that these amendments will still ensure that the data refiners report is adequately representative of the crude oil they receive at the refinery and that the records they keep will be sufficient to support EPA verification of the data. We made this determination in light of the fact that crude oil data is not used to calculate the CO_2 emissions reported under subpart MM.

Comment: We sought comment on our proposed timeline of implementing the technical amendments to subpart MM for the 2010 reporting year and whether this timeline was appropriate considering the nature of the proposed changes and/or the way in which data have been collected thus far in 2010. We received one comment indicating that defining "batch" in a manner that would require monthly reporting of crude oil volumes may necessitate modifications to current refinery sampling and monitoring practices and that refiners may not be able to provide this information by the March 31, 2011 reporting deadline for 2010 data.

Response: While data collection methods may vary by refinery, we have determined that refiners currently collect data as part of normal business practices on the API gravity and sulfur content for at least one of the five tiers described in the definition of "batch" in today's rule and should therefore be able to meet the crude oil reporting requirements in 40 CFR 98.396(a)(20) in a timely manner. However, since we did not include a definition of "batch" in the final rule (74 FR 56260), refiners may not have established data collection and management systems in 2010 to link the information they collect on API gravity, sulfur content, and volumes of crude batches to an EIA crude stream code or generic crude stream name and production area code (*i.e.,* tiers 1 and 2 of the "batch" definition). Likewise, refiners may not have had adequate time to link data they collect on API gravity and sulfur content from crude coming from a single country of origin to "up to a calendar month volume" (*i.e.,* tiers 3 and 4 of the "batch" definition). We are therefore providing refiners the flexibility to report at a lower tier for reporting year 2010 if they do not have appropriate data collection and management systems in place to readily report the information in the higher tier.

S. Subpart NN—Suppliers of Natural Gas and Natural Gas Liquids

1. Summary of Final Amendments and Major Changes Since Proposal

We are amending the definition of the term "$Fuel_h$" in Equation NN–1 of subpart NN to clarify that the abbreviation "Mscf" refers to "thousand standard cubic feet" in order to avoid confusion on if this abbreviation means "million standard cubic feet". We are also adding the subscript "h" to the terms for Fuel and HHV in Equation NN–1.

We are amending the definition of the term "EF" in Equation NN–7 of subpart NN to clarify that the emission factor is for each natural gas liquid (NGL) product "g" and to add the subscript "g" to the term "EF."

We are amending Equation NN–8 of subpart NN to correct the term for "Annual CO_2 mass emissions that would result from the combustion or oxidation of fractionated NGLs received from other fractionators" from "CO_{2j}" to "CO_{2m}". We are also amending Equation NN–8 to remove the summation signs that were unnecessary from this equation for clarification purposes. We are also amending the definition of the term CO_{2i} to clarify that this term includes NGLs delivered to customers or, on behalf of, customers, recognizing that some customers may not receive the NGLs directly.

We are amending 40 CFR 98.406(a)(6) to correct two cross references. The incorrect references referred the reader to 40 CFR 98.406(b)(1) and (b)(2), when they were supposed to refer to 40 CFR 98.406(a)(1) and (a)(2). Similarly, we are amending an incorrect reference in 40 CFR 98.407(d) to refer the reader to 40 CFR 98.406(b)(7) instead of 40 CFR 98.406(b)(6).

We are amending 40 CFR 98.406(a)(9) to correct the abbreviation of NGL (from LNG) and to specify that reporting under that paragraph is for each product type.

We are amending 40 CFR 98.407(a) to remove the word "daily" because daily meter readings are not specifically required under this subpart.

Finally, we are updating the high heat values (HHVs) and default CO_2 emission factors in Tables NN–1 and NN–2 to subpart NN to be consistent with the emission factors in Tables C–1 to subpart C and MM–1 to subpart MM.

2. Summary of Comments and Responses

There were no major comments received on the proposed amendments to this section. A few comments seeking minor technical clarification or correction were received on this subpart. Responses to these comments can be found in Response to Comments: Technical Corrections, Clarifying and Other Amendments document (*see* EPA–HQ–OAR–2010–0109).

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the executive order.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. These amendments do not make any substantive changes to the reporting requirements in any of the subparts for which amendments are being made. In many cases, the amendments to the reporting requirements reduce the reporting burden by making the reporting requirements conform more

closely to current industry practices. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the regulations promulgated on October 30, 2009, under 40 CFR Part 98 under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0629. Burden is defined at 5 CFR 1320.3(b). 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 40 CFR are listed in 40 CFR part 9.

Further information on EPA's assessment on the impact on burden can be found in the Technical Corrections and Amendments Cost Memo (EPA–HQ–OAR–2010–0109).

C. Regulatory Flexibility Act (RFA)

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of these amendments on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of these rule amendments on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The rule amendments will not impose any new requirement on small entities that are not currently required by Part 98 promulgated on October 30, 2009 (*i.e.,* calculating and reporting annual GHG emissions).

EPA took several steps to reduce the impact on small entities. For example, EPA determined appropriate thresholds that reduced the number of small businesses reporting. In addition, EPA did not require facilities to install CEMS if they did not already have them. Facilities without CEMS can calculate emissions using readily available data or data that are less expensive to collect such as process data or material consumption data. For some source categories, EPA developed tiered methods that are simpler and less burdensome. Also, EPA required annual instead of more frequent reporting. Finally, EPA continues to conduct significant outreach on the mandatory GHG reporting rule and maintains an "open door" policy for stakeholders to help inform EPA's understanding of key issues for the industries.

D. Unfunded Mandates Reform Act (UMRA)

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. The action imposes no enforceable duty on any State, local or tribal governments or the private sector. In addition, EPA determined that the rule amendments contain no regulatory requirements that might significantly or uniquely affect small governments because the amendments will not impose any new requirements that are not currently required by Part 98 promulgated on October 30, 2009 (*i.e.,* calculating and reporting annual GHG emissions), and the rule amendments will not unfairly apply to small governments. Therefore, this action is not subject to the requirements of CAA section 203 of the UMRA.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. However, for a more detailed discussion about how these rule amendments will relate to existing State programs, please see Section II of the proposal preamble for the Mandatory GHG Reporting Rule (74 FR 16457–16461, April 10, 2009).

These amendments apply directly to facilities that supply fuel that when used emit greenhouse gases or facilities that directly emit greenhouses gases. They do not apply to governmental entities unless the government entity owns a facility that directly emits greenhouse gases above threshold levels (such as a landfill), so relatively few government facilities will be affected. This regulation also does not limit the power of States or localities to collect GHG data and/or regulate GHG emissions. Thus, Executive Order 13132 does not apply to this action.

Although section 6 of Executive Order 13132 does not apply to this action, EPA did consult with State and local officials or representatives of State and local governments in developing Part 98. A summary of EPA's consultations with State and local governments is provided in Section VIII.E of the preamble to Part 98 (74 FR 56260, October 30, 2009).

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The rule amendments will not result in any changes to the requirements of Part 98. Thus, Executive Order 13175 does not apply to this action.

Although Executive Order 13175 does not apply to this action, EPA sought opportunities to provide information to Tribal governments and representatives during the development of the rules promulgated on October 30, 2009. A summary of the EPA's consultations with Tribal officials is provided Sections VIII.E and VIII.F of the preamble to the 2009 Final Mandatory GHG Reporting Rule (74 FR 56260, October 30, 2009).

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the executive order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113 (15 U.S.C. 272 note) directs EPA to

use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This rulemaking involves the use of one new voluntary consensus standard from ASTM. Specifically, EPA will allow facilities in the glass industry to use ASTM D6349–09 Standard Test Method for Determination of Major and Minor Elements in Coal, Coke, and Solid Residues from Combustion of Coal and Coke by Inductively Coupled Plasma—Atomic Emission Spectrometry in addition to the methods incorporated by reference in Part 98. This additional voluntary consensus standard will provide an alternative method that owners or operators in the glass industry can use to monitor GHG emissions. No new test methods were developed for this action.

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

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

EPA has determined that Part 98 does not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment because it is a rule addressing information collection and reporting procedures.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 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 U.S. 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). This rule will be effective on November 29, 2010.

List of Subjects

40 CFR Part 86

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements, Motor vehicle pollution.

40 CFR Part 98

Environmental protection, Administrative practice and procedure, Greenhouse gases, Incorporation by reference, Suppliers, Reporting and recordkeeping requirements.

Dated: October 7, 2010.

Lisa P. Jackson,

Administrator.

■ For the reasons set out in the preamble, title 40, Chapter I, of the Code of Federal Regulations is amended as follows:

PART 86—[AMENDED]

■ 1. The authority citation for part 86 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

■ 2. Section 86.1844–01 is amended by adding paragraph (j) to read as follows:

§ 86.1844–01 Information requirements: Application for certification and submittal of information upon request.

* * * * *

(j) For complete heavy-duty vehicles only, measure CO_2, N_2O, and CH_4 as described in this paragraph (j) with each certification test on an emission data vehicle. Do not apply deterioration factors to the results. Use the analytical equipment and procedures specified in 40 CFR part 1065 as needed to measure N_2O and CH_4. Report these values in your application for certification. The requirements of this paragraph (j) apply starting with model year 2011 for CO_2 and 2012 for CH_4. The requirements of this paragraph (j) related to N_2O emissions apply for test groups that depend on NO_X after-treatment to meet emission standards starting with model year 2013. Businesses that are defined as a small business by the Small Business Administration size standards in 13 CFR 121.201 may omit measurement of N_2O and CH_4; other manufacturers may provide appropriate data and/or information and omit measurement of N_2O and CH_4 as described in 40 CFR 1065.5. Use the same measurement methods as for your other results to report a single value for CO_2, N_2O, and CH_4. Round the final values as follows:

(1) Round CO_2 to the nearest 1 g/mi.

(2) Round N_2O to the nearest 0.001 g/mi.

(3) Round CH_4 to the nearest 0.001 g/mi.

PART 98—[AMENDED]

■ 3. The authority citation for part 98 continues to read as follows:

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

Subpart A—[Amended]

■ 4. Section 98.6 is amended by:

■ a. Removing the definition of "Argon-oxygen decarburization (AOD) vessel."

■ b. Adding a definition for "Decarburization vessel."

■ c. Revising the definitions of "Carbonate-based mineral," "Carbonate-based mineral mass fraction," "Carbonate-based raw material," "Crude oil," "Gas collection system or landfill gas collection system," "Mscf," and "Non-crude feedstocks."

The addition and revisions read as follows:

§ 98.6 Definitions.

* * * * *

Carbonate-based mineral means any of the following minerals used in the manufacture of glass: Calcium carbonate ($CaCO_3$), calcium magnesium carbonate ($CaMg(CO_3)_2$), sodium carbonate (Na_2CO_3), barium carbonate ($BaCO_3$), potassium carbonate (K_2CO_3), lithium carbonate (Li_2CO_3), and strontium carbonate ($SrCO_3$).

Carbonate-based mineral mass fraction means the following: For limestone, the mass fraction of calcium carbonate ($CaCO_3$) in the limestone; for dolomite, the mass fraction of calcium magnesium carbonate ($CaMg(CO_3)_2$) in the dolomite; for soda ash, the mass fraction of sodium carbonate (Na_2CO_3) in the soda ash; for barium carbonate, the mass fraction of barium carbonate ($BaCO_3$) in the barium carbonate; for potassium carbonate, the mass fraction of potassium carbonate (K_2CO_3) in the potassium carbonate; for lithium carbonate, the mass fraction of lithium carbonate (Li_2CO_3); and for strontium

carbonate, the mass fraction of strontium carbonate ($SrCO_3$).

Carbonate-based raw material means any of the following materials used in the manufacture of glass: Limestone, dolomite, soda ash, barium carbonate, potassium carbonate, lithium carbonate, and strontium carbonate.

* * * * *

Crude oil means a mixture of hydrocarbons that exists in liquid phase in natural underground reservoirs and remains liquid at atmospheric pressure after passing through surface separating facilities. (1) Depending upon the characteristics of the crude stream, it may also include any of the following:

(i) Small amounts of hydrocarbons that exist in gaseous phase in natural underground reservoirs but are liquid at atmospheric conditions (temperature and pressure) after being recovered from oil well (casing-head) gas in lease separators and are subsequently commingled with the crude stream without being separately measured. Lease condensate recovered as a liquid from natural gas wells in lease or field separation facilities and later mixed into the crude stream is also included.

(ii) Small amounts of non-hydrocarbons, such as sulfur and various metals.

(iii) Drip gases, and liquid hydrocarbons produced from tar sands, oil sands, gilsonite, and oil shale.

(iv) Petroleum products that are received or produced at a refinery and subsequently injected into a crude supply or reservoir by the same refinery owner or operator.

(2) Liquids produced at natural gas processing plants are excluded. Crude oil is refined to produce a wide array of petroleum products, including heating oils; gasoline, diesel and jet fuels; lubricants; asphalt; ethane, propane, and butane; and many other products used for their energy or chemical content.

* * * * *

Decarburization vessel means any vessel used to further refine molten steel with the primary intent of reducing the carbon content of the steel, including but not limited to vessels used for argon-oxygen decarburization and vacuum oxygen decarburization.

* * * * *

Gas collection system or landfill gas collection system means a system of pipes used to collect landfill gas from different locations in the landfill by means of a fan or similar mechanical draft equipment to a single location for treatment (thermal destruction) or use. Landfill gas collection systems may also include knock-out or separator drums and/or a compressor. A single landfill may have multiple gas collection systems. Landfill gas collection systems do not include "passive" systems, whereby landfill gas flows naturally to the surface of the landfill where an opening or pipe (vent) is installed to allow for natural gas flow.

* * * * *

Mscf means thousand standard cubic feet.

* * * * *

Non-crude feedstocks means any petroleum product or natural gas liquid that enters the refinery to be further refined or otherwise used on site.

* * * * *

5. Section 98.7 is amended by removing and reserving paragraph (a), and adding paragraph (e)(45).

§ 98.7 What standardized methods are incorporated by reference into this part?

* * * * *

(e) * * *

(45) ASTM D6349–09 Standard Test Method for Determination of Major and Minor Elements in Coal, Coke, and Solid Residues from Combustion of Coal and Coke by Inductively Coupled Plasma—Atomic Emission Spectrometry, IBR approved for § 98.144(b).

* * * * *

Subpart E—[Amended]

■ 6. Section 98.53 is revised to read as follows:

§ 98.53 Calculating GHG emissions.

(a) You must determine annual N_2O emissions from adipic acid production according to paragraphs (a)(1) or (2) of this section.

(1) Use a site-specific emission factor and production data according to paragraphs (b) through (i) of this section.

(2) Request Administrator approval for an alternative method of determining N_2O emissions according to paragraphs (a)(2)(i) and (ii) of this section.

(i) You must submit the request within 45 days following promulgation of this subpart or within the first 30 days of each subsequent reporting year.

(ii) If the Administrator does not approve your requested alternative method within 150 days of the end of the reporting year, you must determine the N_2O emissions for the current reporting period using the procedures specified in paragraphs (b) through (h) of this section.

(b) You must conduct an annual performance test according to paragraphs (b)(1) through (3) of this section.

(1) You must conduct the test on the vent stream from the nitric acid oxidation step of the process, referred to as the test point, according to the methods specified in § 98.54(b) through (f). If multiple adipic acid production units exhaust to a common abatement technology and/or emission point, you must sample each process in the ducts before the emissions are combined, sample each process when only one process is operating, or sample the combined emissions when multiple processes are operating and base the site-specific emission factor on the combined production rate of the multiple adipic acid production units.

(2) You must conduct the performance test under normal process operating conditions.

(3) You must measure the adipic acid production rate during the test and calculate the production rate for the test period in metric tons per hour.

(c) Using the results of the performance test in paragraph (b) of this section, you must calculate an emission factor for each adipic acid unit according to Equation E–1 of this section:

$$EF_{N2O,z} = \frac{\sum_{1}^{n} \frac{C_{N2O} * 1.14 \times 10^{-7} * Q}{P}}{n} \qquad \text{(Eq. E-1)}$$

Where:

$EF_{N_2O,z}$ = Average facility-specific N_2O emission factor for each adipic acid production unit "z" (lb N_2O/ton adipic acid produced).

C_{N_2O} = N_2O concentration per test run during the performance test (ppm N_2O).

1.14×10^{-7} = Conversion factor (lb/dscf-ppm N_2O).

Q = Volumetric flow rate of effluent gas per test run during the performance test (dscf/hr).
P = Production rate per test run during the performance test (tons adipic acid produced/hr).
n = Number of test runs.

(d) If any N_2O abatement technology "N" is located after your test point, you must determine the destruction efficiency according to paragraphs (d)(1), (2), or (3) of this section.

(1) Use the manufacturer's specified destruction efficiency.

(2) Estimate the destruction efficiency through process knowledge. Examples of information that could constitute process knowledge include calculations based on material balances, process stoichiometry, or previous test results provided the results are still relevant to the current vent stream conditions. You must document how process knowledge was used to determine the destruction efficiency.

(3) Calculate the destruction efficiency by conducting an additional performance test on the vent stream following the N_2O abatement technology.

(e) If any N_2O abatement technology "N" is located after your test point, you must determine the annual amount of adipic acid produced while N_2O abatement technology "N" is operating according to § 98.54(f). Then you must calculate the abatement factor for N_2O abatement technology "N" according to Equation E–2 of this section.

$$AF_N = \frac{P_{a,N}}{P_z} \qquad \text{(Eq. E-2)}$$

Where:
AF_N = Abatement utilization factor of N_2O abatement technology "N" (fraction of annual production that abatement technology is operating).
$P_{z,N}$ = Annual adipic acid production during which N_2O abatement technology "N" was used on unit "z" (ton adipic acid produced).
P_z = Total annual adipic acid production from unit "z" (ton acid produced).

(f) You must determine the annual amount of adipic acid produced according to § 98.54(f).

(g) You must calculate N_2O emissions according to paragraph (g)(1), (2), (3), or (4) of this section for each adipic acid production unit.

(1) If one N_2O abatement technology "N" is located after your test point, you must use the emissions factor (determined in Equation E–1 of this section), the destruction efficiency (determined in paragraph (d) of this section), the annual adipic acid production (determined in paragraph (f) of this section), and the abatement utilization factor (determined in paragraph (e) of this section), according to Equation E–3a of this section:

$$E_{a,z} = \frac{EF_{N20,z} * P_z}{2205} * \left(1 - \left(DF * AF\right)\right) \qquad \text{(Eq. E-3a)}$$

Where:
$E_{a,z}$ = Annual N_2O mass emissions from adipic acid production unit "z" according to this Equation E–3a (metric tons).
$EF_{N_2O,z}$ = N_2O emissions factor for unit "z" (lb N_2O/ton adipic acid produced).
P_z = Annual adipic acid produced from unit "z" (tons).
DF = Destruction efficiency of N_2O abatement technology "N" (percent of N_2O removed from vent stream).
AF = Abatement utilization factor of N_2O abatement technology "N" (percent of time that the abatement technology is operating).
2205 = Conversion factor (lb/metric ton).

(2) If multiple N_2O abatement technologies are located in series after your test point, you must use the emissions factor (determined in Equation E–1 of this section), the destruction efficiency (determined in paragraph (d) of this section), the annual adipic acid production (determined in paragraph (f) of this section), and the abatement utilization factor (determined in paragraph (e) of this section), according to Equation E–3b of this section:

$$E_{b,z} = \frac{EF_{N20,z} * P_z}{2205} * \left(1 - \left(DF_1 * AF_1\right)\right) * \left(1 - \left(DF_2 * AF_2\right)\right) * \ldots * \left(1 - \left(DF_N * AF_N\right)\right) \qquad \text{(Eq. E-3b)}$$

Where:
$E_{b,z}$ = Annual N_2O mass emissions from adipic acid production unit "z" according to this Equation E–3b (metric tons).
$EF_{N_2O,z}$ = N_2O emissions factor for unit "z" (lb N_2O/ton adipic acid produced).
P_z = Annual adipic acid produced from unit "z" (tons).
DF_1 = Destruction efficiency of N_2O abatement technology 1 (percent of N_2O removed from vent stream).
AF_1 = Abatement utilization factor of N_2O abatement technology 1 (percent of time that abatement technology 1 is operating).
DF_2 = Destruction efficiency of N_2O abatement technology 2 (percent of N_2O removed from vent stream).
AF_2 = Abatement utilization factor of N_2O abatement technology 2 (percent of time that abatement technology 2 is operating).
DF_N = Destruction efficiency of N_2O abatement technology N (percent of N_2O removed from vent stream).
AF_N = Abatement utilization factor of N_2O abatement technology N (percent of time that abatement technology N is operating).
2205 = Conversion factor (lb/metric ton).
N = Number of different N_2O abatement technologies.

(3) If multiple N_2O abatement technologies are located in parallel after your test point, you must use the emissions factor (determined in Equation E–1 of this section), the destruction efficiency (determined in paragraph (d) of this section), the annual adipic acid production (determined in paragraph (f) of this section), and the abatement utilization factor (determined in paragraph (e) of this section), according to Equation E–3c of this section:

$$E_{c,z} = \frac{EF_{N20,z} * P_z}{2205} * \sum_{1}^{N} \left(\left(1 - \left(DF_N * AF_N\right)\right) * FC_N\right) \qquad \text{(Eq. E-3c)}$$

Where:

$E_{c,z}$ = Annual N_2O mass emissions from adipic acid production unit "z" according to this Equation E–3c (metric tons).

$EF_{N_2O,z}$ = N_2O emissions factor for unit "z" (lb N_2O/ton adipic acid produced).

P_z = Annual adipic acid produced from unit "z" (tons).

DF_N = Destruction efficiency of N_2O abatement technology "N" (percent of N_2O removed from vent stream).

AF_N = Abatement utilization factor of N_2O abatement technology "N" (percent of time that the abatement technology is operating).

FC_N = Fraction control factor of N_2O abatement technology "N" (percent of total emissions from unit "z" that are sent to abatement technology "N").

2205 = Conversion factor (lb/metric ton).

N = Number of different N_2O abatement technologies with a fraction control factor.

(4) If no N_2O abatement technologies are located after your test point, you must use the emissions factor (determined using Equation E–1 of this section) and the annual adipic acid production (determined in paragraph (f) of this section) according to Equation E–3d of this section for each adipic acid production unit.

$$E_{d,z} = \frac{EF_{N20} * P_z}{2205} \qquad \text{(Eq. E-3d)}$$

Where:

$E_{d,z}$ = Annual N_2O mass emissions from adipic acid production for unit "z" according to this Equation E–3d (metric tons).

EF_{N_2O} = N_2O emissions factor for unit "z" (lb N_2O/ton adipic acid produced).

P_Z = Annual adipic acid produced from unit "z" (tons).

2205 = Conversion factor (lb/metric ton).

(h) You must determine the emissions for the facility by summing the unit level emissions according to Equation E–4 of this section.

$$N_2O = \sum_{z=1}^{M} E_{a,z} + E_{b,z} + E_{c,z} + E_{d,z} \qquad \text{(Eq. E-4)}$$

Where:

$E_{a,z}$ = Annual N_2O mass emissions from adipic acid production unit "z" according to Equation E–3a of this section (metric tons).

$E_{b,z}$ = Annual N_2O mass emissions from adipic acid production unit "z" according to Equation E–3b of this section (metric tons).

$E_{c,z}$ = Annual N_2O mass emissions from adipic acid production unit "z" according to Equation E–3c of this section (metric tons).

$E_{d,z}$ = Annual N_2O mass emissions from adipic acid production unit "z" according to Equation E–3d of this section (metric tons).

M = Total number of adipic acid production units.

(i) You must determine the amount of process N_2O emissions that is sold or transferred off site (if applicable). You can determine the amount using existing process flow meters and N_2O analyzers.

■ 7. Section 98.54 is amended by:

■ a. Revising paragraph (a) introductory text.

■ b. Adding second and third sentences to the end of paragraph (a)(1).

■ c. Revising paragraph (a)(3).

■ d. Revising paragraph (c) introductory text.

■ e. Revising the first sentence of paragraph (d) introductory text.

■ f. Revising paragraphs (e) and (f).

The revisions and additions read as follows:

§ 98.54 Monitoring and QA/QC requirements.

(a) You must conduct a new performance test and calculate a new emissions factor for each adipic acid production unit according to the frequency specified in paragraphs (a)(1) through (3) of this section.

(1) * * * The test must be conducted at a point during production that is representative of the average emissions rate from your process. You must document the methods used to determine the representative point.

* * * * *

(3) If you requested Administrator approval for an alternative method of determining N_2O emissions under § 98.53(a)(2), you must conduct the performance test if your request has not been approved by the Administrator within 150 days of the end of the reporting year in which it was submitted.

* * * * *

(c) You must determine the adipic acid production rate during the performance test according to paragraph (c)(1) or (c)(2) of this section.

* * * * *

(d) You must determine the volumetric flow rate during the performance test in conjunction with the applicable EPA methods in 40 CFR part 60, appendices A–1 through A–4. * * *

* * * * *

(e) You must determine the monthly amount of adipic acid produced. You must also determine the monthly amount of adipic acid produced during which N_2O abatement technology, located after the test point, is operating. These monthly amounts are determined according to the methods in paragraphs (c)(1) or (2) of this section.

(f) You must determine the annual amount of adipic acid produced. You must also determine the annual amount of adipic acid produced during which N_2O abatement technology located after the test point is operating. These are determined by summing the respective monthly adipic acid production quantities determined in paragraph (e) of this section.

■ 8. Section 98.56 is amended by:

■ a. Revising the introductory text.

■ b. Revising paragraph (c).

■ c. Revising paragraph (j) introductory text.

■ d. Revising paragraph (j)(1).

■ e. Revising paragraph (k) introductory text.

■ f. Adding paragraph (l).

The revisions and addition read as follows:

§ 98.56 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the information specified in paragraphs (a) through (l) of this section at the facility level.

* * * * *

(c) Annual adipic acid production during which N_2O abatement technology (located after the test point) is operating (tons).

* * * * *

(j) If you conducted a performance test and calculated a site-specific emissions factor according to § 98.53(a)(1), each annual report must also contain the information specified in paragraphs (j)(1) through (7) of this section for each adipic acid production unit.

(1) Emission factor (lb N_2O/ton adipic acid).

* * * * *

(k) If you requested Administrator approval for an alternative method of determining N_2O emissions under § 98.53(a)(2), each annual report must also contain the information specified in paragraphs (k)(1) through (4) of this

section for each adipic acid production facility.

* * * * *

(l) Fraction control factor for each abatement technology (percent of total emissions from the production unit that are sent to the abatement technology) if equation E–3c is used.

■ 9. Section 98.57 is amended by revising paragraphs (c) and (f) to read as follows:

§ 98.57 Records that must be retained.

* * * * *

(c) Number of facility and unit operating hours in calendar year.

* * * * *

(f) Performance test reports.

* * * * *

Subpart H—[Amended]

■ 10. Section 98.83 is amended by revising the introductory text of paragraph (d)(3); and by revising the definitions of "rm", "TOCrm", and "M" in Equation H–5 of paragraph (d)(3) to read as follows:

§ 98.83 Calculating GHG emissions.

* * * * *

(d) * * *

(3) *CO_2 emissions from raw materials.* Calculate CO_2 emissions from raw materials using Equation H–5 of this section:

* * * * *

rm = The amount of raw material i consumed annually, tons/yr (dry basis) or the amount of raw kiln feed consumed annually, tons/yr (dry basis).

* * * * *

TOCrm = Organic carbon content of raw material i or organic carbon content of combined raw kiln feed (dry basis), as determined in § 98.84(c) or using a default factor of 0.2 percent of total raw material weight.

M = Number of raw materials or 1 if calculating emissions based on combined raw kiln feed.

* * * * *

■ 11. Section 98.84 is amended by revising paragraphs (b) through (f) to read as follows:

§ 98.84 Monitoring and QA/QC requirements.

* * * * *

(b) You must determine the weight fraction of total CaO and total MgO in clinker from each kiln using ASTM C114–09 Standard Test Methods for Chemical Analysis of Hydraulic Cement (incorporated by reference, see § 98.7). The monitoring must be conducted monthly for each kiln from a monthly clinker sample drawn from bulk clinker storage if storage is dedicated to the specific kiln, or from a monthly arithmetic average of daily clinker samples drawn from the clinker conveying systems exiting each kiln.

(c) The total organic carbon content (dry basis) of raw materials must be determined annually using ASTM C114–09 Standard Test Methods for Chemical Analysis of Hydraulic Cement (incorporated by reference, see § 98.7) or a similar industry standard practice or method approved for total organic carbon determination in raw mineral materials. The analysis must be conducted either on sample material drawn from bulk raw kiln feed storage or on sample material drawn from bulk raw material storage for each category of raw material (i.e., limestone, sand, shale, iron oxide, and alumina). Facilities that opt to use the default total organic carbon factor provided in § 98.83(d)(3), are not required to monitor for TOC.

(d) The quantity of clinker produced monthly by each kiln must be determined by direct weight measurement of clinker using the same plant techniques used for accounting purposes, such as reconciling weigh hopper or belt weigh feeder measurements against inventory measurements. As an alternative, facilities may also determine clinker production by direct measurement of raw kiln feed and application of a kiln-specific feed-to-clinker factor. Facilities that opt to use a feed-to-clinker factor must verify the accuracy of this factor on a monthly basis.

(e) The quantity of CKD not recycled to the kiln generated by each kiln must be determined quarterly using the same plant techniques used for accounting purposes, such as direct weight measurement using weigh hoppers, truck weigh scales, or belt weigh feeders.

(f) The annual quantity of raw kiln feed or annual quantity of each category of raw materials consumed by the facility (e.g., limestone, sand, shale, iron oxide, and alumina) must be determined monthly by direct weight measurement using the same plant instruments used for accounting purposes, such as weigh hoppers, truck weigh scales, or belt weigh feeders.

* * * * *

■ 12. Section 98.86 is amended by:

■ a. Revising paragraph (b)(3).

■ b. Revising paragraph (b)(4).

■ c. Revising paragraph (b)(12).

■ d. Revising paragraph (b)(13).

■ e. Adding paragraph (b)(15).

The revisions and addition read as follows:

§ 98.86 Data reporting requirements.

* * * * *

(b) * * *

(3) Annual cement production at the facility.

(4) Number of kilns and number of operating kilns.

* * * * *

(12) Annual organic carbon content of raw kiln feed or annual organic carbon content of each raw material (wt-fraction, dry basis).

(13) Annual consumption of raw kiln feed or annual consumption of each raw material (dry basis).

* * * * *

(15) Method used to determine the monthly clinker production from each kiln reported under (b)(2) of this section, including monthly kiln-specific clinker factors, if used.

13. Section 98.87 is revised to read as follows:

§ 98.87 Records that must be retained.

(a) If a CEMS is used to measure CO_2 emissions, then in addition to the records required by § 98.3(g), you must retain under this subpart the records required for the Tier 4 Calculation Methodology in § 98.37.

(b) If a CEMS is not used to measure CO_2 emissions, then in addition to the records required by § 98.3(g), you must retain the records specified in this paragraph (b) for each portland cement manufacturing facility.

(1) Documentation of monthly calculated kiln-specific clinker CO_2 emission factor.

(2) Documentation of quarterly calculated kiln-specific CKD CO_2 emission factor.

(3) Measurements, records and calculations used to determine reported parameters.

Subpart K—[Amended]

■ 14. Section 98.112 is amended by revising paragraph (a) to read as follows:

§ 98.112 GHGs to report.

* * * * *

(a) Process CO_2 emissions from each electric arc furnace (EAF) used for the production of any ferroalloy listed in § 98.110, and process CH_4 emissions from each EAF that is used for the production of any ferroalloy listed in Table K–1 to subpart K.

* * * * *

■ 15. Section 98.113 is amended by revising the introductory text to read as follows:

§ 98.113 Calculating GHG emissions.

You must calculate and report the annual process CO_2 emissions from each

EAF not subject to paragraph (c) of this section using the procedures in either paragraph (a) or (b) of this section. For each EAF also subject to annual process CH_4 emissions reporting, you must also calculate and report the annual process CH_4 emissions from the EAF using the procedures in paragraph (d) of this section.

* * * * *

■ 16. Section 98.116 is amended by:
■ a. Revising paragraph (b).
■ b. Revising paragraph (c).
■ c. Revising paragraph (d) introductory text.
■ d. Revising paragraph (d)(1).
■ e. Revising paragraph (e)(1).

The revisions read as follows:

§ 98.116 Data reporting requirements.

* * * * *

(b) Annual production for each ferroalloy product identified in § 98.110, from each EAF (tons).

(c) Total number of EAFs at facility used for production of ferroalloy products.

(d) If a CEMS is used to measure CO_2 emissions, then you must report under this subpart the relevant information required by § 98.36 for the Tier 4 Calculation Methodology and the following information specified in paragraphs (d)(1) through (d)(3) of this section.

(1) Annual process CO_2 emissions (in metric tons) from each EAF used for the production of any ferroalloy product identified in § 98.110.

* * * * *

(e) * * *

(1) Annual process CO_2 emissions (in metric tons) from each EAF used for the production of any ferroalloy identified in § 98.110 (metric tons).

* * * * *

Subpart N—[Amended]

■ 17. Section 98.144 is amended by revising paragraph (b) to read as follows:

§ 98.144 Monitoring and QA/QC requirements.

* * * * *

(b) You must measure carbonate-based mineral mass fractions at least annually to verify the mass fraction data provided by the supplier of the raw material; such measurements shall be based on sampling and chemical analysis using ASTM D3682–01 (Reapproved 2006) Standard Test Method for Major and Minor Elements in Combustion Residues from Coal Utilization Processes (incorporated by reference, see § 98.7) or ASTM D6349–09 Standard Test Method for Determination of Major and Minor Elements in Coal, Coke, and Solid Residues from Combustion of Coal and Coke by Inductively Coupled Plasma—Atomic Emission Spectrometry (incorporated by reference, see § 98.7).

* * * * *

■ 18. Section 98.146 is amended by:
■ a. Revising paragraph (a) introductory text.
■ b. Revising paragraph (a)(2).
■ c. Revising paragraph (b)(7).
■ d. Revising paragraph (b)(9).

The revisions read as follows:

§ 98.146 Data reporting requirements.

* * * * *

(a) If a CEMS is used to measure CO_2 emissions, then you must report under this subpart the relevant information required under § 98.36 for the Tier 4 Calculation Methodology and the following information specified in paragraphs (a)(1) and (2) of this section:

* * * * *

(2) Annual quantity of glass produced by each glass melting furnace and by all furnaces combined (tons).

(b) * * *

(7) Method used to determine fraction of calcination.

* * * * *

(9) The number of times in the reporting year that missing data procedures were followed to measure monthly quantities of carbonate-based raw materials or mass fraction of the carbonate-based minerals for any continuous glass melting furnace (months).

■ 19. In the Table to Subpart N of Part 98, Table N–1 to subpart N is amended by adding entries for "Barium carbonate," "Potassium carbonate," "Lithium carbonate," and "Strontium carbonate" to the end of the table to read as follows:

Table to Subpart N of Part 98

TABLE N–1 TO SUBPART N—CO_2 EMISSION FACTORS FOR CARBONATE-BASED RAW MATERIALS

Carbonate-based raw material—mineral	CO_2 emission factor [a]
* * * * * * *	
Barium carbonate—$BaCO_3$	0.223
Potassium carbonate—K_2CO_3	0.318
Lithium carbonate (Li_2CO_3)	0.596
Strontium carbonate ($SrCO_3$)	0.298

[a] Emission factors in units of metric tons of CO_2 emitted per metric ton of carbonate-based raw material charged to the furnace.

Subpart O—[Amended]

■ 20. Section 98.154 is amended by:
■ a. Revising the first and second sentences of paragraph (k).
■ b. Revising the second sentence of paragraph (l) introductory text.
■ c. Revising paragraph (o).

The revisions read as follows:

§ 98.154 Monitoring and QA/QC requirements.

* * * * *

(k) The mass of HFC–23 emitted from process vents shall be estimated at least monthly by incorporating the results of the most recent emissions test into Equation O–7 of this subpart. HCFC–22 production facilities that use a destruction device connected to the HCFC–22 production equipment shall conduct emissions tests at process vents at least once every five years or after significant changes to the process.

* * *

(l) * * * HFC–23 destruction facilities shall conduct annual measurements of HFC–23 concentrations at the outlet of the destruction device in accordance with EPA Method 18 at 40 CFR part 60, appendix A–6. * * *

* * * * *

(o) In their estimates of the mass of HFC–23 destroyed, HFC–23 destruction facilities shall account for any temporary reductions in the destruction efficiency that result from any startups, shutdowns, or malfunctions of the destruction device, including departures from the operating conditions defined in State or local permitting requirements

and/or destruction device manufacturer specifications.

* * * * *

■ 21. Section 98.156 is amended by:

■ a. Revising paragraph (b)(1).

■ b. Revising paragraph (b)(3).

■ c. Revising paragraph (c).

■ d. Revising paragraph (d).

■ e. Revising paragraph (e) introductory text.

The revisions read as follows:

§ 98.156 Data reporting requirements.

* * * * *

(b) * * *

(1) Annual mass of HFC–23 fed into the destruction device.

* * * * *

(3) Annual mass of HFC–23 emitted from the destruction device.

(c) Each HFC–23 destruction facility shall report the concentration (mass fraction) of HFC–23 measured at the outlet of the destruction device during the facility's annual HFC–23 concentration measurements at the outlet of the device.

(d) If the HFC–23 concentration measured pursuant to § 98.154(l) is greater than that measured during the performance test that is the basis for the destruction efficiency (DE), the facility shall report the revised destruction efficiency calculated under § 98.154(l) and the values used to calculate it, specifying whether § 98.154(l)(1) or § 98.154(l)(2) has been used for the calculation. Specifically, the facility shall report the following:

(1) Flow rate of HFC–23 being fed into the destruction device in kg/hr.

(2) Concentration (mass fraction) of HFC–23 at the outlet of the destruction device.

(3) Flow rate at the outlet of the destruction device in kg/hr.

(4) Emission rate (in kg/hr) calculated from paragraphs (d)(2) and (d)(3) of this section.

(5) Destruction efficiency (DE) calculated from paragraphs (d)(1) and (d)(4) of this section.

(e) By March 31, 2011 or within 60 days of commencing HFC–23 destruction, HFC–23 destruction facilities shall submit a one-time report including the following information for each destruction process:

* * * * *

■ 22. Section 98.157 is amended by revising paragraph (b)(1) to read as follows:

§ 98.157 Records that must be retained.

* * * * *

(b) * * *

(1) Records documenting their one-time and annual reports in § 98.156(b) through (e).

* * * * *

Subpart P—[Amended]

■ 23. Section 98.160 is amended by revising paragraph (c) to read as follows:

§ 98.160 Definition of the source category.

* * * * *

(c) This source category includes merchant hydrogen production facilities located within another facility if they are not owned by, or under the direct control of, the other facility's owner and operator.

■ 24. Section 98.162 is amended by revising paragraph (a) and removing and reserving paragraph (b).

The revision reads as follows:

§ 98.162 GHGs to report.

* * * * *

(a) CO_2 emissions from each hydrogen production process unit.

* * * * *

■ 25. Section 98.163 is amended by:

■ a. Revising the introductory text.

■ b. Revising paragraph (a).

■ c. Revising paragraph (b) introductory text.

■ d. In paragraph (b)(1), revising the introductory text and revising the definition of "CO_2" in Equation P–1.

■ e. Revising paragraphs (b)(2) introductory text and (b)(3) introductory text.

The revisions read as follows:

§ 98.163 Calculating GHG emissions.

You must calculate and report the annual CO_2 emissions from each hydrogen production process unit using the procedures specified in either paragraph (a) or (b) of this section.

(a) *Continuous Emissions Monitoring Systems (CEMS).* Calculate and report under this subpart the CO_2 emissions by operating and maintaining CEMS according to the Tier 4 Calculation Methodology specified in § 98.33(a)(4) and all associated requirements for Tier 4 in subpart C of this part (General Stationary Fuel Combustion Sources).

(b) *Fuel and feedstock material balance approach.* Calculate and report CO_2 emissions as the sum of the annual emissions associated with each fuel and feedstock used for hydrogen production by following paragraphs (b)(1) through (b)(3) of this section.

(1) *Gaseous fuel and feedstock.* You must calculate the annual CO_2 emissions from each gaseous fuel and feedstock according to Equation P–1 of this section:

* * * * *

CO_2 = Annual CO_2 emissions arising from fuel and feedstock consumption (metric tons/yr).

* * * * *

(2) *Liquid fuel and feedstock.* You must calculate the annual CO_2 emissions from each liquid fuel and feedstock according to Equation P–2 of this section:

* * * * *

(3) *Solid fuel and feedstock.* You must calculate the annual CO_2 emissions from each solid fuel and feedstock according to Equation P–3 of this section:

* * * * *

■ 26. Section 98.166 is amended by revising the introductory text and paragraphs (a)(1), (b)(1), and (c) to read as follows:

§ 98.166 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the information specified in paragraphs (a) or (b) of this section, as appropriate, and paragraphs (c) and (d) of this section:

(a) * * *

(1) Unit identification number and annual CO_2 emissions.

* * * * *

(b) * * *

(1) Unit identification number and annual CO_2 emissions.

* * * * *

(c) Quantity of CO_2 collected and transferred off site in either gas, liquid, or solid forms, following the requirements of subpart PP of this part.

* * * * *

Subpart Q—[Amended]

■ 27. Section 98.172 is amended by revising paragraphs (b) and (c) to read as follows:

§ 98.172 GHGs to report.

* * * * *

(b) You must report CO_2 emissions from flares that burn blast furnace gas or coke oven gas according to the procedures in § 98.253(b)(1) of subpart Y (Petroleum Refineries) of this part. When using the alternatives set forth in § 98.253(b)(1)(ii)(B) and § 98.253(b)(1)(iii)(C), you must use the default CO_2 emission factors for coke oven gas and blast furnace gas from Table C–1 to subpart C in Equations Y–2 and Y–3 of subpart Y. You must report CH_4 and N_2O emissions from flares according to the requirements in § 98.33(c)(2) using the emission factors for coke oven gas and blast furnace gas in Table C–2 to subpart C of this part.

(c) You must report process CO_2 emissions from each taconite indurating

furnace; basic oxygen furnace; non-recovery coke oven battery combustion stack; coke pushing process; sinter process; EAF; decarburization vessel; and direct reduction furnace by following the procedures in this subpart.

■ 28. Section 98.173 is amended by:

■ a. Revising the first sentence of the introductory text.

■ b. In paragraph (b)(1)(vi), revising the introductory text and the definition of "CO_2" in Equation Q–6 of subpart Q.

■ c. Revising the first sentence of paragraph (d).

The revisions read as follows:

§ 98.173 Calculating GHG emissions.

You must calculate and report the annual process CO_2 emissions from each taconite indurating furnace, basic oxygen furnace, non-recovery coke oven battery, sinter process, EAF, decarburization vessel, and direct reduction furnace using the procedures in either paragraph (a) or (b) of this section. * * *

* * * * *

(b) * * *

(1) * * *

(vi) For decarburization vessels, estimate CO_2 emissions using Equation Q–6 of this section.

* * * * *

CO_2 = Annual CO_2 mass emissions from the decarburization vessel (metric tons).

* * * * *

(d) If GHG emissions from a taconite indurating furnace, basic oxygen furnace, non-recovery coke oven battery, sinter process, EAF, decarburization vessel, or direct reduction furnace are vented through the same stack as any combustion unit or process equipment that reports CO_2 emissions using a CEMS that complies with the Tier 4 Calculation Methodology in subpart C of this part (General Stationary Fuel Combustion Sources), then the calculation methodology in paragraph (b) of this section shall not be used to calculate process emissions. * * *

■ 29. Section 98.174 is amended by revising the first sentence of paragraph (c)(2) and revising paragraph (c)(7) to read as follows:

§ 98.174 Monitoring and QA/QC requirements.

* * * * *

(c) * * *

(2) For the furnace exhaust from basic oxygen furnaces, EAFs, decarburization vessels, and direct reduction furnaces, sample the furnace exhaust for at least three complete production cycles that start when the furnace is being charged and end after steel or iron and slag have been tapped. * * *

* * * * *

(7) If your EAF and decarburization vessel exhaust to a common emission control device and stack, you must sample each process in the ducts before the emissions are combined, sample each process when only one process is operating, or sample the combined emissions when both processes are operating and base the site-specific emission factor on the steel production rate of the EAF.

* * * * *

■ 30. Section 98.175 is amended by revising the introductory text to read as follows:

§ 98.175 Procedures for estimating missing data.

A complete record of all measured parameters used in the GHG emissions calculations in § 98.173 is required. Therefore, whenever a quality-assured value of a required parameter is unavailable, a substitute data value for the missing parameter shall be used in the calculations as specified in the paragraphs (a) and (b) of this section. You must follow the missing data procedures in § 98.255(b) of subpart Y (Petroleum Refineries) of this part for flares burning coke oven gas or blast furnace gas. You must document and keep records of the procedures used for all such estimates.

* * * * *

■ 31. Section 98.176 is amended by:

■ a. Revising the introductory text.

■ b. Revising paragraph (c).

■ c. Revising paragraph (e)(3).

■ d. Adding paragraphs (g) and (h).

The revisions and additions read as follows:

§ 98.176 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the information required in paragraphs (a) through (h) of this section for each coke pushing operation; taconite indurating furnace; basic oxygen furnace; non-recovery coke oven battery; sinter process; EAF; decarburization vessel; direct reduction furnace; and flare burning coke oven gas or blast furnace gas. For reporting year 2010, the information required in paragraphs (a) through (h) of this section is not required for decarburization vessels that are not argon-oxygen decarburization vessels. For reporting year 2011 and each subsequent reporting year, the information in paragraphs (a) through (h) of this section must be reported for all decarburization vessels.

* * * * *

(c) If a CEMS is used to measure CO_2 emissions, then you must report the relevant information required under § 98.36 for the Tier 4 Calculation Methodology.

* * * * *

(e) * * *

(3) The annual volume of each type of gaseous fuel (reported separately for each type in standard cubic feet), the annual volume of each type of liquid fuel (reported separately for each type in gallons), and the annual mass (in metric tons) of each other process inputs and outputs used to determine CO_2 emissions.

* * * * *

(g) The annual amount of coal charged to the coke ovens (in metric tons).

(h) For flares burning coke oven gas or blast furnace gas, the information specified in § 98.256(e) of subpart Y (Petroleum Refineries) of this part.

■ 32. Section 98.177 is amended by revising paragraph (d) to read as follows:

§ 98.177 Records that must be retained.

* * * * *

(d) Annual operating hours for each taconite indurating furnace, basic oxygen furnace, non-recovery coke oven battery, sinter process, electric arc furnace, decarburization vessel, and direct reduction furnace.

* * * * *

Subpart S—[Amended]

■ 33. Section 98.190 is amended by revising paragraph (a) to read as follows:

§ 98.190 Definition of the source category.

(a) Lime manufacturing plants (LMPs) engage in the manufacture of a lime product (e.g., calcium oxide, high-calcium quicklime, calcium hydroxide, hydrated lime, dolomitic quicklime, dolomitic hydrate, or other lime products) by calcination of limestone, dolomite, shells or other calcareous substances as defined in 40 CFR 63.7081(a)(1).

* * * * *

■ 34. Section 98.193 is amended by:

■ a. In paragraph (b)(2)(i), revising the second sentence of the introductory text and the definition of "2000/2205" in Equation S–1.

■ b. In paragraph (b)(2)(ii), revising the introductory text and the definitions of "$EF_{LKD,i,n}$", "$CaO_{LKD,i,n}$", "$MgO_{LKD,i,n}$", and "2000/2205" in Equation S–2.

■ c. In paragraph (b)(2)(iii), revising the introductory text and the definitions of

"$E_{waste,i}$", "$CaO_{waste,i}$", "$MgO_{waste,i}$", "$M_{waste,i}$", and "2000/2205" in Equation S–3.

■ d. In Paragraph (b)(2)(iv), revising the definitions of "$EF_{LIME,i,n}$", "$M_{LIME,i,n}$", "$EF_{LKD,i,n}$", "$M_{LKD,i,n}$", "$E_{waste,i}$", "t", "b", and "z" in Equation S–4.

The revisions read as follows:

§ 98.193 Calculating GHG emissions.

* * * * *

(b) * * *

(2) * * *

(i) * * * Calcium oxide and magnesium oxide content must be analyzed monthly for each lime product type that is produced:

* * * * *

2000/2205 = Conversion factor for tons to metric tons.

(ii) You must calculate a monthly emission factor for each type of calcined byproduct/waste sold (including lime kiln dust) using Equation S–2 of this section:

* * * * *

$EF_{LKD,i,n}$ = Emission factor for calcined lime byproduct/waste type i sold, for month n (metric tons CO_2/ton lime byproduct).

* * * * *

$CaO_{LKD,i,n}$ = Calcium oxide content for calcined lime byproduct/waste type i sold, for month n (metric tons CaO/metric ton lime).

$MgO_{LKD,i,n}$ = Magnesium oxide content for calcined lime byproduct/waste type i sold, for month n (metric tons MgO/metric ton lime).

2000/2205 = Conversion factor for tons to metric tons.

(iii) You must calculate the annual CO_2 emissions from each type of calcined byproduct/waste that is not sold (including lime kiln dust and scrubber sludge) using Equation S–3 of this section:

* * * * *

$E_{waste,i}$ = Annual CO_2 emissions for calcined lime byproduct/waste type i that is not sold (metric tons CO_2).

* * * * *

$CaO_{waste,i}$ = Calcium oxide content for calcined lime byproduct/waste type i that is not sold (metric tons CaO/metric ton lime).

$MgO_{waste,i}$ = Magnesium oxide content for calcined lime byproduct/waste type i that is not sold (metric tons MgO/metric ton lime).

$M_{waste,i}$ = Annual weight or mass of calcined byproducts/wastes for lime type i that is not sold (tons).

2000/2205 = Conversion factor for tons to metric tons.

(iv) * * *

$EF_{LIME,i,n}$ = Emission factor for lime type i produced, in calendar month n (metric tons CO_2/ton lime) from Equation S–1 of this section.

$M_{LIME,i,n}$ = Weight or mass of lime type i produced in calendar month n (tons).

$EF_{LKD,i,n}$ = Emission factor of calcined byproducts/wastes sold for lime type i in calendar month n, (metric tons CO_2/ton byproduct/waste) from Equation S–2 of this section.

$M_{LKD,i,n}$ = Monthly weight or mass of calcined byproducts/waste sold (such as lime kiln dust, LKD) for lime type i in calendar month n (tons).

$E_{waste,i}$ = Annual CO_2 emissions for calcined lime byproduct/waste type i that is not sold (metric tons CO_2) from Equation S–3 of this section.

t = Number of lime types produced

b = Number of calcined byproducts/wastes that are sold

z = Number of calcined byproducts/wastes that are not sold

* * * * *

■ 35. Section 98.194 is amended by:

■ a. Revising the first sentence of paragraph (a).

■ b. Revising paragraph (c) introductory text.

■ c. Revising paragraph (d).

The revisions read as follows:

§ 98.194 Monitoring and QA/QC requirements.

(a) You must determine the total quantity of each type of lime product that is produced and each calcined byproduct/waste (such as lime kiln dust) that is sold. * * *

* * * * *

(c) You must determine the chemical composition (percent total CaO and percent total MgO) of each type of lime product that is produced and each type of calcined byproduct/waste sold according to paragraph (c)(1) or (2) of this section. You must determine the chemical composition of each type of lime product that is produced and each type of calcined byproduct/waste sold on a monthly basis. You must determine the chemical composition for each type of calcined byproduct/waste that is not sold on an annual basis.

* * * * *

(d) You must use the analysis of calcium oxide and magnesium oxide content of each lime product that is produced and that is collected during the same month as the production data in monthly calculations.

* * * * *

■ 36. Section 98.195 is amended by revising the first sentence of the introductory text and paragraph (a) to read as follows:

§ 98.195 Procedures for estimating missing data.

For the procedure in § 98.193(b)(1), a complete record of all measured parameters used in the GHG emissions calculations is required (e.g., oxide content, quantity of lime products, etc.).

* * *

(a) For each missing value of the quantity of lime produced (by lime type), and quantity of calcined byproduct/waste produced and sold, the substitute data value shall be the best available estimate based on all available process data or data used for accounting purposes.

* * * * *

■ 37. Section 98.196 is revised to read as follows:

§ 98.196 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the information specified in paragraphs (a) or (b) of this section, as applicable.

(a) If a CEMS is used to measure CO_2 emissions, then you must report under this subpart the relevant information required by § 98.36 and the information listed in paragraphs (a)(1) through (8) of this section.

(1) Method used to determine the quantity of lime that is produced and sold.

(2) Method used to determine the quantity of calcined lime byproduct/waste sold.

(3) Beginning and end of year inventories for each lime product that is produced, by type.

(4) Beginning and end of year inventories for calcined lime byproducts/wastes sold, by type.

(5) Annual amount of calcined lime byproduct/waste sold, by type (tons).

(6) Annual amount of lime product sold, by type (tons).

(7) Annual amount of calcined lime byproduct/waste that is not sold, by type (tons).

(8) Annual amount of lime product not sold, by type (tons).

(b) If a CEMS is not used to measure CO_2 emissions, then you must report the information listed in paragraphs (b)(1) through (17) of this section.

(1) Annual CO_2 process emissions from all kilns combined (metric tons).

(2) Monthly emission factors for each lime type produced.

(3) Monthly emission factors for each calcined byproduct/waste by lime type that is sold.

(4) Standard method used (ASTM or NLA testing method) to determine chemical compositions of each lime type produced and each calcined lime byproduct/waste type.

(5) Monthly results of chemical composition analysis of each type of lime product produced and calcined byproduct/waste sold.

(6) Annual results of chemical composition analysis of each type of lime byproduct/waste that is not sold.

(7) Method used to determine the quantity of lime produced and/or lime sold.

(8) Monthly amount of lime product sold, by type (tons).

(9) Method used to determine the quantity of calcined lime byproduct/waste sold.

(10) Monthly amount of calcined lime byproduct/waste sold, by type (tons).

(11) Annual amount of calcined lime byproduct/waste that is not sold, by type (tons).

(12) Monthly weight or mass of each lime type produced (tons).

(13) Beginning and end of year inventories for each lime product that is produced.

(14) Beginning and end of year inventories for calcined lime byproducts/wastes sold.

(15) Annual lime production capacity (tons) per facility.

(16) Number of times in the reporting year that missing data procedures were followed to measure lime production (months) or the chemical composition of lime products sold (months).

(17) Indicate whether CO_2 was used on-site (i.e. for use in a purification process). If CO_2 was used on-site, provide the information in paragraphs (b)(17)(i) and (ii) of this section.

(i) The annual amount of CO_2 captured for use in the on-site process.

(ii) The method used to determine the amount of CO_2 captured.

Subpart V—[Amended]

■ 38. Section 98.223 is amended by:
■ a. Revising paragraphs (a)(1) and (a)(2)(ii).
■ b. Revising paragraph (b) introductory text.
■ c. Revising paragraphs (b)(1) and (b)(2).
■ d. Revising paragraph (c).
■ e. Revising paragraph (d) introductory text.
■ f. Revising paragraph (e).
■ g. Removing and reserving paragraph (f).
■ h. Revising paragraph (g).
■ i. Adding paragraph (i).

The revisions and addition read as follows:

§ 98.223 Calculating GHG emissions.

(a) * * *

(1) Use a site-specific emission factor and production data according to paragraphs (b) through (i) of this section.

(2) * * *

(ii) If the Administrator does not approve your requested alternative method within 150 days of the end of the reporting year, you must determine the N_2O emissions for the current reporting period using the procedures specified in paragraph (a)(1) of this section.

(b) You must conduct an annual performance test for each nitric acid train according to paragraphs (b)(1) through (3) of this section.

(1) You must conduct the performance test at the absorber tail gas vent, referred to as the test point, for each nitric acid train according to § 98.224(b) through (f). If multiple nitric acid production units exhaust to a common abatement technology and/or emission point, you must sample each process in the ducts before the emissions are combined, sample each process when only one process is operating, or sample the combined emissions when multiple processes are operating and base the site-specific emission factor on the combined production rate of the multiple nitric acid production units.

(2) You must conduct the performance test under normal process operating conditions.

* * * * *

(c) Using the results of the performance test in paragraph (b) of this section, you must calculate an average site-specific emission factor for each nitric acid train "t" according to Equation V–1 of this section:

$$EF_{N2Ot} = \frac{\sum_{1}^{n} \frac{C_{N2O} * 1.14 \times 10^{-7} * Q}{P}}{n} \qquad \text{(Eq. V-1)}$$

Where:

EF_{N_2Ot} = Average site-specific N_2O emissions factor for nitric acid train "t" (lb N_2O/ton nitric acid produced, 100 percent acid basis).

C_{N2O} = N_2O concentration for each test run during the performance test (ppm N_2O).

1.14×10^{-7} = Conversion factor (lb/dscf-ppm N_2O).

Q = Volumetric flow rate of effluent gas for each test run during the performance test (dscf/hr).

P = Production rate for each test run during the performance test (tons nitric acid produced per hour, 100 percent acid basis).

n = Number of test runs.

(d) If nitric acid train "t" exhausts to any N_2O abatement technology "N" after the test point, you must determine the destruction efficiency for each N_2O abatement technology "N" according to paragraphs (d)(1), (d)(2), or (d)(3) of this section.

* * * * *

(e) If nitric acid train "t" exhausts to any N_2O abatement technology "N" after the test point, you must determine the annual amount of nitric acid produced on train "t" while N_2O abatement technology "N" is operating according to § 98.224(f). Then you must calculate the abatement utilization factor for each N_2O abatement technology "N" for each nitric acid train "t" according to Equation V–2 of this section.

$$AF_{t,N} = \frac{P_{t,N}}{P_t} \qquad \text{(Eq. V-2)}$$

Where:

$AF_{t,N}$ = Abatement utilization factor of N_2O abatement technology "N" at nitric acid train "t" (fraction of annual production that abatement technology is operating).

P_t = Total annual nitric acid production from nitric acid train "t" (ton acid produced, 100 percent acid basis).

$P_{a,t,N}$ = Annual nitric acid production from nitric acid train "t" during which N_2O abatement technology "N" was operational (ton acid produced, 100 percent acid basis).

* * * * *

(g) You must calculate N_2O emissions for each nitric acid train "t" according to paragraph (g)(1), (g)(2), (g)(3), or (g)(4) of this section.

(1) If nitric acid train "t" exhausts to one N_2O abatement technology "N" after the test point, you must use the emissions factor (determined in Equation V–1 of this section), the destruction efficiency (determined in paragraph (d) of this section), the annual nitric acid production (determined in paragraph (i) of this section), and the abatement utilization factor (determined in paragraph (e) of this section) according to Equation V–3a of this section:

$$E_{N2Ot} = \frac{EF_{N20t} * P_t}{2205} * \left(1 - \left(DF * AF\right)\right) \qquad \text{(Eq. V-3a)}$$

Where:

E_{N_2Ot} = Annual N_2O mass emissions from nitric acid production unit "t" according to this Equation V–3a (metric tons).

EF_{N_2Ot} = Average site-specific N_2O emissions factor for nitric acid train "t" (lb N_2O/ton acid produced, 100 percent acid basis).

P_t = Annual nitric acid production from the train "t" (ton acid produced, 100 percent acid basis).

DF = Destruction efficiency of N_2O abatement technology N that is used on nitric acid train "t" (percent of N_2O removed from vent stream).

AF = Abatement utilization factor of N_2O abatement technology "N" for nitric acid train "t" (percent of time that the abatement technology is operating).

2205 = Conversion factor (lb/metric ton).

(2) If multiple N_2O abatement technologies are located in series after your test point, you must use the emissions factor (determined in Equation V–1 of this section), the destruction efficiency (determined in paragraph (d) of this section), the annual nitric acid production (determined in paragraph (f) of this section), and the abatement utilization factor (determined in paragraph (e) of this section), according to Equation V–3b of this section:

$$E_{N2Ot} = \frac{EF_{N20,t} * P_t}{2205} * \left(1 - \left(DF_1 * AF_1\right)\right) * \left(1 - \left(DF_2 * AF_2\right)\right) * \ldots * \left(1 - \left(DF_N * AF_N\right)\right) \qquad \text{(Eq. V-3b)}$$

Where:

E_{N_2Ot} = Annual N_2O mass emissions from nitric acid production unit "t" according to this Equation V–3b (metric tons).

$EF_{N_2O,t}$ = N_2O emissions factor for unit "t" (lb N_2O/ton nitric acid produced).

P_t = Annual nitric acid produced from unit "t" (ton acid produced, 100 percent acid basis).

DF_1 = Destruction efficiency of N_2O abatement technology 1 (percent of N_2O removed from vent stream).

AF_1 = Abatement utilization factor of N_2O abatement technology 1 (percent of time that abatement technology 1 is operating).

DF_2 = Destruction efficiency of N_2O abatement technology 2 (percent of N_2O removed from vent stream).

AF_2 = Abatement utilization factor of N_2O abatement technology 2 (percent of time that abatement technology 2 is operating).

DF_N = Destruction efficiency of N_2O abatement technology N (percent of N_2O removed from vent stream).

AF_N = Abatement utilization factor of N_2O abatement technology N (percent of time that abatement technology N is operating).

2205 = Conversion factor (lb/metric ton).

N = Number of different N_2O abatement technologies.

(3) If multiple N_2O abatement technologies are located in parallel after your test point, you must use the emissions factor (determined in Equation V–1 of this section), the destruction efficiency (determined in paragraph (d) of this section), the annual nitric acid production (determined in paragraph (f) of this section), and the abatement utilization factor (determined in paragraph (e) of this section), according to Equation V–3c of this section:

$$E_{N2Ot} = \frac{EF_{N20,t} * P_t}{2205} * \sum_{1}^{N} \left(\left(1 - \left(DF_N * AF_N\right)\right) * FC_N\right) \qquad \text{(Eq. V-3c)}$$

Where:

E_{N_2Ot} = Annual N_2O mass emissions from nitric acid production unit "t" according to this Equation V–3c (metric tons).

$EF_{N_2O,t}$ = N_2O emissions factor for unit "t" (lb N_2O/ton nitric acid produced).

P_t = Annual nitric acid produced from unit "t" (ton acid produced, 100 percent acid basis).

DF_N = Destruction efficiency of N_2O abatement technology "N" (percent of N_2O removed from vent stream).

AF_N = Abatement utilization factor of N_2O abatement technology "N" (percent of time that abatement technology "N" is operating).

FC_N = Fraction control factor of N_2O abatement technology "N" (percent of total emissions from unit "t" that are sent to abatement technology "N").

2205 = Conversion factor (lb/metric ton).

N = Number of different N_2O abatement technologies with a fraction control factor.

(4) If nitric acid train "t" does not exhaust to any N_2O abatement technology after the test point, you must use the emissions factor (determined in Equation V–1 of this section), and the annual nitric acid production (determined in paragraph (i) of this section) according to Equation V–3b of this section:

$$E_{N_2Ot} = \frac{EF_{N20t} * P_t}{2205} \qquad \text{(Eq. V-3d)}$$

Where:

E_{N_2Ot} = Annual N_2O mass emissions from nitric acid production unit "t" according to this Equation V–3d (metric tons).

EF_{N_2Ot} = Average site-specific N_2O emissions factor for nitric acid train "t" (lb N_2O/ton acid produced, 100 percent acid basis).

P_t = Annual nitric acid production from nitric acid train "t" (ton acid produced, 100 percent acid basis).

2205 = Conversion factor (lb/metric ton).

* * * * *

(i) You must determine the total annual amount of nitric acid produced on nitric acid train "t" for each nitric acid train (tons acid produced, 100 percent acid basis), according to § 98.224(f).

■ 39. Section 98.224 is amended by:

■ a. Revising paragraph (a).

■ b. Revising the first sentence in paragraph (d) introductory text.

■ c. Revising paragraphs (e) and (f).

The revisions read as follows:

§ 98.224 Monitoring and QA/QC requirements.

(a) You must conduct a new performance test according to a test plan as specified in paragraphs (a)(1) through (3) of this section.

(1) Conduct the performance test annually. The test should be conducted at a point during the campaign which is representative of the average emissions rate from the nitric acid campaigns. Facilities must document the methods used to determine the representative

point of the campaign when the performance test is conducted.

(2) Conduct the performance test when your nitric acid production process is changed, specifically when abatement equipment is installed.

(3) If you requested Administrator approval for an alternative method of determining N_2O emissions under § 98.223(a)(2), you must conduct the performance test if your request has not been approved by the Administrator within 150 days of the end of the reporting year in which it was submitted.

* * * * *

(d) You must determine the volumetric flow rate during the performance test in conjunction with the applicable EPA methods in 40 CFR part 60, appendices A–1 through A–4.

* * *

* * * * *

(e) You must determine the total monthly amount of nitric acid produced. You must also determine the monthly amount of nitric acid produced while N_2O abatement technology (located after the test point) is operating from each nitric acid train. These monthly amounts are determined according to the methods in paragraphs (c)(1) or (2) of this section.

(f) You must determine the annual amount of nitric acid produced. You must also determine the annual amount of nitric acid produced while N_2O abatement technology (located after the test point) is operating for each train. These annual amounts are determined by summing the respective monthly nitric acid quantities determined in paragraph (e) of this section.

■ 40. Section 98.226 is amended by:

■ a. Revising the introductory text.

■ b. Revising paragraph (g).

■ c. Revising paragraph (m) introductory text.

■ d. Revising paragraph (n) introductory text.

■ e. Adding paragraph (p).

The revisions and addition read as follows:

§ 98.226 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the information specified in paragraphs (a) through (p) of this section.

* * * * *

(g) Number of different N_2O abatement technologies per nitric acid train "t".

* * * * *

(m) If you conducted a performance test and calculated a site-specific emissions factor according to § 98.223(a)(1), each annual report must also contain the information specified in paragraphs (m)(1) through (7) of this section.

* * * * *

(n) If you requested Administrator approval for an alternative method of determining N_2O emissions under § 98.223(a)(2), each annual report must also contain the information specified in paragraphs (n)(1) through (4) of this section.

* * * * *

(p) Fraction control factor for each abatement technology (percent of total emissions from the production unit that are sent to the abatement technology) if equation V–3c is used.

Subpart Z—[Amended]

■ 41. Section 98.263 is amended by revising paragraph (b)(1) to read as follows:

§ 98.263 Calculating GHG emissions.

* * * * *

(b) * * *

(1) Calculate the annual CO_2 mass emissions from each wet-process phosphoric acid process line using the methods in paragraphs (b)(1)(i) or (ii) of this section, as applicable.

(i) If your process measurement provides the inorganic carbon content of phosphate rock as an output, calculate and report the process CO_2 emissions from each wet-process phosphoric acid process line using Equation Z–1a of this section:

$$E_m = \sum_{i=1}^{b}\sum_{n=1}^{z}\left(IC_{n,i} * P_{n,i}\right) * \frac{2000}{2205} * \frac{44}{12} \qquad \text{(Eq. Z-1a)}$$

Where:

E_m = Annual CO_2 mass emissions from a wet-process phosphoric acid process line m according to this Equation Z–1a (metric tons).

$IC_{n,i}$ = Inorganic carbon content of a grab sample batch of phosphate rock by origin i obtained during month n, from the carbon analysis results (percent by weight, expressed as a decimal fraction).

$P_{n,i}$ = Mass of phosphate rock by origin i consumed in month n by wet-process phosphoric acid process line m (tons).

z = Number of months during which the process line m operates.

b = Number of different types of phosphate rock in month, by origin. If the grab sample is a composite sample of rock from more than one origin, b = 1.

2000/2205 = Conversion factor to convert tons to metric tons.

44/12 = Ratio of molecular weights, CO_2 to carbon.

(ii) If your process measurement provides the CO_2 emissions directly as an output, calculate and report the process CO_2 emissions from each wet-process phosphoric acid process line using Equation Z–1b of this section:

$$E_m = \sum_{i=1}^{b}\sum_{n=1}^{z}\left(CO_{2_{n,i}} * P_{n,i}\right) * \frac{2000}{2205} \qquad \text{(Eq. Z-1b)}$$

Where:

E_m = Annual CO_2 mass emissions from a wet-process phosphoric acid process line m according to this Equation Z–1b (metric tons).

$CO_{2n,i}$ = Carbon dioxide emissions of a grab sample batch of phosphate rock by origin i obtained during month n (percent by weight, expressed as a decimal fraction).

$P_{n,i}$ = Mass of phosphate rock by origin i consumed in month n by wet-process phosphoric acid process line m (tons).

z = Number of months during which the process line m operates.

b = Number of different types of phosphate rock in month, by origin. If the grab sample is a composite sample of rock from more than one origin, b=1.

2000/2205 = Conversion factor to convert tons to metric tons.

* * * * *

■ 42. Section 98.264 is amended by revising paragraphs (a) and (b) to read as follows:

§ 98.264 Monitoring and QA/QC requirements.

(a) You must obtain a monthly grab sample of phosphate rock directly from the rock being fed to the process line before it enters the mill using one of the following methods. You may conduct the representative bulk sampling using a method published by a consensus standards organization, or you may use industry consensus standard practice methods, including but not limited to the Phosphate Mining States Methods Used and Adopted by the Association of Fertilizer and Phosphate Chemists (AFPC) (P.O. Box 1645, Bartow, Florida 33831, (863) 534–9755, *http://afpc.net, paul.mcafee@mosaicco.com*). If phosphate rock is obtained from more than one origin in a month, you must obtain a sample from each origin of rock or obtain a composite representative sample.

(b) You must determine the carbon dioxide or inorganic carbon content of each monthly grab sample of phosphate rock (consumed in the production of phosphoric acid). You may use a method published by a consensus standards organization, or you may use industry consensus standard practice methods, including but not limited to the Phosphate Mining States Methods Used and Adopted by AFPC (P.O. Box 1645, Bartow, Florida 33831, (863) 534–9755, *http://afpc.net, paul.mcafee@mosaicco.com*).

* * * * *

■ 43. Section 98.265 is amended by revising the first and second sentences of paragraph (a) to read as follows:

§ 98.265 Procedures for estimating missing data.

* * * * *

(a) For each missing value of the inorganic carbon content of phosphate rock or carbon dioxide (by origin), you must use the appropriate default factor provided in Table Z–1 this subpart. Alternatively, you must determine a substitute data value by calculating the arithmetic average of the quality-assured values of inorganic carbon contents of phosphate rock of origin i from samples immediately preceding and immediately following the missing data incident.

* * *

* * * * *

■ 44. Section 98.266 is amended by:

■ a. Revising the introductory text.

■ b. Revising paragraph (c).

■ c. Revising paragraph (f) introductory text.

■ d. Revising paragraph (f)(2).

■ e. Revising paragraph (f)(4).

■ f. Revising paragraph (f)(5).

■ g. Adding paragraph (f)(9).

The revisions and addition read as follows:

§ 98.266 Data reporting requirements.

In addition to the information required by § 98.3(c), each annual report must contain the information specified in paragraphs (a) through (f) of this section.

* * * * *

(c) Annual arithmetic average percent inorganic carbon or carbon dioxide in phosphate rock from monthly records (percent by weight, expressed as a decimal fraction).

* * * * *

(f) If you do not use a CEMS to measure emissions, then you must report the information in paragraphs (f)(1) through (9) of this section.

* * * * *

(2) Annual CO_2 emissions from each wet-process phosphoric acid process line (metric tons) as calculated by either Equation Z–1a or Equation Z–1b of this subpart.

* * * * *

(4) Method used to estimate any missing values of inorganic carbon content or carbon dioxide content of phosphate rock for each wet-process phosphoric acid process line.

(5) Monthly inorganic carbon content of phosphate rock for each wet-process phosphoric acid process line for which Equation Z–1a is used (percent by weight, expressed as a decimal fraction), or CO_2 (percent by weight, expressed as a decimal fraction) for which Equation Z–1b is used.

* * * * *

(9) Annual process CO_2 emissions from phosphoric acid production facility (metric tons).

Subpart CC—[Amended]

■ 45. Section 98.294 is amended by revising the third sentence of paragraph (a)(1) to read as follows:

§ 98.294 Monitoring and QA/QC requirements.

* * * * *

(a) * * *

(1) * * * The modified method referred to above adjusts the regular ASTM method to express the results in terms of trona.* * *

* * * * *

■ 46. Section 98.296 is amended by:

■ a. Revising paragraph (a)(1).

■ b. Revising paragraph (b)(3).

■ c. Revising paragraph (b)(6).

■ d. Revising paragraph (b)(10).

■ e. Removing paragraphs (b)(11)(iv) through (vi).

The revisions read as follows:

§ 98.296 Data reporting requirements.

* * * * *

(a) * * *

(1) Annual consumption of trona or liquid alkaline feedstock for each manufacturing line (tons).

* * * * *

(b) * * *

(3) Annual production of soda ash for each manufacturing line (tons).

* * * * *

(6) Monthly production of soda ash for each manufacturing line (tons).

* * * * *

(10) If you produce soda ash using the liquid alkaline feedstock process and use the site-specific emission factor method (§ 98.293(b)(3)) to estimate emissions then you must report the following relevant information for each manufacturing line or stack:

(i) Stack gas volumetric flow rate during performance test (dscfm).

(ii) Hourly CO_2 concentration during performance test (percent CO_2).

(iii) CO_2 emission factor (metric tons CO_2/metric tons of process vent flow from mine water stripper/evaporator).

(iv) CO_2 mass emission rate during performance test (metric tons/hour).

* * * * *

Subpart EE—[Amended]

■ 47. Section 98.314 is amended by revising paragraph (e) to read as follows:

§ 98.314 Monitoring and QA/QC requirements.

* * * * *

(e) You must determine the quantity of carbon-containing waste generated from each titanium dioxide production line on a monthly basis using plant instruments used for accounting purposes including direct measurement weighing the carbon-containing waste not used during the process (by belt scales or a similar device) or through the use of sales records.

* * * * *

■ 48. Section 98.316 is amended by revising paragraphs (b)(9) and (b)(11) to read as follows:

§ 98.316 Data reporting requirements.

* * * * *

(b) * * *

(9) Monthly carbon content factor of petroleum coke (percent by weight expressed as a decimal fraction).

* * * * *

(11) Carbon content for carbon-containing waste for each process line (percent by weight expressed as a decimal fraction).

* * * * *

Subpart GG—[Amended]

■ 49. Section 98.333 is amended by revising the definitions of "$(Electrode)_k$" and "$(C_{Electrode})_k$" in Equation GG–1 of paragraph (b)(1) to read as follows:

§ 98.333 Calculating GHG emissions.

* * * * *

(b) * * *

(1) * * * * *

$(Electrode)_k$ = Annual mass of carbon electrode consumed in furnace "k" (tons).

$(C_{Electrode})_k$ = Carbon content of the carbon electrode consumed in furnace "k", from the annual carbon analysis (percent by weight, expressed as a decimal fraction).

* * * * *

■ 50. Section 98.336 is amended by revising paragraph (a) introductory text; and by revising paragraphs (b)(1), (b)(7), and (b)(10) to read as follows:

§ 98.336 Data reporting requirements.

* * * * *

(a) If a CEMS is used to measure CO_2 emissions, then you must report under this subpart the relevant information required for the Tier 4 Calculation Methodology in § 98.36 and the information listed in this paragraph (a):

* * * * *

(b) * * *

(1) Identification number and annual process CO_2 emissions from each individual Waelz kiln or electrothermic furnace (metric tons).

* * * * *

(7) Carbon content of each carbon-containing input material charged to each kiln or furnace (including zinc bearing material, flux materials, and other carbonaceous materials) from the annual carbon analysis or from information provided by the material supplier for each kiln or furnace (percent by weight, expressed as a decimal fraction).

* * * * *

(10) Carbon content of the carbon electrode used in each furnace from the annual carbon analysis or from information provided by the material supplier (percent by weight, expressed as a decimal fraction).

* * * * *

Subpart HH—[Amended]

■ 51. Section 98.340 is amended by revising paragraph (b) to read as follows:

§ 98.340 Definition of the source category.

* * * * *

(b) This source category does not include Resource Conservation and Recovery Act (RCRA) Subtitle C or Toxic Substances Control Act (TSCA) hazardous waste landfills, construction and demolition waste landfills, or industrial waste landfills.

* * * * *

■ 52. Section 98.343 is amended by:

■ a. In paragraph (a)(1), revising Equation HH–1 and the definitions of "x," "S," "W_x," "MCF," "DOC_F," "F," and "k" in Equation HH–1; and removing the definition of "L_0" in Equation HH–1.

■ b. Revising the last sentence of paragraph (a)(2).

■ c. Redesignating paragraph (a)(3) as (a)(4) and revising new paragraph (a)(4).

■ d. Adding a new paragraph (a)(3).

■ e. Revising paragraph (b)(1), and revising paragraph (b)(2) introductory text.

■ f. Revising paragraphs (b)(2)(ii), (b)(2)(iii)(A), and (b)(2)(iii)(B).

■ g. Revising paragraph (c) introductory text.

The revisions and additions read as follows:

§ 98.343 Calculating GHG emissions.

(a) * * *

(1) * * *

$$G_{CH4} = \sum_{x=S}^{T-1} \left\{ W_x \times MCF \times DOC \times DOC_F \times F \times \frac{16}{12} \times \left(e^{-k(T-x-1)} - e^{-k(T-x)} \right) \right\} \qquad \text{(Eq. HH-1)}$$

* * * * *

x = Year in which waste was disposed.

S = Start year of calculation. Use the year 1960 or the opening year of the landfill, whichever is more recent.

* * * * *

W_x = Quantity of waste disposed in the landfill in year × from measurement data, tipping fee receipts, or other company records (metric tons, as received (wet weight)).

MCF = Methane correction factor (fraction). Use the default value of 1 unless there is active aeration of waste within the landfill during the reporting year. If there is active aeration of waste within the landfill during the reporting year, use either the default value of 1 or select an alternative value no less than 0.5 based on site-specific aeration parameters.

* * * * *

DOC_F = Fraction of DOC dissimilated (fraction). Use the default value of 0.5.

F = Fraction by volume of CH_4 in landfill gas from measurement data on a dry basis, if available (fraction); default is 0.5.

k = Rate constant from Table HH–1 to this subpart (yr^{-1}). Select the most applicable k value for the majority of the past 10 years (or operating life, whichever is shorter).

(2) * * * For years when waste composition data are not available, use the bulk waste parameter values for k and DOC in Table HH–1 to this subpart for the total quantity of waste disposed in those years.

(3) Beginning in the first emissions reporting year and for each year thereafter, if scales are in place, you must determine the annual quantity of waste (in metric tons as received, i.e., wet weight) disposed of in the landfill using paragraph (a)(3)(i) of this section for all containers and for all vehicles used to haul waste to the landfill, except for passenger cars, light duty pickup trucks, or waste loads that cannot be measured using the scales due to physical limitations (load cannot physically access or fit on the scale) and/or operational limitations of the scale (load exceeding the limits or sensitivity range of the scale). If scales are not in place, you must use paragraph (a)(3)(ii) of this section to determine the annual quantity of waste disposed. For waste hauled to the landfill in passenger cars or light duty pickup trucks, you may use either paragraph (a)(3)(i) or paragraph (a)(3)(ii) of this section to determine the annual quantity of waste disposed. For loads that cannot be measured using the scales due to physical and/or operational limitations of the scale, you must use paragraph (a)(3)(ii) of this section or similar engineering calculations to determine the annual quantity of waste disposed. The approach used to determine the annual quantity of waste disposed of must be documented in the monitoring plan.

(i) Use direct mass measurements of each individual load received at the landfill using either of the following methods:

(A) Weigh using mass scales each vehicle or container used to haul waste as it enters the landfill or disposal area; weigh using mass scales each vehicle or container after it has off-loaded the waste; determine the quantity of waste received from the individual load as the difference in the two mass measurements; and determine the annual quantity of waste received as the sum of all waste loads received during the year. Alternatively, you may

determine annual quantity of waste by summing the weights of all vehicles and containers entering the landfill and subtracting from it the sum of all the weights of vehicles and containers after they have off-loaded the waste in the landfill.

(B) Weigh using mass scales each vehicle or container used to haul waste as it enters the landfill or disposal area; determine a representative tare weight by vehicle or container type by weighing no less than 5 of each type of vehicle or container after it has off-loaded the waste; determine the quantity of waste received from the individual load as the difference between the measured weight in and the tare weight determined for that container/vehicle type; and determine the annual quantity of waste received as the sum of all waste loads received during the year.

(ii) Determine the working capacity in units of mass for each type of container or vehicle used to haul waste to the landfill (*e.g.,* using volumetric capacity and waste density measurements; direct measurement of a selected number of passenger vehicles and light duty pick-up trucks; or similar methods); record the number of loads received at the landfill by vehicle/container type; calculate the annual mass per vehicle/container type as the mass product of the number of loads of that vehicle/container multiplied by its working capacity; and calculate the annual quantity of waste received as the sum of the annual mass per vehicle/container type across all of the vehicle/container types used to haul waste to the landfill.

(4) For years prior to the first emissions reporting year, use methods in paragraph (a)(3) of this section when waste disposal quantity data are readily available. When waste disposal quantity data are not readily available, W_x shall be estimated using one of the applicable methods in paragraphs (a)(4)(i) through (a)(4)(iii) of this section. You must determine which method is most applicable to the conditions and disposal history of your facility. Historical waste disposal quantities should only be determined once, as part of the first annual report, and the same values should be used for all subsequent annual reports, supplemented by the next year's data on new waste disposal.

(i) Assume all prior years waste disposal quantities are the same as the waste quantity in the first year for which waste quantities are available.

(ii) Use the estimated population served by the landfill in each year, the values for national average per capita waste disposal rates found in Table HH–2 to this subpart, and calculate the waste quantity landfilled using Equation HH–2 of this section.

$$W_x = POP_x \times WDR_x \qquad \text{(Eq. HH-2)}$$

Where:

W_x = Quantity of waste placed in the landfill in year x (metric tons, wet basis).

POP_x = Population served by the landfill in year x from city population, census data, or other estimates (capita).

WDR_x = Average per capita waste disposal rate for year x from Table HH–2 to this subpart (metric tons per capita per year, wet basis; tons/cap/yr).

(iii) Use a constant average waste disposal quantity calculated using Equation HH–3 of this section for each year the landfill was in operation (i.e., from the first year accepting waste until the last year for which waste disposal data is unavailable, inclusive).

$$W_x = \frac{LFC}{(YrData - YrOpen + 1)} \qquad \text{(Eq. HH-3)}$$

Where:

W_x = Quantity of waste placed in the landfill in year x (metric tons, wet basis).

LFC = Landfill capacity or, for operating landfills, capacity of the landfill used (or the total quantity of waste-in-place) at the end of the year prior to the year when waste disposal data are available from design drawings or engineering estimates (metric tons).

YrData = Year in which the landfill last received waste or, for operating landfills, the year prior to the first reporting year when waste disposal data is first available from company records, or best available data.

YrOpen = Year in which the landfill first received waste from company records or best available data. If no data are available for estimating YrOpen for a closed landfill, use 30 years as the default operating life of the landfill.

(b) * * *

(1) If you continuously monitor the flow rate, CH_4 concentration, temperature, pressure, and, if necessary, moisture content of the landfill gas that is collected and routed to a destruction device (before any treatment equipment) using a monitoring meter specifically for CH_4 gas, as specified in § 98.344, you must use this monitoring system and calculate the quantity of CH_4 recovered for destruction using Equation HH–4 of this section. A fully integrated system that directly reports CH_4 content requires no other calculation than summing the results of all monitoring periods for a given year.

$$R = \sum_{n=1}^{N}\left((V)_n \times (K_{MC})_n \times \frac{(C)_n}{100\%} \times 0.0423 \times \frac{520^{o}R}{(T)_n} \times \frac{(P)_n}{1\ \text{atm}} \times \frac{0.454}{1,000} \right) \qquad \text{(Eq. HH-4)}$$

Where:

R = Annual quantity of recovered CH_4 (metric tons CH_4).

N = Total number of measurement periods in a year. Use daily averaging periods for a continuous monitoring system and N = 365 (or N = 366 for leap years). For weekly sampling, as provided in paragraph (b)(2) of this section, use N=52.

n = Index for measurement period.

$(V)_n$ = Cumulative volumetric flow for the measurement period in actual cubic feet (acf). If the flow rate meter automatically corrects for temperature and pressure, replace "$520°R/(T)_n \times (P)_n/1$ atm" with "1".

$(K_{MC})_n$ = Moisture correction term for the measurement period, volumetric basis, as follows: $(K_{MC})_n = 1$ when $(V)_n$ and $(C)_n$ are both measured on a dry basis or if both are measured on a wet basis; $(K_{MC})_n = [1-(f_{H_2O})_n]$ when $(V)_n$ is measured on a wet basis and $(C)_n$ is measured on a dry basis; and $(K_{MC})_n = 1/[1-(f_{H2O})_n]$ when $(V)_n$ is measured on a dry basis and $(C)_n$ is measured on a wet basis.

$(f_{H_2O})_n$ = Average moisture content of landfill gas during the measurement period, volumetric basis (cubic feet water per cubic feet landfill gas)

$(C_{CH4})_n$ = Average CH_4 concentration of landfill gas for the measurement period (volume %).

0.0423 = Density of CH_4 lb/cfm at 520°R or 60 degrees Fahrenheit and 1 atm.

$(T)_n$ = Average temperature at which flow is measured for the measurement period (°R).

$(P)_n$ = Average pressure at which flow is measured for the measurement period (atm).

0.454/1,000 = Conversion factor (metric ton/lb).

(2) If you do not continuously monitor according to paragraph (b)(1) of this section, you must determine the flow rate, CH_4 concentration, temperature, pressure, and moisture content of the landfill gas that is collected and routed to a destruction device (before any treatment equipment) according to the requirements in paragraphs (b)(2)(i) through (b)(2)(iii) of this section and

calculate the quantity of CH_4 recovered for destruction using Equation HH–4 of this section.

* * * * *

(ii) Determine the CH_4 concentration in the landfill gas that is collected and routed to a destruction device (before any treatment equipment) in a location near or representative of the location of the gas flow meter at least once each calendar week; if only one measurement is made each calendar week, there must be at least three days between measurements.

(iii) * * *

(A) Determine the temperature and pressure in the landfill gas that is collected and routed to a destruction device (before any treatment equipment) in a location near or representative of the location of the gas flow meter at least once each calendar week; if only one measurement is made each calendar week, there must be at least three days between measurements.

(B) If the CH_4 concentration is determined on a dry basis and flow is determined on a wet basis or CH_4 concentration is determined on a wet basis and flow is determined on a dry basis, and the flow meter does not automatically correct for moisture content, determine the moisture content in the landfill gas that is collected and routed to a destruction device (before any treatment equipment) in a location near or representative of the location of the gas flow meter at least once each calendar week; if only one measurement is made each calendar week, there must be at least three days between measurements.

(c) For all landfills, calculate CH_4 generation (adjusted for oxidation in cover materials) and actual CH_4 emissions (taking into account any CH_4 recovery, and oxidation in cover materials) according to the applicable methods in paragraphs (c)(1) through (c)(3) of this section.

* * * * *

■ 53. Section 98.344 is amended by:
■ a. Revising paragraph (a).
■ b. Revising the first sentence of paragraph (b) introductory text.
■ c. Revising paragraphs (b)(6)(ii) introductory text, (b)(6)(ii)(A), and (b)(6)(ii)(B).
■ d. Revising the definition of "C_{CH4}" in Equation HH–9 of paragraph (b)(6)(iii).
■ e. Revising the second and third sentences of paragraph (c) introductory text.
■ f. Revising paragraph (d).
■ g. Revising the first sentence of paragraph (e).

The revisions read as follows:

§ 98.344 Monitoring and QA/QC requirements.

(a) Mass measurement equipment used to determine the quantity of waste landfilled on or after January 1, 2010 must meet the requirements for weighing equipment as described in "Specifications, Tolerances, and Other Technical Requirements For Weighing and Measuring Devices" NIST Handbook 44 (2009) (incorporated by reference, see § 98.7).

(b) For landfills with gas collection systems, operate, maintain, and calibrate a gas composition monitor capable of measuring the concentration of CH_4 in the recovered landfill gas using one of the methods specified in paragraphs (b)(1) through (b)(6) of this section or as specified by the manufacturer. * * *

* * * * *

(6) * * *

(ii) Determine a non-methane organic carbon correction factor at the routine sampling location no less frequently than once a reporting year following the requirements in paragraphs (b)(6)(ii)(A) through (b)(6)(ii)(C) of this section.

(A) Take a minimum of three grab samples of the landfill gas with a minimum of 20 minutes between samples and determine the methane composition of the landfill gas using one of the methods specified in paragraphs (b)(1) through (b)(5) of this section.

(B) As soon as practical after each grab sample is collected and prior to the collection of a subsequent grab sample, determine the total gaseous organic concentration of the landfill gas using either Method 25A or 25B at 40 CFR part 60, appendix A–7 as specified in paragraph (b)(6)(i) of this section.

* * * * *

(iii) * * *

C_{CH4} = Methane concentration in the landfill gas (volume %) for use in Equation HH–4 of this subpart.

* * * * *

(c) * * * Each gas flow meter shall be recalibrated either biennially (every 2 years) or at the minimum frequency specified by the manufacturer. Except as provided in § 98.343(b)(2)(i), each gas flow meter must be capable of correcting for the temperature and pressure and, if necessary, moisture content.

* * * * *

(d) All temperature, pressure, and if necessary, moisture content monitors must be calibrated using the procedures and frequencies specified by the manufacturer.

(e) The owner or operator shall document the procedures used to ensure the accuracy of the estimates of disposal quantities and, if applicable, gas flow rate, gas composition, temperature, pressure, and moisture content measurements. * * *

■ 54. Section 98.346 is amended by:
■ a. Revising paragraph (a).
■ b. Revising paragraph (b).
■ c. Revising paragraph (c).
■ d. Revising paragraph (d)(1).
■ e. Revising paragraph (f).
■ f. Revising paragraph (h).
■ g. Revising paragraph (i)(1)
■ h. Revising paragraph (i)(2)
■ i. Revising paragraph (i)(3)
■ j. Revising paragraph (i)(4)
■ k. Revising paragraph (i)(5)
■ l. Revising paragraph (i)(7).

The revisions read as follows:

§ 98.346 Data reporting requirements.

* * * * *

(a) A classification of the landfill as "open" (actively received waste in the reporting year) or "closed" (no longer receiving waste), the year in which the landfill first started accepting waste for disposal, the last year the landfill accepted waste (for open landfills, enter the estimated year of landfill closure), the capacity (in metric tons) of the landfill, an indication of whether leachate recirculation is used during the reporting year and its typical frequency of use over the past 10 years (e.g., used several times a year for the past 10 years, used at least once a year for the past 10 years, used occasionally but not every year over the past 10 years, not used), an indication as to whether scales are present at the landfill, and the waste disposal quantity for each year of landfilling required to be included when using Equation HH–1 of this subpart (in metric tons, wet weight).

(b) Method for estimating reporting year and historical waste disposal quantities, reason for its selection, and the range of years it is applied. For years when waste quantity data are determined using the methods in § 98.343(a)(3), report separately the quantity of waste determined using the methods in § 98.343(a)(3)(i) and the quantity of waste determined using the methods in § 98.343(a)(3)(ii). For historical waste disposal quantities that were not determined using the methods in § 98.343(a)(3), provide the population served by the landfill for each year the Equation HH–2 of this subpart is applied, if applicable, or, for open landfills using Equation HH–3 of this subpart, provide the value of landfill capacity (LFC) used in the calculation.

(c) Waste composition for each year required for Equation HH–1 of this subpart, in percentage by weight, for each waste category listed in Table HH–1 to this subpart that is used in Equation

HH–1 of this subpart to calculate the annual modeled CH_4 generation.

(d) * * *

(1) Degradable organic carbon (DOC), methane correction factor (MCF), and fraction of DOC dissimilated (DOC_F) values used in the calculations. If an MCF value other than the default of 1 is used, provide an indication of whether active aeration of the waste in the landfill was conducted during the reporting year, a description of the aeration system, including aeration blower capacity, the fraction of the landfill containing waste affected by the aeration, the total number of hours during the year the aeration blower was operated, and other factors used as a basis for the selected MCF value.

* * * * *

(f) The surface area of the landfill containing waste (in square meters), identification of the type of cover material used (as either organic cover, clay cover, sand cover, or other soil mixtures). If multiple cover types are used, the surface area associated with each cover type.

* * * * *

(h) For landfills without gas collection systems, the annual methane emissions (i.e., the methane generation, adjusted for oxidation, calculated using Equation HH–5 of this subpart), reported in metric tons CH_4, and an indication of whether passive vents and/or passive flares (vents or flares that are not considered part of the gas collection system as defined in § 98.6) are present at this landfill.

(i) * * *

(1) Total volumetric flow of landfill gas collected for destruction for the reporting year (cubic feet at 520 °R or 60 degrees Fahrenheit and 1 atm).

(2) Annual average CH_4 concentration of landfill gas collected for destruction (percent by volume).

(3) Monthly average temperature and pressure for each month at which flow is measured for landfill gas collected for destruction, or statement that temperature and/or pressure is incorporated into internal calculations run by the monitoring equipment.

(4) An indication as to whether flow was measured on a wet or dry basis, an indication as to whether CH_4 concentration was measured on a wet or dry basis, and if required for Equation HH–4 of this subpart, monthly average moisture content for each month at which flow is measured for landfill gas collected for destruction.

(5) An indication of whether destruction occurs at the landfill facility or off-site. If destruction occurs at the landfill facility, also report an indication of whether a back-up destruction device is present at the landfill, the annual operating hours for the primary destruction device, the annual operating hours for the back-up destruction device (if present), and the destruction efficiency used (percent).

* * * * *

(7) A description of the gas collection system (manufacturer, capacity, and number of wells), the surface area (square meters) and estimated waste depth (meters) for each area specified in Table HH–3 to this subpart, the estimated gas collection system efficiency for landfills with this gas collection system, the annual operating hours of the gas collection system, and an indication of whether passive vents and/or passive flares (vents or flares that are not considered part of the gas collection system as defined in § 98.6) are present at the landfill.

* * * * *

■ 55. Section 98.347 is amended by adding a second sentence to read as follows:

§ 98.347 Records that must be retained.

* * * You must retain records of all measurements made to determine tare weights and working capacities by vehicle/container type if these are used to determine the annual waste quantities.

■ 56. Section 98.348 is revised to read as follows:

§ 98.348 Definitions.

Except as specified in this section, all terms used in this subpart have the same meaning given in the Clean Air Act and subpart A of this part.

Construction and demolition (C&D) waste landfill means a solid waste disposal facility subject to the requirements of part 257, subparts A or B of this chapter that receives construction and demolition waste and does not receive hazardous waste (defined in § 261.3 of this chapter) or industrial solid waste (defined in § 258.2 of this chapter) or municipal solid waste (as defined in § 98.6) other than residential lead-based paint waste. A C&D waste landfill typically receives any one or more of the following types of solid wastes: Roadwork material, excavated material, demolition waste, construction/renovation waste, and site clearance waste.

Destruction device means a flare, thermal oxidizer, boiler, turbine, internal combustion engine, or any other combustion unit used to destroy or oxidize methane contained in landfill gas.

Industrial waste landfill means any landfill other than a municipal solid waste landfill, a RCRA Subtitle C hazardous waste landfill, or a TSCA hazardous waste landfill, in which industrial solid waste, such a RCRA Subtitle D wastes (nonhazardous industrial solid waste, defined in § 257.2 of this chapter), commercial solid wastes, or conditionally exempt small quantity generator wastes, is placed. An industrial waste landfill includes all disposal areas at the facility.

Solid waste has the meaning established by the Administrator pursuant to the Solid Waste Disposal Act (42 U.S.C.A. 6901 *et seq.*).

Working capacity means the maximum volume or mass of waste that is actually placed in the landfill from an individual or representative type of container (such as a tank, truck, or roll-off bin) used to convey wastes to the landfill, taking into account that the container may not be able to be 100 percent filled and/or 100 percent emptied for each load.

■ 57. Table HH–1 to subpart HH is revised to read as follows:

TABLE HH–1 TO SUBPART HH OF PART 98—EMISSIONS FACTORS, OXIDATION FACTORS AND METHODS

Factor	Default value	Units
DOC and k values—Bulk waste option		
DOC (bulk waste)	0.20	Weight fraction, wet basis.
k (precipitation plus recirculated leachate [a] <20 inches/year)	0.02	yr^{-1}
k (precipitation plus recirculated leachate [a] 20–40 inches/year)	0.038	yr^{-1}
k (precipitation plus recirculated leachate [a] >40 inches/year)	0.057	yr^{-1}

TABLE HH–1 TO SUBPART HH OF PART 98—EMISSIONS FACTORS, OXIDATION FACTORS AND METHODS—Continued

Factor	Default value	Units
DOC and k values—Modified bulk MSW option		
DOC (bulk MSW, excluding inerts and C&D waste)	0.31	Weight fraction, wet basis.
DOC (inerts, e.g., glass, plastics, metal, concrete)	0.00	Weight fraction, wet basis.
DOC (C&D waste)	0.08	Weight fraction, wet basis.
k (bulk MSW, excluding inerts and C&D waste)	0.02 to 0.057 [b]	yr^{-1}
k (inerts, e.g., glass, plastics, metal, concrete)	0.00	yr^{-1}
k (C&D waste)	0.02 to 0.04 [b]	yr^{-1}
DOC and k values—Waste composition option		
DOC (food waste)	0.15	Weight fraction, wet basis.
DOC (garden)	0.2	Weight fraction, wet basis.
DOC (paper)	0.4	Weight fraction, wet basis.
DOC (wood and straw)	0.43	Weight fraction, wet basis.
DOC (textiles)	0.24	Weight fraction, wet basis.
DOC (diapers)	0.24	Weight fraction, wet basis.
DOC (sewage sludge)	0.05	Weight fraction, wet basis.
DOC (inerts, e.g., glass, plastics, metal, cement)	0.00	Weight fraction, wet basis.
k (food waste)	0.06 to 0.185 [c]	yr^{-1}
k (garden)	0.05 to 0.10 [c]	yr^{-1}
k (paper)	0.04 to 0.06 [c]	yr^{-1}
k (wood and straw)	0.02 to 0.03 [c]	yr^{-1}
k (textiles)	0.04 to 0.06 [c]	yr^{-1}
k (diapers)	0.05 to 0.10 [c]	yr^{-1}
k (sewage sludge)	0.06 to 0.185 [c]	yr^{-1}
k (inerts e.g., glass, plastics, metal, concrete)	0.00	yr^{-1}
Other parameters—All MSW landfills		
MCF	1.	
DOC_F	0.5.	
F	0.5.	
OX	0.1.	
DE	0.99.	

[a] Recirculated leachate (in inches/year) is the total volume of leachate recirculated from company records or engineering estimates divided by the area of the portion of the landfill containing waste with appropriate unit conversions. Alternatively, landfills that use leachate recirculation can elect to use the k value of 0.057 rather than calculating the recirculated leachate rate.

[b] Use the lesser value when precipitation plus recirculated leachate is less than 20 inches/year. Use the greater value when precipitation plus recirculated leachate is greater than 40 inches/year. Use the average of the range of values when precipitation plus recirculated leachate is 20 to 40 inches/year (inclusive). Alternatively, landfills that use leachate recirculation can elect to use the greater value rather than calculating the recirculated leachate rate.

[c] Use the lesser value when the potential evapotranspiration rate exceeds the mean annual precipitation rate plus recirculated leachate. Use the greater value when the potential evapotranspiration rate does not exceed the mean annual precipitation rate plus recirculated leachate. Alternatively, landfills that use leachate recirculation can elect to use the greater value rather than assessing the potential evapotranspiration rate or recirculated leachate rate.

■ 58. Table HH–2 to subpart HH is amended by:

■ a. Removing the third column "% to SWDS."

■ b. Removing the entries for "1950" through "1959."

■ c. Revising the entries for "1989" through "2006."

■ d. Adding entries for "2007" through "2009."

TABLE HH–2 TO SUBPART HH OF PART 98—U.S. PER CAPITA WASTE DISPOSAL RATES

Year	Waste per capita ton/cap/yr
* * * *	
1989	0.83
1990	0.82
1991	0.76
1992	0.74
1993	0.76
1994	0.75
1995	0.70
1996	0.68
1997	0.69
1998	0.75
1999	0.75
2000	0.80
2001	0.91
2002	1.02
2003	1.02
2004	1.01
2005	0.98
2006	0.95
2007	0.95
2008	0.95
2009	0.95

■ 59. Table HH–3 to subpart HH–3 is amended by revising the entries for "A2: Area without active gas collection, regardless of cover type H2: Average depth of waste in area A2," "A3: Area with daily soil cover and active gas collection H3: Average depth of waste in area A3," "A4: Area with an intermediate soil cover and active gas

collection H4: Average depth of waste in area A4," and "A5: Area with a final soil and geomembrane cover system and active gas collection H5: Average depth of waste in area A5" to read as follows:

TABLE HH–3 TO SUBPART HH OF PART 98—LANDFILL GAS COLLECTION EFFICIENCIES

Description	Landfill gas collection efficiency
* * * * * * *	
A2: Area without active gas collection, regardless of cover type	CE2: 0%.
A3: Area with daily soil cover and active gas collection	CE3: 60%.
A4: Area with an intermediate soil cover, or a final soil cover not meeting the criteria for A5 below, and active gas collection	CE4: 75%.
A5: Area with a final soil cover of 3 feet or thicker of clay and/or geomembrane cover system and active gas collection	CE5: 95%.
* * * * * * *	

Subpart LL—[Amended]

■ 60. Section 98.386 is amended by:
■ a. Revising paragraph (a)(3).
■ b. Adding a third sentence to the end of paragraph (a)(5).
■ c. Adding a third sentence to the end of paragraph (a)(6).
■ d. Revising paragraph (a)(7).
■ e. Revising paragraphs (a)(16) and (a)(17).
■ f. Revising paragraphs (b)(3) and (c)(3).
■ g. Adding paragraph (d).

The revisions and additions read as follows:

§ 98.386 Data reporting requirements.

* * * * *

(a) * * *

(3) For each feedstock reported in paragraph (a)(2) of this section that was produced by blending a fossil fuel-based product with a biomass-based product, report the percent of the volume reported in paragraph (a)(2) of this section that is fossil fuel-based (excluding any denaturant that may be present in any ethanol product).

* * * * *

(5) * * * Those products that enter the facility, but are not reported in (a)(1), shall not be reported under this paragraph.

(6) * * * Those products that enter the facility, but are not reported in (a)(2), shall not be reported under this paragraph.

(7) For each product reported in paragraph (a)(6) of this section that was produced by blending a fossil fuel-based product with a biomass-based product, report the percent of the volume reported in paragraph (a)(6) of this section that is fossil fuel-based (excluding any denaturant that may be present in any ethanol product).

* * * * *

(16) The CO_2 emissions in metric tons that would result from the complete combustion or oxidation of each feedstock reported in paragraph (a)(2) of this section that were calculated according to § 98.393(b) or (h).

(17) The CO_2 emissions in metric tons that would result from the complete combustion or oxidation of each product (leaving the coal-to-liquid facility) reported in paragraph (a)(6) of this section that were calculated according to § 98.393(a) or (h).

* * * * *

(b) * * *

(3) For each product reported in paragraph (b)(2) of this section that was produced by blending a fossil fuel-based product with a biomass-based product, report the percent of the volume reported in paragraph (b)(2) of this section that is fossil fuel-based (excluding any denaturant that may be present in any ethanol product).

* * * * *

(c) * * *

(3) For each product reported in paragraph (c)(2) of this section that was produced by blending a fossil fuel-based product with a biomass-based product, report the percent of the volume reported in paragraph (c)(2) of this section that is fossil fuel-based (excluding any denaturant that may be present in any ethanol product).

* * * * *

(d) *Blended feedstock and products.* (1) Producers, exporters, and importers must report the following information for each blended product and feedstock where emissions were calculated according to § 98.393(i):

(i) Volume or mass of each blending component.

(ii) The CO_2 emissions in metric tons that would result from the complete combustion or oxidation of each blended feedstock or product, using Equation MM–12 or Equation MM–13 of § 98.393.

(iii) Whether it is a blended feedstock or a blended product.

(2) For a product that enters the facility to be further refined or otherwise used on site that is a blended feedstock, producers must meet the reporting requirements of paragraphs (a)(1) and (a)(2) of this section by reflecting the individual components of the blended feedstock.

(3) For a product that is produced, imported, or exported that is a blended product, producers, importers, and exporters must meet the reporting requirements of paragraphs (a)(5), (a)(6), (b)(1), (b)(2), (c)(1), and (c)(2) of this section, as applicable, by reflecting the individual components of the blended product.

Subpart MM—[Amended]

■ 61. Section 98.393 is amended by:
■ a. In paragraph (a)(1), revising the only sentence and the definition of "$Product_i$" in Equation MM–1.
■ b. Revising the definition of "$Product_i$" in Equation MM–2 of paragraph (a)(2).
■ c. Revising the only sentence of paragraph (b)(1) and the first sentence in paragraph (f)(1).
■ d. Revising the definition of "$\%Vol_i$" in Equation MM–8 in paragraph (h)(1).
■ e. Revising Equation MM–9 and the definition of "$\%Vol_j$" in paragraph (h)(2).
■ f. Revising paragraphs (h)(3) and (h)(4).
■ g. Adding paragraph (i).

The revisions and additions read as follows:

§ 98.393 Calculating GHG emissions.

(a) * * *

(1) Except as provided in paragraphs (h) and (i) of this section, any refiner, importer, or exporter shall calculate CO_2 emissions from each individual petroleum product and natural gas liquid using Equation MM–1 of this section.

* * * * *

$Product_i$ = Annual volume of product "i" produced, imported, or exported by the reporting party (barrels). For refiners, this volume only includes products ex

refinery gate, and excludes products that entered the refinery but are not reported under § 98.396(a)(1). For natural gas liquids, volumes shall reflect the individual components of the product as listed in Table MM–1 to subpart MM.

* * * * *

(2) * * *

$Product_i$ = Annual mass of product "i" produced, imported, or exported by the reporting party (metric tons). For refiners, this mass only includes products ex refinery gate, and excludes products that entered the refinery but are not reported under § 98.396(a)(1).

* * * * *

(b) * * *

(1) Except as provided in paragraphs (h) and (i) of this section, any refiner shall calculate CO_2 emissions from each non-crude feedstock using Equation MM–2 of this section.

* * * * *

(f) * * *

(1) *Calculation Method 1.* To determine the emission factor (i.e., EF_i in Equation MM–1) for solid products, multiply the default carbon share factor (i.e., percent carbon by mass) in column B of Table MM–1 to this subpart for the appropriate product by 44/12. * * *

* * * * *

(h) * * *

(1) * * *

$\%Vol_i$ = Percent volume of product "i" that is petroleum-based, not including any denaturant that may be present in any ethanol product, expressed as a fraction (e.g., 75% would be expressed as 0.75 in the above equation).

(2) * * *

$$CO_{2j} = Feedstock_j * EF_j * \%Vol_j \qquad \text{(Eq. MM-9)}$$

* * * * *

$\%Vol_j$ = Percent volume of feedstock "j" that is petroleum-based, not including any denaturant that may be present in any ethanol product, expressed as a fraction (e.g., 75% would be expressed as 0.75 in the above equation).

(3) Calculation Method 2 procedures for products.

(i) A reporter using Calculation Method 2 of this subpart to determine the emission factor of a petroleum product that does not contain denatured ethanol must calculate the CO_2 emissions associated with that product using Equation MM–10 of this section in place of Equation MM–1 of this section.

$$CO_{2i} = \left(Product_i * EF_i\right) - \left(Product_i * EF_m * \%Vol_m\right) \qquad \text{(Eq. MM-10)}$$

Where:

CO_{2i} = Annual CO_2 emissions that would result from the complete combustion or oxidation of each product "i" (metric tons).

$Product_i$ = Annual volume of each petroleum product "i" produced, imported, or exported by the reporting party (barrels). For refiners, this volume only includes products ex refinery gate.

EF_i = Product-specific CO_2 emission factor (metric tons CO_2 per barrel).

EF_m = Default CO_2 emission factor from Table MM–2 to subpart MM that most closely represents the component of product "i" that is biomass-based.

$\%Vol_m$ = Percent volume of petroleum product "i" that is biomass-based, expressed as a fraction (e.g., 75% would be expressed as 0.75 in the above equation).

(ii) In the event that a petroleum product contains denatured ethanol, importers and exporters must follow Calculation Method 1 procedures in paragraph (h)(1) of this section; and refineries must sample the petroleum portion of the blended biomass-based fuel prior to blending and calculate CO_2 emissions using Equation MM–10a of this section.

$$CO_{2i} = Product_p * EF_i \qquad \text{(Eq. MM-10a)}$$

Where:

CO_{2i} = Annual CO_2 emissions that would result from the complete combustion or oxidation of each biomass-blended fuel "i" (metric tons).

$Product_p$ = Annual volume of the petroleum-based portion of each biomass blended fuel "i" produced by the refiner (barrels).

EF_i = Petroleum product-specific CO_2 emission factor (metric tons CO_2 per barrel).

(4) Calculation Method 2 procedures for non-crude feedstocks.

(i) A refiner using Calculation Method 2 of this subpart to determine the emission factor of a non-crude petroleum feedstock that does not contain denatured ethanol must calculate the CO_2 emissions associated with that feedstock using Equation MM–11 of this section in place of Equation MM–2 of this section.

$$CO_{2j} = \left(Feedstock_j * EF_j\right) - \left(Feedstock_j * EF_m * \%Vol_m\right) \qquad \text{(Eq. MM-11)}$$

Where:

CO_{2j} = Annual CO_2 emissions that would result from the complete combustion or oxidation of each non-crude feedstock "j" (metric tons).

$Feedstock_j$ = Annual volume of each petroleum product "j" that enters the refinery to be further refined or otherwise used on site (barrels).

EF_j = Feedstock-specific CO_2 emission factor (metric tons CO_2 per barrel).

EF_m = Default CO_2 emission factor from Table MM–2 to subpart MM that most closely represents the component of petroleum product "j" that is biomass-based.

$\%Vol_m$ = Percent volume of non-crude feedstock "j" that is biomass-based, expressed as a fraction (e.g., 75% would be expressed as 0.75 in the above equation).

(ii) In the event that a non-crude feedstock contains denatured ethanol, refiners must follow Calculation Method 1 procedures in paragraph (h)(2) of this section.

(i) Optional procedures for blended products that do not contain biomass.

(1) In the event that a reporter produces, imports, or exports a blended product that does not include biomass, the reporter may calculate emissions for the blended product according to the method in paragraph (i)(2) of this section. In the event that a refiner receives a blended non-crude feedstock that does not include biomass, the refiner may calculate emission for the blended non-crude feedstock according

to the method in paragraph (i)(3) of this section. The procedures in this section may be used only if all of the following criteria are met:

(i) The reporter knows the relative proportion of each component of the blend (i.e., the mass or volume percentage).

(ii) Each component of blended product "i" or blended non-crude feedstock "j" meets the strict definition of a product listed in Table MM–1 to subpart MM.

(iii) The blended product or non-crude feedstock is not comprised entirely of natural gas liquids.

(iv) The reporter uses Calculation Method 1.

(v) Solid components are blended only with other solid components.

(2) The reporter must calculate emissions for the blended product using Equation MM–12 of this section in place of Equation MM–1 of this section.

$$CO_{2i} = \sum \left[Blending\ Component_{i...n} * EF_{i...n} \right] \qquad \text{(Eq. MM-12)}$$

Where:

CO_{2i} = Annual CO_2 emissions that would result from the complete combustion or oxidation of a blended product "i" (metric tons).

Blending $Component_{i...n}$ = Annual volume or mass of each blending component that is blended (barrels or metric tons).

$EF_{i...n}$ = CO_2 emission factors specific to each blending component (metric tons CO_2 per barrel or per metric ton of product).

n = Number of blending components blended into blended product "i".

(3) For refineries, the reporter must calculate emissions for the blended non-crude feedstock using Equation MM–13 of this section in place of Equation MM–2 of this section.

$$CO_{2i} = \sum \left[Blending\ Component_{i...n} * EF_{i...n} \right] \qquad \text{(Eq. MM-13)}$$

Where:

CO_{2j} = Annual CO_2 emissions that would result from the complete combustion or oxidation of a blended non-crude feedstock "j" (metric tons).

Blending $Component_{i...n}$ = Annual volume or mass of each blending component that is blended (barrels or metric tons).

$EF_{i...n}$ = CO_2 emission factors specific to each blending component (metric tons CO_2 per barrel or per metric ton of product).

n = Number of blending components blended into blended non-crude feedstock "j".

(4) For refineries, if a blending component "k" used in paragraph (i)(2) of this section enters the refinery before blending as non-crude feedstock:

(i) The emissions that would result from the complete combustion or oxidation of non-crude feedstock "k" must still be calculated separately using Equation MM–2 of this section and applied in Equation MM–4 of this section.

(ii) The quantity of blending component "k" applied in Equation MM–12 of this section and the quantity of non-crude feedstock "k" applied in Equation MM–2 of this section must be determined using the same method or practice.

■ 62. Section 98.394 is amended by:

■ a. Revising paragraph (a)(1) introductory text.

■ b. Adding paragraph (a)(3).

■ c. Revising paragraphs (d)(1) through (d)(4).

The revisions and additions read as follows:

§ 98.394 Monitoring and QA/QC requirements.

(a) * * *

(1) The quantity of petroleum products, natural gas liquids, and biomass, as well as the quantity of crude oil measured on site at a refinery, shall be determined as follows:

* * * * *

(3) The quantity of crude oil not measured on site at a refinery shall be determined according to one of the following methods. You may use an appropriate standard method published by a consensus-based standards organization or you may use an industry standard practice.

* * * * *

(d) * * *

(1) A representative sample or multiple representative samples of each batch of crude oil shall be taken according to one of the following methods. You may use an appropriate standard method published by a consensus-based standards organization or you may use an industry standard practice.

(2) Samples shall be handled according to one of the following methods. You may use an appropriate standard method published by a consensus-based standards organization or you may use an industry standard practice.

(3) API gravity shall be measured according to one of the following methods. You may use an appropriate standard method published by a consensus-based standards organization or you may use an industry standard practice. The weighted average API gravity for each batch shall be calculated by multiplying the volume associated with each representative sample by the API gravity, adding these values for all the samples, and then dividing that total value by the volume of the batch.

(4) Sulfur content shall be measured according to one of the following methods. You may use an appropriate standard method published by a consensus-based standards organization or you may use an industry standard practice. The weighted average sulfur content for each batch shall be calculated by multiplying the volume associated with each representative sample by the sulfur content, adding these values for all the samples, and then dividing that total value by the volume of the batch.

* * * * *

■ 63. Section 98.396 is amended by:

■ a. Revising paragraph (a)(3).

■ b. Amending paragraphs (a)(5) and (a)(6) by adding a third sentence.

■ c. Revising paragraphs (a)(7), (a)(16), and (a)(17), (a)(20)(ii), (a)(20)(iii), and (a)(20)(iv).

■ d. Adding paragraphs (a)(20)(v), (a)(20)(vi), (a)(22), and (a)(23).

■ e. Revising paragraphs (b)(3) and (c)(3).

■ f. Adding paragraph (d).

§ 98.396 Data reporting requirements.

* * * * *

(a) * * *

(3) For each feedstock reported in paragraph (a)(2) of this section that was produced by blending a petroleum-based product with a biomass-based product, report the percent of the volume reported in paragraph (a)(2) of this section that is petroleum-based

(excluding any denaturant that may be present in any ethanol product).

* * * * *

(5) * * * Petroleum products and natural gas liquids that enter the refinery, but are not reported in (a)(1), shall not be reported under this paragraph.

(6) * * * Petroleum products and natural gas liquids that enter the refinery, but are not reported in (a)(2), shall not be reported under this paragraph.

(7) For each product reported in paragraph (a)(6) of this section that was produced by blending a petroleum-based product with a biomass-based product, report the percent of the volume reported in paragraph (a)(6) of this section that is petroleum-based (excluding any denaturant that may be present in any ethanol product).

* * * * *

(16) The CO_2 emissions in metric tons that would result from the complete combustion or oxidation of each petroleum product and natural gas liquid (ex refinery gate) reported in paragraph (a)(6) of this section that were calculated according to § 98.393(a) or (h).

(17) The CO_2 emissions in metric tons that would result from the complete combustion or oxidation of each feedstock reported in paragraph (a)(2) of this section that were calculated according to § 98.393(b) or (h).

* * * * *

(20) * * *

(ii) Weighted average API gravity representing the batch at the point of entry at the refinery.

(iii) Weighted average sulfur content representing the batch at the point of entry at the refinery.

(iv) Country of origin, of the batch, if known and data in paragraphs (a)(20)(v) and (a)(20)(vi) of this section are unknown.

(v) EIA crude stream code and crude stream name of the batch, if known.

(vi) Generic name for the crude stream and the appropriate EIA two-letter country or state and production area code of the batch, if known and no appropriate EIA crude stream code exists.

* * * * *

(22) Volume of crude oil in barrels that you injected into a crude oil supply or reservoir. A volume of crude oil that entered the refinery, but was not reported in paragraphs (a)(2) or (a)(20), shall not be reported under this paragraph.

(23) *Special provisions for 2010.* For reporting year 2010 only, a refiner that knows the information under a specific tier of the batch definition in 40 CFR 98.398, but does not have the necessary data collection and management in place to readily report this information, can use the next most appropriate tier of the batch definition for reporting batch information under paragraph 98.396(a)(20).

(b) * * *

(3) For each product reported in paragraph (b)(2) of this section that was produced by blending a petroleum-based product with a biomass-based product, report the percent of the volume reported in paragraph (b)(2) of this section that is petroleum-based (excluding any denaturant that may be present in any ethanol product).

* * * * *

(c) * * *

(3) For each product reported in paragraph (c)(2) of this section that was produced by blending a petroleum-based product with a biomass-based product, report the percent of the volume reported in paragraph (c)(2) of this section that is petroleum based (excluding any denaturant that may be present in any ethanol product).

* * * * *

(d) *Blended non-crude feedstock and products.* (1) Refineries, exporters, and importers must report the following information for each blended product and non-crude feedstock where emissions were calculated according to § 98.393(i):

(i) Volume or mass of each blending component.

(ii) The CO_2 emissions in metric tons that would result from the complete combustion or oxidation of each blended non-crude feedstock or product, using Equation MM–12 or Equation MM–13 of this section.

(iii) Whether it is a blended non-crude feedstock or a blended product.

(2) For a product that enters the refinery to be further refined or otherwise used on site that is a blended non-crude feedstock, refiners must meet the reporting requirements of paragraphs (a)(1) and (a)(2) of this section by reflecting the individual components of the blended non-crude feedstock.

(3) For a product that is produced, imported, or exported that is a blended product, refiners, importers, and exporters must meet the reporting requirements of paragraphs (a)(5), (a)(6), (b)(1), (b)(2), (c)(1), and (c)(2) of this section, as applicable, by reflecting the individual components of the blended product.

■ 64. Section 98.397 is amended by:

a. Revising the second sentence of paragraph (b).

b. Removing paragraph (e).

c. Redesignating paragraphs (f) and (g) as (e) and (f), respectively.

The amended text reads as follows:

§ 98.397 Records that must be retained.

* * * * *

(b) * * * For all reported quantities of petroleum products, natural gas liquids, and biomass, as well as crude oil quantities measured on site at a refinery, reporters shall maintain metering, gauging, and other records normally maintained in the course of business to document product and feedstock flows including the date of initial calibration and the frequency of recalibration for the measurement equipment used.

* * * * *

■ 65. Section 98.398 is revised to read as follows:

§ 98.398 Definitions.

Except as specified in this section, all terms used in this subpart have the same meaning given in the Clean Air Act and subpart A of this part.

Batch means either a volume of crude oil that enters a refinery or the components of such volume (e.g., the volumes of different crude streams that are blended together and then delivered to a refinery). The batch volume is the first appropriate tier in the following list:

(1) Up to an annual volume of a type of crude oil identified by an EIA crude stream code, if the EIA crude stream code is known.

(2) Up to an annual volume of a type of crude oil identified by a generic name for the crude stream and an appropriate EIA two-letter country or state and production area code, if the generic name and EIA two-letter code are known but no appropriate EIA crude stream code exists.

(3) Up to a calendar month of crude oil volume from a single known foreign country of origin if the crude stream name is unknown.

(4) Up to a calendar month of crude oil volume from the United States if the crude stream name and production area are unknown.

(5) Up to a calendar month of crude oil volume if the country of origin is unknown.

Subpart NN—[Amended]

■ 66. Section 98.403 is amended by:

■ a. Revising the definitions of "$Fuel_h$" and "HHV_h" in Equation NN–1 of paragraph (a)(1).

■ b. Revising the definition of "$Fuel_h$" in Equation NN–2 of paragraph (a)(2).

■ c. Revising the definition of "$Fuel_l$" in Equation NN–5 of paragraph (b)(3).

■ d. Revising the definition of "EF_g" in Equation NN–7 of paragraph (c)(1).

■ e. In paragraph (c)(2), revising Equation NN–8 and the definition of "CO_{2i}" in Equation NN–8.

The revisions read as follows:

§ 98.403 Calculating GHG emissions.

(a) * * *

(1) * * *

$Fuel_h$ = Total annual volume of product "h" supplied (volume per year, in thousand standard cubic feet (Mscf) for natural gas and bbl for NGLs).

HHV_h = Higher heating value of product "h" supplied (MMBtu/Mscf or MMBtu/bbl).

* * * * *

(2) * * *

$Fuel_h$ = Total annual volume of product "h" supplied (bbl or Mscf per year)

* * * * *

(b) * * *

(3) * * *

$Fuel_1$ = Total annual volume of natural gas received by the LDC at the city gate and stored on-system or liquefied and stored in the reporting year (Mscf per year).

* * * * *

(c) * * *

(1) * * *

EF_g = Fuel-specific CO_2 emission factor of NGL product "g" (MT CO_2/bbl).

(2) * * *

$$CO_2 = CO_{2i} - CO_{2m} \qquad \text{(Eq. NN-8)}$$

* * * * *

CO_{2i} = Annual CO_2 mass emissions that would result from the combustion or oxidation of fractionated NGLs delivered to all customers or on behalf of customers as calculated in paragraph (a)(1) or (a)(2) of this section (metric tons).

* * * * *

■ 67. Section 98.406 is amended by revising paragraphs (a)(6) and (a)(9) introductory text to read as follows:

§ 98.406 Data reporting requirements.

(a) * * *

(6) Annual CO_2 emissions (metric tons) that would result from the complete combustion or oxidation of the quantities in paragraphs (a)(1) and (a)(2) of this section, calculated in accordance with § 98.403(a) and (c)(1).

* * * * *

(9) If the NGL fractionator developed reporter-specific EFs or HHVs, report the following for each product type:

* * * * *

■ 68. Section 98.407 is amended by revising paragraphs (a) and (d) to read as follows:

§ 98.407 Records that must be retained.

* * * * *

(a) Records of all meter readings and documentation to support volumes of natural gas and NGLs that are reported under this part.

* * * * *

(d) Records related to the large end-users identified in § 98.406(b)(7).

* * * * *

■ 69. Tables NN–1 and NN–2 to Subpart NN are revised to read as follows:

TABLE NN–1 TO SUBPART NN OF PART 98—DEFAULT FACTORS FOR CALCULATION METHODOLOGY 1 OF THIS SUBPART

Fuel	Default high heating value factor	Default CO_2 emission factor (kg CO_2/MMBtu)
Natural Gas	1.028 MMBtu/Mscf	53.02
Propane	3.822 MMBtu/bbl	61.46
Normal butane	4.242 MMBtu/bbl	65.15
Ethane	4.032 MMBtu/bbl	62.64
Isobutane	4.074 MMBtu/bbl	64.91
Pentanes plus	4.620 MMBtu/bbl	70.02

TABLE NN–2 TO SUBPART NN OF PART 98—LOOKUP DEFAULT VALUES FOR CALCULATION METHODOLOGY 2 OF THIS SUBPART

Fuel	Unit	Default CO_2 emission value (MT CO_2/Unit)
Natural Gas	Mscf	0.055
Propane	Barrel	0.235
Normal butane	Barrel	0.276
Ethane	Barrel	0.253
Isobutane	Barrel	0.266
Pentanes plus	Barrel	0.324

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October 28, 2010

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Endangered Status and Designation of Critical Habitat for Spikedace and Loach Minnow; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2010–0072; MO 92210–0–0009–B4]

RIN 1018–AX17

Endangered and Threatened Wildlife and Plants; Endangered Status and Designation of Critical Habitat for Spikedace and Loach Minnow

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to change the status of spikedace (*Meda fulgida*) and loach minnow (*Tiaroga cobitis*) from threatened to endangered under the Endangered Species Act of 1973, as amended, and to designate critical habitat for both species. In total, we are proposing approximately 1,168 kilometers (726 mi) of streams as critical habitat for spikedace, and 1,141 kilometers (709 miles) of streams as critical habitat for loach minnow. The proposed critical habitat is located in Apache, Cochise, Gila, Graham, Greenlee, Navajo, Pima, Pinal, and Yavapai Counties, Arizona, and Catron, Grant, and Hidalgo Counties in New Mexico.

DATES: We will consider comments received or postmarked on or before December 27, 2010. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by December 13, 2010.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments to Docket No. FWS–R2–ES–2010–0072.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: [Docket Number FWS–R2–ES–2010–0072]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Steve Spangle, Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Office, 2321 W. Royal Palm Road, Suite 103, Phoenix, AZ 85021; telephone (602) 242–0210; facsimile (602) 242–2513. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

This document consists of: (1) A proposed rule to reclassify spikedace (*Meda fulgida*) and loach minnow (*Tiaroga cobitis*) from threatened to endangered status; and (2) a proposed rule to designate critical habitat for the two species.

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned government agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The factors that are the basis for making a listing determination for a species under section 4(a) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), which are:

(a) The present or threatened destruction, modification, or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; or

(e) Other natural or manmade factors affecting its continued existence.

(2) Additional information concerning the range, distribution, and population size of this species, including the locations of any additional populations of this species.

(3) Any information on the biological or ecological requirements of the species.

(4) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*) including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(5) Specific information on:

- The amount and distribution of spikedace and loach minnow habitat;
- What areas occupied at the time of listing and containing features essential to the conservation of the species should be included in the designation and why;
- Special management considerations or protections that features essential to the conservation of spikedace and loach minnow, as identified in this proposal, may require, including managing for the potential effects of climate change; and
- What areas not occupied at the time of listing are essential for the conservation of the species and why.

(6) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(7) Any probable economic, national security, or other impacts of designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(8) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(9) Information on whether the benefit of an exclusion of any particular area outweighs the benefit of inclusion under section 4(b)(2) of the Act. We specifically solicit the delivery of spikedace- and loach minnow-specific management plans for areas included in this proposed designation. Management plans considered in previous critical habitat exclusions for spikedace and loach minnow are available through the contact information listed in the **FOR FURTHER INFORMATION CONTACT** section.

(10) Information on the projected and reasonably likely impacts of climate change on spikedace and loach minnow and on the critical habitat areas we are proposing.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov.* If you provide personal identifying information, such as your street address, phone number, or e-mail address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT)**.

Background

It is our intent to discuss only those topics directly relevant to the proposed reclassification and proposed designation of critical habitat for spikedace and loach minnow in this proposed rule. For more information on the species themselves, refer to the final listing rule (51 FR 23769, July 1, 1986 (spikedace), and 51 FR 39468, October 28, 1986 (loach minnow)) and the previous critical habitat designation (72 FR 13356, March 21, 2007).

Spikedace

The spikedace is a member of the minnow family Cyprinidae, and is the only species in the genus *Meda.* The spikedace was first collected from the San Pedro River in 1851. The spikedace is a small, slim fish less than 75 millimeters (mm) (3 inches (in)) in length (Sublette *et al.* 1990, p. 136). Spikedace have olive-gray to brownish skin, with silvery sides and vertically elongated black specks. Spikedace have spines in the dorsal fin (Minckley 1973, pp. 82, 112, 115).

Spikedace are found in moderate to large perennial streams, where they inhabit shallow riffles (those shallow portions of the stream with rougher, choppy water) with sand, gravel, and rubble substrates (Barber and Minckley 1966, p. 31; Propst *et al.* 1986, p. 12; Rinne and Kroeger 1988, p. 1; Rinne 1991, pp. 8–10). Specific habitat for this species consists of shear zones where rapid flow borders slower flow; areas of sheet flow at the upper ends of mid-channel sand or gravel bars; and eddies at downstream riffle edges (Rinne 1991, p. 11; Rinne and Kroeger 1988, pp. 1, 4). Recurrent flooding and a natural flow regime are very important in maintaining the habitat of spikedace and in helping maintain a competitive edge over invading nonnative aquatic species (Propst *et al.* 1986, pp. 76–81; Minckley and Meffe 1987, pp. 97, 103–104).

The spikedace was once common throughout much of the Gila River basin, including the mainstem Gila River upstream of Phoenix, and the Verde, Agua Fria, Salt, San Pedro, and San Francisco subbasins. Habitat destruction and competition and predation by nonnative aquatic species reduced its range and abundance (Miller 1961, pp. 365, 377, 397–398; Lachner *et al.* 1970, p. 22; Ono *et al.* 1983, p. 90; Moyle 1986, pp. 28–34; Moyle *et al.* 1986, pp. 416–423; Propst *et al.* 1986, pp. 82–84).

Spikedace are now restricted to portions of the upper Gila River (Grant, Catron, and Hidalgo Counties, New Mexico); Aravaipa Creek (Graham and Pinal Counties, Arizona); Eagle Creek (Graham and Greenlee Counties, Arizona); and the Verde River (Yavapai County, Arizona) (Marsh *et al.* 1990, pp. 107–108, 111; M. Brouder, U.S. Fish and Wildlife Service (Service), pers. comm. 2002; Stefferud and Reinthal 2005, pp. 16–21; Paroz *et al.* 2006, pp. 62–67; Propst 2007, pp. 7–9, 11–14).

In 2007, spikedace were translocated into Hot Springs Canyon, in Cochise County, Arizona, and Redfield Canyon, in Cochise and Pima Counties, Arizona, and these streams were subsequently augmented (Robinson 2008a, pp. 2, 6; T. Robinson, Arizona Game and Fish Department (AGFD), pers. comm. 2008b; D. Orabutt, AGFD, pers. comm. 2009; Robinson 2009a, pp. 2, 5–8). (We use the term "translocate" to describe stocking fish into an area where suitable habitat exists, but for which there are no documented collections.) Both Hot Springs and Redfield canyons are tributaries to the San Pedro River. Spikedace were also translocated into Fossil Creek, a tributary to the Verde River in Gila County, Arizona, in 2007, and were subsequently augmented in 2008 (Carter 2007b, p. 1; Carter 2008a, p. 1; Robinson 2009b, p. 9; Boyarski *et al.* 2010, in draft, p. 7). In 2008, spikedace were translocated into Bonita Creek, a tributary to the Gila River in Graham County, Arizona (H. Blasius, U.S. Bureau of Land Management (BLM), pers. comm. 2008; D. Orabutt, AGFD, pers. comm. 2009; Robinson *et al.* 2009a, p. 209), and were repatriated to the upper San Francisco River in Catron County, New Mexico (D. Propst, New Mexico Department of Game and Fish (NMDGF), pers. comm. 2010). (We use the term "repatriate" to describe stocking fish into an area where we have historical records of prior presence.) Augmentations with additional fish will occur for the next several years at all sites, if adequate numbers of fish are available. Monitoring at each of these sites is ongoing to determine if populations ultimately become self-sustaining.

The species is now common only in Aravaipa Creek in Arizona (AGFD 1994; Arizona State University (ASU) 2002; P. Reinthal, University of Arizona, pers. comm. 2008, Reinthal 2009, pp. 1–2) and one section of the Gila River south of Cliff, New Mexico (NMDGF 2008; Propst *et al.* 2009, pp. 14–17). The Verde River is presumed occupied; however, the last captured fish from this river was from a 1999 survey (M. Brouder, Service, pers. comm. 2002; AGFD 2004). Spikedace from the Eagle Creek population have not been seen for over a decade (Marsh 1996, p. 2), although they are still thought to exist in numbers too low for the sampling efforts to detect (Carter *et al.* 2007, p. 3; see Minckley and Marsh 2009). The Middle Fork Gila River population is thought to be very small and has not been seen since 1991 (Jakle 1992, p. 6), but sampling is localized and inadequate to detect a sparse population.

Population estimates have not been developed as a result of the difficulty in detecting the species, the sporadic nature of most surveys, and the difference in surveying techniques that have been applied over time. Based on the available maps and survey information, we estimate the spikedace's present range to be approximately 10 percent or less of its historical range, and the status of the species within occupied areas ranges from common to very rare. Data indicate that the population in New Mexico has declined in recent years (Paroz *et al.* 2006, p. 56). Historical and current records for spikedace are summarized in three databases (ASU 2002, AGFD 2004, NMDGF 2008), which are referenced throughout this document.

A species' geographic range is the total area that encompasses all known locations of that species. As noted above, spikedace occur in several streams in portions of Arizona and New Mexico. For purposes of this document, we have used watershed boundaries associated with the Verde, Salt, San Pedro, Gila, and San Francisco rivers to define the geographic range of spikedace. All known records of spikedace occur within these watershed boundaries.

We evaluated species detections and habitat descriptions in various databases, formal and informal survey records, agency and researcher field notes, and published literature to determine which geographic areas were reasonably occupied by the species at the time of listing. Surveys have been infrequent or inconsistent for this species. Further, even where surveys occur, the species can be difficult to detect due to its small body size. As a result, the lack of a positive detection in any specific area may not mean that the area is not occupied. Therefore, relying strictly on point-specific survey results

for historical occupancy information would likely create an incomplete picture of occupied area. The extent of a stream reach that is occupied up- or downstream of a known occupied site is generally limited only by availability of suitable habitat. Therefore, we assume that for areas where the species has been documented, it was likely also present in the adjacent stream segments if adjacent segments were connected and contain suitable habitat.

In addition, this document discusses areas occupied at the time of listing. We are defining areas occupied at the time of listing to include streams for which we have spikedace records up to 1986, when they were first listed. These records include the Agua Fria River; the Verde River and its tributaries Beaver Creek and West Clear Creek; the Salt River and its tributary Tonto Creek; the San Pedro River and its tributary Aravaipa Creek; Eagle Creek; the San Francisco River; and the Gila River and its tributaries East, Middle, and West Fork Gila, and Blue Creek.

Loach Minnow

The loach minnow is a member of the minnow family Cyprinidae. The loach minnow was first collected in 1851 from the San Pedro River in Arizona and was described by those specimens in 1865 by Girard (pp. 191–192). The loach minnow is a small, slender fish less than 80 mm (3 in) in length. It is olive-colored overall, with black mottling or splotches. Breeding males have vivid red to red-orange markings on the bases of fins and adjacent body, on the mouth and lower head, and often on the abdomen (Minckley 1973, p. 134; Sublette *et al.* 1990, p. 186).

Loach minnow are found in small to large perennial streams and use shallow, turbulent riffles with primarily cobble substrate and swift currents (Minckley 1973, p. 134; Propst *et al.* 1988, pp. 36–43; Rinne 1989, pp. 113–115; Propst and Bestgen 1991, pp. 29, 32–33). The loach minnow uses the spaces between, and in the lee (sheltered) side of, rocks for resting and spawning. It is rare or absent from habitats where fine sediments fill these interstitial spaces (Propst and Bestgen 1991, p. 34).

Loach minnow are now restricted to portions of the Gila River and its tributaries, the West, Middle, and East Fork Gila River (Grant, Catron, and Hidalgo Counties, New Mexico) (Paroz and Propst 2007, p. 16; Propst 2007, pp. 7–8, 10–11, 13–14); the San Francisco and Tularosa rivers and their tributaries Negrito and Whitewater creeks (Catron County, New Mexico) (Propst *et al.* 1988, p. 15; ASU 2002; Paroz and Propst 2007, p. 16; Propst 2007, pp. 4–5); the Blue River and its tributaries Dry Blue, Campbell Blue, Pace, and Frieborn creeks (Greenlee County, Arizona and Catron County, New Mexico) (Miller 1998, pp. 4–5; ASU 2002; C. Carter 2005, pp. 1–5; C. Carter, AGFD, pers. comm. 2008b; Clarkson *et al.* 2008, pp. 3–4; Robinson 2009c, p. 3); Aravaipa Creek and its tributaries Turkey and Deer creeks (Graham and Pinal Counties, Arizona) (Stefferud and Reinthal 2005, pp. 16–21); Eagle Creek (Graham and Greenlee Counties, Arizona), (Knowles 1994, pp. 1–2, 5; Bagley and Marsh 1997, pp. 1–2; Marsh *et al.* 2003, pp. 666–668; Carter *et al.* 2007, p. 3; Bahm and Robinson 2009a, p. 1); and the North Fork East Fork Black River (Apache and Greenlee Counties, Arizona) (Leon 1989, pp. 1–2; M. Lopez, AGFD pers. comm. 2000; S. Gurtin, AGFD, pers. comm. 2004; Carter 2007b, p. 2; Robinson *et al.* 2009b, p. 4); and possibly the White River and its tributaries, the East and North Fork White River (Apache, Gila, and Navajo Counties, Arizona). The present range is 15 to 20 percent of its historical range, and the status of the species within occupied areas ranges from common to very rare.

As noted above, a species' range includes the total area that encompasses all known locations of that species. As with spikedace, loach minnow are known to occur in several streams in portions of Arizona and New Mexico. For purposes of this document, we have used watershed boundaries associated with the Verde, Salt, San Pedro, Gila, and San Francisco rivers to determine the range of loach minnow. All known loach minnow records occur within these watershed boundaries.

We evaluated species detections and habitat descriptions in various databases, formal and informal survey records, agency and researcher field notes, and published literature to determine which geographic areas were reasonably occupied by the species at the time of listing. Surveys have been infrequent or inconsistent for this species. Further, even where surveys occur, the species can be difficult to detect due to its small body size. As a result, the lack of a positive detection in any specific area may not mean that the area is not occupied. Therefore, relying strictly on point-specific survey results for historical occupancy information would likely create an incomplete picture of occupied areas. The extent of a stream reach that is occupied up- or downstream of a known occupied site is generally limited only by availability of suitable habitat. Therefore, we assume that for areas where the species has been documented, it was likely also present in the adjacent stream segments if adjacent segments were connected and contain suitable habitat.

In addition, this document discusses areas occupied at the time of listing. We are defining areas occupied at the time of listing to include streams for which we have loach minnow records up to 1986, when the species was first listed. These records include the Verde River and its tributary Beaver Creek; the White River and its tributary East Fork White River; Aravaipa Creek; the San Pedro River; Eagle Creek; the Blue River and its tributaries Campbell Blue, Dry Blue, and Little Blue creeks; the San Francisco River and its tributary Tularosa River; and the Gila River and its tributaries West Fork, Middle Fork, and East Fork Gila Rivers and Whitewater Creek. In addition, loach minnow were identified from several tributary streams following 1986. As no reintroduction efforts had taken place prior to discovering each of these populations, it is assumed they were occupied at listing, but undetected. We are therefore including these areas as occupied at listing: Deer Creek and Turkey Creek (tributaries to Aravaipa Creek); Frieborn Canyon and Pace Creek (tributaries to the Blue River); and North Fork East Fork Black River, and Negrito Creek (tributary to the Tularosa River).

Although suitable habitat existed in Hot Springs, Redfield Canyons, Fossil Creek, or Bonita Creek, loach minnow had not previously been documented there. In 2007, loach minnow were translocated into Hot Springs and Redfield canyons in Cochise County, Arizona (Robinson 2008a, pp. 2, 6; T. Robinson, AGFD, pers. comm. 2008b; D. Orabutt, AGFD, pers. comm. 2009); both of these streams are tributaries to the San Pedro River. Fish were also translocated into Fossil Creek, a tributary to the Verde River in Gila County, Arizona (Carter 2007a, p. 1; Carter 2008a, p. 1; Robinson 2009b, p. 9; Orabutt and Robinson 2010, in draft, p. 12). In 2008, loach minnow were translocated into Bonita Creek, a tributary to the Gila River in Graham County, Arizona (H. Blasius, BLM, pers. comm. 2008; D. Orabutt, AGFD, pers. comm. 2009). Augmentations with additional fish will occur for the next several years. Monitoring will be conducted at each of these sites to determine if populations ultimately become established at these new locations.

Loach minnow is now common only in Aravaipa Creek, the Blue River, and limited portions of the San Francisco, upper Gila, and Tularosa rivers in New Mexico. Since listing, loach minnow have been found in small tributary

streams, including Pace, Frieborn, Negrito, Turkey, and Deer creeks (Stefferud and Reinthal 2005, pp. 16–21; Paroz and Propst 2007, p. 16; NMDGF 2008). In addition, two previously undocumented populations of loach minnow have been discovered, one in Eagle Creek (Knowles 1994, p. 1; Marsh *et al.* 2003, p. 666) and one in the North Fork East Fork Black River (Bagley *et al.* 1997, p. 8). However, following a wildfire in the Black River watershed, a salvage rescue operation in the area known to be occupied by the loach minnow in 2004 resulted in the capture of only two loach minnow (S. Gurtin, AGFD, pers. comm. 2004). Both of these newly identified populations appear to be very small, but each represents a remnant portion of the historical range that was thought to be extirpated. Little information is available on the White River population due to the proprietary nature of Tribal survey information. Historical and current records for loach minnow are summarized in three databases (ASU 2002, AGFD 2004, NMDGF 2008), which are referenced throughout this document.

Previous Federal Actions

The spikedace was listed as threatened on July 1, 1986 (51 FR 23769); the loach minnow was listed as threatened on October 28, 1986 (51 FR 39468). The Service received a petition to uplist these species from threatened to endangered status on September 22, 1993. On July 11, 1994, we published 90-day and 12-month findings on the petition to amend the List of Threatened and Endangered Wildlife (59 FR 35303). We found that the petitioners presented substantial scientific information indicating that reclassifying spikedace and loach minnow as endangered was warranted but precluded by other listing actions (59 FR 35303). We restated this conclusion on January 8, 2001 (66 FR 1295), and considered the reclassification of spikedace and loach minnow each year in our Candidate Notice of Review. Our most recent Candidate Notice of Review was published on November 9, 2009 (74 FR 57804).

We designated critical habitat for both species on March 8, 1994 (59 FR 10898 (loach minnow); 59 FR 10906 (spikedace)). Those critical habitat designations were set aside by court order in *Catron County Board of Commissioners, New Mexico* v. *U.S. Fish and Wildlife Service,* CIV No. 93–730 HB (D.N.M. 1994) due to our failure to analyze the effects of critical habitat designation under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*).

We subsequently published a proposed critical habitat designation on December 10, 1999 (64 FR 69324), and a final critical habitat designation on April 25, 2000 (65 FR 24328). However, in *New Mexico Cattle Growers' Association and Coalition of Arizona/New Mexico Counties for Stable Economic Growth* v. *United States Fish and Wildlife Service,* CIV 02–0199 JB/LCS (D.N.M), the plaintiffs challenged the April 25, 2000, critical habitat designation for the spikedace and loach minnow because the economic analysis had been prepared using the same methods that the Tenth Circuit had held to be invalid. The Service agreed to a voluntary vacatur of the critical habitat designation, except for the Tonto Creek Complex. On August 31, 2004, the United States District Court for the District of New Mexico set aside the April 25, 2000, critical habitat designation in its entirety and remanded it to the Service for preparation of a new proposed and final designation.

On December 20, 2005, we published a proposed critical habitat designation (70 FR 75546), and on March 21, 2007, we published a final critical habitat designation (72 FR 13356) for the spikedace and loach minnow. In *Coalition of Arizona/New Mexico Counties for Stable Economic Growth, et al* . v. *Salazar, et al.* (D.N.M.), two sets of plaintiffs challenged the Service's critical habitat designation for the spikedace and the loach minnow on the grounds that we designated critical habitat without adequate delineation or justification. We filed a motion for voluntary remand of the final rule on February 2, 2009, in order to reconsider the final rule in light of a recently issued Department of the Interior Solicitor's Opinion, which discusses the Secretary of the Interior's authority to exclude areas from a critical habitat designation under section 4(b)(2) of the ESA. On May 4, 2009, the Court granted our motion for voluntary remand.

There are differences in the areas included in this proposed designation from those included in the critical habitat designations published in 1994, 2000, and 2007. We have gained new information on species' distribution since the 1994 designation. We have acknowledged the flaws in the 2007 designation through our voluntary vacatur. This proposal is most similar to the 2000 designation. However, in contrast to the 2000 designation, we have not included every complex for spikedace and for loach minnow. Instead, we have attempted to consider occupancy data and habitat parameters specific to each species, and identified some areas that are suitable for one or the other species, but not both. While there is still considerable overlap in the designation, so that most areas are designated for both species, we have included some areas only for spikedace or only for loach minnow within this proposed designation.

For more information on previous Federal actions concerning the spikedace and loach minnow, refer to previous publications, including listing documents published in 1985 and 1986 (50 FR 25380, June 18, 1985; 50 FR 25390, June 18, 1985; 51 FR 39468, October 28, 1986; 51 FR 23769, July 1, 1986), as well as previous critical habitat designations in 1994 (59 FR 10898, March 8, 1994; 59 FR 10906, March 8, 1994), 1999 and 2000 (64 FR 69324, December 10, 1999; 65 FR 24328, April 25, 2000), and 2005 and 2007 (70 FR 75546, December 20, 2005; 72 FR 13356, March 21, 2007).

Summary of Factors Affecting the Species

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. Both spikedace and loach minnow currently exist in a small portion of their historical range (10 percent, or less, for spikedace, and 15 to 20 percent for loach minnow), and the threats continue throughout its range. Accordingly, our assessment and determination applies to each species throughout its entire range.

Section 4 of the Act (16 U.S.C. 1533), and implementing regulations (50 CFR part 424), set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, a species may be determined to be endangered or threatened based on any of the following five factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence. In making this finding, information pertaining to spikedace and loach minnow, in relation to the five factors provided in section 4(a)(1) of the Act, are discussed below.

In considering what factors might constitute threats to a species, we must look beyond the exposure of the species to a 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 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 in the Act.

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

The majority of historical native habitat for spikedace and loach minnow has been altered or destroyed. Activities such as groundwater pumping, surface water diversions, impoundments, dams, channelization (straightening of the natural watercourse, typically for flood control purposes), improperly managed livestock grazing, wildfire, agriculture, mining, road building, residential development, and recreation all contribute to habitat loss and stream habitat degradation in Arizona and New Mexico (Minckley and Deacon 1991, pp. 15–18; Tellman *et al.* 1997, pp. 1, 4; Propst 1999, pp. 14–15; Minckley and Marsh 2009, pp. 24–48).

The aforementioned activities are human-caused; thus the local and regional effects of most of these activities are expected to increase with an increasing local human population. As of 2005, Arizona was recognized as the second fastest in Statewide population growth in the nation. The population of the State of Arizona is projected to grow by 66 percent by the year 2030, while the population in New Mexico is expected to grow by 33 percent (Southwest Climate Change 2009, p. 1). Arizona experienced a 28.6 percent population growth from 2000 to 2009, while New Mexico experienced growth at 10.5 percent during the same period (U.S. Census Bureau 2010, pp. 1, 3). An example of this population growth is on the Verde River (Yavapai County, Arizona), which likely includes a remnant spikedace population, and is important recovery habitat for spikedace and loach minnow. Yavapai County experienced a 28.8 percent increase in human population between 2000 and 2009. Groundwater use for municipal, industrial, and agricultural purposes has continued to increase since 1971 (Arizona Water Atlas 2010, p. 292) which increases the competition for the limited water resources used by spikedace and loach minnow.

Portions of some rivers receive protection as specially designated areas. In the upper Gila River, spikedace and loach minnow habitat receives some protection along the portions of the river that flow through the U.S. Forest Service Gila Wilderness and the Gila River Research Natural Area, which have use and access restrictions. Some portions of the river in the Gila National Forest are still affected by past and present uses within the watershed and riparian zone, such as grazing, timber harvest, and road development, and by water diversion for public and private uses. Other areas designated for special uses and subject to access and use restrictions include the Blue Range Primitive Area, the lower Gila River Bird Habitat Management Area, and the Gila River Research Natural Area.

Water Withdrawals

Water resources are limited in the Southwestern United States and have led to the conversion of portions of habitat to intermittent streams or reservoirs unsuitable for spikedace or loach minnow. Growing water demands reduce southern Arizona perennial surface water in the Gila Basin, and threaten aquatic species. Historically, water withdrawals led to the conversion of large portions of flowing streams into intermittent streams, large reservoirs, or dewatered channels, thus eliminating suitable spikedace and loach minnow habitat in impacted areas (Propst *et al.* 1986, p. 3; Tellman *et al.* 1997, pp. 37, 50, 63–64, 66, 103). These habitat changes, together with the introduction of nonnative fish species (see factors C and E), have resulted in the extirpation of spikedace and loach minnow throughout an estimated 80 to 90 percent of their historical ranges.

After leaving the Mogollon Mountains in New Mexico, the Gila River is affected by agricultural and industrial water diversions, impoundment, and channelization. In the Gila River, agricultural diversions and groundwater pumping have caused declines in the water table, and surface flows in the central portion of the river basin are diverted for agriculture (Leopold 1997, pp. 63–64; Tellman *et al.* 1997, pp. 101–104; Arizona Department of Water Resources 2000, pp. 16–17). On the mainstem Salt River, impoundments have permanently limited the flow regime and suitability for spikedace or loach minnow.

Of particular concern to spikedace and loach minnow survival in the Gila River is the implementation of Public Law 108–451, the Arizona Water Settlements Act. Title II of the Arizona Water Settlements Act would facilitate the exchange of Central Arizona Project water within and between southwestern river basins in Arizona and New Mexico. The Arizona Water Settlements Act may also result in the construction of new water development projects. For example, Section 212 of the Arizona Water Settlements Act pertains to the New Mexico Unit of the Central Arizona Project. Development of the New Mexico Unit may facilitate diversion of water via the construction of an on- or off-stream reservoir on the Gila River in New Mexico. Implementation of the Arizona Water Settlement Act is in its early stages on the Gila River, such that the exact location, scope, scale, timing, and effects of those efforts on the spikedace and its habitat in the Gila River cannot be definitively analyzed at present. However, should water be diverted from the river, there would be a diminished flow that could potentially result in direct and indirect loss and degradation of habitat for aquatic and riparian species. Because the Gila River is a stronghold for spikedace and loach minnow, impacts to those portions of the Gila River in New Mexico are of particular concern for the persistence of these species.

The San Francisco River has undergone sedimentation, riparian habitat degradation, and extensive water diversion and at present has an undependable water supply throughout much of its length. Groundwater pumping also poses a threat to surface flows in the remaining spikedace and loach minnow habitat in Eagle Creek. Groundwater withdrawal in Eagle Creek, primarily for water supply for a large open-pit copper mine at Morenci, dries portions of the stream (Sublette *et al.* 1990, p. 19; Service 2005; Propst *et al.* 1986, p. 7). Mining is the largest industrial water user in southeastern Arizona. The Morenci mine on Eagle Creek is North America's largest producer of copper, covering 60,000 acres. Water for the mine is imported from the Black River, diverted from Eagle Creek as surface flows, or withdrawn from the Upper Eagle Creek Well Field (Arizona Department of Water Resources 2009, p. 1).

Aravaipa Creek is relatively protected from further habitat loss because it is within a Bureau of Land Management (BLM) Wilderness and is a Nature Conservancy preserve. However, Aravaipa Creek is affected by upstream uses in the watershed, primarily groundwater pumping for irrigation. Irrigation can reduce creek flows, as crop irrigation uses large amounts of water, especially during the summer months when the creek flows are already at their lowest. Increased groundwater pumping from wells is known to be linked to reduced creek flows (Fuller 2000, pp. 4–8).

Water depletion is also a concern for the Verde River. In 2000, the Arizona Department of Water Resources (2000,

p. 1–1) reported that the populations of major cities and towns within the Verde River watershed had more than doubled in the last 20 years, resulting in more than a 39 percent increase in municipal water usage. The Arizona Department of Water Resources (2000, p. 1–1) anticipated that human populations in the Verde River watershed are expected to double again before 2040, resulting in more than a 400 percent increase over the 2000 water usage. The middle and lower Verde River has limited or no flow during portions of the year due to agricultural diversion and upstream impoundments, and has several impoundments in its middle reaches, which could expand the area of impacted spikedace and loach minnow habitat. The Little Chino basin within the Verde River watershed has already experienced significant groundwater declines that have reduced flow in Del Rio Springs (Arizona Department of Water Resources 2000, pp. 1–1, 1–2). Blasch *et al.* (2006, p. 2) suggests that groundwater storage in the Verde River watershed has already declined due to groundwater pumping and reductions in natural channel recharge resulting from streamflow diversions.

Also impacting water in the Verde River, the City of Prescott, Arizona, experienced a 22 percent increase in population between 2000 and 2005 (U.S. Census Bureau 2010b, p. 1), averaging around 4 percent growth per year (City of Prescott 2010, p. 1). In addition, the towns of Prescott Valley and Chino Valley experienced growth rates of 66 and 67 percent, respectively (Arizona Department of Commerce 2009a, p. 1; 2009b, p. 1). This growth is facilitated by groundwater pumping in the Verde River basin. In 2004, the cities of Prescott and Prescott Valley purchased a ranch in the Big Chino basin in the headwaters of the Verde River, with the intent of drilling new wells to supply up to approximately 4,000 acre-feet (AF) of groundwater per year. If such drilling occurs, it could have serious adverse effects on the mainstem and tributaries of the Verde River. Scientific studies have shown a link between the Big Chino aquifer and spring flows that form the headwaters of the Verde River. It is estimated that 80 to 86 percent of baseflow in the upper Verde River comes from the Big Chino aquifer (Wirt 2005, p. G8). However, while these withdrawals could potentially dewater the upper 42 kilometers (km) (26 miles (mi)) of the Verde River (Wirt and Hjalmarson 2000, p. 4), it is uncertain that this project will occur given the legal and administrative challenges it faces. This upper portion of the Verde River is considered currently occupied by spikedace, and barrier construction and stream renovation plans are underway with the intention of using this historically occupied area for recovery of native fishes including loach minnow. Reductions of available water within this reach could preclude its use for recovery purposes. This area is currently considered occupied by spikedace, that are considered genetically (Tibbets 1993, pp. 25–29) and morphologically (Anderson and Hendrickson 1994, pp. 148, 150–154) distinct from all other spikedace populations.

There are numerous surface water diversions in spikedace and loach minnow habitats, including the Verde River, Blue River, San Francisco River, Gila River, and Eagle Creek. Larger dams may prevent movement of fish between populations and dramatically alter the flow regime of streams through the impoundment of water (Ligon *et al.* 1995, pp. 184–189). These diversions also require periodic maintenance and re-construction, resulting in potential habitat damages and inputs of sediment into the active stream.

Water withdrawals have occurred historically, and continue to occur, throughout the ranges of spikedace and loach minnow. Groundwater pumping and surface diversions used for agricultural, industrial, and municipal purposes can lead to declines in the water table and dewatering of active stream channels. Ongoing water withdrawals are known to occur on the Gila, San Francisco, and Verde rivers, and are occurring at limited levels, with the potential for increased withdrawal, on Aravaipa Creek.

Stream Channelization

Sections of many Gila Basin rivers and streams have been, and continue to be, channelized for flood control, which disrupts natural channel dynamics (sediment scouring and deposition) and promotes the loss of riparian plant communities. Channelization changes the stream gradient above and below the channelization. Water velocity increases in the channelized section, which results in increased rates of erosion of the stream and its tributaries, accompanied by gradual deposits of sediment in downstream reaches that may increase the risk of flooding (Emerson 1971, p. 326; Simpson 1982, p. 122). Channelization can affect spikedace and loach minnow habitat by reducing its complexity, eliminating cover, reducing nutrient input, improving habitat for nonnative species, changing sediment transport, altering substrate size, increasing flow velocities, and reducing the length of the stream (and therefore the amount of aquatic habitat available) (Gorman and Karr 1978, pp. 512–513; Simpson 1982, p. 122; Schmetterling *et al.* 2001, pp. 7–10). Historical and ongoing channelization will continue to contribute to riparian and aquatic habitat decline most notably eliminating cover and reducing nutrient input.

Water Quality

In the past, the threat from water pollution was due primarily to catastrophic pollution events (Rathbun 1969, pp. 1–5; Eberhardt 1981, pp. 3–6, 8–10) or chronic leakage (Eberhardt 1981, pp. 2, 16) from large mining operations. Although this is not as large a problem today as it was historically, some damage to spikedace and loach minnow populations still occurs from occasional spills or chronic inability to meet water quality standards (*United States* v. *ASARCO,* No. 98–0137 PHX–ROS (D. Ariz. June 2, 1998)). Mine tailings from a number of past and present facilities throughout the Gila Basin would threaten spikedace populations if catastrophic spills occur (Arizona Department of Health Services 2010, p. 3). Spills or discharges have occurred in the Gila River and affected streams within the watersheds of spikedace and loach minnow, including the Gila River, San Francisco River, San Pedro River, and some of their tributaries (Environmental Protection Agency 1997, pp. 24–67; Arizona Department of Environmental Quality 2000, p. 6; Church *et al.* 2005, p. 40; Arizona Department of Environmental Quality 2007, p. 1).

In January of 2006, the Arizona Department of Environmental Quality announced that it had been conducting a remedial investigation at the Klondyke Tailings site on Aravaipa Creek, which currently supports one of the two remaining populations where spikedace and loach minnow are considered common. The Klondyke tailings site was a mill that processed ore to recover lead, zinc, copper, silver, and gold between the 1920s and the 1970s. There are eight contaminants in the tailings and soil at the Klondyke tailings site that are at levels above regulatory limits. These contaminants include antimony, arsenic, beryllium, cadmium, copper, lead, manganese, and zinc. Samples of shallow groundwater collected at the site contained arsenic, beryllium, cadmium, chromium, lead, and nickel above regulatory limits (Arizona Department of Environmental Quality 2006, p. 2). A preliminary study in Aravaipa Creek has found high levels of

lead in two other native fish species, Sonora sucker (*Catostomus insignis*) and roundtail chub (*Gila robusta*), as well as in the sediment and in some of the invertebrates. These lead levels are high enough that they could negatively impact reproduction (P. Reinthal, University of Arizona pers. comm. 2010). We do not know with certainty whether these levels of lead would affect spikedace or loach minnow, but we assume the same negative effects would occur.

Pollution is increasingly more widespread and more often from non-point sources. Urban and suburban development is one source of non-point pollution. Increasing the area subject to runoff from roads, golf courses, and other sources of petroleum products, pesticides, and other toxic materials, can cause changes in fish communities (Wang *et al.* 1997, pp. 6, 9, 11). Nutrient and sediment loads are increasing in urban areas (King *et al.* 1997, pp. 7–24, 38, 39) and, combined with depleted stream flows, can be serious threats to aquatic ecosystem during some periods of the year. Bridges and roads increase with increasing rural and urban populations in Arizona (Arizona Department of Transportation 2000, pp. 1–3), and pose significant risks to the fish from increases in toxic materials along roadways (Trombulak and Frissall 2000, pp. 22–24). As noted previously, human populations within the ranges of spikedace and loach minnow are expected to increase over the next 20 years. Therefore, we expect a corresponding increase in non-point source pollution.

Based on historical records and long-term tree-ring records, wildfires have increased in the ponderosa pine forests of the Southwest, including the range of the spikedace and loach minnow (Swetnam and Betancourt 1990, pp. 1017, 1019; Swetnam and Betancourt 1998, pp. 3131–3135). This is due to a combination of decades of fire suppression, increases in biomass due to increased precipitation after 1976, and warming temperatures coupled with recent drought conditions (University of Arizona 2006, pp. 1, 3). As wildfires increase, so does the use of fire retardant chemical applications. Some fire retardant chemicals are ammonia-based, which is toxic to aquatic wildlife; however, many formulations also contain yellow prussiate of soda (sodium ferrocyanide), which is added as an anticorrosive agent. Such formulations are toxic for fish, aquatic invertebrates, and algae (Angeler *et al.* 2006, pp. 171–172; Calfee and Little 2003, pp. 1527–1530; Little and Calfee 2002, p. 5; Buhl and Hamilton 1998, p. 1598; Hamilton *et al.* 1998, p. 3; Gaikwokski *et al.* 1996, pp. 1372–1373). Toxicity of these formulations is enhanced by sunlight (Calfee and Little 2003, pp. 1529–1533). In a 2008 biological opinion issued by the U.S. Fish and Wildlife Service to the Forest Service on the nationwide use of fire retardants, the U.S. Fish and Wildlife Service concluded that the use of fire retardants can cause mortality to fish by exposing them to ammonia. We concluded in the opinion that the proposed action, which included the application of fire retardants throughout the range of the species, was likely to jeopardize the continued existence of the spikedace and loach minnow (Service 2008a).

Severe wildfires capable of extirpating or decimating fish populations are a relatively recent phenomenon, and result from the cumulative effects of historical or ongoing grazing (removes the fine fuels needed to carry fire) and fire suppression (Madany and West 1983, pp. 665–667; Savage and Swetnam 1990, p. 2374; Swetnam 1990, p. 12; Touchan *et al.* 1995, pp. 268–271; Swetnam and Baisan 1996, p. 29; Belsky and Blumenthal 1997, pp. 315–316, 324–325; Gresswell 1999, pp. 193–194, 213). Historical wildfires were primarily cool-burning understory fires with return intervals of 4 to 8 years in ponderosa pine (Swetnam and Dieterich 1985, pp. 390, 395). Cooper (1960, p. 137) concluded that prior to the 1950s, crown fires were extremely rare or nonexistent in the region. However, since 1989, high-severity wild fires, and subsequent floods and ash flows, have caused the extirpation of several populations of Gila trout in the Gila National Forest, New Mexico (Propst *et al.* 1992, pp. 119–120, 123; Brown *et al.* 2001, pp. 140–141). It is not known if spikedace or loach minnow have suffered local extirpations; however, native fishes, including spikedace and loach minnow, in the West Fork Gila River, showed 60 to 80 percent decreases in population following the Cub Fire in 2002, due to flooding events after the fire (Rinne and Carter 2008, pp. 171). Increased fines and ash may be continuing to affect the populations on the West Fork Gila, near the Gila Cliff Dwellings (D. Propst. NMDGF, pers. comm. 2004).

Effects of fire may be direct and immediate or indirect and sustained over time. Because spikedace and loach minnow are found primarily in the lower elevation, higher-order streams, they are most likely affected by the indirect effects of fire (*e.g.,* ash flows), not direct effects (*e.g.,* drastic changes in pH, ammonium concentrations). Indirect effects of fire include ash and debris flows, increases in water temperature, increased nutrient inputs, and sedimentation (Propst *et al.* 1992, pp. 119–120; Gresswell 1999, pp. 194–211; Rinne and Carter 2008, pp. 169–171). Of these, ash flows probably have the greatest effect on spikedace and loach minnow. Ash and debris flows may occur months after fires, when barren soils are eroded during monsoonal rain storms (Bozek and Young 1994, pp. 92–94). Ash and fine particulate matter created by fire can fill the interstitial spaces between gravel particles, eliminating spawning habitat or, depending on the timing, suffocating eggs that are in the gravel. Ash and debris flows can also decimate aquatic invertebrate populations that the fish depend on for food (Molles 1985, p. 281).

Recreation

The impacts to spikedace and loach minnow from recreation can include movement of livestock along streambanks, trampling, loss of vegetation, and increased danger of fire (Northern Arizona University 2005, p. 136; Monz *et al.* 2010, pp. 553–554). In the arid Gila River Basin, recreational impacts are disproportionately distributed along streams as a primary focus for recreation (Briggs 1996, p. 36). Within the range of spikedace and loach minnow, the majority of the occupied areas occur on Federal lands, which are managed for recreation and other purposes. Spikedace and loach minnow are experiencing increasing habitat impacts from such use in some areas. For example, Fossil Creek experienced an increase in trail use at one site, with an estimated 8,606 hikers using the trail in 1998, and an estimated 19,650 hikers using the trail in 2003. Dispersed camping also occurs in the area. The greatest impacts from camping were vegetation loss and litter (Northern Arizona University 2005, pp. 134–136). Similar impacts have been observed at Aravaipa Creek. Vegetation loss is often accompanied by soil compaction, which when combined with vegetation loss, can result in increased runoff and sedimentation in waterways (Monz *et al.* 2010, pp. 551–553; Andereck 1993, p. 2).

Roads and Bridges

Roads impact Gila River Basin streams (Dobyns 1981, pp. 120–129, 167, 198–201), including spikedace, loach minnow, and their habitats (Jones *et al.* 2000, pp. 82–83). The need for bridges and roads increases with increasing rural and urban populations in Arizona (Arizona Department of

Transportation 2000, pp. 1–3). In addition, existing roads and bridges have ongoing maintenance requirements that result in alterations of stream channels within spikedace and loach minnow habitats (Service 1994a, pp. 8–12; Service 1995a, pp. 10–12; Service 1995b, pp. 5–7; Service 1997a, pp. 10–15; Service 1997b, pp. 54–77). Bridge construction or repair causes channel alteration and, if not carefully executed, can result in long-term channel adjustments, altering habitats upstream and downstream. In some areas, low-water ford crossings exist within occupied spikedace and loach minnow habitats and cause channel modification and habitat disruption. Low-water crossings on general-use roads exist in a number of areas that may support spikedace and loach minnow. These crossings frequently require maintenance following minor flooding.

Repeated road repairs near the Gila Cliff Dwellings on the West Fork Gila River have occurred because the bridge span is too short to accommodate peak flows. This is a common problem on bridges that cross the Gila River, and on other rivers occupied by spikedace and loach minnow in the Southwest. In an attempt to protect bridges, large amounts of fill (such as boulders, rip rap, and dirt) are used to confine and redirect the river. Typically, this habitat alteration is detrimental to spikedace and loach minnow because it changes the channel gradient and substrate composition, and reduces habitat availability. Eventually, peak flows remove the fill material, roads and bridges are damaged, and the resulting repairs and reconstruction lead to additional habitat disturbance (Service 1998, 2002, 2005, 2008b, 2008c, 2009, 2010a).

Livestock Grazing

Livestock grazing has been one of the most widespread and long-term adverse impacts to native fishes and their habitat (Miller 1961, pp. 394–395, 399), but is one of the few threats where adverse effects to species such as spikedace and loach minnow are decreasing, due to improved management on Federal lands (Service 1997c, pp. 121–129, 137–141; Service 2001, pp. 50–67). This improvement occurred primarily by discontinuing grazing in the riparian and stream corridors. However, although adverse effects are less than in the past, livestock grazing within watersheds where spikedace and loach minnow and their habitats are located continues to cause adverse effects. These adverse effects occur through watershed alteration and subsequent changes in the natural flow regime, sediment production, and stream channel morphology (Platts 1990, pp. I–9—I–11; Belsky *et al.* 1999, pp. 1–3, 8–10; Service 2001, pp. 50–67).

Livestock grazing can destabilize stream channels and disturb riparian ecosystem functions (Platts 1990, pp. I–9—I–11; Armour *et al.* 1991, pp. 7–10; Tellman *et al.* 1997, pp. 20–21, 33, 47, 101–102). Improper livestock grazing can negatively affect spikedace and loach minnow through removal of riparian vegetation (Propst *et al.* 1986, p. 3; Clary and Webster 1989, p. 1; Clary and Medin 1990, p. 1; Schulz and Leininger 1990, p. 295; Fleishner 1994, pp. 631–633, 635–636), which can result in reduced bank stability and higher water temperatures (Kauffman and Krueger 1984, pp. 432–434; Platts and Nelson 1989, pp. 453, 455; Fleishner 1994, pp. 635–636; Belsky *et al.* 1999, pp. 2–5, 9–10). Livestock grazing can also cause increased sediment in the stream channel, due to streambank trampling and riparian vegetation loss (Weltz and Wood 1986, pp. 364–368; Pearce *et al.* 1998, pp. 302, 307; Belsky *et al.* 1999, p. 10). Livestock can physically alter the streambank through trampling and shearing, leading to bank erosion (Trimble and Mendel 1995, pp. 243–244; Belsky *et al.* 1999, p. 1). In combination, loss of riparian vegetation and bank erosion can alter channel morphology, including increased erosion and deposition, increased sediment loads, downcutting, and an increased width-to-depth ratio, all of which lead to a loss of spikedace and loach minnow habitat components. Livestock grazing management also continues to include construction and maintenance of open stock tanks, which are often stocked with nonnative aquatic species harmful to spikedace and loach minnow (Service 1997b, pp. 54–77) if they escape or are transported to waters where these native fish occur.

Summary of Factor A

Impacts associated with roads and bridges, changes in water quality, and recreation have altered or destroyed many of the rivers, streams, and watershed functions in the ranges of the spikedace and loach minnow. As discussed above, activities such as groundwater pumping, surface water diversions, impoundments, dams, channelization, improperly managed livestock grazing, wildfire, agriculture, mining, road building, residential development, and recreation all contribute to riparian habitat loss and degradation of aquatic resources in Arizona and New Mexico. Changes in flow regimes are expected to continue into the foreseeable future. Therefore, we find that the spikedace and loach minnow are threatened by the destruction, modification, or curtailment of their habitats.

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

Currently, collection of spikedace and loach minnow in Arizona is prohibited by Arizona Game and Fish Commission Order 40, except where such collection is authorized by special permit (AGFD 2009, p. 5). The collection of these species is prohibited in the State of New Mexico except by special scientific permit (NMDGF 2010, p. 4). Because spikedace and loach minnow do not grow larger than 80 mm (3 in), we believe that angling for this species is not a threat. No known commercial uses exist for spikedace or loach minnow. A limited amount of scientific collection occurs, but does not pose a threat to these species because it is regulated by the States. Therefore, we have determined that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to spikedace or loach minnow.

C. Disease or Predation

The introduction and spread of nonnative species has been identified as one of the primary factors in the continuing decline of native fishes throughout North America and particularly in the Southwest (Miller 1961, pp. 365, 397–398; Lachner *et al.* 1970, p. 21; Ono *et al.* 1983, pp. 90–91; Carlson and Muth 1989, pp. 222, 234; Fuller *et al.* 1999, p. 1). Miller *et al.* (1989, pp. 22, 34, 36) concluded that introduced nonnative species were a causal factor in 68 percent of fish extinctions in North America in the last 100 years. For the 70 percent of fish species that are still extant, but are considered to be endangered or threatened, introduced nonnative species are a primary cause of the decline (Lassuy 1995, pp. 391–394). Release or dispersal of new nonnative aquatic organisms is a continuing phenomenon in the species' range (Rosen *et al.* 1995, p. 254). Currently, all native fishes in Arizona and 80 percent of native fishes in the Southwest are on either State or Federal protection lists.

Nonnative fish introductions in the Southwestern United States began before 1900, and have steadily increased in frequency (Rinne and Stefferud 1996b, p. 29). New species are continually being introduced through various mechanisms, including aquaculture, aquarium trade, sport fish stocking, live bait use, interbasin water

transfers, and general "bait bucket transport," where people move fish from one area to another without authorization and for a variety of purposes (Service 1994b, pp. 12–16; Service 1999, pp. 24–59). Nearly 100 kinds of nonnative fishes have been stocked or introduced into streams in the Southwest (Minckley and Marsh 2009, p. 51). Nonnative fishes known to occur within the historical range of the spikedace include channel catfish (*Ictalurus punctatus*), flathead catfish (*Pylodictis olivaris*), red shiner (*Cyprinella lutrensis*), fathead minnow (*Pimephales promelas*), green sunfish (*Lepomis cyanellus*), largemouth bass (*Micropterus salmoides*), smallmouth bass (*Micropterus dolomieui*), rainbow trout (*Oncorhynchus mykiss*), mosquitofish (*Gambusia affinis*), carp (*Cyprinus carpio*), bluegill (*Lepomis macrochiris*), yellow bullhead (*Ameiurus natalis*), black bullhead (*Ameiurus melas*), and goldfish (*Carassius auratus*) (ASU 2002).

In the Gila River basin, introduction of nonnative species is considered a primary factor in the decline of native fish species (Minckley 1985, pp. 1, 68; Williams *et al.* 1985, pp. 1–2; Minckley and Deacon 1991, pp. 15–17; Douglas *et al.* 1994, pp. 9–11; Clarkson *et al.* 2005 p. 20; Olden and Poff 2005, pp. 79–87). Aquatic and semi-aquatic mammals, reptiles, amphibians, crustaceans, mollusks (snails and clams), parasites, disease organisms, and aquatic and riparian vascular plants outside of their historical range, have all been documented to adversely affect aquatic ecosystems (Cohen and Carlton 1995, pp. i–iv). The effects of nonnative fish competition on spikedace and loach minnow can be classified as either interference or exploitive. Interference competition occurs when individuals directly affect others, such as by fighting, producing toxins, or preying upon them (Schoener 1983, p. 257). Exploitive competition occurs when individuals affect others indirectly, such as through use of common resources (Douglas *et al.* 1994, p. 14). Interference competition in the form of predation is discussed here, while a discussion of the history of nonnative species introductions and resulting interference competition for resources are discussed under Factor E below.

Predation

Nonnative channel catfish, flathead catfish, and smallmouth bass all prey on spikedace and loach minnow, as indicated by prey remains of native fishes in the stomachs of these species (Propst *et al.* 1986, p. 82; Propst *et al.* 1988, p. 64; Bonar *et al.* 2004, pp. 13, 16–21). Channel catfish move into riffles to feed, preying on the same animals most important to loach minnows, while juvenile flathead catfish prey on loach minnows (Service 1991a, p. 5). Smallmouth bass are known to co-occur with spikedace and are documented predators of the species (Service 1991b, p. 6). Green sunfish are also thought to be a predator, likely responsible for replacement of native species like spikedace and loach minnow. While no direct studies have been completed on predation by green sunfish on spikedace or loach minnow, they are a known predator of fish that size, and they occur within areas occupied by these species.

Declines of native fish species appear linked to increases in nonnative fish species. For example, in 1949, 52 spikedace were collected at Red Rock on the Gila River, while channel catfish composed only 1.65 percent of the 607 fish collected. However, in 1977, only six spikedace were located at the same site, and the percentage of channel catfish had risen to 14.5 percent of 169 fish collected. The decline of spikedace and the increase of channel catfish is likely related (Anderson 1978, pp. 2, 13, 50–51). Similarly, interactions between native and nonnative fishes were observed in the upper reaches of the East Fork of the Gila River. Prior to the 1983 and 1984 floods in the Gila River system, native fish were limited, with spikedace being rare or absent, while nonnative channel catfish and smallmouth bass were moderately common. After the 1983 flooding, adult nonnative predators were generally absent, and spikedace were collected in moderate numbers in 1985 (Propst *et al.* 1986, p. 83).

The majority of areas considered occupied by spikedace and loach minnow have seen a shift from a predominance of native fishes to a predominance of nonnative fishes. For spikedace, this is best demonstrated on the upper Verde River, where native species dominated the total fish community at greater than 80 percent from 1994 to 1996, before dropping to approximately 20 percent in 1997 and 19 percent in 2001. At the same time, three nonnative species increased in abundance between 1994 and 2000 (Rinne *et al.* 2004, pp. 1–2). Similar changes in the dominance of nonnative fishes have occurred on the Middle Fork Gila River, with a 65 percent decline of native fishes between 1988 and 2001 (Propst 2002, pp. 21–25).

In other areas, nonnative fishes may not dominate the system, but their abundance has increased, while spikedace and loach minnow abundance has declined. This is the case for the Cliff-Gila Valley area of the Gila River, where nonnative fishes increased from 1.1 percent to 8.5 percent, while native fishes declined steadily over a 40-year period (Propst *et al.* 1986, pp. 27–32). At the Redrock and Virden valleys on the Gila River, the relative abundance in nonnative fishes in the same time period increased from 2.4 percent to 17.9 percent (Propst *et al.* 1986, pp. 32–34). Four years later, the relative of abundance of nonnative fishes increased to 54.7 percent at these sites (Propst *et al.* 1986, pp. 32–36). The percentage of nonnative fishes increased by almost 12 percent on the Tularosa River between 1988 and 2003, while on the East Fork Gila River, nonnative fishes increased to 80.5 percent relative abundance in 2003 (Propst 2005, pp. 6–7, 23–24). Nonnative fishes are also considered a management issue in other areas including Eagle Creek, the San Pedro River, West Fork Gila River, and to a lesser extent on the Blue River and Aravaipa Creek.

Generally, when the species composition of a community shifts in favor of nonnative fishes, a decline in spikedace or loach minnow abundance occurs (Olden and Poff 2005, pp. 79–86). Propst *et al.* (1986, p. 38) noted this during studies of the Gila River between 1960 and 1980. While native species, including spikedace, dominated the study area initially, red shiner, fathead minnow, and channel catfish were more prevalent following 1980. Propst *et al.* (1986, pp. 83–86) noted that drought and diversions for irrigation first brought a decline in habitat quality, followed by the establishment of nonnative fishes in remaining suitable areas, thus reducing the availability and utility of these areas for native species. It should be noted that the effects of nonnative fishes often occur with, or are exacerbated by, changes in flow regimes or declines in habitat conditions (see Factor A above) and should be considered against the backdrop of historical habitat degradation that has occurred over time (Minckley and Meffe 1987, pp. 94, 103; Rinne 1991, p. 12).

Nonnative channel catfish, flathead catfish, and smallmouth bass are present in most spikedace habitats, including the Verde River (Minckley 1993, pp. 7–13; Jahrke and Clark 1999, pp. 2–7; Rinne 2004, pp. 1–2; Bahm and Robinson 2009, pp. 1–4; Robinson and Crowder 2009, pp. 3–5); the Gila River (Propst *et al.* 1986, pp. 14–31; Springer 1995, pp. 6–10; Jakle 1995, pp. 5–7; Propst *et al.* 2009, pp. 14–17); the San Pedro River (Jakle 1992, pp. 3–5; Minckley 1987, pp. 2, 16); the San Francisco River (Papoulias *et al.* 1989, pp. 77–80; Propst *et al.* 2009, pp. 5–6);

the Blue River (ASU 1994, multiple reports; ASU 1995, multiple reports; Clarkson *et al.* 2008, pp. 3–4); the Tularosa River, East Fork Gila River, West Fork Gila River, and Middle Fork Gila River (Propst *et al.* 2009, pp. 7–13; NMDGF 2009 *in draft,* pp. 2–14); and Eagle Creek (Marsh *et al.* 2003, p. 667; ASU 2008, multiple reports; Bahm and Robinson 2009a, pp. 2–6).

Pilger *et al.* (2010, pp. 311–312) studied the food webs in six reaches of the Gila River. Their study attempted to quantify resource overlap among native and nonnative fishes. Their study determined that nonnative fishes consumed a greater diversity of invertebrates and more fish than native species, and that nonnative fishes consumed predacious invertebrates and terrestrial invertebrates more frequently than native fishes. They found that, on average, the diets of adult nonnative fishes were comprised of 25 percent fish, but that there was high variability among species. Only 6 percent of the diet of channel catfish was fish, while fish made up 84 percent of the diet of flathead catfish. They found that both juvenile and adult nonnative species could pose a predation threat to native fishes.

As noted below under Factor E, nonnative fishes also compete for resources with native fishes. While nonnative fishes were preying on native fishes, small-bodied nonnative fishes are potentially affecting native fishes through competition (discussed further under Factor E), so that native fishes are impacted by both competition and predation. Pilger *et al.* (2010, p. 312) note that removal and preclusion of nonnative predators and competitors may be necessary for conservation of native fishes in the upper Gila River in order to mitigate the effects they have on native species. Pilger *et al.* (2010, p. 312) note that, in the upper Verde River, native fishes have declined precipitously since the mid-1990s, which may indicate that a stressor threshold has been crossed. They conclude that there are declining trends of native fish abundances in the upper Gila River, and that the coexistence of native and nonnative fishes there may indicate that the threshold has not been reached, but may be imminent.

Disease

Various parasites may affect spikedace and loach minnow. Asian tapeworm (*Bothriocephalus acheilognathi*) was introduced into the United States with imported grass carp (*Ctenopharyngodon idella*) in the early 1970s. It has since become well established in areas throughout the southwestern United States. The definitive host in the life cycle of Asian tapeworm is a cyprinid fish (carp or minnow), and therefore it is a potential threat to spikedace and loach minnow, as well as other native cyprinids in Arizona. The Asian tapeworm adversely affects fish health by impeding the digestion of food as it passes through the intestinal track. Emaciation and starvation of the host can occur when large enough numbers of worms feed off of the fish directly. An indirect effect is that weakened fish are more susceptible to infection by other pathogens. Asian tapeworm invaded the Gila River basin and was found during the Central Arizona Project's fall 1998 monitoring in the Gila River at Ashurst-Hayden Dam. It has also been confirmed from Bonita Creek in 2010 and from Fossil Creek in 2004 and 2010 (U.S. Fish and Wildlife Service National Wild Fish Health Survey 2004, 2010). This parasite can infect many species of fish and is carried into new areas along with nonnative fishes or native fishes from contaminated areas.

The parasite (*Ichthyophthirius multifiliis*) (Ich) usually occurs in deep waters with low flow and is a potential threat to spikedace and loach minnow. Ich has occurred in some Arizona streams, probably encouraged by high temperatures and crowding as a result of drought (Mpoame 1982, pp. 45–47). This parasite was observed being transmitted on the Sonora sucker (*Catostomus insignis*), although it does not appear to be host-specific and could be transmitted by other species (Mpoame 1982, p. 46). It has been found on desert and Sonoran suckers, as well as roundtail chub (Robinson *et al.* 1998, p. 603). This parasite becomes embedded under the skin and within the gill tissues of infected fish. When Ich matures, it leaves the fish, causing fluid loss, physiological stress, and sites that are susceptible to infection by other pathogens. If Ich is present in large enough numbers, it can also impact respiration because of damaged gill tissue. There are recorded spikedace mortalities in captivity due to Ich. Ich is known to be present in Aravaipa Creek (Mpoame 1982, p. 46), which is currently occupied by both spikedace and loach minnow.

Anchor worm (*Lernaea cyprinacea*), an external parasite, is unusual in that it has little host specificity, infecting a wide range of fishes and amphibians. Infection by this parasite has been known to kill large numbers of fish due to tissue damage and secondary infection of the attachment site (Hoffnagle and Cole 1999, p. 24). Presence of this parasite in the Gila River basin is a threat to spikedace, loach minnow, and other native fishes. In July 1992, the BLM found anchor worms in Bonita Creek. They have also been documented in Aravaipa Creek and the Verde River (Robinson *et al.* 1998, pp. 599, 603–605). Both spikedace and loach minnow occur in Bonita and Aravaipa Creeks.

Summary of Factor C

Both spikedace and loach minnow have been severely impacted by the presence of nonnative predators. Aquatic nonnative species have been introduced or spread into new areas through a variety of mechanisms, including intentional and accidental releases, sport stocking, aquaculture, aquarium releases, and bait-bucket release. Channel catfish, flathead catfish, and smallmouth bass appear to be the most prominent predators, although other species contribute to the decline of native fishes in the Southwest, including spikedace and loach minnow. Spikedace and loach minnow have been replaced by nonnative fishes in several Arizona streams. In addition to threats from predation, we also conclude that both spikedace and loach minnow are reasonably certain to become impacted by parasites that have been documented in the Gila River basin and that are known to adversely affect or kill fish hosts. For these reasons, we find that the spikedace and loach minnow are threatened by disease and predation.

D. The Inadequacy of Existing Regulatory Mechanisms

Because of the complex, indirect, and cumulative nature of many of the threats to spikedace and loach minnow, existing regulatory mechanisms are often inadequate to address or ameliorate the threats. Causes of the declining status of these species are a mix of many human activities and natural events, which makes it difficult to remove those threats through regulation. Spikedace is listed by New Mexico as an endangered species, while loach minnow is listed as threatened (Bison-M 2010). These designations provide the protection of the New Mexico Wildlife Conservation Act. However, the primary focus of the New Mexico Wildlife Conservation Act and other State legislation is to prevent actual destruction or harm to individuals of the species. Since most of the threats to these species come from actions that do not directly kill individuals, but indirectly result in their death from the lack of some habitat requirement or an inability to reproduce, the State protection is only

partially effective for this species. Similarly, spikedace and loach minnow are listed as species of concern by the State of Arizona. The listing under the State of Arizona law does not provide protection to the species or their habitats; however, AGFD regulations prohibit possession of these species (AGFD 2006, Appendix 10, p. 4).

As discussed above under Factor C, the introduction and spread of nonnative aquatic species is a major threat to spikedace and loach minnow. Neither the States of New Mexico and Arizona nor the Federal government has adequate regulatory mechanisms to address this issue. Programs to introduce, augment, spread, or permit such actions for nonnative sport, bait, aquarium, and aquaculture species continue. Regulation of these activities does not adequately address the spread of nonnative species, as many introductions are conducted through incidental or unregulated actions.

New Mexico water law does not include provisions for instream water rights to protect fish and wildlife and their habitat. Arizona water law does recognize such provisions; however, because this change is relatively recent, instream water rights have low priority and are often overcome by more senior diversion rights. Arizona State law also allows surface water depletion by groundwater pumping.

There are many Federal statutes that potentially afford protection to spikedace and loach minnow. A few of these are section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*), Federal Land Policy and Management Act (43 U.S.C. 1701–1782), National Forest Management Act (16 U.S.C. 1600 *et seq.*), NEPA, and the Act. However, in practice these statutes have not been able to provide sufficient protection to prevent the downward trend in the populations and habitat of spikedace and loach minnow and the upward trend in threats. Section 404 of the Clean Water Act regulates placement of fill into waters of the United States, including most of spikedace and loach minnow habitat. However, many actions highly detrimental to spikedace and loach minnow and their habitats, such as gravel mining and irrigation diversion structure construction and maintenance, are often exempted from the Clean Water Act. Other detrimental actions, such as bank stabilization and road crossings, are covered under nationwide permits that receive little or no Service review. A lack of thorough, site-specific analyses for projects can allow substantial adverse effects to spikedace, loach minnow, and their habitat.

The Federal Land Policy and Management Act and National Forest Management Act provide mechanisms for protection and enhancement of spikedace, loach minnow, and their habitat on Federal lands; however, these laws have been in effect longer than the 24 years since spikedace and loach minnow were listed. Although the Forest Service has made significant progress on some stream enhancements (Fossil Creek, Blue River), the multiple-use mission and limited staffing and resources has limited measureable on-the-ground success, and the status of these species has continued to decline.

Spikedace and loach minnow are currently listed as threatened under the Act and therefore are afforded the protections of the Act. Special rules were promulgated for spikedace and loach minnow in 1986, which prohibit taking of the species, except under certain circumstances in accordance with applicable State fish and wildlife conservation laws and regulations. Violations of the special rules are considered violations of the Act (50 CFR 17.44(p) for spikedace and 50 CFR 17.44(q) for loach minnow). As a result of the special rules for spikedace and loach minnow, the AGFD is issuing scientific collecting permits. This authority was granted at 50 CFR 17.44(p) for spikedace and 50 CFR 17.44(q) for loach minnow. This is confirmed through Arizona Commission Order 40 and New Mexico special permit (19 New Mexico Administrative Code 33.6.2).

Under section 7 of the Act, Federal agencies must insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the adverse modification or destruction of designated critical habitat. The Service promulgated regulations extending take prohibitions under section 9 for endangered species to threatened species. Prohibited actions under section 9 include, but are not limited to, take (i.e., harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such activity). Critical habitat designation alerts the public that the areas designated as critical habitat are important for the future recovery of the species, as well as invoking the review of these areas under section 7 of the Act with regard to any possible Federal actions in that area.

Section 10 of the Act allows for the permitting of take in the course of otherwise lawful activities by private entities, and may involve habitat conservation plans which can ultimately benefit spikedace or loach minnow. The habitat conservation plan prepared by Salt River Project is expected to benefit spikedace and loach minnow in the Verde River.

Summary of Factor D

In summary, prohibitions against taking the species have been in place for decades, but these prohibitions have limited ability to address the numerous habitat impacts, particularly water diversion and the distribution and abundance of nonnative fishes, affecting spikedace and loach minnow. Therefore, we find that the spikedace and loach minnow are threatened by the inadequacy of existing regulatory mechanisms.

E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

Nonnative Fishes

As described under Factor C above, nonnative fishes pose a significant threat to Gila River basin native fishes, including spikedace and loach minnow (Minckley 1985, pp. 1, 68; Williams *et al.* 1985, pp. 3, 17–20; Minckley and Deacon 1991, pp. 15–17). Competition with nonnative fish species is considered a primary threat to spikedace and loach minnow (predation by nonnative fish species is discussed under Factor C). The effects of nonnative fish species are often exacerbated by changes in flow regimes or declines in habitat conditions associated with water developments, as discussed above, and should be considered against the backdrop of historical habitat degradation that has occurred over time (Minckley and Meffe 1987, pp. 94, 103; Rinne 1991, p. 12). Stefferud and Rinne (1996b, p. 25) note that a long history of water development and diversion coupled with nonnative fish introductions has resulted in few streams in Arizona retaining their native fish communities. Using the Gila River as an example, Propst *et al.* (1988, p. 67) note that natural (e.g., drought) and human-induced (e.g., flow level reductions through irrigation diversion) factors combined to reduce loach minnow abundance in the Gila River. They note that where canyon habitat would normally continue to contain surface flows and suitable habitat for loach minnow, the establishment of nonnative fishes in canyon reaches has reduced their suitability as habitat for the minnow. Minckley and Douglas (1991, pp. 7–17) concluded that, for fishes native to the Southwest, the combination of changes in stream discharge patterns and nonnative fish

introductions have reduced the range and numbers of all native species of fish, and has led to extinction of some.

As with many fish in the West, spikedace and loach minnow lacked exposure to a wider range of species, so that they seem to lack the competitive abilities and predator defenses developed by fishes from regions where more species are present (Moyle 1986, pp. 28–31; Douglas *et al.* 1994, pp. 9–10). As a result, the native western fish fauna is significantly impacted by interactions with nonnative species. The introduction of more aggressive and competitive nonnative fish has led to significant losses of spikedace and loach minnow (Douglas *et al.* 1994, pp. 14–17).

The aquatic ecosystem of the central Gila River basin has relatively small streams with warm water and low gradients, and many of the native aquatic species are small. Therefore, the primary threat to native fishes comes from small, nonnative fish species (Deacon *et al.* 1964, pp. 385, 388). Examples of this are the impacts of mosquitofish and red shiner, which may compete with, or predate upon, native fish in the Gila River basin (Meffe 1985, pp. 173, 177–185; Douglas *et al.* 1994, pp. 1, 13–17).

Nonnative fishes known to occur within the historical range of spikedace and loach minnow in the Gila River basin include channel catfish, flathead catfish, red shiner, fathead minnow, green sunfish, largemouth bass, smallmouth bass, rainbow trout, western mosquitofish, carp, warmouth (*Lepomis gulosus*), bluegill, yellow bullhead, black bullhead, and goldfish (Miller 1961, pp. 373–394; Nico and Fuller 1999, pp. 16, 21–24; Clark 2001, p. 1; AGFD 2004, Bahm and Robinson 2009b, p. 3). Additionally, as discussed above, parasites introduced incidentally with nonnative species may jeopardize spikedace and loach minnow populations. For spikedace and loach minnow, every habitat that has not been renovated or protected by barriers has at least six nonnative fish species present, at varying levels of occupation. In addition, occupied habitats have also been invaded by nonnative crayfish (*Orconectes virilis*) (Taylor *et al.* 1996, p. 31; Carter *et al.* 2007, p. 4; Robinson and Crowder 2009, p. 3; Robinson *et al.* 2009b, p. 4). Crayfish are known to eat eggs, especially those bound to the substrate (Dorn and Mittlebach 2004, p. 2135), as is the case for spikedace and loach minnow. Additionally, crayfish cause decreases in macroinvertebrates, amphibians, and fishes (Hanson *et al.* 1990, p. 69; Lodge *et al.* 2000, p. 11). Several of the nonnative species now in spikedace and loach minnow habitats arrived there since the species were listed, such as red shiner in Aravaipa Creek (Stefferud and Reinthal 2005, p. 51) and Asian tapeworm in the middle Gila River.

Interference competition occurs with species such as red shiner. Nonnative red shiners compete with spikedace for suitable habitats, as the two species occupy essentially the same habitat types. The red shiner has an inverse distribution pattern in Arizona to spikedace (Minckley 1973, p. 138). Where the two species occur together, there is evidence of displacement of spikedace to less suitable habitats than previously occupied (Marsh *et al.* 1989, pp. 67, 107). As a result, if red shiners are present, suitable habitat for spikedace is reduced. In addition, the introduction of red shiner and the decline of spikedace have occurred simultaneously (Minckley and Deacon 1968, pp. 1427–1428; Douglas *et al.* 1994, pp. 13, 16–17). The red shiner was introduced in the mainstem Colorado River in the 1950s, spreading upstream to south-central Arizona by 1963, and by the late 1970s eastward into New Mexico. Spikedace disappeared at the same time and in the same progressively upstream direction, likely as a result of interactions with red shiner and in response to impacts of various water developments (Minckley and Deacon 1968, pp. 1427–1428; Minckley and Deacon 1991, pp. 7, 15; Douglas *et al.* 1994, pp. 13–17).

One study focused on potential impacts of red shiner on spikedace in three areas: (1) Portions of the Gila River and Aravaipa Creek having only spikedace; (2) a portion of the Verde River where spikedace and red shiner co-occurred for three decades; and (3) a portion of the Gila River where red shiner invaded areas and where spikedace have never been recorded. The study indicated that, for reaches where only spikedace were present, spikedace displayed a preference for slower currents and smaller particles in the substrate than were generally available throughout the Gila River and Aravaipa Creek systems. Where red shiner occur in the Verde River, the study showed that red shiner occupied waters that were generally slower with smaller particle sizes in the substrate than were, on average, available in the system. The study concludes that spikedace, where co-occurring with red shiner, move into currents swifter than those selected when in isolation, while red shiner occupy the slower habitat, whether alone or with spikedace (Douglas *et al.* 1994, pp. 14–16). Red shiners are known to occur in the Verde River (Minckley 1993, p. 10; Jahrke 1999, pp. 2–7; Bahm and Robinson 2009b, pp. 3–5), Aravaipa Creek (P. Reinthal, University of Arizona, pers. comm. 2008; Reinthal 2009, pp. 1–2), Blue River (ASU 2004, multiple reports; ASU 2005, multiple reports), and Gila River (Minckley 1973, pp. 136–137; Marsh *et al.* 1989, pp. 12–13; Propst *et al.* 2009, pp. 14–18).

As with spikedace, exploitive competition also appears to occur between red shiner and loach minnow. Red shiners occur in all places known to be formerly occupied by loach minnow, and are absent or rare in places where loach minnow persists. Because of this, red shiner has often been implicated in the decline of loach minnow. Loach minnow habitat is markedly different than that of red shiner, so interaction between the two species is unlikely to cause shifts in habitat use by loach minnow (Marsh *et al.* 1989, p. 39). Instead, studies indicate that red shiner move into voids left when native fishes such as loach minnow are extirpated due to habitat degradation in the area (Bestgen and Propst 1986, p. 209). Should habitat conditions improve and the habitat once again become suitable for loach minnow, the presence of red shiner may preclude occupancy of loach minnow, although the specific mechanism of this interaction is not fully understood.

Prior to 1960, the Glenwood-Pleasanton reach of the Gila River supported a native fish assemblage of eight different species. Post-1960, four of these species became uncommon, and ultimately three of them were extirpated. In studies completed between 1961 and 1980, it was determined that loach minnow was less common than it had been, while the diversity of the nonnative fish community had increased in comparison to the pre-1960 period. Following 1980, red shiner, fathead minnow, and channel catfish were all regularly collected. Drought and diversions for irrigation resulted in a decline in habitat quality, with canyon reaches retaining most habitat components for native species. However, establishment of nonnative fishes in the canyon reaches has reduced the utility of these areas for native species (Propst *et al.* 1988, pp. 51–56).

Western mosquitofish were introduced outside of their native range to help control mosquitoes. Because of their aggressive and predatory behavior, mosquitofish may negatively affect populations of small fishes through predation and competition (Courtenay and Meffe 1989, pp. 320–324).

Introduced mosquitofish have been particularly destructive to native fish communities in the American West, where they have contributed to the elimination or decline of populations of federally endangered and threatened species, such as the Gila topminnow (*Poeciliopsis occidentalis occidentalis*) (Courtenay and Meffe 1989, pp. 323–324).

Pilger *et al.* (2010, p. 312) found that the generalist feeding strategy of small-bodied nonnative fishes could further affect native fishes through competition, particularly if there is a high degree of overlap in habitat use. In their study on the upper Gila River, they determined that the diets of nonnative, small-bodied fishes and all age groups of native fishes overlapped, so that the presence of both juvenile and adult nonnative species could pose a competitive threat to native fishes (Pilger *et al.* 2010, p. 311).

Restoration efforts have led to limited success in removing large-bodied predators, but the small-bodied competitors present more of a challenge. In the desert Southwest, the habitat conditions are so limited that native fish reintroductions can occur only in those areas where the competition and predation of nonnative fishes can be physically precluded, such as above a fish barrier.

Drought

The southwestern United States is currently experiencing drought conditions (University of Nebraska-Lincoln 2010, p. 1). Drought conditions are reported as severe to extreme for the watersheds within the Verde River, San Pedro River, Bonita Creek, Eagle Creek, Blue River, and San Francisco River subbasins in Arizona (Arizona Department of Water Resources 2009, p. 1). Portions of New Mexico are also considered abnormally dry, but not in areas currently occupied by spikedace and loach minnow (University of Nebraska-Lincoln 2010, p. 1). While spikedace and loach minnow have survived many droughts in their evolutionary histories, the present status of these species and their habitats are so degraded that the effects of the drought are more difficult for the species to withstand. In some areas of spikedace and loach minnow habitat, drought results in lower streamflow, and consequently warmer water temperatures beyond the species' tolerance limits, and more crowded habitats with higher levels of predation and competition. In other areas, drought reduces flooding, that would normally rejuvenate habitat and tend to reduce populations of some nonnative species, which are less adapted to the large floods of southwestern streams (Minckley and Meffe 1987, pp. 94, 104; Stefferud and Rinne 1996a, p. 80). The conjunction of drought with ongoing habitat loss and alteration; increased predation, competition, and disease from nonnative species; the uncertainties associated with climate change; and the general loss of resiliency in highly altered aquatic ecosystems have had negative consequences for spikedace and loach minnow populations.

Genetics

Each remaining population of spikedace is genetically distinct. Genetic distinctiveness in the Verde River and Gila River fishes indicates that these populations have been historically isolated. The center of the spikedace's historical distribution is permanently altered, and the remaining populations are isolated and represent the fringes of the formerly occupied range. Isolation of these populations has important ramifications for the overall survival of the species. Loss of any population may be permanent, as there is little ability to repopulate isolated areas, due largely to habitat alterations in areas between remaining populations (Propst *et al.* 1986, pp. 38, 86). No genetic exchange is possible between the remaining populations of spikedace without human assistance. In addition, because genetic variation is important to the species' fitness and adaptive capability, losses of genetic variation represent a threat to the species (Meffe and Carroll 1997, pp. 162–172).

Spikedace believed to remain in the upper Verde River are genetically different than those that were translocated to Fossil Creek; however, there is a minimal opportunity for the two populations to interbreed due to the length of the river between the two occupied areas. While the Verde River supports many of the habitat features for spikedace, it currently supports a high number of nonnative species that compete with, and prey on, spikedace. We anticipate that, until extensive management takes place, spikedace in the two areas will remain isolated. The spikedace translocation in Fossil Creek has been in place for approximately 2 years. It is not known if that translocation effort will succeed.

As with spikedace, each remaining population of loach minnow is genetically distinct. Genetic subdivision into three geographic regions indicates that gene flow has been low but not historically absent (Tibbets 1993, pp. 22–24, 33). The center of the loach minnow's historical distribution is permanently gone, and the remaining populations are isolated and represent the fringes of the formerly occupied range. Isolation of these populations has important ramifications for the overall survival of the species. Loss of any population may be permanent, as there is little ability to repopulate isolated areas, due largely to habitat alterations in areas between remaining populations (Propst *et al.* 1988, p. 65). No genetic exchange is likely between the remaining populations of loach minnow without human assistance. In addition, because genetic variation is important to the species' fitness and adaptive change, losses of genetic variation represent a threat to the species' ability to adapt and persist, and further compromise their continued existence (Meffe and Carroll 1997, pp. 162–172).

Climate Conditions

Climate conditions have contributed to the status of the spikedace and loach minnow now and will likely continue into the foreseeable future. While floods may benefit the species, habitat drying affects the occurrence of natural events, such as fire, drought, and forest die-off, and increases the chances of disease and infection.

Climate simulations of Palmer Drought Severity Index (PSDI) (a calculation of the cumulative effects of precipitation and temperature on surface moisture balance) for the Southwest for the periods of 2006–2030 and 2035–2060 predict an increase in drought severity with surface warming. Additionally, drought still increases during wetter simulations because the effect of heat-related moisture loss (Hoerling and Eicheid 2007, p. 19). Annual mean precipitation is likely to decrease in the Southwest as well as the length of snow season and snow depth (IPCC 2007, p. 887). Most models project a widespread decrease in snow depth in the Rocky Mountains and earlier snowmelt (IPCC 2007, p. 891). Exactly how climate change will affect precipitation is less certain, because precipitation predictions are based on continental-scale general circulation models that do not yet account for land use and land cover change effects on climate or regional phenomena. Consistent with recent observations in changes from climate, the outlook presented for the Southwest predicts warmer, drier, drought-like conditions (Seager *et al.* 2007, p. 1181; Hoerling and Eischeid 2007, p. 19). A decline in water resources with or without climate change will be a significant factor in the compromised watersheds of the desert southwest.

Summary of Factor E

The small and declining spikedace and loach minnow populations make these species susceptible to natural environmental variability, including climate conditions such as drought. The high level of nonnative fish species competing for food resources and spawning conditions will exacerbate the compromised conditions where spikedace and loach minnow can occur. These native fishes are unable to maintain a competitive edge in areas where resources are already limited, and these resources are likely to become more limited due to water developments and drought. The demands on water resources, decreases in precipitation, and increases in temperatures are likely to further limit the areas where spikedace or loach minnow can persist. Therefore, we find that the spikedace and loach minnow are threatened by other natural or manmade factors.

Available Conservation Measures

Conservation measures provided to spikedace and loach minnow under the Act include several reintroduction and augmentation projects. Some of these projects have already begun; others are in the planning stage. Project planning is underway for renovation efforts in Blue River and Spring Creek in Arizona. Other recovery actions include reintroduction or translocation of spikedace into streams within its historical range. In 2007, translocations included 210 spikedace into Hot Springs Canyon, 210 spikedace into Redfield Canyon, and 124 spikedace into Fossil Creek. Monitoring and augmentation with 500 additional spikedace each at Hot Springs and Redfield and 600 additional spikedace at Fossil Creek occurred at these sites in 2008. In 2008, 448 spikedace were reintroduced into Bonita Creek, Arizona. Spikedace were also reintroduced into the San Francisco River in New Mexico. Augmentation and monitoring will occur at these sites as well. Monitoring conducted at each of these sites will be used to determine if populations ultimately become self-sustaining at these new locations.

Several translocation projects for loach minnow are also in the planning stages. These projects may occur with or without construction of fish barriers. Loach minnow may also benefit from the Blue River and Spring Creek renovation projects mentioned above.

Additional recovery actions include translocations or reintroduction of loach minnow into streams within its historical range. In 2007, translocations included 205 loach minnow into Hot Springs Canyon, 205 loach minnow into Redfield Canyon, and 124 loach minnow into Fossil Creek. Monitoring and augmentation with 1,000 additional loach minnow each at Hot Springs and Redfield canyons and 2,004 additional loach minnow at Fossil Creek occurred in 2008. In 2008, 678 loach minnow were translocated into Bonita Creek, Arizona. Augmentation and monitoring will occur at this site as well. Monitoring conducted at each of these sites will be used to determine if populations ultimately become self-sustaining at these new locations.

The AGFD and Bureau of Reclamation continue to fund equipment and staff to run the Bubbling Ponds Native Fish Research Facility through the Gila River Basin Native Fishes Conservation Program (formerly known as the Central Arizona Project Fund Transfer Program). Salt River Project's habitat conservation plan was signed in 2008, and is expected to benefit both the spikedace and the loach minnow in the Verde River watershed. Also in 2008, AGFD staff managed original source stock and their progeny at the Bubbling Ponds facility, totaling 740 Gila River spikedace, 1,650 Aravaipa Creek spikedace, 670 Blue River loach minnow, and 3,250 Aravaipa Creek loach minnow. Plans are underway to bring in stock from every extant population of loach minnow, including those in the San Francisco River, the three forks of the Gila River, the upper Gila River in New Mexico, and Eagle and the Black River system in Arizona. Bubbling Ponds will serve as a refuge for some populations, and as a captive breeding facility for others, depending on the status of the population and availability of translocation sites.

Proposed Determination

As required by the Act, we considered the five factors in assessing whether the spikedace and loach minnow are endangered or threatened throughout all or a significant portion of their range. We carefully assessed the best scientific and commercial information available regarding reclassification of the spikedace and the loach minnow from threatened to endangered. We believe there are many threats to both species, including habitat loss and modifications (Factor A) caused by historical and ongoing land uses such as water diversion and pumping, livestock grazing, and road construction. However, competition with, or predation by, nonnative species, such as channel and flathead catfish, green sunfish, and red shiner, is likely the largest remaining threat to the species (Factors C and E). Existing regulatory mechanisms (Factor D) have not proven adequate to halt the decline of spikedace or loach minnow since the time of their listing as threatened species. In addition, the warmer, drier, drought-like conditions predicted to occur due to climate change (Factor E) will further reduce available resources for spikedace and loach minnow.

In 1991, we completed a 5-year review for spikedace and loach minnow in which we determined that the species' status was very precarious and that a change in status from threatened to endangered was warranted. Since that time, although some recovery actions have occurred, the majority of the areas historically occupied by spikedace and loach minnow have seen a shift from a predominance of native fishes to a predominance of nonnative fishes. The low numbers of spikedace and loach minnow, their isolation in tributary waters, drought, ongoing water demands, and other threats indicate that the species are now in danger of extinction throughout their ranges.

We determined in 1994 that reclassifying spikedace and loach minnow to endangered status was warranted but precluded (59 FR 35303, July 11, 1994), and restated this conclusion on January 8, 2001 (66 FR 1295). We reanalyzed the determination each year in our Candidate Notice of Review, and determined that reclassification to endangered is warranted, with the most recent Candidate Notice of Review published on November 9, 2009 (74 FR 57804). Based on this information, as well as the above review of the best scientific and commercial information available, we find that both species meet the definition of endangered species under the Act, and propose that spikedace and loach minnow be reclassified as endangered.

If we finalize the reclassification of spikedace and loach minnow to endangered status, we would remove the special rules for these species at 50 CFR 17.44(p) and 17.44(q), respectively. Special rules apply only to threatened species; therefore, if spikedace and loach minnow were listed as endangered, these special rules would no longer apply.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are

found those physical or biological features:

(I) Essential to the conservation of the species and

(II) Which may require special management considerations or protection; and

(ii) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing actions that are likely to result in the destruction or adverse modification of critical habitat. Section 7(a)(2) requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal agency and the applicant is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features (PBFs) essential to the conservation of the species, and be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (areas on which are found the PBFs laid out in the appropriate quantity and spatial arrangement for the conservation of the species). Under the Act and regulations at 50 CFR 424.12, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed only when we determine that those areas are essential for the conservation of the species and that designation limited to those areas occupied at the time of listing would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When determining which areas should be designated as critical habitat, our primary source of information is generally developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area of a river system to another over time. Furthermore, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species.

Areas that are important to the conservation of the species, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. Areas that support populations are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical and Biological Features (PBFs)

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and the regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied at the time of listing to propose as critical habitat, we consider the physical and biological features essential to the conservation of the species which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

We considered the specific PBFs essential to the conservation of the species and in the appropriate quantity and spatial arrangement for the conservation of the species. We derived the specific PBFs from the biological needs of spikedace and loach minnow.

Space for Individual and Population Growth and for Normal Behavior

Spikedace

Microhabitats. Habitat occupied by spikedace can be broken down into smaller, specialized habitats called microhabitats. These microhabitats vary by stream, by season, and by species' life stage. Studies on habitat use have been completed on the Gila River in New Mexico, and the Verde River and Aravaipa Creek in Arizona. Generally, spikedace occupy moderate to large perennial streams at low elevations over substrates (river bottom material) of sand, gravel, and cobble (Barber and Minckley 1966, p. 31; Propst *et al.* 1986, pp. 3, 12; Rinne and Kroeger 1988, p. 1). Occupied streams are typically of low gradient (Barber *et al.* 1970, p. 10; Rinne and Kroeger 1988, p. 2; Rinne 1991, pp. 8–12; Rinne and Stefferud 1996, p. 17), and less than 1 meter (m) (3.28 feet (ft)) in depth (Propst *et al.* 1986, p. 41; Minckley and Marsh 2009, p. 155).

Larval spikedace occur most frequently in slow-velocity water near stream margins or along pool edges. Most larvae are found over sand substrates. Juvenile spikedace tend to be found over a greater range of water velocities than larvae, but still in shallow areas. Juvenile spikedace occupy areas with a gravel or sand substrate, although some have been found over cobble substrates as well. Larvae and juveniles may occasionally be found in quiet pools or backwaters (*e.g.,* pools that are connected with, but out of, the main river channel) (Sublette *et al.* 1990, p. 138).

Adult spikedace occur in the widest range of flow velocities. They are typically associated with shear zones (areas within a stream where more rapidly flowing water abuts water moving at slower velocities), downstream of sand bars, and in eddies or small whirlpools along downstream margins of riffles (those shallow portions of the stream with rougher, choppy water). Adult spikedace are found in shallow water over predominantly gravel-dominated substrates (Propst *et al.* 1986, p. 40; Rinne 1991, pp. 8–12; Rinne and Stefferud 1997, p. 21; Rinne and Deacon 2000, p. 106; Rinne 2001, p. 68), but also over cobble and sand substrates (Minckley and Marsh 2009, p. 155; Rinne and Kroeger 1988, p. 3; Sublette *et al.* 1990, p. 138).

In addition to substrate type, the amount of embeddedness (filling in of spaces by fine sediments) is also important to spikedace. Spikedace more commonly occur in areas with low to moderate amounts of fine sediment and substrate embeddedness, which is important for the healthy development of eggs. Spawning has been observed in areas with sand and gravel beds and not in areas where fine materials smaller than sand coats the sand or gravel substrate. Additionally, low to moderate fine sediments ensure that eggs remain well-oxygenated and will not suffocate due to sediment deposition (Propst *et al.* 1986, p. 40).

Water temperatures of occupied spikedace habitat vary with time of year. Water temperatures have been collected at Aravaipa Creek, and on the Gila River in the Forks area and at the Cliff-Gila Valley. Summer water temperatures were between 19.3 degrees Celsius (°C) (66.7 degrees Fahrenheit (°F)) (Gila River, Forks Area) and 27 °C (80.6 °F) (Aravaipa Creek). Winter water temperatures ranged between 8.9 °C (48.0 °F) at Aravaipa Creek and 11.7 °C (53.1 °F) in the Cliff-Gila Valley (Barber and Minckley 1966, p. 316; Barber *et al.* 1970, pp. 11, 14; Propst *et al.* 1986, p. 57).

Recent studies by the University of Arizona focused on temperature tolerances of spikedace. In the study, fish were acclimated to a given temperature, and then temperatures were increased by 1 °C (1.8 °F) per day until test temperatures were reached. The study determined that no spikedace survived exposure of 30 days at 34 or 36 °C (93.2 or 96.8 °F), and that 50 percent mortality occurred after 30 days at 32.1 °C (89.8 °F). In addition, growth rate was slowed at 32 °C (89.6 °F), as well as at the lower test temperatures of 10 and 4 °C (50 and 39.2 °F). Multiple behavioral and physiological changes were observed, indicating the fish became stressed at 30, 32, and 33 °C (86, 89.6 and 91.4 °F) treatments. The study concludes that temperature tolerance in the wild may be lower due to the influence of additional stressors, including disease, predation, competition, or poor water quality. Survival of fish in the fluctuating temperature trials in the study likely indicates that exposure to higher temperatures for short periods during a day would be less stressful to spikedace. The study concludes that 100 percent survival of spikedace at 30 °C (86 °F) in the experiment suggests that little juvenile or adult mortality would occur due to thermal stress if peak water temperatures remain at or below that level (Bonar *et al.* 2005, pp. 7–8, 29–30).

Spikedace occupy streams with low to moderate gradients (Propst *et al.* 1986, p. 3; Rinne and Stefferud 1997, p. 14; Stefferud and Rinne 1996, p. 21; Sublette *et al.* 1990, p. 138). Specific gradient data are generally lacking, but the gradient of occupied portions of Aravaipa Creek and the Verde River varied between approximately 0.3 to < 1.0 percent (Barber *et al.* 1970, p. 10; Rinne and Kroeger 1988, p. 2; Rinne and Stefferud 1997, p. 14).

Table 1 compares specific parameters of habitat occupied by spikedace at various ages as identified through studies completed to date. Studies on flow velocity in occupied spikedace habitat have been completed on the Gila River, Aravaipa Creek, and the Verde River (Barber and Minckley 1966, p. 321; Minckley 1973, p. 114; Anderson 1978, p. 17; Schreiber 1978, p. 4; Turner and Tafanelli 1983, pp. 15–16; Propst *et al.* 1986, pp. 39–41; Rinne and Kroeger 1988, p. 1; Hardy *et al.* 1990, pp. 19–20, 39; Sublette *et al.* 1990, p. 138; Rinne 1991, pp. 9–10; Rinne 1999, p. 6).

TABLE 1—HABITAT PARAMETERS FOR VARYING LIFE STAGES OF SPIKEDACE

	Larvae	Juveniles	Adults
Flow Velocity in centimeters per second (inches per second).	8.4 (3.3)	16.8 (6.6)	23.3–70.0 (9.2–27.6).
Depth in centimeters (inches)	3.0–48.8 (1.2–19.2)	3.0–45.7 (1.2–18.0)	6.1–42.7 (2.4–16.8).
Gradient (percent)	No data	No data	0.3 to < 1.0.
Substrate	Primarily sand, with some over gravel or cobble.	Primarily gravel, with some sand and cobble.	Sand, gravel, cobble, and low amounts of fine sediments.

In studies on the Gila River, there were seasonal shifts in microhabitats used, involving depth or velocity, depending on the study site. It is believed that seasonal shifts in microhabitat use reflect selection by spikedace for particular microhabitats. In the cold season, when their metabolic rate decreases, spikedace near the Forks

area on the Gila River seek protected areas among the cobble of stream channel margins, where water is shallower and warmer. In other areas such as the Cliff-Gila Valley, cobbled banks for protection were generally not available, but slow-velocity areas in the lee of gravel bars and riffles were common, and spikedace shifted to these protected areas of slower velocity during the cold season. Seasonal changes in microhabitat preference by spikedace are not entirely understood, and additional study is needed (Propst *et al.* 1986, pp. 47–49).

Studies indicate a geographic variation in the portion of the stream used by spikedace. On the Verde River, outside of the April to June breeding season, 80 percent of the spikedace collected used run and glide habitat. For this study, a glide was defined as a portion of the stream with a lower gradient (0.3 percent), versus a run which had a slightly steeper gradient (0.3–0.5 percent) (Rinne and Stefferud 1996, p. 14). In contrast, spikedace in the Gila River were most commonly found in riffle areas of the stream with moderate to swift currents (Anderson 1978, p. 17) and some run habitats (J.M. Montgomery 1985, p. 21), as were spikedace in Aravaipa Creek (Barber and Minckley 1966, p. 321).

Flooding. In part, suitable habitat conditions are maintained by flooding. Periodic flooding appears to benefit spikedace in three ways: (1) Removing excess sediment from some portions of the stream; (2) removing nonnative fish species from a given area; and (3) increasing prey species diversity. Items 2 and 3 will be addressed in greater detail below.

Flooding in Aravaipa Creek has resulted in the transport of heavier loads of sediments, such as cobble, gravel, and sand, that are deposited where the stream widens, gradient flattens, and velocity and turbulence decreases. Dams formed by such deposition can temporarily cause water to back up and break into braids downstream of the dam. The braided areas provide excellent nurseries for larval and juvenile fishes (Velasco 1997, pp. 28–29).

On the Gila River in New Mexico, flows fluctuate seasonally with snowmelt, causing spring pulses and occasional floods, and late-summer or monsoonal rains produce floods of varying intensity and duration. These high flows likely rejuvenate spikedace spawning and foraging habitat (Propst *et al.* 1986, p. 3). Floods likely benefit native fish by breaking up embedded bottom materials (Mueller 1984, p. 355). A study of the Verde River analyzed the effects of flooding in 1993 and 1995, finding that the floods either stimulated spawning, enhanced recruitment of three native species, or eliminated one of the nonnative fish species (Stefferud and Rinne 1996a, p. 80).

In summary, based on the best scientific and commercial information available for spikedace, we have developed the following ranges in habitat parameters, as follows:

- Shallow water generally less than 1 m (3.3 ft) in depth;
- Slow to swift flow velocities between 5 and 80 cm per second (sec) (1.9 and 31.5 in. per sec);
- Glides, runs, riffles, the margins of pools and eddies, and backwater components;
- Sand, gravel, and cobble substrates with low or moderate amounts of fine sediment and substrate embeddedness, as maintained by a natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of transporting sediments;
- Low gradients of less than approximately one percent;
- Water temperatures in the general range of 8 to 28 °C (46.4 to 82.4 °F); and
- Elevations below 2,100 m (6,890 ft).

Loach Minnow

Microhabitat. The best scientific and commercial information available indicates that, in general, loach minnow live on the bottom of small to large streams or rivers with low gradients within shallow, swift, and turbulent riffles. They are also known to occupy pool, riffle, and run habitats in some areas. They live and feed among clean, loose, gravel-to-cobble substrates. Their reduced air bladder (the organ that aids in controlling a fish's ability to float without actively swimming) allows them to persist in high-velocity habitats with a minimal amount of energy, and they live in the interstitial spaces (openings) between rocks (Anderson and Turner 1977, pp. 2, 6–7, 9, 12–13; Barber and Minckley 1966, p. 315; Lee *et al.* 1980, p. 365; Britt 1982, pp. 10–13, 29–30; J.M. Montgomery 1985, p. 21; Marsh *et al.* 2003, p. 666; Minckley 1981, p. 165; Propst *et al.* 1988, p. 35; Rinne 1989, p. 109; Velasco 1997, p. 28; Sublette *et al.* 1990, p. 187; AGFD 1994, pp. 1, 5–11; Bagley *et al.* 1995, pp. 11, 13, 16, 17, 22; Rinne 2001, p. 69; Minckley and Marsh 2009, p. 174). Loach minnow are sometimes found in or near filamentous (threadlike) algae, which are attached to the stream substrates (Anderson and Turner 1977, p. 5; Lee *et al.* 1980, p. 365; Minckley 1981, p. 165; Sublette *et al.* 1990, p. 187; Marsh and Minckley 2009, p. 174).

Microhabitats used by loach minnow vary by life stage and stream. Adult loach minnow occupy a broad range of water velocities, with the majority of adults occurring in swift flows. Their eggs are adhesive, and are placed on the undersurfaces of rocks in the same riffles that they themselves occupy. After hatching, larval loach minnow move from the rocks under which they were spawned to areas with slower velocities than the main stream, typically remaining in areas with significantly slower velocities than juveniles and adults. Larval loach minnow occupy areas that are shallower and significantly slower than areas where eggs are found (Propst *et al.* 1988, p. 37; Propst and Bestgen 1991, p. 32). Juvenile loach minnow generally occur in areas where velocities are similar to those used by adults, and that have higher flow velocities than those occupied by larvae (Propst *et al.* 1988, pp. 36–37).

Substrate is an important component of loach minnow habitat. Studies in Aravaipa Creek and the Gila River indicate that loach minnow prefer cobble and large gravel, avoiding areas dominated by sand or fine gravel. This may be because loach minnow maintain a relatively stationary position on the bottom of a stream in flowing water. An irregular bottom, such as that created by cobble or larger gravels, creates pockets of lower water velocities around larger rocks where loach minnow can remain stationary with less energy expenditure (Turner and Tafanelli 1983, pp. 24–25). In the Gila and San Francisco rivers, the majority of loach minnow captured occurred in the upstream portion of a riffle, rather than in the central and lower sections of the riffle, where loose materials are more likely to fall out of the water column and settle on the stream bottom. This is likely due to the availability of interstitial spaces in the cobble-rubble substrate, which became filled with sediment more quickly in the central and lower sections of a riffle (Propst *et al.* 1984, p. 12).

Varying substrates are used during different life stages of loach minnow. Adults occur over cobble and gravel, and place their eggs in these areas. Larval loach minnow are found where substrate particles are smaller than those used by adults. Juvenile loach minnow occupy areas with substrates of larger particle size than larvae. Generally, adults exhibited a narrower preference for depth and substrate than did juveniles, and were associated with gravel to cobble substrates within a narrower range of depths (Propst *et al.*

1988, pp. 36–39; Propst and Bestgen 1991, pp. 32–33).

Loach minnow have a fairly narrow range in temperature tolerance, and their upstream distributional limits in some areas may be linked to low winter stream temperature (Propst *et al.* 1988, p. 62). Suitable temperature regimes appear to be fairly consistent across geographic areas. Studies of Aravaipa Creek, East Fork White River, the San Francisco River, and the Gila River determined that loach minnow were present in areas with water temperatures in the range of 9 to 22 °C (48.2 to 71.6 °F) (Britt 1982, p. 31; Propst *et al.* 1988, p. 62; Leon 1989, p. 1; Propst and Bestgen 1991, p. 33; Vives and Minckley 1990, p. 451).

Recent studies by the University of Arizona focused on temperature tolerances of loach minnow. In one study, fish were acclimated to a given temperature, and then temperatures were increased by 1 °C (1.8 °F) per day until test temperatures were reached. The study determined that no loach minnow survived for 30 days at 32 °C (89.6 °F), and that 50 percent mortality occurred after 30 days at 30.6 °C (87.1 °F). In addition, growth rate slowed at 28 and 30 °C (82.4 and 86.0 °F) compared to growth at 25 °C (77 °F), indicating that loach minnow were stressed at sublethal temperatures. Survival of fish in the fluctuating temperature trials of the study likely indicates that exposure to higher temperatures for short periods during a day would be less stressful to loach minnow. The study concludes that temperature tolerance in the wild may be lower due to the influence of additional stressors, including disease, predation, competition, or poor water quality. The study concludes that since 100 percent survival of loach minnow at 28 °C (82.4 °F) was observed, that little juvenile or adult mortality would occur due to thermal stress if peak water temperatures remain at or below that level (Bonar *et al.* 2005, pp. 6–8, 28, 33).

Gradient may influence the distribution and abundance of loach minnow. In studies of the San Francisco River, Gila River, Aravaipa Creek, and the Blue River, loach minnow occurred in stream reaches where the gradient was generally low, ranging from 0.3 to 2.2 percent (Rinne 1989, p. 109; Rinne 2001, p. 69).

Table 2 compares specific parameters of microhabitats occupied by loach minnow at various ages as identified through studies completed to date. Studies on habitat occupied by loach minnow have been completed on the Gila River, Tularosa River, San Francisco River, Aravaipa Creek, Deer Creek, and Eagle Creek (Barber and Minckley 1966, p. 321; Britt 1982, pp. 1, 5, 10–12, 29; Turner and Tafanelli 1983, pp. 15–20, 26; Propst *et al.* 1984, pp. 7–12; Propst *et al.* 1988, pp. 32, 36–39; Rinne 1989, pp. 111–113, 116; Propst and Bestgen 1991, p. 32; Vives and Minckley 1990, pp. 451–452; Propst and Bestgen 1991, pp. 32–33; Velasco 1997, pp. 5–6; Marsh *et al.* 2003, p. 666).

TABLE 2—HABITAT PARAMETERS FOR VARYING LIFE STAGES OF LOACH MINNOW

	Egg	Larvae	Juveniles	Adults
Flow Velocity in centimeters per second (inches per second).	3.0–91.4 (1.2–36.0) ...	0.0–48.8 (0.0–19.2) ...	3.0–85.3 (1.2–33.6) ...	0.0–79.2 (0.0–31.2).
Depth in centimeters (inches)	3.0–30.5 (1.2–12)	3.0–45.7 (1.2– 8.0)	6.1–42.7 (2.4–16.8) ...	6.1–45.7 (2.4–18.0).
Substrate	Large gravel to rubble	No data	No data	Gravel to cobble.

There are some differences in microhabitats occupied by loach minnow in different areas. Studies completed in New Mexico determined that there were significant differences in water velocities occupied among the three study sites, with the mean velocities at 37.4 (Tularosa River), 56.3 (Forks area of the Gila River) and 60.5 cm per second (Cliff-Gila Valley site on the Gila River). Differences in water depth were not as pronounced, however. Much of the variation in microhabitat utilization may be explained by habitat availability, as the compared streams varied in size (Propst *et al.* 1988, pp. 37–43).

Flooding. Flooding also plays an important role in habitat suitability for loach minnow. In areas where substantial diversions (structures created to divert water to pools for pumping from the stream) or impoundments have been constructed, loach minnow are less likely to occur (Propst *et al.* 1988, pp. 63–64; Propst and Bestgen 1991, p. 37). This is in part due to habitat changes caused by the construction of the diversions, and in part due to the reduction of beneficial effects of flooding on loach minnow habitat. Flooding appears to positively affect loach minnow population dynamics by resulting in higher recruitment (reproduction and survival of young) and by decreasing the abundance of nonnative fishes (addressed further below) (Stefferud and Rinne 1996b, p. 1).

Flooding also cleans, rearranges, and rehabilitates important riffle habitat (Propst *et al.* 1988, pp. 63–64). Flooding allows for the scouring of sand and gravel in riffle areas, which reduces the degree of embeddedness of cobble and boulder substrates (Britt 1982, p. 45). Typically, sediment is carried along the bed of a stream and deposited at the downstream, undersurface side of cobbles and boulders. Over time, this can result in the filling of cavities created under cobbles and boulders (Rinne 2001, p. 69). Flooding removes the extra sediment, and cavities created under cobbles by scouring action of the flood waters provides enhanced spawning habitat for loach minnow.

Studies on the Gila, Tularosa, and San Francisco rivers found that flooding is primarily a positive influence on native fish, and apparently had a positive influence on the relative abundance of loach minnow (Britt 1982, p. 45). Rather than following a typical pattern of winter mortality and population decline, high levels of loach minnow recruitment occurred after the flood, and loach minnow relative abundance remained high through the next spring. Flooding enhanced and enlarged loach minnow habitat, resulting in a greater survivorship of individuals through winter and spring (Propst *et al.* 1988, p. 51). Similar results were observed on the Gila and San Francisco rivers following flooding in 1978 (Britt 1982, p. 45).

In summary, based on the best scientific and commercial information available for loach minnow, we have developed generalized ranges in habitat parameters within streams or rivers, as follows:

- Shallow water generally less than 1 m (3.3 ft) in depth;
- Slow to swift flow velocities between 0 and 80 cm per sec (0.0 and 31.5 in. per sec);
- Pools, runs, riffles and rapids;
- Sand, gravel, cobble, and rubble substrates with low or moderate amounts of fine sediment and substrate embeddedness, as maintained by a

natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, flow regime that allow for adequate river functions, such as flows capable of transporting sediments;

- Water temperatures in the general range of 8 to 25 °C (46.4 to 77 °F);
- Low stream gradients of less than approximately 2.5 percent; and
- Elevations below 2,500 m (8,202 ft).

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Spikedace

Food. Spikedace are active, highly mobile fish that visually inspect drifting materials both at the surface and within the water column. Gustatory inspection, or taking the potential prey items into the mouth before either swallowing or rejecting it, is also common (Barber and Minckley 1983, p. 37). Prey body size is small, typically ranging from 2 to 5 mm (0.08 to 0.20 in) long (Anderson 1978, p. 36).

Stomach content analysis of spikedace determined that mayflies, caddisflies, true flies (Order Diptera), stoneflies, and dragonflies (Order Odonata) are all potential prey items. In one Gila River study, the frequency of occurrence was 71 percent for mayflies, 34 percent for true flies, and 25 percent for caddisflies (Propst *et al.* 1986, p. 59). A second Gila River study of four samples determined that total food volume was composed of 72.7 percent mayflies, 17.6 percent caddisflies, and 4.5 percent true flies (Anderson 1978, pp. 31–32). At Aravaipa Creek, mayflies, caddisflies, true flies, stoneflies, and dragonflies were all prey items for spikedace, as were some winged insects and plant materials (Schreiber 1978, pp. 12–16, 29, 35–37). Barber and Minckley (1983, pp. 34–38) found that spikedace at Aravaipa Creek also consumed ants and wasps (Order Hymenoptera), spiders (Order Areneae), beetles (Order Coleoptera), true bugs, and water fleas (Order Cladocera).

Spikedace diet varies seasonally (Barber and Minckley 1983, pp. 34–38). Mayflies dominated stomach contents in July, but declined in August and September, increasing in importance again between October and June. When mayflies were available in lower numbers, spikedace consumed a greater variety of foods, including true bugs, true flies, beetles, and spiders.

Spikedace diet varies with age class as well. Young spikedace fed on a diversity of small-bodied invertebrates occurring in and on sediments along the margins of the creek. True flies were found most frequently, but water fleas and aerial adults of aquatic and terrestrial insects also provide significant parts of the diet. As juveniles grow and migrate into the swifter currents of the channel, mayfly nymphs (invertebrates between the larval and adult life stages, similar to juveniles) and adults increase in importance (Barber and Minckley 1983, pp. 36–37).

Spikedace are dependent on aquatic insects for sustenance, and the production of the aquatic insects consumed by spikedace occurs mainly in riffle habitats (Propst *et al.* 1986, p. 59). Barber and Minckley (1983, pp. 36–37, 40) found that spikedace in pools had eaten the least diverse food, while those from riffles contained a greater variety of taxa, indicating that the presence of riffles in good condition and abundance help to ensure that a sufficient number and variety of prey items will continue to be available for spikedace.

Aquatic invertebrates that constitute the bulk of the spikedace diet have specific habitat parameters of their own. Mayflies occur primarily in fresh water with an abundance of oxygen. Spikedace consume mayflies from the genus *Baetidae* (Schreiber 1978, p. 36), which are free-ranging species of rapid waters that maintain themselves in currents by clinging to pebbles. Spikedace also consumed individuals from two other mayfly genera (*Heptageniidae* and *Ephemerellidae*), which are considered "clinging species," as they cling tightly to stones and other objects and may be found in greatest abundance in crevices and on the undersides of stones (Pennak 1978, p. 539). The importance of gravel and cobble substrates is illustrated by the fact that the availability of these prey species, which make up the bulk of the spikedace diet, requires these surfaces to persist.

The availability of food for spikedace is affected by flooding. The onset of flooding corresponds with an increased diversity of food items, as inflowing flood water carries terrestrial invertebrates, such as ants, bees, and wasps, into aquatic areas (Barber and Minckley 1983, p. 39).

Water. As a purely aquatic species, spikedace are entirely dependent on streamflow habitat for all stages of their life cycle. Therefore, perennial flows are an essential feature. Areas with intermittent flows may serve as connective corridors between occupied or seasonally occupied habitat through which the species may move when the habitat is wetted.

In addition to water quantity, water quality is important to spikedace. Water with no or low levels of pollutants is essential for the survival of spikedace. For spikedace, pollutants such as copper, arsenic, mercury, cadmium, human and animal waste products, pesticides, suspended sediments, ash, and gasoline or diesel fuels should not be present at high levels (D. Baker, Service, pers. comm. 2005). In addition, for freshwater fish, dissolved oxygen should generally be greater than 3.5 cubic centimeters per liter (cc per l) (Bond 1979, p. 215). Below this, some stress to fish may occur.

Fish kills have been documented within the range of the spikedace, including on the San Francisco River (Rathbun 1969, pp. 1–2) and the San Pedro River (Eberhardt 1981, pp. 1–4, 6–9, 11–12, 14, 16, and Tables 2–8). Occupancy by spikedace at the San Francisco River site is less certain, but spikedace were present in the Gila River upstream of its confluence with the San Francisco. Spikedace were present in the San Pedro River up through 1969 within the area affected by the Cananea Mine spill, which extended 97 km (60 mi) north of the United States/Mexico border (Eberhardt 1981, p. 3). All aquatic life within this 97-km (60-mi) stretch was killed between 1977 and 1979, and no spikedace records are known after that time. For both the San Francisco and San Pedro rivers, leaching ponds associated with copper mines released waters into the streams, resulting in elevated levels of toxic chemicals. For the San Pedro River, this included elevated levels of iron, copper, manganese, and zinc. Both incidents resulted in die-offs of species inhabiting the streams. Eberhardt (1981, pp. 1, 3, 9, 10, 14–15) noted that no bottom-dwelling aquatic insects, live fish, or aquatic vegetation of any kind were found in the area affected by the spill. Rathbun (1969, pp. 1–2) reported similar results for the San Francisco River. As detailed above under the threats discussion, spills or discharges have occurred in the Gila River and affected streams within the watersheds of spikedace, including the Gila River, San Francisco River, San Pedro River, and some of their tributaries (Environmental Protection Agency 1997, pp. 24–67; Arizona Department of Environmental Quality 2000, p. 6; Church *et al.* 2005, p. 40; Arizona Department of Environmental Quality 2007, p. 1).

Based on the information above, we identify an appropriate prey base and water quality to be a PBF for spikedace, as follows:

- An abundant aquatic insect food base consisting of mayflies, true flies,

black flies, caddisflies, stoneflies, and dragonflies;

• Streams with no or no more than low levels of pollutants;

• Perennial flows, or interrupted stream courses that are periodically dewatered but that serve as connective corridors between occupied or seasonally occupied habitat and through which the species may move when the habitat is wetted;

• Streams with a natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of transporting sediments.

Loach Minnow

Food. Loach minnow are opportunistic, feeding on riffle-dwelling larval mayflies, black flies, and true flies, as well as from larvae of other aquatic insect groups such as caddisflies and stoneflies. Loach minnow in the Gila, Tularosa, and San Francisco rivers consumed primarily true flies and mayflies, with mayfly nymphs being an important food item throughout the year. Mayfly nymphs constituted the most important food item throughout the year for adults studied on the Gila and San Francisco Rivers, while larvae of true flies (insects of the order Diptera) were most common in the winter months (Propst *et al.* 1988, p. 27; Propst and Bestgen 1991, p. 35). In Aravaipa Creek, loach minnow consumed 11 different prey items, including mayflies, stoneflies, caddisflies, and true flies. Mayflies constituted the largest percentage of their diet during this study except in January, when true flies made up 54.3 percent of the total food volume (Schreiber 1978, pp. 40–41).

Loach minnow consume different prey items during their various life stages. Both larvae and juveniles primarily consumed true flies, which constituted approximately 7 percent of their food items in one year, and 49 percent the following year in one study. Mayfly nymphs were also an important dietary element at 14 percent and 31 percent during a one-year study. Few other aquatic macroinvertebrates were consumed (Propst *et al.* 1988, p. 27). In a second study, true fly larvae and mayfly nymphs constituted the primary food of larval and juvenile loach minnow (Propst and Bestgen 1991, p. 35).

The availability of pool and run habitats affects availability of prey species. While most of the food items of loach minnow are riffle species, two are not, including true fly larvae and mayfly nymphs. Mayfly nymphs, at times, made up 17 percent of the total food volume of loach minnow in a study at Aravaipa Creek (Schreiber 1978, pp. 40–41). The presence of a variety of habitat types is, therefore, important to the persistence of loach minnow in a stream, even though they are typically associated with riffles.

Water Quality. Water, with no or low pollutant levels, is important for the conservation of loach minnow. For loach minnow, waters should have no more than low levels of pollutants, such as copper, arsenic, mercury, cadmium, human and animal waste products, pesticides, suspended sediments, and gasoline or diesel fuels (D. Baker, Service, pers. comm. 2005). In addition, for freshwater fish, dissolved oxygen should generally be greater than 3.5 cc per l (Bond 1979, p. 215). Below this, some stress to the fish may occur.

Fish kills associated with previous mining accidents, as well as other contaminants issues, are detailed under the spikedace discussion above. These incidents occurred within the historical range of the loach minnow. As with spikedace, loach minnow were known to occur in the area affected by the Cananea Mine spill up through 1961. All aquatic life within the affected area was killed between 1977 and 1979, and no loach minnow records are known after that time. On the San Francisco River, loach minnow are known to have occurred in the general area of the spill in the 1980s and 1990s (ASU 2002). Additional spills or discharges have occurred in the Gila River and affected streams within the watersheds occupied by loach minnow, including the Gila River, San Francisco River, San Pedro River, and some of their tributaries (Environmental Protection Agency 1997, pp. 24–67; Arizona Department of Environmental Quality 2000, p. 6; Church *et al.* 2005, p. 40; Arizona Department of Environmental Quality 2007, p. 1).

Based on the information above, we identify an appropriate prey base and water quality to be a PBF for the loach minnow, as follows:

• An abundant aquatic insect food base consisting of mayflies, true flies, black flies, caddisflies, stoneflies, and dragonflies;

• Streams with no or no more than low levels of pollutants;

• Perennial flows, or interrupted stream courses that are periodically dewatered but that serve as connective corridors between occupied or seasonally occupied habitat and through which the species may move when the habitat is wetted; and

• Streams with a natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of transporting sediments.

Cover or Shelter

Spikedace. No specific information on habitat parameters used specifically for cover and shelter is available for spikedace. Therefore, we have not identified any specific physical and biological features specific to cover and shelter for spikedace.

Loach Minnow. As noted above, adult loach minnow are sometimes associated with filamentous algae, which may serve as a protective cover (Anderson and Turner 1977, p. 5; Lee *et al.* 1980, p. 365; Minckley 1981, p. 165; Sublette *et al.* 1990, p. 187; Marsh and Minckley 2009, p. 174).

Loach minnow adults place their adhesive eggs on the undersides of rocks, with the rock serving as protective cover. Probst *et al.* (1988, p. 21) found that the rocks used were typically elevated from the surface of the streambed on the downstream side, with most rocks flattened and smooth-surfaced. Adult loach minnow remain with the eggs, so that the rock serves as a protective cover for them as well (Propst *et al.* 1988, pp. 21–25, 36–39).

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Spikedace

Suitable sites. Spikedace occur in specific habitat during the breeding season, with female and male spikedace becoming segregated. Females occupy pools and eddies, while males occupy riffles flowing over sand and gravel beds in water approximately 7.9 to 15.0 cm (3.1 to 5.9 in) deep. Females then enter the riffles occupied by the males before eggs are released into the water column (Barber *et al.* 1970, pp. 11–12).

Spikedace eggs are adhesive and develop among the gravel and cobble of the riffles following spawning. Spawning in riffle habitat ensures that the eggs are well oxygenated and are not normally subject to suffocation by sediment deposition due to the swifter flows found in riffle habitats. However, after the eggs have adhered to the gravel and cobble substrate, excessive sedimentation could cause suffocation of the eggs (Propst *et al.* 1986, p. 40).

Larval and juvenile spikedace occupy peripheral portions of streams that have slower currents (Anderson 1978, p. 17; Propst *et al.* 1986, pp. 40–41). Gila River studies found larval spikedace in velocities of 8.4 cm per second (3.3 in. per sec) while juvenile spikedace occupy areas with velocities of approximately 16.8 cm per second (6.6 in. per sec) (Propst *et al.* 1986, p. 41).

Once they emerge from the gravel of the spawning riffles, spikedace larvae disperse to stream margins where water velocity is very slow or still. Larger larval and juvenile spikedace (those fish 25.4 to 35.6 mm (1.0 to 1.4 in) in length) occurred over a greater range of water velocities than smaller larvae, but still occupied water depths of less than 32.0 cm (12.6 in) (Propst *et al.* 1986, p. 40). Juveniles and larvae are also occasionally found in quiet pools or backwaters (e.g., pools that are connected with, but out of, the main river channel) lacking streamflow (Sublette *et al.* 1990, p. 138).

During a study on the Gila River, 60 percent of spikedace larvae were found over sand-dominated substrates, while 18 percent were found over gravel, and an additional 18 percent found over cobble-dominated substrates. While 45 percent of juvenile spikedace were found over sand substrates, an additional 45 percent of the juveniles were found over gravel substrates, with the remaining 10 percent associated with cobble-dominated substrates. Juveniles occupy a wider range in flow velocities than larvae (0.0 to 57.9 cm per second (22.8 in. per second)), but occurred at similar depths as larvae (Propst *et al.* 1986, pp. 40–41).

As noted above, excessive sedimentation can lead to suffocation of eggs. Clean substrates are therefore essential for successful breeding. Both flooding and unaltered flow regimes are essential for maintenance of suitable substrates. As noted above under habitat requirements, periodic flooding appears to benefit spikedace by removing excess sediment from some portions of the stream, breaking up embedded bottom materials, or rearranging sediments in ways that restore suitable habitats. Flooding may also stimulate spawning or enhance recruitment (Mueller 1984, p. 355; Propst *et al.* 1986, p. 3; Stefferud and Rinne 1996a, p. 80; Minckley and Meffe 1987, pp. 99, 100; Rinne and Stefferud 1997, pp. 159, 162; Velasco 1997, pp. 28–29).

Streams in the southwestern United States have a wide fluctuation in flows and some are periodically dewatered. While portions of stream segments included in this proposed designation may experience dry periods, they are still considered important because the spikedace is adapted to stream systems with fluctuating water levels. While they cannot persist in dewatered areas, spikedace will use these areas as connective corridors between occupied or seasonally occupied habitat when they are wetted. Areas that serve as connective corridors are those ephemeral or intermittent stream segments that connect two or more other perennial stream segments.

Therefore, based on the information above, we identify the following to be PBFs for spikedace:

- Sand, gravel, and cobble substrates;
- Riffle habitat;
- Slower currents along stream margins with appropriate stream velocities for larvae;
- Appropriate water depths for larvae and juvenile spikedace;
- Flow velocities that encompass the range of 8.5 cm per sec (3.3 in. per sec) to 57.9 cm per sec (22.8 in. per sec); and
- Streams with a natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of transporting sediments.

Loach Minnow

Adult loach minnow attach eggs to the undersurfaces of rocks in the same riffles in which they are typically found. In studies conducted on the Gila River, water velocities in these areas ranged from 3.0 to 91.4 cm per second (36.0 in. per second). The majority of rocks with attached eggs were found in water flowing at approximately 42.7 cm per second (16.8 in. per second). The range of depths in which rocks with eggs attached were found was 3.0 to 30.5 cm (1.2 to 12 in), with the majority found between 6.1 and 21.3 cm (2.4 and 8.4 in) (Propst *et al.* 1988, pp. 36–39).

Loach minnow larvae occupy shallower and slower water than eggs. In Gila River studies, larvae occurred in flow velocities averaging 7.9 cm per second (3.1 in. per second), and in depths between 3.0 to 45.7 cm (1.2 to 18 in). Juveniles occurred in areas with higher velocities, ranging between 35.1 and 85.3 cm per second (13.8 and 33.6 in. per second). Juveniles occurred in slightly deeper water of approximately 6.1 to 42.7 cm (2.4 to 16.8 in) (Propst *et al.* 1988, pp. 36–39).

As noted above under general habitat requirements, flooding is important in maintaining loach minnow habitat, including habitats used for breeding. Flooding reduces embeddedness of cobble and boulder substrates under which eggs are placed (Britt 1982, p. 45).

The construction of water diversions have reduced or eliminated riffle habitat in many stream reaches, resulting in pool development. Loach minnow are generally absent in stream reaches affected by impoundments. While the specific factors responsible for this are not known, it is likely related to modification of thermal regimes, habitat, food base, or discharge patterns (Propst *et al.* 1988, p. 64; Minckley 1973, pp. 1–11).

Therefore, based on the information above, we identify the following to be PBFs for loach minnow:

- Cobble substrates;
- Riffle habitats;
- Slower currents along stream margins with appropriate stream velocities for larvae;
- Appropriate water depths for larvae and juvenile loach minnow;
- Flow velocities that encompass the range of 6.1 to 42.7 cm (2.4 to 16.8 in); and
- Streams with a natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of transporting sediments.

Habitats Protected From Disturbance or Representative of the Historical, Geographical, and Ecological Distributions of the Species

Spikedace

Nonnative aquatic species. One of the primary reasons for the decline of native species is the presence of nonnative fishes, as described above under Factors C and E above. Interactions with nonnative fishes can occur in the form of interference competition (e.g., predation) or exploitive competition (competition for resources), and introduced species are considered a primary factor in the decline of native species (Anderson 1978, pp. 50–51; Miller *et al.* 1989, p. 1; Lassuy 1995, p. 392). Multiple nonnative fish species are now present in the range of spikedace and loach minnow. In addition, nonnative parasites are also present.

Flooding may help to reduce the threat presented by nonnative species. Minckley and Meffe (1987, pp. 99–100) found that flooding, as part of a natural flow regime, may temporarily remove nonnative fish species, which are not adapted to flooding patterns in the Southwest. Thus flooding consequently removes the competitive pressures of nonnative fish species on native fish species which persist following the flood. Minckley and Meffe (1987, pp. 99–100) studied the differential response of native and nonnative fishes in seven unregulated and three regulated streams or stream reaches that were sampled before and after major flooding and noted that fish faunas of canyon-bound reaches of unregulated streams invariably shifted from a mixture of native and nonnative fish species to predominantly, and in some cases exclusively, native fishes after

large floods. Samples from regulated systems indicated relatively few or no changes in species composition due to releases from upstream dams at low, controlled volumes. However, during emergency releases, effects to nonnative fish species were similar to those seen with flooding on unregulated systems. There is some variability in fish response to flooding. Some nonnative species, such as smallmouth bass and green sunfish, appear to be partially adapted to flooding, and often reappear in a few weeks (Minckley and Meffe 1987, p. 100).

The information presented above indicates the detrimental effects of interference and exploitive competition with nonnative species to spikedace, as well as the issues presented by the introduction of nonnative parasites. Therefore, based on this information, we identify the necessary PBFs for spikedace to be:

- Habitat devoid of nonnative aquatic species, or habitat in which nonnative aquatic species are at levels that allow persistence of spikedace.

Loach Minnow

As with spikedace (discussed above), interference and exploitive competition with nonnative species can be detrimental to loach minnow. Interference competition, in the form of predation, may result from interactions between loach minnow and nonnative channel and flathead catfish, while exploitive competition likely occurs with red shiner. The discussion under Factor C above on disease and predation includes information on other nonnative aquatic species, such as Asian tapeworm, anchor worm, and Ich, which are also detrimental to loach minnow.

The discussion under spikedace on flooding and its benefits in potentially minimizing threats from nonnative fishes applies to loach minnow as well.

The information presented above indicates the detrimental effects of interference and exploitive competition with nonnative species to loach minnow, as well as the issues presented by the introduction of nonnative parasites. Therefore, based on this information, we identify the PBFs for loach minnow as follows:

- Habitat devoid of nonnative aquatic species, or habitat in which nonnative aquatic species are at levels that allow persistence of loach minnow; and
- Streams with a natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of transporting sediments.

Physical and Biological Features for Spikedace and Loach Minnow

Based on the above needs and our current knowledge of the life history, biology, and ecology of the species and the habitat requirements for sustaining the essential life history functions of the species, we have determined that PBFs for the spikedace are:

(1) Habitat to support all egg, larval, juvenile, and adult spikedace. This habitat includes perennial flows with a stream depth generally less than 1 m (3.3 ft), and with slow to swift flow velocities between 5 and 80 cm per second (1.9 and 31.5 in. per second). Appropriate stream microhabitat types include glides, runs, riffles, the margins of pools and eddies, and backwater components over sand, gravel, and cobble substrates with low or moderate amounts of fine sediment and substrate embeddedness. Appropriate habitat will have a low gradient of less than approximately 1.0 percent, at elevations below 2,100 m (6,890 ft). Water temperatures should be in the general range of 8.0 to 28.0 °C (46.4 to 82.4 °F);

(2) An abundant aquatic insect food base consisting of mayflies, true flies, black flies, caddisflies, stoneflies, and dragonflies;

(3) Streams with no or no more than low levels of pollutants;

(4) Perennial flows, or interrupted stream courses that are periodically dewatered but that serve as connective corridors between occupied or seasonally occupied habitat and through which the species may move when the habitat is wetted;

(5) No nonnative aquatic species, or levels of nonnative aquatic species that are sufficiently low as to allow persistence of spikedace; and

(6) Streams with a natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of transporting sediments.

Based on the above needs and our current knowledge of the life history, biology, and ecology of the species and the habitat requirements for sustaining the essential life history functions of the species, we have determined that PBFs for the loach minnow are:

(1) Habitat to support all egg, larval, juvenile, and adult loach minnow. This habitat includes perennial flows with a stream depth of generally less than 1 m (3.3 ft), and with slow to swift flow velocities between 0 and 80 cm per second (0.0 and 31.5 in. per second). Appropriate microhabitat types include pools, runs, riffles, and rapids over sand, gravel, cobble, and rubble substrates with low or moderate amounts of fine sediment and substrate embeddedness. Appropriate habitats have a low stream gradient of less than 2.5 percent, are at elevations below 2,500 m (8,202 ft). Water temperatures should be in the general range of 8.0 to 25.0 °C (46.4 to 77 °F);

(2) An abundant aquatic insect food base consisting of mayflies, true flies, black flies, caddisflies, stoneflies, and dragonflies;

(3) Streams with no or no more than low levels of pollutants;

(4) Perennial flows, or interrupted stream courses that are periodically dewatered but that serve as connective corridors between occupied or seasonally occupied habitat and through which the species may move when the habitat is wetted;

(5) No nonnative aquatic species, or levels of nonnative aquatic species that are sufficiently low to allow persistence of loach minnow; and

(6) Streams with a natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of transporting sediments.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas determined to be occupied at the time of listing contain the PBFs and may require special management considerations or protection. We believe each area included in this proposed designation requires special management and protections as described in our unit descriptions.

Special management considerations for each area will depend on the threats to the spikedace or loach minnow, or both, in that critical habitat area. For example, threats requiring special management include nonnative fish species and the continued spread of nonnative fishes into spikedace or loach minnow habitat. Other threats requiring special management include the threat of fire, retardant application during fire, and excessive ash and sediment following fire. Poor water quality and adequate quantities of water for all life stages of spikedace and loach minnow threaten these fish and may require special management actions or protections. Improper livestock grazing can be a threat to spikedace and loach minnow and their habitats, although concern for this threat has lessened due to improved management practices. The construction of water diversions can

include increasing water depth behind diversion structures, and has reduced or eliminated riffle habitat in many stream reaches. In addition, loach minnow are generally absent in stream reaches affected by impoundments. While the specific factor responsible for this is not known, it is likely related to modification of thermal regimes, habitat, food base, or discharge patterns.

We have included below in our description of each of the critical habitat areas for the spikedace and loach minnow a discussion of the threats occurring in that area requiring special management or protections.

Criteria Used To Identify Critical Habitat

As required by section 4(b) of the Act, we used the best scientific and commercial data available in determining areas within the geographical area occupied at the time of listing that contain the features essential to the conservation of spikedace and loach minnow, and areas outside of the geographical areas occupied at the time of listing that are essential for the conservation of spikedace and loach minnow. Sources of data for these two species include multiple databases maintained by universities and State agencies for Arizona and New Mexico, existing recovery plans, endangered species reports (Propst *et al.* 1986, 1988), and numerous survey reports on streams throughout the species' range. We have also reviewed available information that pertains to the habitat requirements of this species. Sources of information on habitat requirements include existing recovery plans, endangered species reports, studies conducted at occupied sites and published in peer-reviewed articles, agency reports, and data collected during monitoring efforts.

The recovery plans for spikedace and loach minnow were both finalized in 1991 (Service 1991a; Service 1991b), and are in need of revision. We are in the process of convening a recovery team for this purpose. In the interim, we have developed an internal preliminary assessment of potential steps necessary for achieving recovery of spikedace and loach minnow.

The current distribution of both spikedace and loach minnow is much reduced from their historical distribution. We anticipate that recovery will require establishing populations in streams and watersheds that more closely approximate their historical distribution in order to ensure there are adequate numbers of fish in stable populations, and that these populations occur over a wide geographic area. This will help to ensure that catastrophic events, such as wildfire or contaminant spills, cannot simultaneously affect all known populations. We developed necessary steps for downlisting as well as delisting. For spikedace, our preliminary assessment recommends that downlisting criteria include that one additional stable population be established in either the Salt or Verde subbasin, and the number of occupied streams be increased from 8 (the current level) to 10 rangewide. Occupancy may be established through natural means (*i.e.,* expansion by the fish themselves) or through translocation efforts. For delisting of spikedace, our preliminary assessment indicates that a stable population should be established in the remaining subbasin, and that occupied streams within the historical range of the species be increased to 12. In addition, the goal is to ensure that all genetic lineages are adequately represented in the 12 occupied streams, where appropriate and feasible.

For loach minnow, our preliminary assessment recommends that, in order to delist the species, the number of occupied streams be increased from 19 (the current level) to 22, with one occupied stream in each of the major watersheds. For delisting, the preliminary assessment recommends increasing the number of occupied streams to 25, with at least one occupied stream in each of the major watersheds, and that remaining genetic lineages be adequately represented in at least one stream, where appropriate and feasible.

The preliminary assessment makes other recommendations, including establishing protective measures for connective areas, maintaining captive breeding stocks, and developing plans for augmentation of captive breeding stock.

Our preliminary assessment of the habitats needed for conservation of these species attempts to provide geographic distribution across the ranges of the species, represent the full ranges of habitat and environmental variability the species have occupied, and preserve existing genetic diversity. We anticipate that the final recovery plans developed by the Recovery Team, once formed, may vary from this assessment, and will likely provide additional criteria and prioritization of recovery actions. However, we believe that the broad goals used in our preliminary assessment will be similar to those for the recovery planning process as recovery will require expanding the currently contracted ranges and establishing additional populations.

We determined that all areas proposed for designation contain the PBFs for spikedace or loach minnow. There are no developed areas within the proposed designation except for barriers constructed on streams or road crossings of streams, which do not remove the suitability of these areas for these species.

We used the following ruleset to determine which areas to include within this proposal:

(1) Evaluate the suitability of stream segments that are within the geographic area occupied at the time of listing and:

(a) Retain those segments that contain sufficient PBFs to support life-history functions essential for the conservation of the species, and

(b) Eliminate those areas that were known to be occupied at listing, but that no longer support any PBFs for the species or that have been permanently altered so that restoration is unlikely, or both.

(2) Evaluate stream segments not known to be within the geographic area occupied at listing, but that are within the historical range of the species to determine if they are essential to the survival and recovery of the species. Essential areas are those that:

(a) Serve as an extension of habitat in the unit, as existing habitat is insufficient to recover the species;

(b) Expand the geographic distribution across the range of the species, as the current geographic distribution is reduced to 10 to 20 percent of historical range, and concentrates fish in a few remaining areas that are more likely susceptible to catastrophic events; and

(c) Connect to other occupied areas, which will enhance genetic exchange between populations.

We considered the known occupancy of the area, as well as the suitability and level of adverse impacts to habitat within each unit. We believe the areas proposed provide for the conservation of the spikedace and the loach minnow because they include habitat for all extant populations, provide habitat for all known genetic lineages, and include habitat for connectivity and dispersal opportunities within units. Such opportunities for dispersal assist in maintaining the population structure and distribution of the two species.

As a final step, we evaluated those stream segments retained through the above analysis, and refined the starting and end points by evaluating the presence or absence of appropriate PBFs. We selected upstream and downstream cutoff points to exclude areas that are highly degraded and are not likely restorable. For example,

permanently dewatered areas, permanently developed areas, or areas in which there was a change to unsuitable parameters (*e.g.,* a steep gradient, bedrock substrate) were used to mark the start or endpoint of a stream segment proposed for designation. Critical habitat stream segments were then mapped using ArcMap (Environmental Systems Research Institute, Inc.), a Geographic Information Systems program.

The areas proposed for designation as critical habitat are designed to provide sufficient riverine and associated floodplain area for breeding, non-breeding, and dispersing adult spikedace and loach minnow, as well as for the habitat needs for juvenile and larval stages of these fishes. In general, the physical and biological features of critical habitat for spikedace and loach minnow are contained within the riverine ecosystem formed by the wetted channel and the adjacent floodplains within 91.4 lateral m (300 lateral ft) on either side of bankfull stage, except where bounded by canyon walls. Areas within the lateral extent also contribute to the PBFs, including water quality and intermittent areas through which fish may move when wetted. Spikedace and loach minnow use the riverine ecosystem for feeding, breeding, and sheltering while breeding and migrating.

This proposed designation takes into account the naturally dynamic nature of riverine systems and floodplains (including riparian and adjacent upland areas) that are an integral part of the stream ecosystem. For example, riparian areas are seasonally flooded habitats (i.e., wetlands) that are major contributors to a variety of functions vital to fish within the associated stream channel (Brinson *et al.* 1981, pp. 2–61, 2–69, 2–72, 2–75, 2–84 through 2–85; Federal Interagency Stream Restoration Working Group 1998). They are responsible for energy and nutrient cycling, filtering runoff, absorbing and gradually releasing floodwaters, recharging groundwater, maintaining streamflow, protecting stream banks from erosion, and providing shade and cover for fish and other aquatic species. Healthy riparian and adjacent upland areas help ensure water courses maintain the habitat important for aquatic species (e.g., see Forest Service 1979, pp. 18, 109, 158, 264, 285, 345; Middle Rio Grande Biological Interagency Team 1993, pp. 64, 89, 94; Castelle *et al.* 1994, pp. 279–281), including the spikedace and loach minnow. Habitat quality within the mainstem river channels in the historical range of the spikedace and loach minnow is intrinsically related to the character of the floodplain and the associated tributaries, side channels, and backwater habitats that contribute to the key habitat features (e.g., substrate, water quality, and water quantity) in these reaches. We have determined that a relatively intact riparian area, along with periodic flooding in a relatively natural pattern, is important for maintaining the PBFs necessary for long-term conservation of the spikedace and the loach minnow.

The lateral extent (width) of riparian corridors fluctuates considerably between a stream's headwaters and its mouth. The appropriate width for riparian buffer strips has been the subject of several studies and varies depending on the specific function required for a particular buffer (Castelle *et al.* 1994, pp. 879–881). Most Federal and State agencies generally consider a zone 23 to 46 m (75 to 150 ft) wide on each side of a stream to be adequate (National Resource Conservation Service 1998, pp. 2–3; Moring *et al.* 1993, p. 204; Lynch *et al.* 1985, p. 164), although buffer widths as wide as 152 m (500 ft) have been recommended for achieving flood attenuation benefits (U.S. Army Corps 1999, pp. 5–29). In most instances, however, riparian buffer zones are primarily intended to reduce (i.e., buffer) detrimental impacts to the stream from sources outside the river channel. Consequently, while a riparian corridor 23 to 46 m (75 to 150 ft) in width may function adequately as a buffer, it is likely inadequate to preserve the natural processes that provide spikedace and loach minnow PBFs.

The lateral extent of streams included in this proposed designation is 91.4 m (300 ft) to either side of bankfull stage. We believe this width is necessary to accommodate stream meandering and high flows, and in order to ensure that this proposal contains the features essential to the conservation of the species. Bankfull stage is defined as the upper level of the range of channel-forming flows, which transport the bulk of available sediment over time. Bankfull stage is generally considered to be that level of stream discharge reached just before flows spill out onto the adjacent floodplain. The discharge that occurs at bankfull stage, in combination with the range of flows that occur over a length of time, govern the shape and size of the river channel (Rosgen 1996, pp. 2–2 to 2–4; Leopold 1997, pp. 62–63, 66). The use of bankfull stage and 91.4 m (300 ft) on either side recognizes the naturally dynamic nature of riverine systems, recognizes that floodplains are an integral part of the stream ecosystem, and contains the area and associated features essential to the conservation of the species.

We determined the 91.4-m (300-ft) lateral extent for several reasons. First, the implementing regulations of the Act require that critical habitat be defined by reference points and lines as found on standard topographic maps of the area (50 CFR 424.12(c)). Although we considered using the 100-year floodplain, as defined by the Federal Emergency Management Agency, we found that it was not included on standard topographic maps, and the information was not readily available from Federal Emergency Management Agency or from the U.S. Army Corps of Engineers for the areas we are proposing to designate. We suspect this is related to the remoteness of many of the stream reaches where these species occur. Therefore, we selected the 91.4-m (300-ft) lateral extent, rather than some other delineation, for three biological reasons: (1) The biological integrity and natural dynamics of the river system are maintained within this area (*i.e.,* the floodplain and its riparian vegetation provide space for natural flooding patterns and latitude for necessary natural channel adjustments to maintain appropriate channel morphology and geometry, store water for slow release to maintain base flows, provide protected side channels and other protected areas, and allow the river to meander within its main channel in response to large flow events); (2) conservation of the adjacent riparian area also helps to provide important nutrient recharge and protection from sediment and pollutants; and (3) vegetated lateral zones are widely recognized as providing a variety of aquatic habitat functions and values (*e.g.,* aquatic habitat for fish and other aquatic organisms, moderation of water temperature changes, and detritus for aquatic food webs) and help improve or maintain local water quality (see U.S. Army Corps of Engineers' Final Notice of Issuance and Modification of Nationwide Permits, March 9, 2000, 65 FR 12818).

When determining critical habitat boundaries within this proposed rule, we made every effort to avoid including structures such as bridges, diversion structures, or other structures which lack suitable PBFs for the spikedace and loach minnow. The scope of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such structures and the land under them inadvertently left inside critical habitat boundaries shown on the maps are excluded by text in this proposed rule.

Therefore, a Federal action involving these lands (if and when designated) would not trigger section 7 consultation with respect to critical habitat and the prohibition of destruction or adverse modification, unless the specific action may affect adjacent critical habitat. Where a developed structure is within the proposed critical habitat designation (*e.g.,* paved low water crossing, a portion of a stream flowing under a bridge), the area would be considered to be proposed critical habitat if it continues to contain one or more of the PBFs.

We propose eight units for designation based on sufficient PBFs being present to support spikedace or loach minnow life processes. Some segments contain all PBFs and support multiple life processes. Some segments contain only a portion of the PBFs necessary to support the spikedace or the loach minnow's particular use of that habitat.

Proposed Critical Habitat Designation

We are proposing 1,168 km (726 mi) of streams as critical habitat for spikedace, and 1,141 km (709 mi) of streams as critical habitat for loach minnow. Of this total mileage, 874 km (543 mi) of streams are overlapping (*i.e.,* proposed for designation for both species). The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for spikedace and loach minnow. The eight units we propose as critical habitat occur in portions of the Verde River and its tributaries; the Salt River and its tributaries; the San Pedro River and its tributaries; Bonita Creek; Eagle Creek; the San Francisco River and its tributaries; the Blue River and its tributaries; and the Gila River and its tributaries. Tables 3 and 4 show the occupied units for the spikedace and the loach minnow. Table 5 provides a breakdown of river miles by type of landowner or manager for all proposed critical habitat units for the spikedace and the loach minnow.

TABLE 3—OCCUPANCY OF PROPOSED CRITICAL HABITAT UNITS BY SPIKEDACE

Stream segment	Occupied at time of listing	Currently occupied?	Translocated population
Unit 1—Verde River Subbasin			
Verde River mainstem	Yes	Yes	No.
Granite Creek	No	No	No.
Oak Creek	No	No	No.
Beaver and Wet Beaver Creek	Yes	No	No.
West Clear Creek	Yes	No	No.
Fossil Creek	No	Yes	Yes.
Unit 2—Salt River Subbasin			
Tonto Creek	Yes	No	No.
Greenback Creek	No	No	No.
Rye Creek	No	No	No.
Spring Creek	No	No	Proposed.
Rock Creek	No	No	Proposed.
Unit 3—San Pedro River Subbasin			
San Pedro River	Yes	No	No.
Hot Springs Canyon	No	Yes	Yes.
Bass Canyon	No	No	No.
Redfield Canyon	No	Yes	Yes.
Aravaipa Creek	Yes	Yes	No.
Deer Creek	No	No	No.
Turkey Creek	No	No	No.
Unit 4—Bonita Creek Subbasin			
Bonita Creek mainstem	No	Yes	Yes.
Unit 5—Eagle Creek Subbasin			
Eagle Creek mainstem	Yes	Yes	No.
Unit 6—San Francisco River Subbasin			
San Francisco River	Yes	Yes	Yes.
Unit 7—Blue River Subbasin			
Blue River	No	No	Proposed.
Campbell Blue Creek	No	No	No.
Dry Blue Creek	No	No	No.
Little Blue Creek	No	No	No.
Pace Creek	No	No	No.
Frieborn Creek	No	No	No.

TABLE 3—OCCUPANCY OF PROPOSED CRITICAL HABITAT UNITS BY SPIKEDACE—Continued

Stream segment	Occupied at time of listing	Currently occupied?	Translocated population
Unit 8—Gila River Subbasin			
Gila River	Yes	Yes	No.
West Fork Gila River	Yes	Yes	No.
Middle Fork Gila River	Yes	Yes	No.
East Fork Gila River	Yes	Yes	No.
Mangas Creek	Yes	Yes	No.

TABLE 4—OCCUPANCY OF PROPOSED CRITICAL HABITAT UNITS BY LOACH MINNOW

Unit	Known to be occupied at listing	Currently occupied	Translocated population
Unit 1—Verde River Subbasin			
Verde River mainstem	Yes	No	No.
Granite Creek	No	No	No.
Oak Creek	No	No	No.
Beaver and Wet Beaver Creek	Yes	No	No.
Fossil Creek	No	Uncertain	Yes.
Unit 2—Salt River Subbasin			
White River mainstem	Yes	Uncertain	No.
East Fork White River	Yes	Uncertain	No.
North Fork White River	Yes	Uncertain	No.
East Fork Black River	No	No	No.
Boneyard Creek	No	No	No.
Coyote Creek	Yes	Yes	No.
Unit 3—San Pedro River Subbasin			
San Pedro mainstem	Yes	No	No.
Hot Springs Canyon	No	Yes	Yes.
Bass Canyon	No	No	No.
Redfield Canyon	No	Yes	Yes.
Aravaipa Creek	Yes	Yes	No.
Deer Creek	Yes	Yes	No.
Turkey Creek	Yes	Yes	No.
Unit 4—Bonita Creek Subbasin			
Bonita Creek mainstem	No	Yes	Yes.
Unit 5—Eagle Creek Subbasin			
Eagle Creek mainstem	Yes	Yes	No.
Unit 6—San Francisco River Subbasin			
San Francisco mainstem	Yes	Yes	No.
Tularosa River	Yes	Yes	No.
Negrito Creek	Yes	Yes	No.
Whitewater Creek	Yes	No	No.
Unit 7—Blue River Subbasin			
Blue River mainstem	Yes	Yes	No.
Campbell Blue Creek	Yes	Yes	No.
Dry Blue Creek	Yes	Yes	No.
Little Blue Creek	Yes	No	No.
Pace Creek	Yes	Yes	No.
Frieborn Creek	Yes	Yes	No.
Unit 8—Gila River Subbasin			
Gila River mainstem	Yes	Yes	No.
West Fork Gila River	Yes	Yes	No.
Middle Fork Gila River	Yes	Yes	No.

TABLE 4—OCCUPANCY OF PROPOSED CRITICAL HABITAT UNITS BY LOACH MINNOW—Continued

Unit	Known to be occupied at listing	Currently occupied	Translocated population
East Fork Gila River	Yes	Yes	No.
Mangas Creek	Yes	Yes	No.

TABLE 5—PROPOSED CRITICAL HABITAT UNITS FOR SPIKEDACE AND LOACH MINNOW

[Area estimates reflect all land within critical habitat unit boundaries]

Unit	Federal		State		Local or tribal *		Private		Total	
	Km	Mi	Km	Mi	Km	Mi	Km	Mi	Km	Mi
1	146	90	4	2	11	7	112	70	273	169
2	119	74	0	0	46	28	12	7	177	109
3	89	55	17	11	4	2	50	31	160	99
4	18	11	0	0	0	0	5	3	23	14
5	21	13	0	0	27	17	27	17	75	47
6	146	91	3	2	0	0	70	44	219	137
7	93	58	0	0	0	0	14	9	107	67
8	156	97	2	1	0	0	90	56	248	154
Total	788	489	26	16	88	54	380	237	1,282	796

Note: Area sizes may not sum due to rounding. Total figures for Complex 1 vary from those in the text description below. The additional stream miles fall within different landowner categories which were not summarized here.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for spikedace and loach minnow or both, below. Table 6 at the end of this section summarizes the criteria from the ruleset (above) under which units were included.

Unit 1: Verde River Subbasin

Within this Verde River Subbasin, we are proposing to designate 281.2 km (174.8 mi) on the Verde River and its tributaries Granite Creek, Oak Creek, Beaver and Wet Beaver Creek, West Clear Creek, and Fossil Creek for spikedace. For loach minnow, we are proposing to designate 218.2 km (135.6 mi) on the Verde River and its tributaries Granite Creek, Oak Creek, Beaver and Wet Beaver Creek, and Fossil Creek. All of the mileage included in the proposed designation for loach minnow is included within the proposed designation for spikedace.

The Verde River and its tributaries included within the proposed designation are in Yavapai and Gila Counties, Arizona. From Sullivan Lake, near its headwaters, the Verde River flows for 201 km (125 mi) downstream to Horseshoe Reservoir. The Verde River is unique in comparison to many desert streams such as the Salt or Gila rivers in that it is free-flowing for its upper 201 km (125 mi). The Verde River is also perennial for that length (Sullivan and Richardson 1993, pp. 19–21; The Nature Conservancy 2006).

Due to the low number of remaining populations and severely restricted range, spikedace are at risk of extirpation from this watershed. Portions of this unit are known to be have been occupied at listing, while others have historical records or newly translocated populations. We determined that this area is essential to the conservation of both species because it contains physical habitat features to support the species (PBF 1), perennial streams with no or low levels of pollutants (PBFs 3 and 4), has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6), and provides suitable areas for a possible future barrier construction and species augmentation to support both species' recovery. Securing both species in this watershed will contribute significantly to the species' eventual recovery.

Approximately 1.2 km (0.8 mi) of the Verde River and 0.2 km (0.1 mi) of Beaver Creek/Wet Beaver Creek occur on lands owned by the Yavapai-Apache Nation. These areas will be considered for exclusion from the final critical habitat designation under section 4(b)(2) of the Act (see "*Application of Section 4(b)(2) of the Act*" section below for additional information).

Spikedace and loach minnow. For both spikedace and loach minnow, we are including within this proposal 3.2 km (2.0 mi) of Granite Creek from the confluence with the Verde River upstream to an unnamed spring. Above the spring there are insufficient flows to maintain these species. There are no known records of spikedace or loach minnow from Granite Creek specifically, but it is within the historical range known to be occupied by both species. As a perennial tributary of the Verde River in the area with the highest species density, Granite Creek is considered an important expansion area for spikedace recovery. Granite Creek is also considered an important expansion area for loach minnow recovery. These portions of Granite Creek are essential to the conservation of both species because they contain suitable habitat for all life stages of spikedace and loach minnow (PBF 1); have an appropriate food base (PBF 2); and consist of perennial streams with no or low levels of pollutants (PBFs 3 and 4). In addition, they are connected to portions of the Verde River believed to be occupied by spikedace.

Granite Creek occurs predominantly on lands managed by the AGFD in their Upper Verde Wildlife Area. The primary emphasis in this area is on management of riparian habitat and maintenance of native fish diversity. The parcel is 100 hectares (ha) (249 acres (ac)). It is surrounded by private lands on which a variety of actions, including livestock

grazing, may occur. The essential features in this unit may require special management considerations or protections due to competition with or predation by nonnative aquatic species present in both the Verde River and Granite Creek, sand and gravel operations, severe drought (University of Nebraska-Lincoln 2010) and other water demands, and potentially livestock grazing on private lands and associated impacts to uplands, riparian vegetation, and the stream.

This proposed designation includes 54.3 km (33.7 mi) of Oak Creek from the confluence with the Verde River upstream to the confluence with an unnamed tributary near the Yavapai and Coconino County boundary. The lower portions of the creek contain suitable, although degraded, habitat. Above the unnamed tributary, the creek becomes unsuitable due to urban and suburban development and to increasing gradient and substrate size.

There are no known records of spikedace or loach minnow from Oak Creek specifically, but it occurs within the historical range known to be occupied by both species. Oak Creek contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). Oak Creek is currently being evaluated by a multi-agency team for translocation of spikedace and loach minnow. As noted below in the Fossil Creek discussion, areas suitable for such actions are rare in the desert southwest. As a perennial tributary of the Verde River, and a potential translocation site, Oak Creek contains the physical features that can provide an important expansion area for spikedace and loach minnow recovery. We determined that this area is essential to the conservation of both species because it provides suitable areas for a possible future barrier construction and species augmentation to support both species' recovery.

Oak Creek occurs on a mix of private and Coconino National Forest lands. The essential features in this unit may require special management considerations or protections due to competition with and predation by nonnative aquatic species; recreation including off-road vehicles (ORVs) and associated damage to streams, vegetation and streambanks; severe drought (University of Nebraska-Lincoln 2010, p. 1); and residual effects of livestock grazing and impacts to uplands, riparian vegetation, and the stream.

We are including within the proposed designation 33.5 km (20.8 mi) of Beaver and Wet Beaver Creek from the confluence with the Verde River upstream to the confluence with Casner Canyon. Beaver Creek and its upstream extension in Wet Beaver Creek historically supported spikedace (ASU 2002; AGFD 2004) and contains suitable, although degraded, habitat. This area is not within the geographic area occupied at listing, but it is within the historical range known to be occupied by the species. There is one historical record for loach minnow from Beaver Creek but none from Wet Beaver Creek. There is one historical record for loach minnow on the mainstem Verde River approximately 7.2 km (4.5 mi) above the confluence with Beaver and Wet Beaver Creek (ASU 2002; AGFD 2004). Beaver and Wet Beaver Creek currently contain suitable habitat for all life stages of spikedace and loach minnow (PBF 1); have appropriate food bases (PBF 2); consist of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and have appropriate hydrologic regimes to maintain suitable habitat characteristics (PBF 6). As noted under Granite and Oak creeks, habitat within this portion of the species' ranges is limited to the Verde River Unit, including the Verde and a few of its perennial tributaries like Beaver and Wet Beaver Creek. Inclusion of Beaver and Wet Beaver Creek expands the overall unit size, adding to available habitat in this portion of the species' historical range, as well as expands recovery potential for the species in this portion of their historical ranges. This area is therefore essential to the conservation of both species.

Beaver and Wet Beaver Creek occur on a mix of private, National Park, and Coconino National Forest lands. The essential features in this unit may require special management considerations or protection due to residual impacts associated with past livestock grazing and impacts to uplands, riparian vegetation, and the stream; competition with and predation by nonnative aquatic species; severe drought (University of Nebraska-Lincoln 2010, p. 1); and increasing human development within the watershed.

We are including within this proposal 7.5 km (4.7 mi) of Fossil Creek extending from the confluence with the Verde River upstream to the confluence with an unnamed tributary. Fossil Creek was not known to be occupied by spikedace or loach minnow at listing. Although sufficient flows were previously lacking through this area, in 2005, following decommissioning of the Childs-Irving Power Plant, formerly diverted flows were returned to Fossil Creek (Robinson 2009b, p. 3). Spikedace and loach minnow were translocated into this important recovery stream in 2007 (Carter 2007a, p. 1), and additional fish were added in 2008 (Carter 2008a, pp. 1–2).

Fossil Creek contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). With the severe reductions in the species' overall distribution, and an already initiated translocation effort, Fossil Creek is essential to the recovery of spikedace and loach minnow as it supports one of the few remaining populations for both species. The translocation of spikedace and loach minnow into Fossil Creek is part of a larger conservation planning effort to restore a native fishery to the creek.

Fossil Creek occurs primarily on Federal lands, forming the boundary between the Coconino and Tonto National Forests. The essential features in this unit may require special management considerations or protection due to residual effects of past livestock grazing and impacts to uplands, riparian vegetation, and the stream; severe drought (University of Nebraska-Lincoln 2010, p. 1); and recreation.

Spikedace only. We are including within this unit 171.8 km (106.7 mi) of the Verde River from Sullivan Lake downstream to the confluence with Fossil Creek. The Verde River mainstem is within the geographic area occupied at the time of listing (ASU 2002; M. Brouder, pers. comm. 2002; AGFD 2004; C. Crowder, AGFD, pers. comm. 2009). Survey efforts are not continuous or consistent, and the current status of the population in this area is uncertain. Spikedace can be difficult to detect in monitoring efforts due to their small size, small population sizes, and yearly fluctuations in populations. Populations have been known to appear and disappear over time, which makes specific determinations on status and exact locations of populations difficult to determine. For example, spikedace were not detected in surveys conducted in 1950, or again in the 1970s or early 1980s in Eagle Creek, but were subsequently detected in 1985 and 1987 (Marsh *et al* . 1990, pp. 107–108). However, given the abundance of nonnative fishes, it is likely that any

remaining spikedace are very rare and only in the uppermost reaches of the Verde River.

While current occupancy remains uncertain, the Verde River is essential to the conservation of the species. It currently contains suitable habitat for all life stages of spikedace (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). The Verde River is the only occupied stream system in this geographic portion of the species' historical range, and represents one of four units in this proposed designation in which spikedace are most likely to be found. Protection of the species in this portion of the historical range will contribute to the long-term conservation of the species. Finally, spikedace in the Verde River are genetically (Tibbets 1993, pp. 25–27, 34) and morphologically (Anderson and Hendrickson 1994, pp. 148, 154) distinct from all other spikedace populations.

The essential features in this unit may require special management considerations and protections due to water diversions; existing and proposed groundwater pumping potentially resulting in drying of habitat; residual effects of past livestock grazing and impacts to uplands, riparian vegetation, and the stream channel; human development of surrounding areas; increased recreation including off-road vehicle use; severe drought (University of Nebraska-Lincoln 2010, p. 1); and competition with or predation by nonnative aquatic species.

We are including 10.9 km (6.8 mi) of West Clear Creek from the confluence with the Verde River upstream to the confluence with Black Mountain Canyon. Gradient and channel morphology changes above Black Mountain Canyon make the upstream area unsuitable for spikedace. The lower portion of West Clear Creek was known to be occupied by spikedace at listing (ASU 2002; AGFD 2004) and contains suitable habitat for all life stages of spikedace (PBF 1); has an appropriate food base (PBF 2); and consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4). West Clear Creek is under consideration as a translocation site for spikedace by a multi-agency team. The presence of PBFs, its past occupancy, and its consideration for translocation of spikedace indicate the suitability of this area, which will serve as an important expansion area for spikedace recovery.

West Clear Creek is on private and Coconino National Forest lands. West Clear Creek runs through private land for several miles in the vicinity of the Town of Camp Verde. The essential features in this unit may require special management considerations or protection due to impacts associated with rural residential uses adjacent to the channel; agriculture; residual effects of past livestock grazing and impacts to uplands, riparian vegetation, and the stream; severe drought (University of Nebraska-Lincoln 2010, p. 1); and competition with and predation by nonnative aquatic species.

Loach minnow only. We include within this unit 119.7 km (74.4 mi) of the Verde River from Sullivan Lake downstream to the confluence with Wet Beaver Creek. This mileage partially overlaps mileage proposed for designation as critical habitat for spikedace, which extends further downstream on the Verde River than this segment for loach minnow. This area is within the geographic area occupied by loach minnow at the time of listing. Surveys completed during the 1930s detected both species near Wet Beaver Creek. Spikedace and loach minnow were known to co-occur throughout much of their historical ranges. While spikedace were detected as far south as West Clear Creek, loach minnow were not. Subsequent surveys in more recent years have failed to detect either species. While incomplete, there are no known records of loach minnow from any point lower on the Verde River than Wet Beaver Creek.

The Verde River contains the suitable physical habitat features for all life stages of loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). The Verde River is located in the far northwestern portion of the species' range, and is the only river system in that geographic portion of the species' range. The suitability and location make the Verde River essential to the conservation of the loach minnow.

Land ownership and actions requiring special management considerations and protections for loach minnow are as summarized for spikedace in the above description of the Verde River for spikedace.

Unit 2: Salt River Subbasin

Spikedace and Loach Minnow

We are not proposing to designate any portion of the mainstem Salt River as critical habitat for spikedace at this time. Those portions below Theodore Roosevelt Reservoir have been altered by numerous dams and reservoirs, permanently limiting the natural flow regime and resulting in regulated flows. Those portions of the Salt River above the Reservoir support three historical records of spikedace near the confluence with Cibecue Creek. However, the Salt River, as well as the lower portions of Cibecue Creek, are canyon bound. While spikedace may occur in or travel through canyon areas, long stretches of canyon-bound river typically do not support the wider, shallower streams in which spikedace occur. Canyons are typically associated with a bedrock substrate, rather than the sand, gravel, or cobble over which spikedace are typically found. Where the river does have wider areas, it is currently dominated by nonnative fish species. Due to its limited available habitat, limited habitat suitability, and permanent alteration for reservoirs, we are not able to conclude that this area is essential to the conservation of the spikedace at this time.

In previous designations, we have included portions of Tonto Creek, Rye Creek, and Greenback Creek as critical habitat for loach minnow. These areas have no historical records for loach minnow. The limited mileage and habitat features make these areas less important to the overall conservation of loach minnow, and our current assessment is that the suitability for loach minnow in these streams is limited. We believe the habitat in the White and Black River systems is more suitable for loach minnow, and inclusion of these areas as critical habitat is sufficient to meet the preliminary recovery goals for the Salt River basin. We continue to propose these areas for spikedace critical habitat, as there are no records for spikedace from either the White or Black river systems, so that Tonto Creek and its tributaries represent the only occupied habitat within the Salt River subbasin for that species.

Spikedace. Unit 2 consists of 98.78 km (61.3 mi) of river on Tonto Creek and its tributaries Greenback, Rye, and Spring creeks, as well as Rock Creek, a tributary to Spring Creek, in Gila County, Arizona. The Salt River subbasin is a significant portion of spikedace historical range but currently has no known extant populations of spikedace. Large areas of the subbasin are unsuitable, either because of topography or because of reservoirs and other stream-channel alterations. Historical records for spikedace are from the Salt River near the confluence with

Cibecue Creek; the Salt River immediately below what is now Theodore Roosevelt Reservoir; and the Salt River in what is now Saguaro Lake (ASU 2002; AGFD 2004). With the exception of the record near Cibecue, existing locations have been substantially modified by the development of a series of dams and reservoirs. Streamflow between these reservoirs is regulated, removing the natural flow regime previously associated with the Salt River.

We are including within this proposal 47.8 km (29.7 mi) of Tonto Creek from the confluence with Greenback Creek upstream to the confluence with Houston Creek. Tonto Creek below Greenback Creek is influenced by Theodore Roosevelt Reservoir, resulting in unsuitable habitat below Greenback Creek. Those portions of Tonto Creek above the confluence with Houston Creek are of a gradient and substrate that are not suitable to spikedace. Tonto Creek was known to be occupied at listing (Abarca and Weedman 1993, p. 1; ASU 2002; AGFD 2004) but is not currently occupied. Tonto Creek supports perennial reaches that contain suitable habitat for all life stages of spikedace (PBF 1); has an appropriate food base (PBF 2); and consists of perennial flow with no or low levels of pollutants (PBFs 3 and 4).

The Salt River tributaries included in this proposal, Tonto Creek, Greenback Creek, Rye Creek, Spring Creek, and Rock Creek, occur almost entirely on the Tonto National Forest, with a few parcels of private land interspersed among Forest lands. The essential features in this unit may require special management considerations or protection due to residual impacts from past livestock grazing and impacts to uplands, riparian vegetation, and the stream; competition with and predation by nonnative aquatic species; moderate drought (University of Nebraska-Lincoln 2010, p. 1); water diversions that diminish flows in the active channel; and road maintenance that results in repeated impacts to the channel.

We are including within the proposed designation 15.1 km (9.4 mi) of Greenback Creek beginning at the confluence with Tonto Creek and continuing upstream to the confluence with Lime Springs. Portions of Greenback Creek are intermittent, but may connect Greenback Creek to Tonto Creek during seasonal flows. There are no known records of spikedace from Greenback Creek, but it is a tributary to Tonto Creek, which was known to be occupied at listing. Greenback Creek contains suitable habitat for all life stages of spikedace (PBF 1); has an appropriate food base (PBF 2); and consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4). As noted above, the Salt River subbasin is a significant portion of spikedace historical range, but there are limited areas of suitable habitat. The suitable habitat, its connection with Tonto Creek, and fact that it occurs almost entirely on Federal lands make Greenback Creek an important expansion area for spikedace recovery, and it is therefore essential to the conservation of the species.

We are including within this proposal 2.8 km (1.8 mi) of Rye Creek from the confluence with Tonto Creek upstream to the confluence with Brady Canyon. There are no known records of spikedace from Rye Creek, but it occurs within the historical range known to be occupied by the species. The entire portion of the proposed designation is perennial. Rye Creek contains suitable habitat for all life stages of spikedace (PBF 1); has an appropriate food base (PBF 2); and consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4). As with Greenback Creek, Rye Creek serves as connected perennial stream habitat that expands the available habitat associated with Tonto Creek and the Salt River subbasin, and it is therefore essential to the conservation of the species.

We are including within this proposal 27.2 km (16.9 mi) of Spring Creek from the confluence with Tonto Creek upstream to its confluence with Sevenmile Canyon. There are no known records of spikedace from Spring Creek, but it occurs within the historical range known to be occupied by the species. The entire portion of the proposed designation is perennial. Spring Creek contains suitable habitat for all life stages of spikedace (PBF 1); has an appropriate food base (PBF 2); and consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4). Spring Creek serves as connected perennial stream habitat that expands the available habitat associated with Tonto Creek and the Salt River subbasin, and it is therefore essential to the conservation of the species. In addition, for both Rock and Spring creeks, conservation efforts for spikedace are underway. The feasibility of constructing a barrier and translocating spikedace to Spring Creek, a tributary to Tonto Creek, has been initiated with draft NEPA documents under development.

We are including within this proposal 5.8 km (3.6 mi) of Rock Creek from its confluence with Spring Creek upstream to its confluence with Buzzard Roost Canyon. There are no known records of spikedace from Rock Creek, but it occurs within the historical range known to be occupied by the species. Rock Creek contains suitable habitat for all life stages of spikedace (PBF 1); has an appropriate food base (PBF 2); and consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4). Rock Creek will further expand the available habitat in the Salt River Subbasin. As noted above under Spring Creek, conservation planning efforts are underway that will likely lead to a translocation of spikedace into Rock Creek. The suitable habitat, perennial flows, and location within the Salt River subbasin make Rock Creek essential to the conservation of the spikedace.

Loach minnow. Unit 2 consists of 51.9 km (32.2 mi) of the White River and its tributary East Fork White River; and East Fork Black River, North Fork East Fork Black River, and Coyote and Boneyard creeks in Gila, Navajo, and Apache Counties, Arizona. Portions of this unit are known to have been occupied at listing, while others have historical records. The Salt River subbasin is a significant portion of loach minnow historical range, and the Salt River mainstem was known at listing to have historical records near the confluence with Cibecue Creek. The Black and White Rivers, which join to form the Salt River, are also known to have been occupied at listing. Within this subbasin, loach minnow have been extirpated from all but a small portion of the Black and White Rivers.

We are including within this proposal 29.0 km (18.0 mi) of the White River from the confluence with the Black River upstream to the confluence with the North and East Forks of the White River. Loach minnow were known at the time of listing to have occurred in this portion of the White River (M. Douglas, ASU, pers. comm. 1988; ASU 2002). The White River contains suitable habitat for all life stages of loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). Current occupancy of this area is unknown due to the proprietary nature of Tribal survey information. The length of perennial flows with suitable habitat parameters, historical occupancy, and potential current occupancy make this area essential to the conservation of the loach minnow.

The proposed designation on the White River is entirely within lands owned by the White Mountain Apache Tribe. This area will be considered for exclusion from the final critical habitat

designation under section 4(b)(2) of the Act (see "*Application of Section 4(b)(2) of the Act*" section below for additional information).

The essential features in this unit may require special management considerations or protection due to residual effects of past livestock grazing and impacts to uplands, riparian vegetation, and the stream; competition with and predation by nonnative aquatic species; and moderate drought (University of Nebraska-Lincoln 2010, p. 1).

We are including within this proposal 17.2 km (10.7 mi) of the East Fork White River from the confluence with North Fork White River upstream to the confluence with Bones Canyon. Loach minnow were known at the time of listing to have occurred in these portions of the East Fork White River (Leon 1989; pp. 1–2; ASU 2002; Service 2006, pp. 2–3). These areas contains suitable habitat for all life stages of loach minnow (PBF 1); have an appropriate food base (PBF 2); consist of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and have an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). As perennial streams within the Salt River subbasin, these streams are considered essential to the recovery and survival of loach minnow.

The proposed designation on East Fork White River is entirely within lands owned by the White Mountain Apache Tribe. This area will be considered for exclusion from the final critical habitat designation under section 4(b)(2) of the Act (see "*Application of Section 4(b)(2) of the Act*" section below for additional information).

The essential features in this unit may require special management considerations or protection due to residual effects of past livestock grazing and impacts to uplands, riparian vegetation, and the stream; competition with and predation by nonnative aquatic species; and moderate drought (University of Nebraska-Lincoln 2010, p. 1).

The North Fork White River was not specifically known to be occupied at the time of listing, but has been known to be occupied at times since listing. However, the North Fork White River is not thought to be able to support a breeding population of loach minnow, but rather, the collections of loach minnow in the North Fork of the White River are thought to be attributable to upstream migration from the breeding population found in the East Fork White River. It is suspected that high temperatures may be a limiting factor in the establishment of viable loach minnow populations in the North Fork White River (Raleigh Consultants 1995). Further, this reach is comprised of swift, deep runs which are not characteristic of the preferred shallow riffle habitat of the loach minnow (Raleigh Consultants 1996). Due to these factors, we cannot conclude that the North Fork White River supports adequate PBFs to support essential life history functions of loach minnow and we are not including this area within the proposed critical habitat designation.

The Salt River Subbasin also includes a total of 32.0 km (20 mi) of the East Fork Black River and its tributary Coyote Creek, and the North Fork East Fork Black River and its tributary Boneyard Creek. We are including within this proposal 19.1 km (11.9 mi) of the East Fork Black River extending from the confluence with the West Fork Black River upstream to the confluence with Boneyard Creek. East Fork Black River contains suitable habitat for all life stages of loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). The presence of multiple PBFs, and the presence of a distinct genetic population in the adjoining North Fork East Fork River, makes this area essential to the conservation of loach minnow.

Those portions of the East Fork Black River, the portions of the North Fork East Fork Black River, and the portions of Boneyard and Coyote Creek included within this proposal are entirely on Apache-Sitgreaves National Forests lands. The essential features in this unit may require special management considerations or protection due to residual effects of past livestock grazing and impacts to uplands, riparian vegetation, and the stream; and competition with and predation by nonnative aquatic species. Native trout species are regularly stocked into the Black River and may also increase competition for resources and predation by trout. Wildfire has occurred in this area in the past, and there may be minimal increases in sediment carried into the stream from burned areas in the uplands.

We are including within this proposal 7.1 km (4.4 mi) of the North Fork East Fork Black River extending from the confluence with East Fork Black River upstream to the confluence with an unnamed tributary. Above this tributary, the river has finer substrate and lacks riffle habitat, making it unsuitable for loach minnow. The North Fork East Fork Black River is currently occupied (ASU 2002; S. Gurtin, AGFD, pers. comm. 2004; Robinson *et al.* 2009b, p. 1), and is presumed to have been occupied at listing. The North Fork East Fork Black River contains suitable habitat for all life stages of loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). As with the East Fork Black River, the presence of multiple PBFs, its occupied status, and the presence of a distinct genetic population make this area essential to the conservation of loach minnow.

We are including within the proposal 2.3 km (1.4 mi) of Boneyard Creek extending from the confluence with the East Fork Black River upstream to the confluence with an unnamed tributary. Occupancy of this area is uncertain, but it is connected to the North Fork East Fork Black River which is occupied by loach minnow (ASU 2002; S. Gurtin, AGFD, pers. comm. 2004; Robinson *et al.* 2009b, p. 1). It contains suitable habitat for all life stages of loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). As with the East Fork Black and North Fork East Fork Black rivers, the presence of multiple PBFs, and the presence of a distinct genetic population in the adjacent river, makes this area essential to the conservation of loach minnow.

We are including within this proposal 3.4 km (2.1 mi) of Coyote Creek, extending from the confluence with East Fork Black River upstream to the confluence with an unnamed tributary. This area is considered occupied and is connected to the North Fork East Fork Black River, which is occupied by loach minnow (M. Lopez, AGFD, pers. comm. 2000; ASU 2002; S. Gurtin, AGFD, pers. comm. 2004, Robinson *et al.* 2009b, p. 1). The portions of Coyote Creek proposed for inclusion in this proposed designation contain suitable habitat for all life stages of loach minnow (PBF 1); have an appropriate food base (PBF 2); and consist of perennial streams with no or low levels of pollutants (PBFs 3 and 4). As with the East Fork Black and North Fork East Fork Black rivers and Boneyard Creek, the presence of multiple PBFs, its occupied status, and the presence of a distinct genetic population make this area essential to the conservation of loach minnow.

Unit 3: San Pedro Subbasin

Spikedace and loach minnow. Unit 3 consists of 159.7 km (99.3 mi) of habitat on the upper San Pedro River, Aravaipa Creek and its tributaries Deer and Turkey creeks, Redfield and Hot Springs canyons, as well as Bass Canyon, tributary to Hot Springs Canyon, in Cochise, Pima, Pinal, and Graham Counties, Arizona. The San Pedro subbasin contains streams that are known to have been occupied by both species at listing, some of which are currently occupied, as well as streams with translocated populations of spikedace and loach minnow.

We are including within this proposal 60.0 km (37.2 mi) on the upper San Pedro River from the international border with Mexico downstream to the confluence with the Babocomari River. North of this confluence, the San Pedro was perennial, but does not currently support adequate flows for spikedace and loach minnow. Portions of the San Pedro River included within this proposed designation were known to be occupied by both species at listing. Multiple occurrence records of each species indicate the suitability of this area (ASU 2002; AGFD 2004). This portion of the San Pedro River contains suitable habitat for all life stages of loach minnow (PBF 1); has an appropriate food base (PBF 2); and consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4). The BLM has identified this area as having high restoration potential for spikedace and loach minnow. This portion of the San Pedro represents the southernmost extension of the two species' historical range. Suitable habitat within this geographic area is limited. Because of the presence of more than one PBF (including perennial flows), the abundance of historical records, and its importance to the overall range of the species, this area is considered essential to the conservation of both species.

The majority of this area is on lands managed by the BLM, with small portions of private and State lands. The essential features in this unit may require special management considerations or protection due to residual effects of past livestock grazing and impacts to uplands, riparian vegetation, and the stream; competition with and predation by nonnative aquatic species; water developments; severe drought (University of Nebraska-Lincoln 2010, p. 1); and increasing human development within the watershed.

We are including within this proposal 44.9 km (27.91 mi) of Aravaipa Creek from the confluence with the San Pedro River upstream to the confluence with Stowe Gulch. Stowe Gulch is the upstream limit of sufficient perennial flows to support spikedace and loach minnow; no records of either species are known from above this point. Aravaipa Creek currently supports one of the largest remaining populations of spikedace and loach minnow, and has been monitored since 1943 (ASU 2002; Stefferud and Reinthal 2005, pp. 15–21; AGFD 2004; P. Reinthal, University of Arizona pers. comm. 2008; Reinthal 2009, pp. 1–2). Aravaipa Creek is unique in that it supports an intact native fish fauna comprised of seven species (Stefferud and Reinthal 2005, p. 11). It contains suitable habitat for all life stages of spikedace (PBF 1); has an appropriate food base (PBF 2); consists of perennial flows (PBF 3); has no nonnative aquatic species, or levels of nonnative aquatic species that are sufficiently low to allow persistence of spikedace (PBF 5); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). The presence of all PBFs, and long-term presence and current occupancy by spikedace, makes this area essential to the conservation of the species.

Land ownership at Aravaipa Creek is predominantly BLM, with large parcels of private and State land on either end of the river. The essential features in this unit may require special management considerations or protection due to contaminants issues with lead, arsenic, and cadmium; surface and groundwater removal; limited recreation; severe drought (University of Nebraska-Lincoln 2010, p. 1); and channelization in upstream portions (Stefferud and Reinthal 2005, pp. 36–38).

We are including within this proposal 3.7 km (2.3 mi) of Deer Creek from the confluence with Aravaipa Creek upstream to the boundary of the Aravaipa Wilderness. Above this point, habitat is no longer suitable for spikedace or loach minnow. We are also including 4.3 km (2.7 mi) of Turkey Creek from the confluence with Aravaipa Creek upstream to the confluence with Oak Grove Canyon. Above this point, flows are not suitable for spikedace or loach minnow. Loach minnow are known to have occupied Deer and Turkey creeks at listing, while spikedace are not. Each of these tributary streams contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has appropriate food bases (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6).

Both Deer and Turkey creeks occur on lands managed by the BLM. The essential features in these two streams may require special management due to surface and groundwater removal; limited recreation; severe drought (University of Nebraska-Lincoln 2010, p. 1); occasional issues with nonnative aquatic species; and proposed utilities projects, such as the SunZia Southwest Transmission Project, which is currently in the study phase (Service 2010b, pp. 1–7). Deer and Turkey Creek are tributaries to Aravaipa Creek which is currently occupied by spikedace and so serve as an extension of the occupied habitat, and are therefore essential to the conservation of the species.

We are including within this proposal 19.0 km (11.8 mi) of stream in Hot Springs Canyon from the confluence with the San Pedro River upstream to the confluence with Bass Canyon. (The stream in Hot Springs Canyon is not named and is known only as Hot Springs Canyon.) There are no known records of spikedace or loach minnow from Hot Springs Canyon, but it is within the geographical range known to be occupied by both species. Following coordination by a multi-agency team, spikedace and loach minnow were translocated into Hot Springs Canyon in 2007, with augmentations in 2008 and 2009 (Robinson 2008a, pp. 1, 15–16; Robinson *et al.* 2010, pp. 4–5). Hot Springs Canyon contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); has no nonnative aquatic species, or levels of nonnative aquatic species that are sufficiently low to allow persistence of spikedace and loach minnow (PBF 5); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). The current occupancy by spikedace and loach minnow and presence of all PBFs, which extend the habitat available in this unit, make this area essential to the conservation of the species.

Hot Springs Canyon occurs on a mix of State, private, and BLM lands. The essential features in these two streams may require special management due to low flows or dewatering associated with severe drought (University of Nebraska-Lincoln 2010, p. 1) and climate change, and proposed utilities projects (as noted above under Aravaipa Creek (Service 2010, pp. 1–7)).

We are including within this proposal 22.5 km (14.0 mi) of stream in Redfield

Canyon from the confluence with the San Pedro River upstream to the confluence with Sycamore Canyon. (The stream in Redfield Canyon is not named and is known only as Redfield Canyon.) Above Sycamore Canyon, perennial water becomes very scarce, and the habitat becomes steeper, and more canyon-confined. Although there are no known records of spikedace or loach minnow from Redfield Canyon, it is within the geographical range known to be occupied by both species. Following coordination by a multi-agency team, spikedace and loach minnow were translocated into Redfield Canyon in 2007, with augmentations in 2008 (Robinson 2008b, pp. 1, 15–16; Robinson *et al.* 2010, pp. 4–5). Redfield Canyon contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); has no nonnative aquatic species, or levels of nonnative aquatic species that are sufficiently low to allow persistence of spikedace and loach minnow (PBF 5); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). Redfield Canyon was specifically identified within the species' Recovery Plan as an area with potential for spikedace (Service 1991a, p. 21; Service 1991b, p. 20). The current occupancy by spikedace and loach minnow and presence of all PBFs, which extends the available habitat in this unit, make this area essential to the conservation of the species.

Redfield Canyon occurs on primarily State lands, with small areas of private and Federal (BLM) lands. The essential features in Redfield Canyon may require special management due to occasional issues with nonnative aquatic species, low flows or dewatering associated with severe drought (University of Nebraska-Lincoln 2010, p. 1) and climate change, and proposed utilities projects (such as the SunZia Southwest Transmission Project as noted above under Aravaipa Creek).

We are including within this proposal 5.5 km (3.4 mi) of stream in Bass Canyon from the confluence with Hot Springs Canyon upstream to the confluence with Pine Canyon. (The stream in Bass Canyon is not named and is known only as Hot Springs Canyon.) There are no known records of spikedace or loach minnow from Bass Canyon, but it is within the geographical range known to be occupied by both species, and spikedace and loach minnow have been translocated into Hot Springs Canyon, to which Bass Canyon is connected and is a tributary stream (see discussion above under Hot Springs Canyon). Bass Canyon contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and has no nonnative aquatic species, or levels of nonnative aquatic species that are sufficiently low to allow persistence of spikedace and loach minnow (PBF 5). Bass Canyon serves as an extension to Hot Springs Canyon and supports multiple PBFs. We therefore consider it to be essential to the conservation of both species.

The essential features in these two streams may require special management due to low flows or dewatering associated with severe drought (University of Nebraska-Lincoln 2010, p. 1) and climate change, and proposed utilities projects (such as the SunZia Southwest Transmission Project as noted above under Aravaipa Creek).

Cooperative conservation efforts for spikedace and loach minnow are ongoing in Hot Springs Canyon, Bass Canyon, and Redfield Canyon. To date, those activities have resulted in the translocation, augmentation, and monitoring of five native fishes, including spikedace and loach minnow. A multi-agency committee continues to work cooperatively on this multi-stream, multi-species conservation effort.

Unit 4: Bonita Creek Subbasin

Spikedace and Loach Minnow

We are including within this proposal 23.8 km (14.8 mi) of Bonita Creek from the confluence with the Gila River upstream to the confluence with Martinez Wash in Graham County, Arizona. The Bonita Creek subbasin is not known to have been occupied at listing but is within the geographical range known to have been occupied by both species. In 2008, spikedace and loach minnow were translocated into the lower portions of Bonita Creek (T. Robinson, AGFD, pers. comm. 2008c), with a small population of spikedace placed above the City of Safford's infiltration gallery, but below the southern boundary of the San Carlos Indian Reservation, in 2009. As noted above for Fossil Creek and Hot Springs Canyon and Redfield Canyon, there are limited opportunities for translocating or reintroducing populations of spikedace, and the reduction in the species' distribution necessitates that additional populations be established to recover the species. Bonita Creek is considered essential to the survival and recovery of spikedace and loach minnow because it contains suitable habitat for all life stages of spikedace (PBF 1); has an appropriate food base (PBF 2); and consists of perennial flow with no or low levels of pollutants (PBFs 3 and 4). It also allows for the expansion of the geographic distribution of the species' ranges.

Land ownership at Bonita Creek is almost entirely Federal under the BLM, with a few small private parcels. The proposed designation ends at the San Carlos Indian Reservation boundary. Critical habitat within this subbasin requires special management for nonnative aquatic species, some recreation, residual effects of past livestock grazing, moderate drought (University of Nebraska-Lincoln 2010, p. 1), and water diversion. Following rehabilitation of the stream, Bonita Creek will have no to at most low levels of nonnative aquatic species (PBF 5).

Cooperative conservation efforts for spikedace and loach minnow are ongoing in Bonita Creek. To date, those activities have resulted in the removal of nonnative fish species and translocation of spikedace, loach minnow, Gila topminnow, and desert pupfish into Bonita Creek. A Memorandum of Understanding was signed with the City of Safford regarding water management for Bonita Creek as part of this effort.

Unit 5: Eagle Creek Subbasin

Spikedace and loach minnow. We are including within this proposal 75.5 km (46.9 mi) of Eagle Creek from the Freeport McMoRan diversion dam upstream to the confluence with East Eagle Creek in Greenlee and Graham Counties, Arizona. Freeport McMoRan is a copper mining company formerly known as Phelps Dodge. Eagle Creek was known to be occupied at the time of listing by both spikedace and loach minnow. Loach minnow and spikedace are both considered present, but likely in small numbers, as suitable habitat is present (Marsh 1996, p. 2; ASU 2002; Bahm and Robinson 2009a, p. 1).

Eagle Creek contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial flows with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6) above the barrier, which serves as the endpoint of this unit.

Eagle Creek occurs primarily on San Carlos Apache Tribal and Apache-Sitgreaves National Forests' lands, along with small parcels of State, private, and BLM lands. The essential features in

this stream may require special management considerations or protection due to competition with and predation by nonnative aquatic species; residual effects of past livestock grazing and impacts to uplands, riparian vegetation, and the stream; mining activities in the uplands; moderate drought (University of Nebraska-Lincoln 2010, p. 1); and road construction and maintenance within and adjacent to the stream channel.

Those portions of Eagle Creek in Graham County are on the San Carlos Apache Reservation. Additionally, portions of Eagle Creek also flow through private lands belonging to Freeport McMoRan. These areas will be considered for exclusion from the final critical habitat designation under section 4(b)(2) of the Act (see "Application of Section 4(b)(2) of the Act" section below for additional information).

Unit 6: San Francisco River Subbasin

Spikedace and loach minnow. We are including within this proposal 181.0 km (112.3 mi) of the San Francisco River extending from the confluence with the Gila River in Greenlee County, Arizona upstream to the confluence with the Tularosa River in Catron County, New Mexico. Above the confluence with the Tularosa River, habitat is no longer suitable for spikedace or loach minnow. The San Francisco River, downstream of the Tularosa River confluence, was known to be occupied by spikedace at listing, and a reintroduction of spikedace occurred in 2008, above the town of Alma, New Mexico (NMDGF 2009, p. 1). This area was also known to be occupied by loach minnow at listing, and is currently occupied by loach minnow (NMDGF 2008; Propst *et al.* 2009, pp. 5–6). The San Francisco River is perennial throughout this length, and contains suitable habitat for all life stages of spikedace (PBF 1); has an appropriate food base (PBF 2); consists of perennial flows with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). The San Francisco River is one of the larger intact streams remaining within the species' ranges, with an overall length of approximately 202 km (125 mi). Because it represents one of the largest remaining rivers in the species' historical ranges, was historically occupied, has a reintroduced population of spikedace, is currently occupied by loach minnow, and supports several of the PBFs for spikedace, this area is essential to the conservation of spikedace and loach minnow.

Land ownership on the San Francisco River includes primarily BLM and Apache-Sitgreaves National Forests with small parcels of private and State lands in Arizona, and the Gila National Forest with small parcels of private lands in New Mexico. The essential features in this stream may require special management considerations or protection due to livestock grazing and impacts to uplands, riparian vegetation, and the stream; moderate drought (University of Nebraska-Lincoln 2010, p. 1) in those portions in Arizona; competition with and predation by nonnative aquatic species; water diversions; road construction and maintenance; and channelization.

We are not including portions of the Tularosa River, Whitewater Creek, or Negrito Creek as critical habitat for spikedace in this proposal. There are no known records of spikedace from these streams, and spikedace have not been known to occur any higher in the San Francisco River than Pleasanton (Paroz and Propst 2007, pp. 13–15).

Loach minnow only: We are proposing 30.0 km (18.6 mi) of the Tularosa River from the confluence with the San Francisco River upstream to the town of Cruzville, New Mexico. Above Cruzville, habitat becomes unsuitable for loach minnow. The Tularosa River is currently occupied by loach minnow (Propst *et al.* 2009, pp. 4–5). The Tularosa River is perennial throughout this reach, and contains suitable habitat for all life stages of loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial flows with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). This area is considered essential to the conservation of loach minnow because it is currently occupied, supports more than one of the PBFs, and is connected to occupied habitat on the San Francisco River.

We are including within this proposal 6.8 km (4.2 mi) of Negrito Creek extending from the confluence with the Tularosa River upstream to the confluence with Cerco Canyon. Above this point, gradient and channel morphology make the creek unsuitable for loach minnow. Negrito Creek has been recently occupied by loach minnow, and is within the historical range known to be occupied by the species at listing. Negrito Creek is perennial through this reach, and contains suitable habitat for all life stages of loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial flows with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). This area is considered essential to the conservation of loach minnow because of its occupancy history, and because it supports more than one of the PBFs and expands suitable habitat for loach minnow in this unit.

Negrito Creek occurs primarily on the Gila National Forest, with a few parcels of private land interspersed with the Forest lands. The essential features in this stream may require special management considerations or protection due to residual effects of past livestock grazing and impacts to uplands, riparian vegetation, and the stream, as well as other disturbances in the watershed.

We are also including within this proposed designation 1.9 km (1.2 mi) of Whitewater Creek from the confluence with the San Francisco River upstream to the confluence with Little Whitewater Creek. Upstream of this point, gradient and channel changes make the habitat unsuitable for loach minnow. Whitewater Creek was known to be occupied by loach minnow at the time of listing and has perennial flows. It serves as an extension of habitat on the San Francisco River. Whitewater Creek contains suitable habitat for all life stages of loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial flows with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6).

Whitewater Creek occurs entirely on private lands. The essential features in this stream may require special management considerations or protection due to residual impacts from past livestock grazing and impacts to uplands, riparian vegetation, and the stream; water diversions; competition with and predation by nonnative aquatic species; road construction and maintenance; and channelization.

Unit 7: Blue River Subbasin

Spikedace and loach minnow. We are including within this unit 106.6 km (66.3 mi) of the Blue River, Campbell Blue Creek, and Little Blue Creek in Greenlee County, Arizona, and portions of Campbell Blue, Pace, Frieborn, and Dry Blue creeks in Catron County, New Mexico. The Blue River Subbasin is not specifically known to have been occupied by spikedace. The Blue River and its tributary streams included within this unit are known to have been occupied by loach minnow at listing, and are currently occupied by loach minnow (AGFD 1994, pp. 4–14; Bagley *et al.* 1995, multiple survey records;

Carter 2005, pp. 1–8; Clarkson *et al.* 2008, pp. 3–4).

The tributaries Campbell Blue Creek and Little Blue Creek occur primarily on Federal lands on the Apache-Sitgreaves National Forests, along with a few parcels of private lands. The tributaries Pace Creek and Frieborn Creek occur entirely on Federal lands on the Gila National Forest in New Mexico. The essential features in these streams may require special management considerations or protection due to residual effects of past livestock grazing and impacts to uplands, riparian vegetation, and the stream; moderate drought (University of Nebraska-Lincoln 2010, p. 1); and competition with and predation by nonnative aquatic species.

Included within this proposed designation are 81.4 km (50.6 mi) of the Blue River from the confluence with the San Francisco River upstream to the confluence of Campbell Blue and Dry Blue creeks. Loach minnow are known to occur throughout the Blue River, while spikedace have not been documented. Because the range of spikedace has been severely reduced with only four remaining populations, additional areas for expansion of spikedace numbers will be required to ensure the survival and recovery of the species. In addition, planning among several State and Federal agencies is underway for restoration of native fish species, including spikedace, in the Blue River through construction of a barrier that will exclude nonnative fish from moving upstream. Barrier feasibility studies have been completed, as has a draft Memorandum of Understanding with land managers and residents in this area. The larger size of this stream, compared to smaller, tributary streams within the species' range, along with its perennial flows and conservation management activities, present a unique opportunity for spikedace. Federal land ownership throughout the majority of this proposed critical habitat unit would facilitate management for the species. In addition, the Blue River is occupied by loach minnow, and contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low pollutant issues (PBFs 3 and 4); has no nonnative aquatic species, or levels of nonnative aquatic species that are sufficiently low to allow persistence of spikedace and loach minnow (PBF 5); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). Because of its suitability, the Blue River can expand the geographic distribution of spikedace, and is therefore essential to its survival and recovery.

Landownership surrounding the Blue River is primarily Federal lands on the Apache-Sitgreaves National Forests, with small parcels of private lands. The essential features in this stream may require special management considerations or protection due to livestock grazing and impacts to uplands, riparian vegetation, and the stream (Service 2008); moderate drought (University of Nebraska-Lincoln 2010, p.1); water diversions and associated habitat alteration and water decreases in the active channel; and road construction and maintenance.

We are including within this proposal 12.4 km (7.7 mi) of Campbell Blue Creek extending from the confluence of Dry Blue and Campbell Blue Creeks upstream to the confluence with Coleman Canyon. Above Coleman Canyon, the creek changes and becomes steeper and rockier, making it unsuitable for spikedace and loach minnow. As with the Blue River, Campbell Blue Creek is not known to have been occupied by spikedace. Campbell Blue is currently occupied by loach minnow (Carter 2005, pp. 1–8). Campbell Blue Creek contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial flows with no or low levels of pollutants (PBFs 3 and 4); has no nonnative aquatic species, or levels of nonnative aquatic species that are sufficiently low to allow persistence of spikedace and loach minnow (PBF 5); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). Because it supports more than one PBF and serves as an extension of available habitat on the Blue River, Campbell Blue Creek is essential to the conservation of spikedace and loach minnow.

We are including within this proposal 5.1 km (3.1 mi) of Little Blue Creek. This includes the lower, perennial portions of Little Blue Creek extending from the confluence with the Blue River upstream to the confluence with a canyon. Above the canyon, flows are not perennial. There are no spikedace records from Little Blue Creek; however, it was known to be occupied at listing by loach minnow. Little Blue Creek contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial flows with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). Because it supports more than one PBF and serves as an extension of available habitat on the Blue River, this area is essential to the conservation of spikedace and loach minnow.

We are including within this proposal 1.2 km (0.8 mi) of Pace Creek from the confluence with Dry Blue Creek upstream to a barrier falls. Habitat above the barrier is considered unsuitable. There are no known records of spikedace from Pace Creek; however, it is currently occupied by loach minnow (ASU 2002; NMDGF 2008), and is presumed to have been occupied by loach minnow at listing. Its occupancy by loach minnow, a species which often co-occurs with spikedace, is also indicative of its suitability. Pace Creek contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial flows with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). Because it supports more than one PBF and serves as an extension of available habitat on the Blue River, and is currently occupied by loach minnow, this area is essential to the conservation of spikedace and loach minnow.

We are including within this proposal 1.8 km (1.1 mi) of Frieborn Creek from the confluence with Dry Blue Creek upstream to an unnamed tributary. There are no known records for spikedace in Frieborn Creek; however, it is currently occupied by loach minnow. Its occupancy by loach minnow, a co-occurring species for spikedace, indicates its suitability. Frieborn Creek contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial flows with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). Because it supports more than one PBF and serves as an extension of available habitat on the Blue River, this area is essential to the conservation of spikedace and loach minnow.

We are including within this proposal 4.7 km (3.0 mi) of Dry Blue Creek from the confluence with Campbell Blue Creek upstream to the confluence with Pace Creek. Dry Blue Creek is not known to be occupied by spikedace; however, it currently supports loach minnow, a co-occurring species for spikedace (ASU 2002; NMDGF 2008). Loach minnow are presumed to have been present at listing. In addition, Dry Blue Creek contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate

food base (PBF 2); consists of perennial flows with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). Because it supports more than one PBF and serves as an extension of available habitat on the Blue River, this area is essential to the conservation of spikedace and loach minnow.

The essential features in this subbasin may require special management considerations or protection due to residual impacts of past livestock grazing and impacts to uplands, riparian vegetation, and the stream; moderate drought (University of Nebraska-Lincoln 2010, p. 1); and competition with and predation by nonnative aquatic species.

Unit 8. Gila River Subbasin

Spikedace and loach minnow. The upper Gila River subbasin includes portions of the mainstem Gila River and four tributaries including West Fork Gila River, Middle Fork Gila River, East Fork Gila River, and Mangas Creek in Hidalgo, Grant, and Catron Counties, New Mexico. The Gila River subbasin also includes the Gila River in Greenlee, Graham, Maricopa, and Pinal Counties in Arizona. All streams included within this unit were known to be occupied by both species at listing.

We are including within the proposal 165.1 km (102.6 mi) of the Gila River from the confluence with Moore Canyon (near the Arizona-New Mexico border) upstream to the confluence of the East and West Forks. Below Moore Canyon, the river is substantially altered by agriculture, diversion, and urban development. In addition, no spikedace or loach minnow records are known from Moore Canyon downstream in Pinal County, Arizona. The portions of the Gila River included within the proposed designation support the largest remaining populations of spikedace and loach minnow (NMDGF 2008; Propst *et al.* 2009, pp. 14–17). The Gila River contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). The mainstem Gila River in New Mexico is considered essential to the survival and recovery of the species because it supports the largest remaining population of spikedace and loach minnow, and contains several of the PBFs for both species.

Spikedace and loach minnow on the Gila River mainstem occur primarily on Federal lands managed by the BLM and the Gila National Forest, interspersed with private and State lands. The essential features in this stream may require special management considerations or protection due to residual impacts of past livestock grazing and impacts to uplands, riparian vegetation, and the stream; competition with and predation by nonnative aquatic species; road construction and maintenance; water diversions; and recreation.

Portions of streams on the Gila River mainstem within this unit are owned and managed by Freeport McMoRan. This area may be considered for exclusion from the final critical habitat designation under section 4(b)(2) of the Act (see "*Application of Section 4(b)(2) of the Act*" section below for additional information).

We are including within the proposal 13.0 km (8.1 mi) of the West Fork Gila River from the confluence with the East Fork Gila River upstream to the confluence with EE Canyon. Flows throughout this reach are perennial. Above EE Canyon, the river becomes unsuitable for spikedace and loach minnow due to gradient and channel morphology. The West Fork Gila River is currently occupied by both species (NMDGF 2008; Propst *et al.* 2009, pp. 7–9). The West Fork Gila River contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). This area is considered essential to the survival and recovery of spikedace and loach minnow due to its historical and current occupancy and multiple PBFs. In addition, the West Fork Gila River is connected to habitat occupied by both species on the Gila River.

The West Fork Gila River occurs primarily on a mix of Federal lands on the Gila National Forest, the National Park Service, and private lands. The essential features in this stream may require special management considerations or protection due to competition with and predation by nonnative aquatic species, road construction and maintenance, and watershed impacts associated with past wildfires.

We are including within the proposal 42.1 km (26.2 mi) of the East Fork Gila River from the confluence with the West Fork Gila River upstream to the confluence of Beaver and Taylor Creeks. The East Fork Gila River is currently occupied by spikedace and loach minnow (NMDGF 2008; Propst *et al.* 2009 pp. 12–13). The East Fork Gila River contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial flows with no or low pollutant levels (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). The East Fork Gila River is essential to the survival and recovery of both species because of its historical and current occupancy and several PBFs. In addition, the East Fork Gila River is connected to habitat occupied by spikedace and loach minnow on the Gila River.

The East Fork Gila River occurs primarily on Federal lands on the Gila National Forest, with small parcels of private lands interspersed. The essential features in this stream may require special management considerations or protection due to residual impacts of past livestock grazing and impacts to uplands, riparian vegetation, and the stream; competition with and predation by nonnative aquatic species; and watershed impacts associated with past wildfires.

We are including within the proposal 9.1 km (5.7 mi) of Mangas Creek from the confluence with the Gila River upstream to the confluence with Willow Creek. Mangas Creek was not specifically known to be occupied at listing by spikedace or loach minnow, but is within the historical ranges of the species. Mangas Creek is currently occupied by spikedace and loach minnow (NMDGF 2008). Mangas Creek contains suitable habitat for all life stages of spikedace and loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial flows with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). This area is considered essential to the conservation of these species because it is currently occupied, has several PBFs, and is connected to portions of the Gila River occupied by spikedace and loach minnow.

Mangas Creek occurs primarily on private lands, occasionally crossing the Gila National Forest or State land parcels. The essential features in this stream may require special management considerations or protection due to dispersed livestock grazing, and potential competition with and predation by nonnative aquatic species.

Portions of the Gila River mainstem and the majority of Mangas Creek proposed for inclusion as critical habitat within this unit are owned and managed by Freeport McMoRan. These areas may

be considered for exclusion from the final critical habitat designation under section 4(b)(2) of the Act (see "*Application of Section 4(b)(2) of the Act*" section below for additional information).

Spikedace only. The Agua Fria River is located on the extreme western edge of the species' range, on the lower portions of the Gila River in Yavapai and Maricopa Counties, Arizona. The Agua Fria River supports stretches of perennial flows interspersed with sections of intermittent flows before entering the Lake Pleasant reservoir created by Pleasant Dam. Suitable habitat areas on the Agua Fria River are therefore minimal, with perennial stretches mixed with predominantly intermittent stretches, and isolated from any mainstem system by a large reservoir. The Gila River at the confluence with the Agua Fria River is not perennial, so that the Agua Fria River does not act as an extension of suitable habitat in the adjacent mainstem river. Due to these factors, we cannot conclude that the Agua Fria River is essential to the conservation of spikedace at this time.

We are including within the proposal 12.5 km (7.7 mi) of the Middle Fork Gila River extending from the confluence with West Fork Gila River upstream to the confluence with Big Bear Canyon. This area is currently occupied by spikedace and is connected to currently occupied habitat on the West Fork of the Gila River (NMDGF 2008; Propst *et al.* 2009, pp. 9–11). The Gila River contains suitable habitat for all life stages of spikedace (PBF 1); has an appropriate food base (PBF 2); consists of perennial streams with no or low pollutant issues (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). This area is considered essential to the survival and recovery of the species because of its historical and current occupancy and multiple PBFs. In addition, the Middle Fork Gila River is connected to habitat occupied by spikedace on the West Fork Gila River.

The Middle Fork Gila River occurs primarily on Federal lands managed by the Gila National Forest, with small parcels of private lands interspersed with Federal lands. The essential features in this stream may require special management considerations or protection due to residual impacts of past livestock grazing and impacts to uplands, riparian vegetation, and the stream; competition with and predation by nonnative aquatic species; and watershed impacts associated with past wildfires.

Loach minnow only. In addition to the areas described above for this unit, we are including within the proposed designation 19.1 km (11.9 mi) of the Middle Fork Gila River extending from the confluence with West Fork Gila River upstream to the confluence with Brothers West Canyon. The 12.5 km (7.7 mi) designated on the Middle Fork Gila River for spikedace is completely within this 19.1 km (11.9 mi) designated for loach minnow. This area is currently occupied by loach minnow (NMDGF 2008; Propst *et al.* 2009, pp. 9–11). The Middle Fork Gila River contains suitable habitat for all life stages of loach minnow (PBF 1); has an appropriate food base (PBF 2); consists of perennial flows with no or low levels of pollutants (PBFs 3 and 4); and has an appropriate hydrologic regime to maintain suitable habitat characteristics (PBF 6). This area is considered essential to the survival and recovery of loach minnow due to its historical and current occupancy, its multiple PBFs, and its connection to the West Fork of the Gila River, which is currently occupied by loach minnow. See the description above, describing the proposed designation along the West and Middle Forks of the Gila River for spikedace for details on land ownership and special management needs.

Loach minnow were found in Bear Creek in 2005 (Schiffmiller 2005, pp. 1–4; NMDGF 2008); however, we are not including Bear Creek within this proposed designation. Bear Creek contains limited reaches of perennial flows in the upstream portions. However, most of the stream is intermittent. It is believed that loach minnow detected in 2005 came from the Gila River during a period when the upstream, perennial section was temporarily connected to the Gila River. However, we do not believe this area supports suitable conditions for loach minnow; therefore we do not believe this area is occupied on a regular or frequent basis. While we have documentation of the species from Bear Creek in 2005, there is no evidence of persistence of the species here, and the unsuitable habitat conditions indicate that this area is not essential to the survival and recovery of loach minnow.

TABLE 6—STREAM SEGMENTS CONSIDERED IN THIS CRITICAL HABITAT PROPOSAL, AND THE RULESET CRITERIA UNDER WHICH THEY ARE IDENTIFIED

Stream	Occupied by spikedace and loach minnow at the time of listing	Ruleset criteria met *
Verde River	Yes	1a.
Granite Creek	No	2a, 2c.
Oak Creek	No	2a.
Beaver and Wet Beaver Creek	No	2a.
Fossil Creek	No	2a.
West Clear Creek (spikedace only)	Yes	1a.
Salt River (spikedace only)	Yes	1b.
Agua Fria River (spikedace only)	Yes	1b.
Tonto Creek (spikedace only)	Yes	1a.
Greenback Creek (spikedace only)	No	2a, 2b.
Rye Creek (spikedace only)	No	2a, 2b.
Spring Creek (spikedace only)	No	2a, 2b.
Rock Creek (spikedace only)	No	2a, 2b.
White River (loach minnow only)	Yes	1a.
North Fork White River (loach minnow only)	Yes	1b.
East Fork White River (loach minnow only)	Yes	1a.
East Fork Black River (loach minnow only)	Yes	1a.
North Fork East Fork Black River (loach minnow only)	Yes	1a.
Boneyard Creek (loach minnow only)	Yes	1a.
Coyote Creek (loach minnow only)	Yes	1a.

TABLE 6—STREAM SEGMENTS CONSIDERED IN THIS CRITICAL HABITAT PROPOSAL, AND THE RULESET CRITERIA UNDER WHICH THEY ARE IDENTIFIED—Continued

Stream	Occupied by spikedace and loach minnow at the time of listing	Ruleset criteria met *
San Pedro River	Yes	1a.
Aravaipa Creek	Yes	1a.
Deer Creek	Yes (loach minnow)	1a
	No (spikedace)	2a, 2c.
Turkey Creek	Yes (loach minnow)	1a
	No (spikedace)	2a, 2c.
Hot Springs Canyon	No	2a.
Redfield Canyon	No	2a.
Bass Canyon	No	2a.
Bonita Creek	No	2b.
Eagle Creek	Yes	1a.
San Francisco River	Yes	1a.
Tularosa River (loach minnow only)	Yes	1a.
Negrito Creek (loach minnow only)	Yes	1a.
Whitewater Creek (loach minnow only)	Yes	1a.
Blue River	No—spikedace	2b
	Yes—loach minnow	1a.
Campbell Blue Creek	No—spikedace	2b
	Yes—loach minnow	1a.
Little Blue Creek	No—spikedace	2b
	Yes—loach minnow	1a.
Pace Creek	No—spikedace	2b
	Yes—loach minnow	1a.
Dry Blue Creek	No—spikedace	2b
	Yes—loach minnow	1a.
Frieborn Creek	No—spikedace	2b
	Yes—loach minnow	1a.
Gila River	Yes	1a.
West Fork Gila River	Yes	1a.
Middle Fork Gila River	Yes	1a.
East Fork Gila River	Yes	1a.
Mangas Creek	Yes	1a.

(*1a) Occupied at listing, and contains one or more of the PBFs.
(1b) Occupied at listing, and no longer supports PBFs or has been permanently altered so that recovery is unlikely.
(2a) Not known to be occupied at listing, within the historical range of the species, has one or more PBFs and serves as an extension of habitat in the unit.
(2b) Not known to be occupied at listing, within the historical range of the species, has one or more PBFs, and expands the geographic distribution across the range of the species.
(2c) Not known to be occupied at listing, within the historical range of the species, has one or more PBFs, and is connected to other occupied areas.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the Fifth and Ninth Circuits Court of Appeals have invalidated our definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain those PBFs that relate to the ability of the area to periodically support the species) to serve its intended conservation role for the species.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define "Reasonable and prudent alternatives" at 50 CFR 402.02 as alternative actions identified during consultation that:

• Can be implemented in a manner consistent with the intended purpose of the action,

• Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

• Are economically and technologically feasible, and

• Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect spikedace and loach minnow or their designated critical habitat require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10 of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local or private lands that are not federally funded, authorized, or permitted, do not require section 7 consultations.

Application of the Jeopardy and Adverse Modification Standard

Application of the Jeopardy Standard

Prior to and following listing and designation of critical habitat, the Service applies an analytical framework for jeopardy analyses that relies heavily on the importance of core area populations to the survival and recovery of the species. The section 7(a)(2) analysis is focused not only on these populations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of the species in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, if a proposed Federal action is incompatible with the viability of the affected core area population(s), inclusive of associated habitat conditions, a jeopardy finding is considered to be warranted, because of the relationship of each core area population to the survival and recovery of the species as a whole.

Application of the "Adverse Modification" Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or retain those PBFs that relate to the ability of the area to periodically support the species. Activities that may destroy or adversely modify critical habitat are those that alter the PBFs to an extent that appreciably reduces the conservation value of critical habitat for spikedace and loach minnow. As discussed above, the role of critical habitat is to support the life-history needs of the species and provide for the conservation (including recovery) of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for spikedace and loach minnow include, but are not limited to:

(1) Actions that would diminish flows within the active stream channel. Such activities could include, but are not limited to: Water diversions, channelization, construction of any barriers or impediments within the active river channel, removal of flows in excess of those allotted under a given water right, construction of permanent or temporary diversion structures, and groundwater pumping within aquifers associated with the river. These actions could affect water depth, velocity, and flow pattern, all of which are essential to the different life stages of spikedace or loach minnow.

(2) Actions that significantly alter the water chemistry of the active channel. Such activities could include, but are not limited to: release of chemicals, biological pollutants, or other substances into the surface water or connected groundwater at a point source or by dispersed release (non-point source); and storage of chemicals or pollutants that can be transmitted, via surface water, groundwater, or air into critical habitat. These actions can affect water chemistry, and in turn the prey base of spikedace and loach minnow.

(3) Actions that would significantly increase sediment deposition within a stream channel. Such activities could include, but are not limited to: Excessive sedimentation from livestock overgrazing, road construction, commercial or urban development, channel alteration, timber harvest, ORV use, recreational use, or other watershed and floodplain disturbances. These activities could adversely affect reproduction of the species by preventing hatching of eggs, or by eliminating suitable habitat for egg placement by loach minnow. In addition, excessive levels of sedimentation can make it difficult for these species to locate prey.

(4) Actions that result in the introduction, spread, or augmentation of nonnative aquatic species in occupied stream segments, or in stream segments that are hydrologically connected to occupied stream segments, even if those segments are occasionally intermittent, or introduction of other species that compete with or prey on spikedace or loach minnow. Possible actions could include, but are not limited to: Introduction of parasites or disease, stocking of nonnative fishes, stocking of sport fish, stocking of nonnative amphibians, or other related actions. These activities can affect the growth, reproduction, and survival of spikedace and loach minnow.

(5) Actions that would significantly alter channel morphology. Such activities could include, but are not limited to: Channelization, impoundment, road and bridge construction, mining, dredging, and destruction of riparian vegetation. These activities may lead to changes in water flows and levels that would degrade or eliminate the spikedace or loach minnow, their habitats, or both. These actions can also lead to increased sedimentation and degradation in water

quality to levels that are beyond the tolerances of spikedace and loach minnow.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

There are no Department of Defense lands within the proposed designation.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the proposed designation, we must identify the benefits of including the area in the proposed designation, identify the benefits of excluding the area from the proposed designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If, based on this analysis, we make this determination, then we can exclude areas only if such exclusion would not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus, the educational benefits of mapping essential habitat for recovery of the listed species, and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; implementation of a management plan that provides equal to or more conservation that a critical habitat designation would provide; or some combination of these.

After evaluating the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to determine if the benefits of exclusion outweigh those of inclusion. If we determine that they do, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we are required to consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors. An economic analysis was completed for the 2007 designation of spikedace and loach minnow critical habitat (72 FR 13355, March 21, 2007). This analysis concluded, in part, that there would be potential impacts on several economic activities, including water diversion repair, livestock grazing, recreation, species management, residential and commercial development, and transportation, as well as administrative costs associated with species conservation activities. A new economic analysis will be completed on this currently proposed designation.

We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.regulations.gov,* or by contacting the Arizona Ecological Services Office directly (see **FOR FURTHER INFORMATION CONTACT** section). During the development of a final designation, we will consider economic impacts, public comments, and other new information, and areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense (DOD) where a national security impact might exist. In preparing this proposal, we determined that the lands within the proposed designation of critical habitat for spikedace and loach minnow are not owned or managed by the DOD, and therefore we anticipate no impacts to national security. We are not considering any areas for exclusion from the final critical habitat designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts to national security. We consider a number of factors including

whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any Tribal issues, and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

When we evaluate the existence of a conservation plan when considering the benefits of exclusion, we consider a variety of factors, including but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical and biological features; whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

During the preparation of the 2007 critical habitat designation (72 FR 13355, March 21, 2007), we received management plans from the White Mountain Apache Tribe, San Carlos Apache Tribe, and Freeport McMoRan (formerly Phelps Dodge). Additionally, a Tribal Resolution was prepared by the Yavapai Apache Nation. Areas covered by these plans and the resolution were excluded from the previous final critical habitat designation. On October 3, 2008, a formal opinion was issued by the Solicitor of the Department of the Interior, "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act" (U.S. Department of the Interior 2008). The opinion clearly lays out that areas which are under consideration for exclusion from critical habitat under section 4(b)(2) of the Act should be included in the proposed rule and excluded from the final rule. Thus, the areas that we excluded from the 2007 designation may not be automatically excluded from this new proposal, but must be reconsidered for exclusion during the new final designation process. We will consider these materials and any other relevant information pertaining to these entities during the development of the final rule to determine if any of these areas should be excluded from the final critical habitat designation under section 4(b)(2) of the Act.

Finally, portions of the Verde River are included in the area covered by the Salt River Project's HCP. We will consider the HCP and any other relevant information during the development of the final rule to determine if this area should be excluded from the final critical habitat designation under section 4(b)(2) of the Act.

A final determination on whether we should exclude any of these areas from critical habitat for the spikedace and loach minnow will be made when we publish the final rule designating critical habitat. We will take into account public comments and carefully weigh the benefits of exclusion versus inclusion of these areas. We may also consider areas not identified above for exclusion from the final critical habitat designation based on information we may receive during the preparation of the final rule (*e.g.,* management plans for additional areas).

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will invite these peer reviewers to comment during this public comment period on our specific assumptions and conclusions in this proposed designation of critical habitat.

We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Public Hearings

Section 4(b)(5)(E) of the Act requires us to hold at least one public hearing on this proposal, if properly requested. Requests for public hearings must be made in writing within 45 days of the publication of this proposal in the **Federal Register** (see **DATES**). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days prior to the first hearing.

Required Determinations

Regulatory Planning and Review—Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, we defer the RFA finding until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and E.O. 12866. This draft economic analysis and any public comment on these issues will provide the required factual basis for the RFA finding. Therefore, upon completion of the draft economic analysis, we will announce availability of the draft economic analysis of the proposed designation in the **Federal Register** and reopen the public comment period for the proposed designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(b) We lack the available economic information to determine if a Small Government Agency Plan is required. Therefore, we defer this finding until completion of the draft economic analysis prepared under section 4(b)(2) of the Act.

Takings

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we will analyze the potential takings implications of designating critical habitat for the spikedace and the loach minnow in a takings implications assessment. Following completion of the proposed rule, a draft Economic Analysis will be completed for the proposed designation. The draft Economic Analysis will provide the foundation for us to use in preparing a takings implications assessment.

Federalism

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in Arizona and New Mexico, and Tribal governments. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical and biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the physical and biological features within the designated areas to assist the public in understanding the habitat needs of the spikedace and the loach minnow.

Paperwork Reduction Act of 1995

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). However, when the range of the species includes States within the Tenth Circuit, such as that of the spikedace and the loach minnow, under the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we will undertake a NEPA analysis for critical habitat designation and notify the public of the availability of the draft environmental

assessment for this proposal when it is finished.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship With Tribes

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

For this proposal, we are including stream portions of the White River and East Fork White River on lands belonging to the White Mountain Apache Tribe; portions of Eagle Creek on lands belonging to the San Carlos Apache Tribe; and portions of the Verde River on lands belonging to the Yavapai-Apache Nation. We are including these areas because we have found them to be essential to the survival and recovery of the species.

During the process of developing the 2007 designation of critical habitat for spikedace and loach minnow, the Yavapai Apache Nation submitted a Tribal Resolution, while the White Mountain Apache and San Carlos Apache tribes submitted management plans. Based on these plans, we excluded critical habitat on their lands from the previous final designation. We have notified the Tribes that a new critical habitat proposal is underway, and provided them with information on the timeline. We anticipate working with all three entities to address river systems on their lands prior to publication of a final rule. Additionally, these areas may again be considered for exclusion from the final critical habitat designation under section 4(b)(2) of the Act (see "*Application of Section 4(b)(2) of the Act*" section above for additional information).

Energy Supply, Distribution, or Use

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect this action to significantly affect energy supplies, distribution, or use. One project, the SunZia Southwest Transmission Project, is currently in the study phase. This project involves the construction of up to two 500 kV transmission lines with key interconnections to the existing extra-high voltage grid in Arizona and New Mexico. The specific route of the transmission lines has not yet been determined, and may or may not cross critical habitat proposed in this rule (AGFD 2010, p. 1). Alternative alignments, which would not cross proposed critical habitat areas, are under consideration (Service 2010, p. 5). Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Arizona Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this package are the staff members of the Arizona Ecological Services Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h), revise the entries for "Spikedace" and "Minnow, loach" under "FISHES" in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
Fishes							
*	*	*	*	*	*		*
Minnow, loach	*Tiaroga cobitis*	U.S.A. (AZ, NM), Mexico.	Entire	E		17.95(e)	NA

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
Spikedace	*Meda fulgida*	U.S.A. (AZ, NM), Mexico.	Entire	E		17.95(e)	NA
*	*	*	*	*	*		*

§ 17.44 [Amended]

3. In § 17.44, remove and reserve paragraphs (p) and (q).

4. In § 17.95, amend paragraph (e) by revising the entries for "Spikedace (*Meda fulgida*),"and "Loach Minnow (*Tiaroga cobitis*)" to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Loach Minnow (*Tiaroga cobitis*)

(1) Critical habitat units are depicted for Apache, Cochise, Gila, Graham, Greenlee, Navajo, Pinal, and Yavapai Counties, Arizona, and for Catron, Grant, and Hidalgo Counties, New Mexico, on the maps below.

(2) The physical and biological features of critical habitat for the loach minnow are:

(i) Habitat to support all egg, larval, juvenile, and adult loach minnow. This habitat includes perennial flows with a stream depth of generally less than 1 m (3.3 ft), and with slow to swift flow velocities between 0 and 80 cm per second (0.0 and 31.5 in. per second). Appropriate microhabitat types include pools, runs, riffles, and rapids over sand, gravel, cobble, and rubble substrates with low or moderate amounts of fine sediment and substrate embeddedness. Appropriate habitats have a low gradient of less than 2.5 percent, and are at elevations below 2,500 m (8,202 ft). Water temperatures should be in the general range of 8.0 to 25.0 °C (46.4 to 77 °F);

(ii) An abundant aquatic insect food base consisting of mayflies, true flies, black flies, caddisflies, stoneflies, and dragonflies.

(iii) Streams with no or no more than low levels of pollutants.

(iv) Perennial flows, or interrupted stream courses that are periodically dewatered but that serve as connective corridors between occupied or seasonally occupied habitat and through which the species may move when the habitat is wetted.

(v) No nonnative aquatic species, or levels of nonnative aquatic species that are sufficiently low to allow persistence of loach minnow.

(vi) Streams with a natural, unregulated flow regime that allows for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of transporting sediments.

(3) We have determined that all designated areas contain at least one PBF for loach minnow. There are no developed areas within the designation except for manmade barriers constructed on streams, low water road crossings of streams, and areas beneath bridges, all of which do not remove the suitability of these areas for this species. Where a manmade structure is within the proposed critical habitat designation, the structure would be considered to be proposed critical habitat if it continues to contain one or more of the PBFs. If the structure does not contain one or more of the PBFs, the structure is excluded by text in this proposed rule. For excluded structures, a Federal action involving these lands (if and when designated) would not trigger section 7 consultation with respect to critical habitat and the prohibition of destruction or adverse modification, unless the specific action may affect adjacent critical habitat.

(4) Each stream segment includes a lateral component that consists of 300 feet (91.4 meters) on either side of the stream channel measured from the stream edge at bank full discharge. This lateral component of critical habitat contains and contributes to the physical and biological features essential to the loach minnow and is intended as a surrogate for the 100-year floodplain.

(5) Critical habitat map units. Data layers defining map units were created on a base of USGS 7.5′ quadrangles along with shapefiles generated by the Arizona Land Resource Information Service for land ownership, streams, counties, and the Public Land Survey System. Information on species locations was derived from databases developed by the Arizona Game and Fish Department, the New Mexico Department of Game and Fish, and Arizona State University.

(6) Note: Index map for loach minnow critical habitat units follows.

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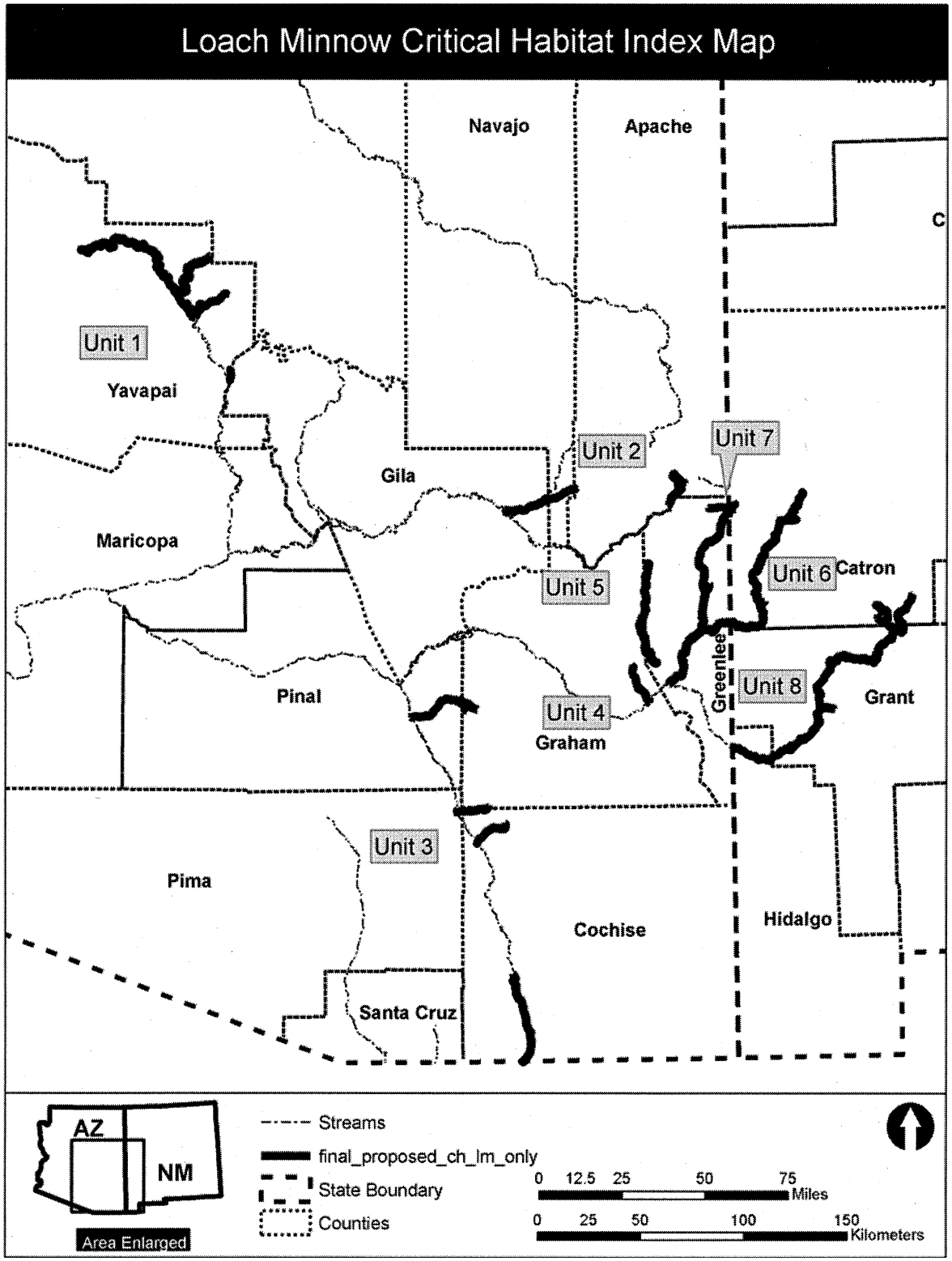


(7) Unit 1: Verde River Subbasin, Yavapai County, Arizona.

(i) Verde River for approximately 119.7 km (74.4 mi), extending from the confluence with Beaver and Wet Beaver Creek in Township 14 North, Range 5 East, southeast quarter of section 30 upstream to Sullivan Dam in Township 17 North, Range 2 West, northwest quarter of section 15.

(ii) Granite Creek for approximately 3.2 km (2.0 mi), extending from the confluence with the Verde River in Township 17 North, Range 2 West, northeast quarter of section 14 upstream to a spring in Township 17 North, Range 2 West, southwest quarter of the southwest quarter of section 13.

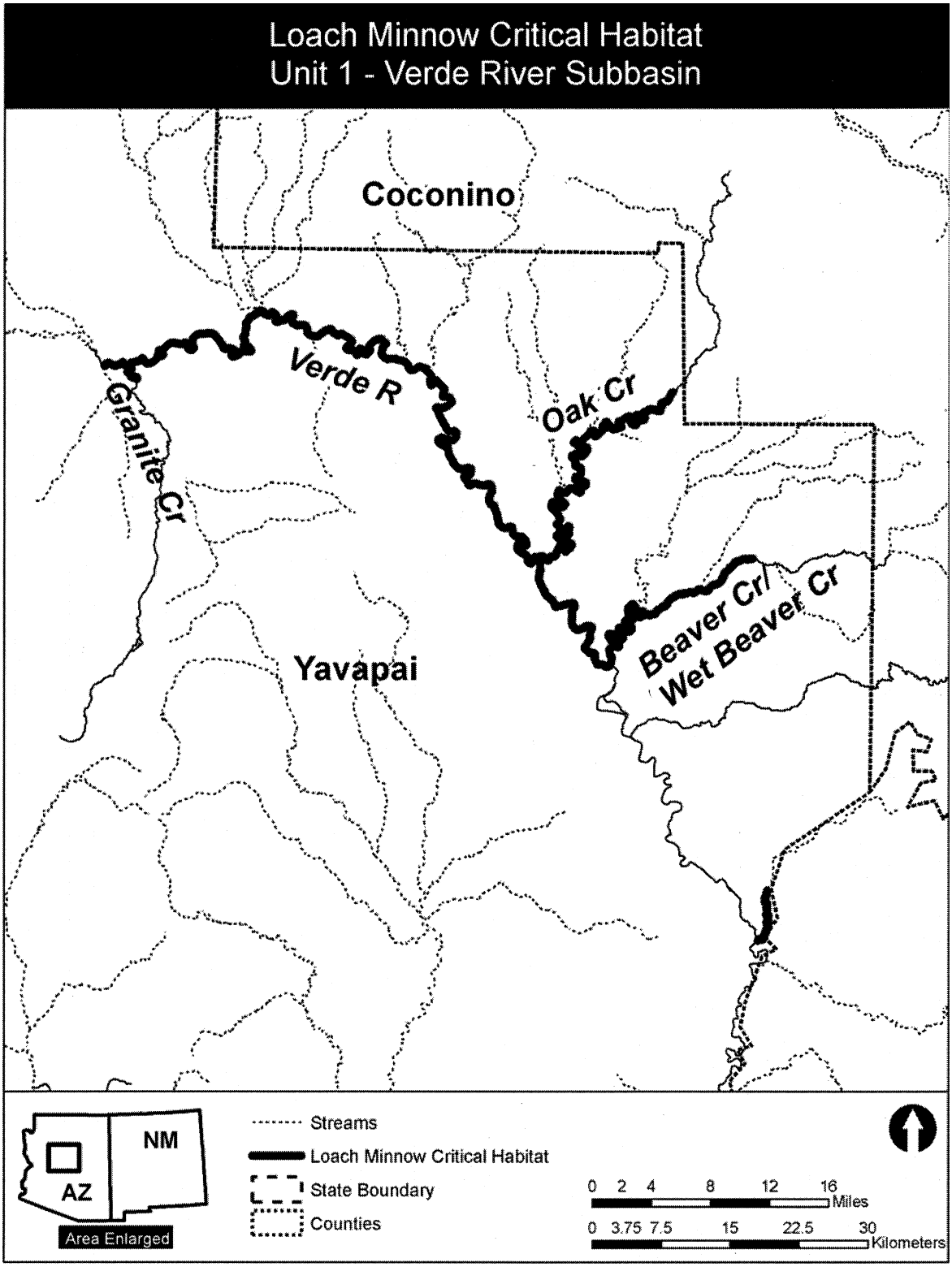
(iii) Oak Creek for approximately 54.3 km (33.7 mi), extending from the confluence with the Verde River in Township 15 North, Range 4 East, southeast quarter of section 20 upstream to the confluence with an unnamed

tributary from the south in Township 17 North, Range 5 East, southeast quarter of the northeast quarter of section 24.

(iv) Beaver Creek and Wet Beaver Creek for approximately 33.5 km (20.8 mi), extending from the confluence with the Verde River in Township 14 North, Range 5 East, southeast quarter of section 30 upstream to the confluence with Casner Canyon in Township 15 North, Range 6 East, northwest quarter of section 23.

(v) Fossil Creek for approximately 7.5 km (4.7 mi) extending from the confluence with the Verde River in Township 11 North, Range 5 East, northeast quarter of section 25 upstream to the confluence with an unnamed tributary from the northwest in Township 11.5 North, Range 7 East, center of section 29.

(vi) **Note:** Map of Unit 1, Verde River Subbasin (Map 2), follows.



(8) Unit 2: Salt River Subbasin, Apache, Gila, and Navajo Counties, Arizona.

(i) White River for approximately 29.0 km (18.0 mi) from the confluence with the Black River at Township 4.5 North, Range 20 East, northeast quarter of section 35 upstream to the confluence with the North and East Forks of the White River at Township 5 North, Range 22 East, northwest quarter of section 35.

(ii) East Fork White River for approximately 17.2 km (10.7 mi) from the confluence with North Fork White River at Township 5 North, Range 22 East, northeast quarter of section 35 upstream to the confluence with Bones Canyon at Township 5 North, Range 24 East, southwest quarter of section 18.

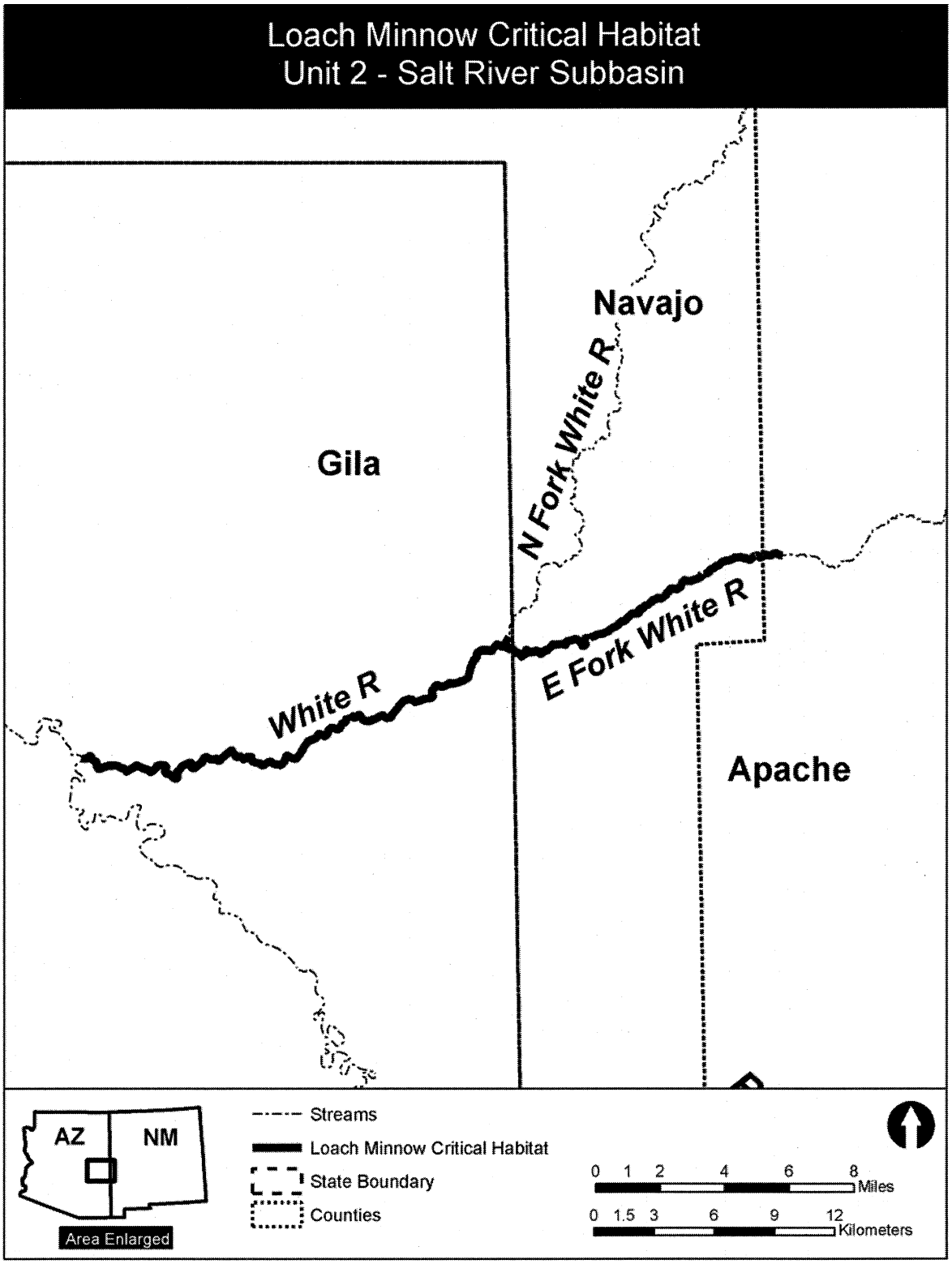
(iii) East Fork Black River for approximately 19.1 km (11.9 mi) from the confluence with the West Fork Black River at Township 4 North, Range 28 East, southeast quarter of section 11 upstream to the confluence with an unnamed tributary approximately 0.82 km (0.51 mi) downstream of the Boneyard Creek confluence at Township 5 North, Range 29 East, northwest quarter of Section 5.

(iv) North Fork East Fork Black River for approximately 7.1 km (4.4 mi) of the North Fork East Fork Black River extending from the confluence with East Fork Black River at Township 5 North, Range 29 East, northwest quarter of section 5 upstream to the confluence with an unnamed tributary at Township 6 North, Range 29 East, center of Section 30.

(v) Boneyard Creek for approximately 2.3 km (1.4 mi) extending from the confluence with the East Fork Black River at Township 5 North, Range 29 East, SW quarter of section 5 upstream to the confluence with an unnamed tributary at Township 6 North, Range 29 East, southeast quarter of section 32.

(vi) Coyote Creek for approximately 3.4 km (2.1 mi) from the confluence with East Fork Black River at Township 5 North, Range 29 East, northeast quarter of section 8 upstream to an unnamed confluence at Township 5 North, Range 29 East, northwest quarter of section 10.

(vii) **Note:** Map of Unit 2, Salt River Subbasin (Map 3), follows.



(9) Unit 3: San Pedro Subbasin, Cochise, Pinal, and Graham Counties, Arizona.

(i) San Pedro River for approximately 60.0 km (37.2 mi) extending from the International Boundary with Mexico in Township 24 South, Range 22 East, section 19 downstream to the confluence with the Babocomari River in the San Juan de las Boquillas y Nogales land grant.

(ii) Aravaipa Creek for approximately 44.9 km (27.9 mi) extending from the confluence with the San Pedro River in Township 7 South, Range 16 East, center of section 9 upstream to the confluence with Stowe Gulch in Township 6 South, Range 19 East, southeast quarter of the northeast quarter of section 35.

(iii) Deer Creek—3.7 km (2.3 mi) of the creek extending from the confluence with Aravaipa Creek at Township 6 South, Range 18 East, section 14

upstream to the boundary of the Aravaipa Wilderness at Township 6 South, range 19 East, section 18.

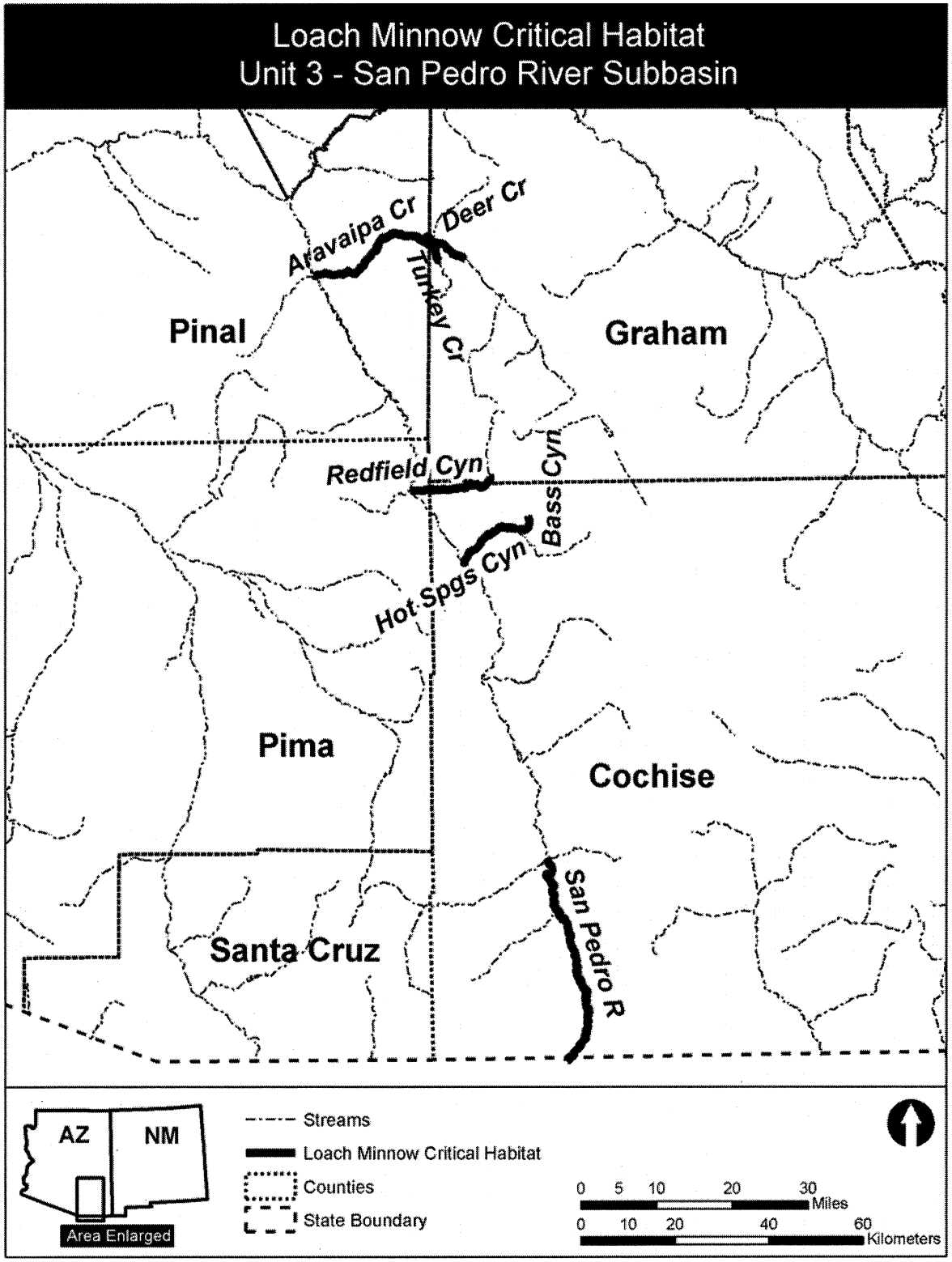
(iv) Turkey Creek—4.3 km (2.7 mi) of the creek extending from the confluence with Aravaipa Creek at Township 6 South, Range 19 East, section 19 upstream to the confluence with Oak Grove Canyon at Township 6 South, Range 19 east, section 32.

(v) Hot Springs Canyon for approximately 19.0 km (11.8 mi) extending from the confluence with the San Pedro River in Township 13 South, Range 19 East, center of section 23 upstream to the confluence with Bass Canyon in Township 12 South, Range 20 East, northeast quarter of section 36.

(vi) Redfield Canyon for approximately 22.5 km (14.0 mi) extending from the confluence with the San Pedro River in Township 11 South, Range 18 East, southwest quarter of section 34 upstream to the confluence with Sycamore Canyon in Township 11 South, Range 20 East, northwest quarter of section 28.

(vii) Bass Canyon for approximately 5.5 km (3.4 mi) from the confluence with Hot Springs Canyon in Township 12 South, Range 20 East, northeast quarter of section 36 upstream to the confluence with Pine Canyon in Township 12 South, Range 21 East, center of section 20.

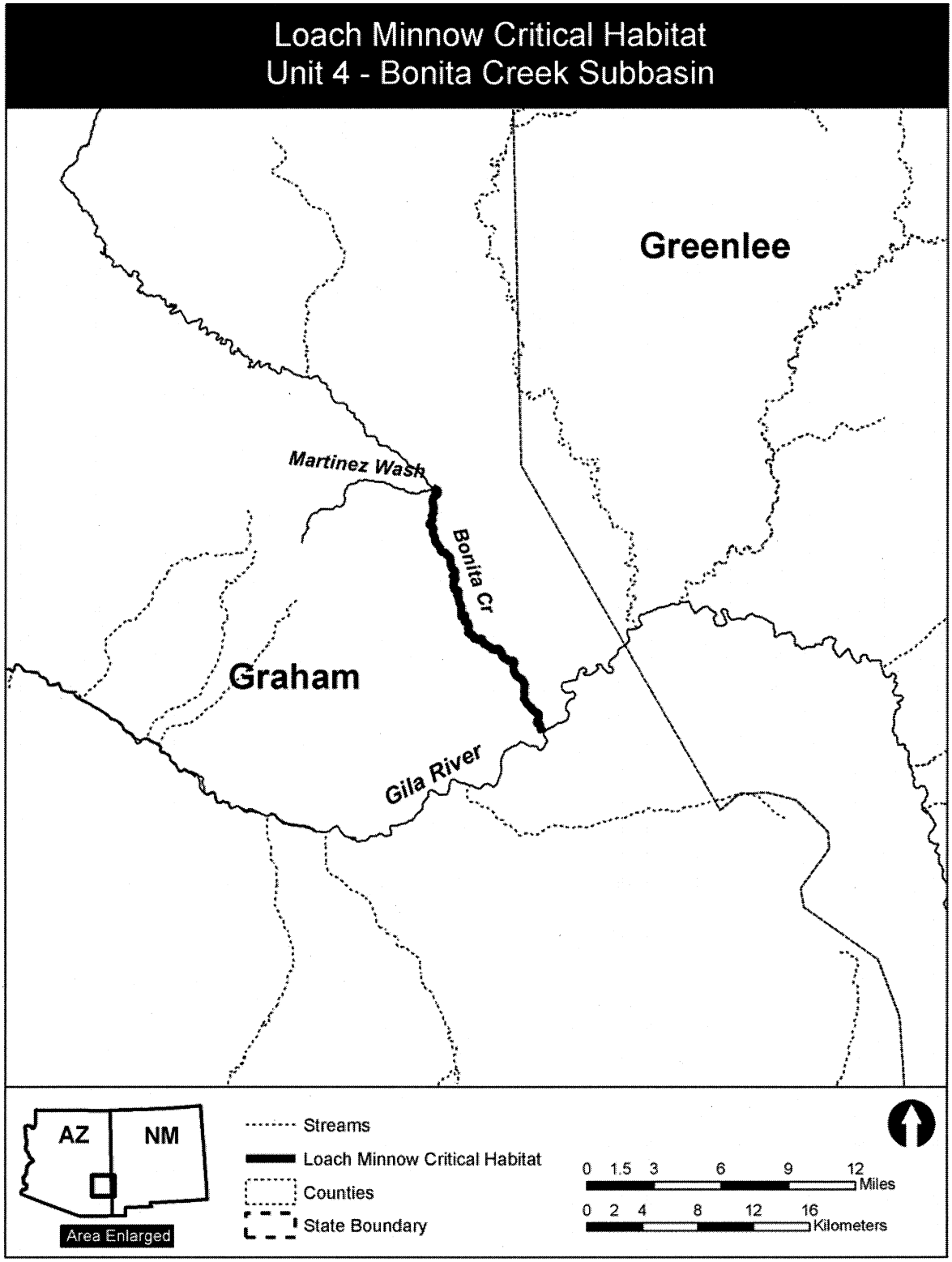
(viii) **Note:** Map of Unit 3, San Pedro River Subbasin (Map 4), follows.



(10) Unit 4: Bonita Creek Subbasin, Graham County, Arizona.

(i) Bonita Creek for approximately 23.8 km (14.8 mi) from the confluence with the Gila River in Township 6 South, Range 28 East, southeast quarter of section 21 upstream to the confluence with Martinez Wash in Township 4 South, Range 27 East, southeast quarter of section 27.

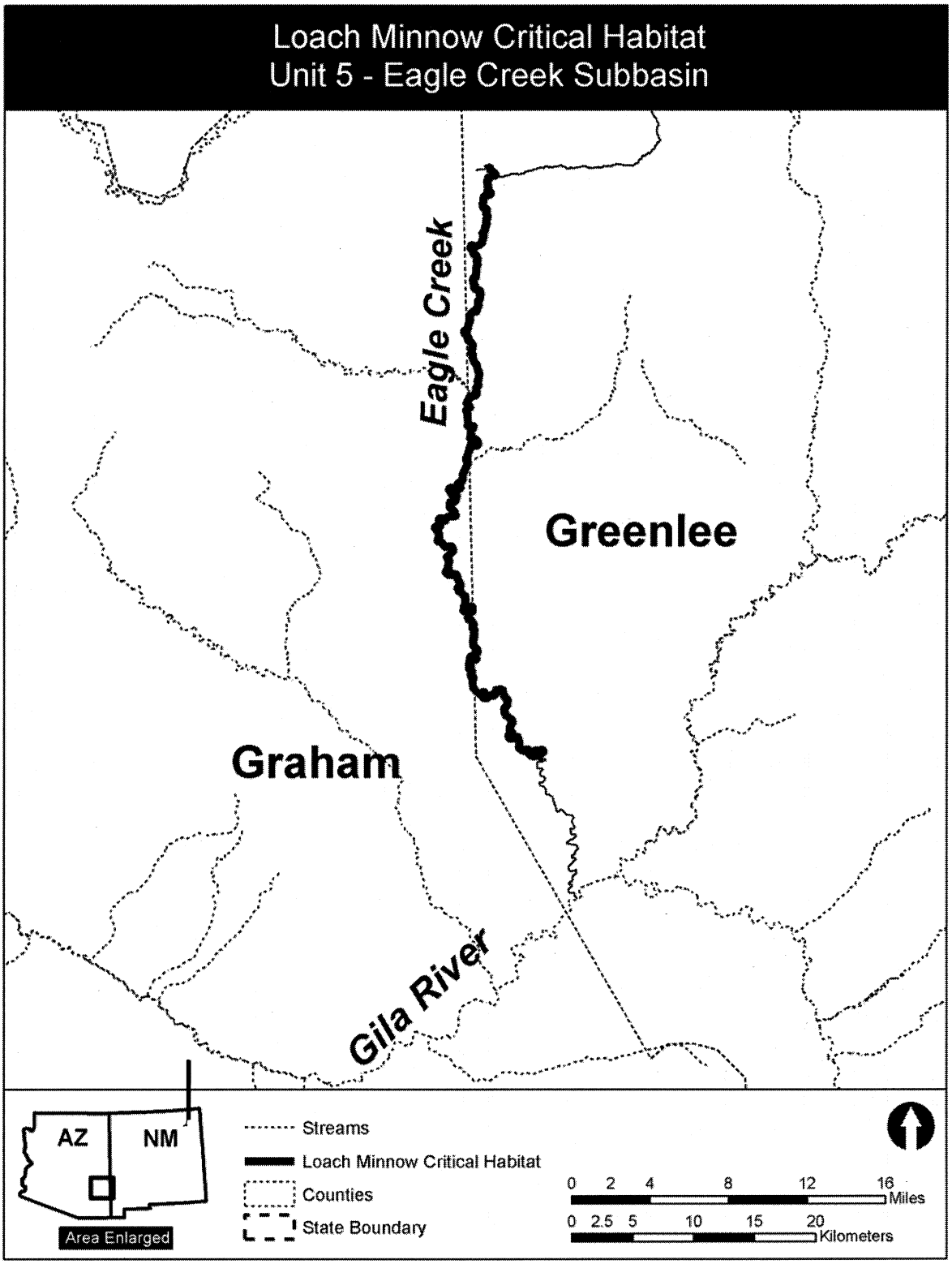
(ii) **Note:** Map of Unit 4, Bonita Creek Subbasin (Map 5), follows.



(11) Unit 5: Eagle Creek Subbasin, Graham and Greenlee Counties, Arizona.

(i) Eagle Creek for approximately 75.5 km (46.9 mi) from the Freeport McMoRan diversion dam at Township 4 South, Range 28 East, southwest quarter of the northwest quarter of section 23 upstream to the confluence of East Eagle Creek in Township 2 North, Range 28 East, southwest quarter of section 20.

(ii) **Note:** Map of Unit 5, Eagle Creek Subbasin (Map 6), follows.



(12) Unit 6: San Francisco River Subbasin, Greenlee County, Arizona, and Catron County, New Mexico.

(i) San Francisco River for approximately 181.0 km (112.3 mi) of the San Francisco River extending from the confluence with the Gila River in Township 5 South, Range 29 East, southeast quarter of section 21 upstream to the confluence with the Tularosa River in Township 7 South, Range 19 West, southwest quarter of Section 23.

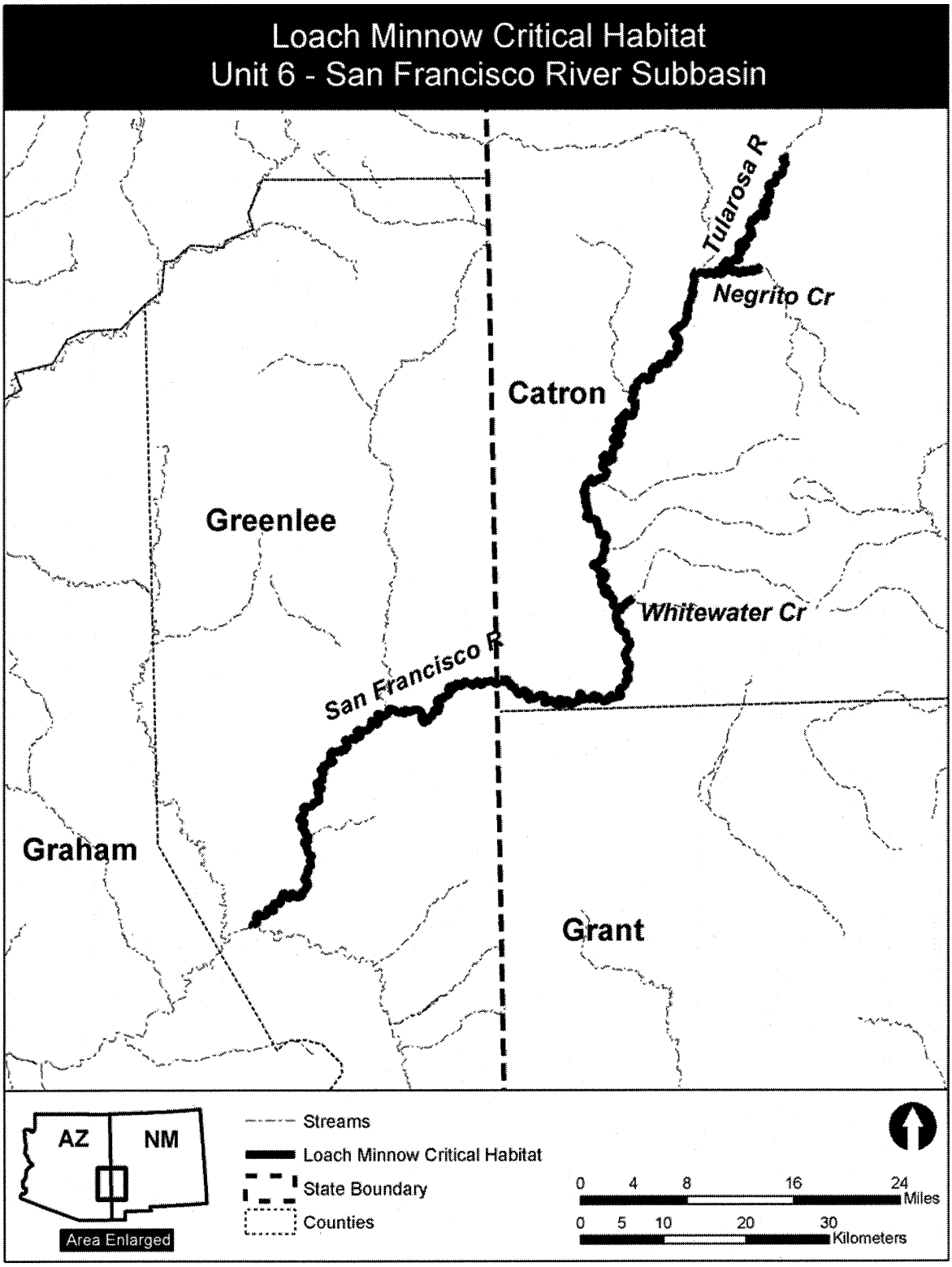
(ii) Tularosa River for approximately 30.0 km (18.6 mi) from the confluence with the San Francisco River at Township 7 South, Range 19 West, southwest quarter of section 23 upstream to the town of Cruzville at Township 6 South, Range 18 West, southern boundary of section 1.

(iii) Negrito Creek for approximately 6.8 km (4.2 mi) extending from the confluence with the Tularosa River at Township 7 South, Range 18 West,

southwest quarter of the northwest quarter of section 19 upstream to the confluence with Cerco Canyon at Township 7 South, Range 18 West, west boundary of section 22.

(iv) Whitewater Creek for approximately 1.9 km (1.2 mi) from the confluence with the San Francisco River at Township 11 South, Range 20 West, Section 27 upstream to the confluence with Little Whitewater Creek at Township 11 South, Range 20 West, southeast quarter of section 23.

(v) **Note:** Map of Unit 6, San Francisco Subbasin (Map 7), follows.



(13) Unit 7: Blue River Subbasin, Greenlee County, Arizona, and Catron County, New Mexico.

(i) Blue River for approximately 81.4 km (50.6 mi) from the confluence with the San Francisco River at Township 2 South, Range 31 East, southeast quarter of section 31 upstream to the confluence of Campbell Blue and Dry Blue creeks at Township 7 South, Range 21 West, southeast quarter of section 6.

(ii) Campbell Blue Creek for approximately 12.4 km (7.7 mi) from the confluence of Dry Blue and Campbell Blue Creeks at Township 7 South, Range 21 West, southeast quarter of section 6 to the confluence with Coleman Canyon in Township 4.5 North, Range 31 East, southwest quarter of the northeast quarter of section 32.

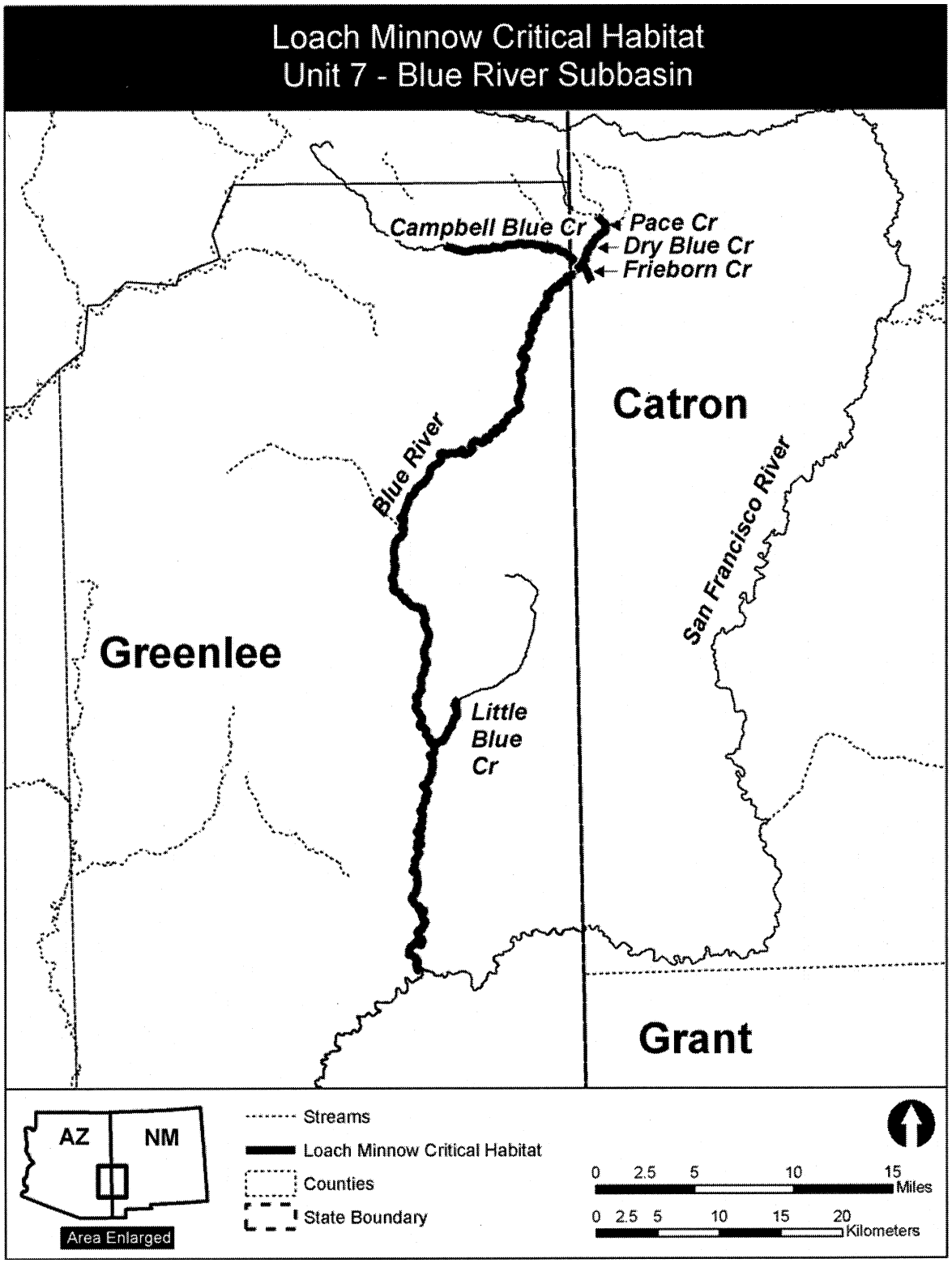
(iii) Little Blue Creek for approximately 5.1 km (3.1 mi) from the confluence with the Blue River at Township 1 South, Range 31 East, center of section 5 upstream to the mouth of a canyon at Township 1 North, Range 31 East, northeast quarter of section 29.

(iv) Pace Creek for approximately 1.2 km (0.8 mi) from the confluence with Dry Blue Creek at Township 6 South, Range 21 West, southwest quarter of section 28 upstream to a barrier falls at Township 6 South, Range 21 West, northeast quarter of section 29.

(v) Frieborn Creek for approximately 1.8 km (1.1 mi) from the confluence with Dry Blue Creek at Township 7 South, Range 21 West, southwest quarter of the northwest quarter of section 5 upstream to an unnamed tributary flowing from the south in Township 7 South, Range 21 West, northeast quarter of the southwest quarter of section 8.

(vi) Dry Blue Creek for approximately 4.7 km (3.0 mi) from the confluence with Campbell Blue Creek at Township 7 South, Range 21 West, southeast quarter of Section 6 upstream to the confluence with Pace Creek in Township 6 South, Range 21 West, southwest quarter of section 28.

(vii) **Note:** Map of Unit 7, Blue River Subbasin (Map 8), follows.



(14) Unit 8: Gila River Subbasin, Catron, Grant, and Hidalgo Counties, New Mexico.

(i) Gila River for approximately 165.1 km (102.6 mi) from the confluence with Moore Canyon at Township 18 South, Range 21 West, southeast quarter of the southwest quarter of section 32 upstream to the confluence of the East and West Forks of the Gila River at Township 13 South, Range 13 West, center of section 8.

(ii) West Fork Gila River for approximately 13.0 km (8.1mi) from the confluence with the East Fork Gila River at Township 13 South, Range 13 West, center of Section 8 upstream to the confluence with EE Canyon at Township 12 South, Range 14 West, east boundary of Section 21.

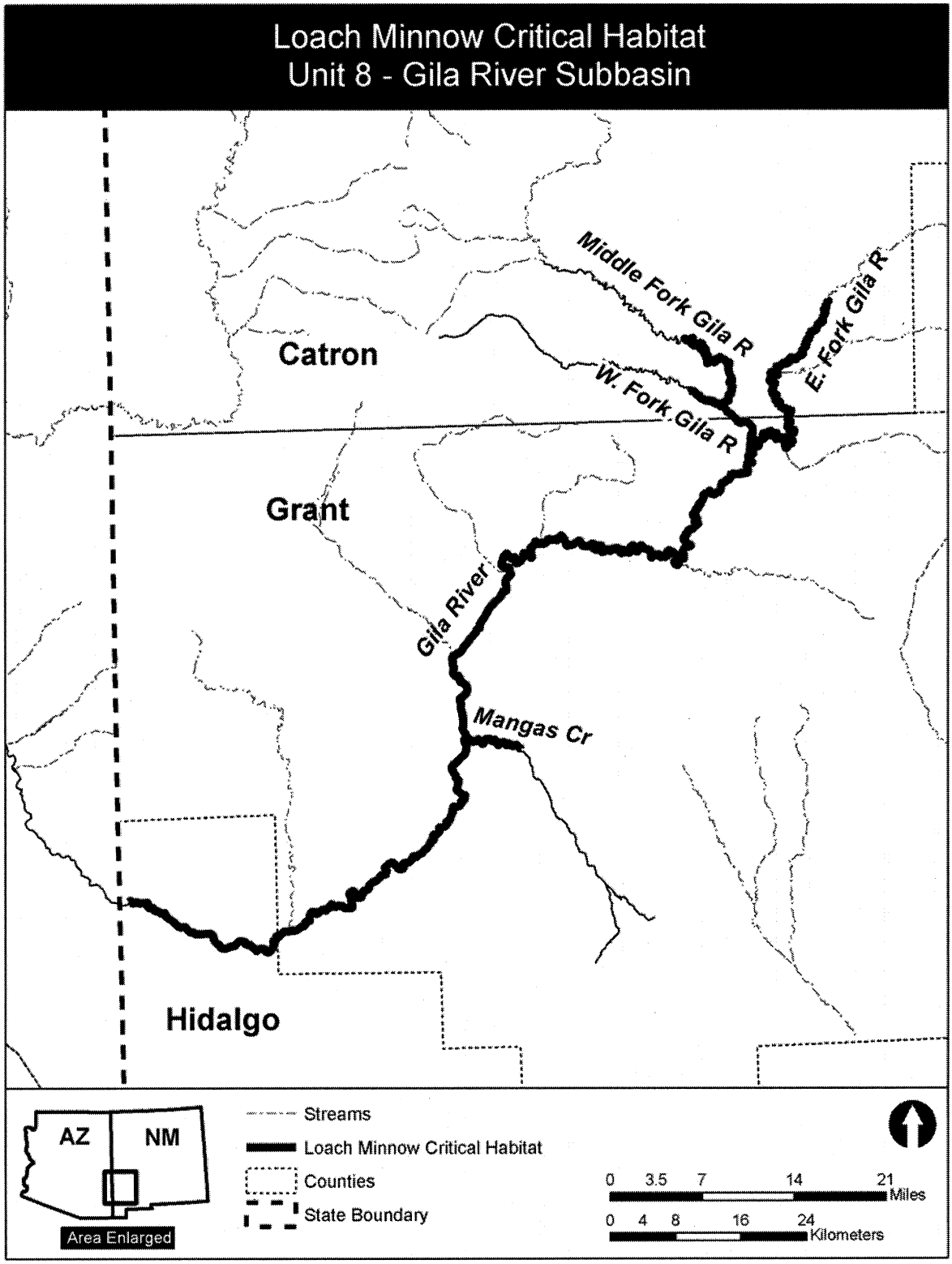
(iii) Middle Fork Gila River for approximately 19.1 km (11.9 mi) of the Middle Fork Gila River extending from the confluence with West Fork Gila

River at Township 12 South, Range 14 West, southwest quarter of section 25 upstream to the confluence of Brothers West Canyon in Township 11 South, Range 14 West, northeast quarter of section 33.

(iv) East Fork Gila River for approximately 42.1 km (26.2 mi) extending from the confluence with West Fork Gila River at Township 13 South, Range 13 West, center of section 8 upstream to the confluence of Beaver and Taylor Creeks in Township 11 South, Range 12 West, northeast quarter of section 17.

(v) Mangas Creek for approximately 9.1 km (5.7 mi) extending from the confluence with the Gila River at Township 17 South, Range 16 West, southwest quarter of Section 5 upstream to the confluence with Blacksmith Canyon at Township 17 South, Range 17 West, northwest quarter of section 3.

(vi) **Note:** Map of Unit 8, Gila River Subbasin (Map 9), follows.



* * * * *

Spikedace (*Meda fulgida*)

(1) Critical habitat units are depicted for Cochise, Gila, Graham, Greenlee, Pinal, and Yavapai Counties, Arizona, and for Catron, Grant, and Hidalgo Counties, New Mexico, on the maps below.

(2) The physical and biological features of critical habitat for the spikedace are:

(i) Habitat to support all egg, larval, juvenile, and adult spikedace. This habitat includes streams with perennial flows with a stream depth generally less than 1 m (3.3 ft), and with slow to swift flow velocities between 5 and 80 cm per second (1.9 and 31.5 in. per second). Appropriate stream microhabitat types include glides, runs, riffles, the margins of pools, and eddies, and backwater components over sand, gravel, and

cobble substrates with low or moderate amounts of fine sediment and substrate embeddedness. Appropriate habitat will have a low gradient of less than approximately 1.0 percent, at elevations below 2,100 m (6,890 ft). Water temperatures should be in the general range of 8.0 to 28.0 °C (46.4 to 82.4 °F).

(ii) An abundant aquatic insect food base consisting of mayflies, true flies, black flies, caddisflies, stoneflies, and dragonflies.

(iii) Streams with no or no more than low levels of pollutants.

(iv) Perennial flows, or interrupted stream courses that are periodically dewatered but that serve as connective corridors between occupied or seasonally occupied habitat and through which the species may move when the habitat is wetted.

(v) No nonnative aquatic species, or levels of nonnative aquatic species that are sufficiently low as to allow persistence of spikedace.

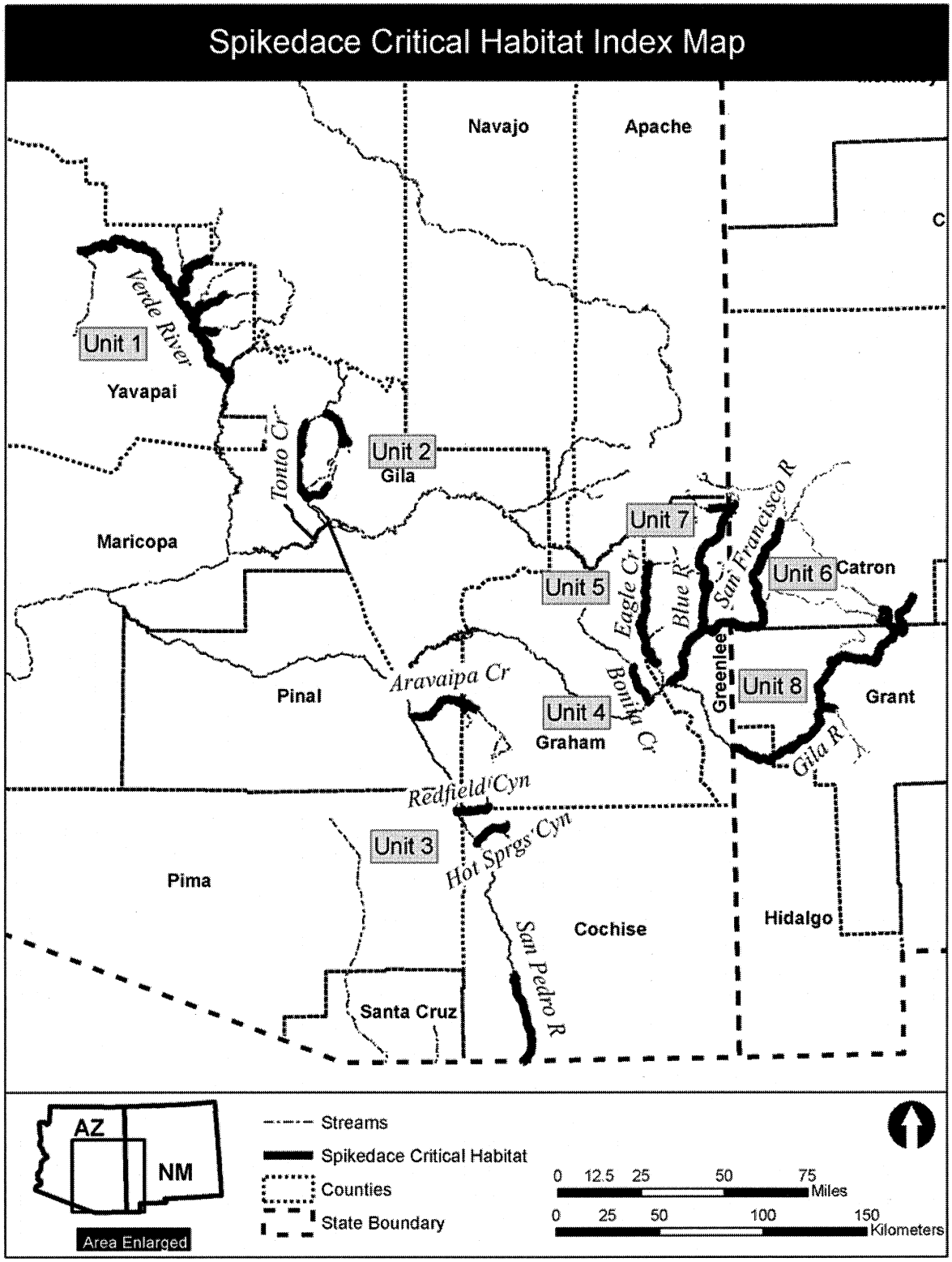
(vi) Streams with a natural, unregulated flow regime that allow for periodic flooding or, if flows are modified or regulated, a flow regime that allows for adequate river functions, such as flows capable of transporting sediments.

(3) We have determined that all designated areas contain at least one PBF for spikedace. There are no developed areas within the designation except for manmade barriers constructed on streams, low water road crossings of streams, and areas beneath bridges, all of which do not remove the suitability of these areas for this species. Where a manmade structure is within the proposed critical habitat designation, the structure would be considered to be proposed critical habitat if it continues to contain one or more of the PBFs. If the structure does not contain one or more of the PBFs, the structure is excluded by text in this proposed rule. For excluded structures, a Federal action involving these lands (if and when designated) would not trigger section 7 consultation with respect to critical habitat and the prohibition of destruction or adverse modification, unless the specific action may affect adjacent critical habitat.

(4) Each stream segment includes a lateral component that consists of 300 feet (91.4 meters) on either side of the stream channel measured from the stream edge at bank full discharge. This lateral component of critical habitat contains and contributes to the physical and biological features essential to the spikedace and is intended as a surrogate for the 100-year floodplain.

(5) Critical habitat map units. Data layers defining map units were created on a base of USGS 7.5′ quadrangles along with shapefiles generated by the Arizona Land Resource Information Service for land ownership, streams, counties, and the Public Land Survey System. Information on species locations was derived from databases developed by the Arizona Game and Fish Department, the New Mexico Department of Game and Fish, and Arizona State University.

(6) **Note:** Index map for spikedace critical habitat units follows.



(7) Unit 1: Verde River Subbasin, Yavapai County, Arizona.

(i) Verde River for approximately 171.8 km (106.7 mi), extending from the confluence with Fossil Creek in Township 11 North, Range 6 East, northeast quarter of section 25 upstream to Sullivan Dam in Township 17 North, Range 2 West, northwest quarter of section 15.

(ii) Granite Creek for approximately 3.2 km (2.0 mi), extending from the confluence with the Verde River in Township 17 North, Range 2 West, northeast quarter section 14 upstream to a spring in Township 17 North, Range 2 West, southwest quarter of the southwest quarter of section 13.

(iii) Oak Creek for approximately 54.3 km (33.7 mi), extending from the confluence with the Verde River in Township 15 North, Range 4 East, southeast quarter section 20 upstream to the confluence with an unnamed

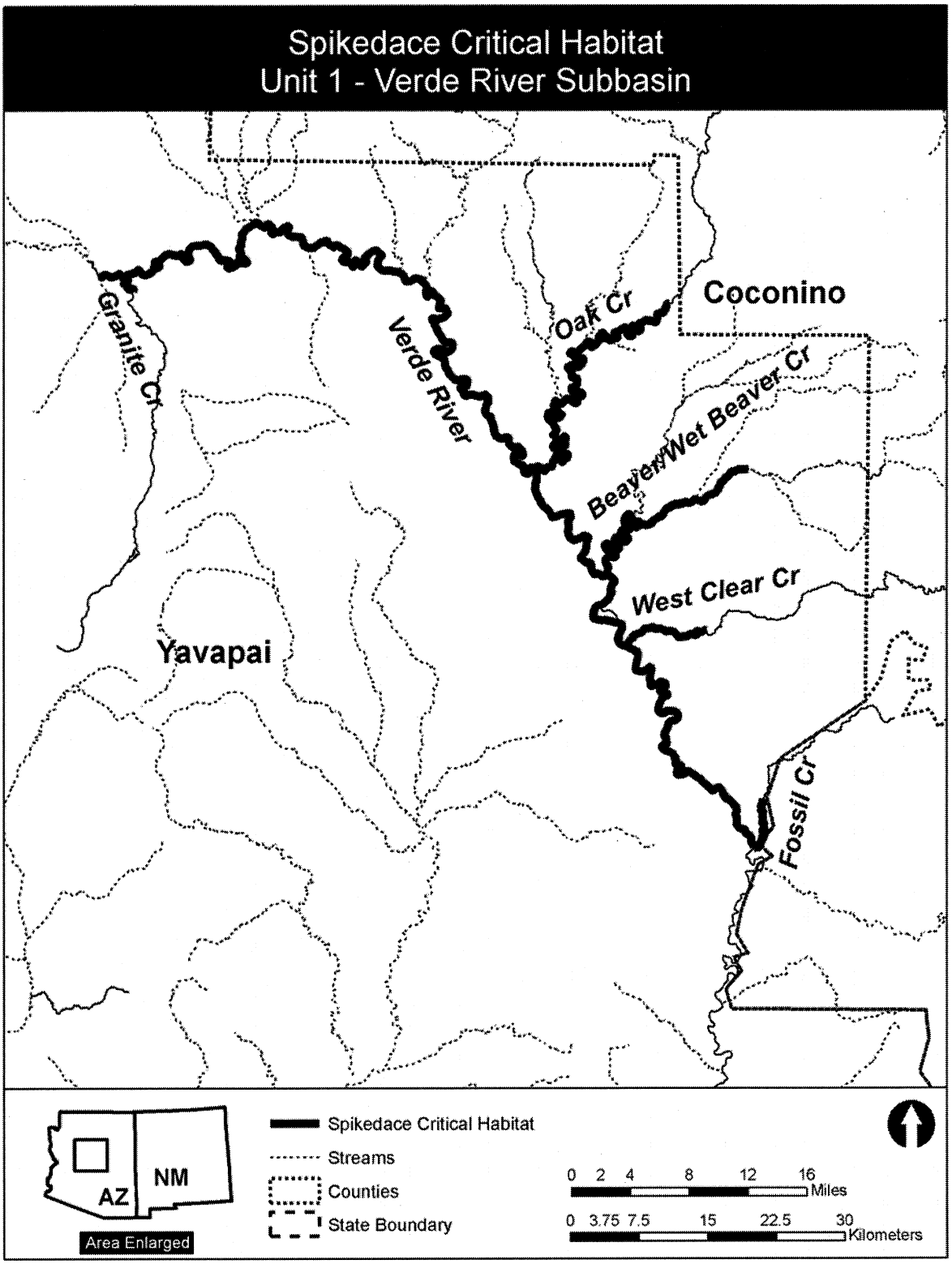
tributary from the south in Township 17 North, Range 5 East, southeast quarter of the northeast quarter of section 24.

(iv) Beaver Creek/Wet Beaver Creek for approximately 33.5 km (20.8 mi), extending from the confluence with the Verde River in Township 14 North, Range 5 East, southeast quarter of section 30 upstream to the confluence with Casner Canyon in Township 15 North, Range 6 East, northwest quarter of section 23.

(v) West Clear Creek for approximately 10.9 km (6.8. mi), extending from the confluence with the Verde River in Township 13 North, Range 5 East, center section 21, upstream to the confluence with Black Mountain Canyon in Township 13 North, Range 6 East, southeast quarter of section 17.

(vi) Fossil Creek for approximately 7.5 km (4.7 mi) extending from the confluence with the Verde River in Township 11 North, Range 5 East, northeast quarter of section 25 upstream to the confluence with an unnamed tributary from the northwest in Township 11.5 North, Range 7 East, center of section 29.

(vii) **Note:** Map of Unit 1, Verde River Subbasin (Map 2), follows.



(8) Unit 2: Salt River Subbasin, Gila County, Arizona.

(i) Tonto Creek for approximately 47.8 km (29.7 mi) extending from the confluence with Greenback Creek in Township 5 North, Range 11 East, northwest quarter of section 8 upstream to the confluence with Houston Creek in Township 9 North, Range 11 East, northeast quarter of section 18.

(ii) Greenback Creek for approximately 15.1 km (9.4 mi) from the confluence with Tonto Creek in Township 5 North, Range 11 East, northwest quarter of section 8 upstream to Lime Springs in Township 6 North, Range 12 East, southwest quarter of section 20.

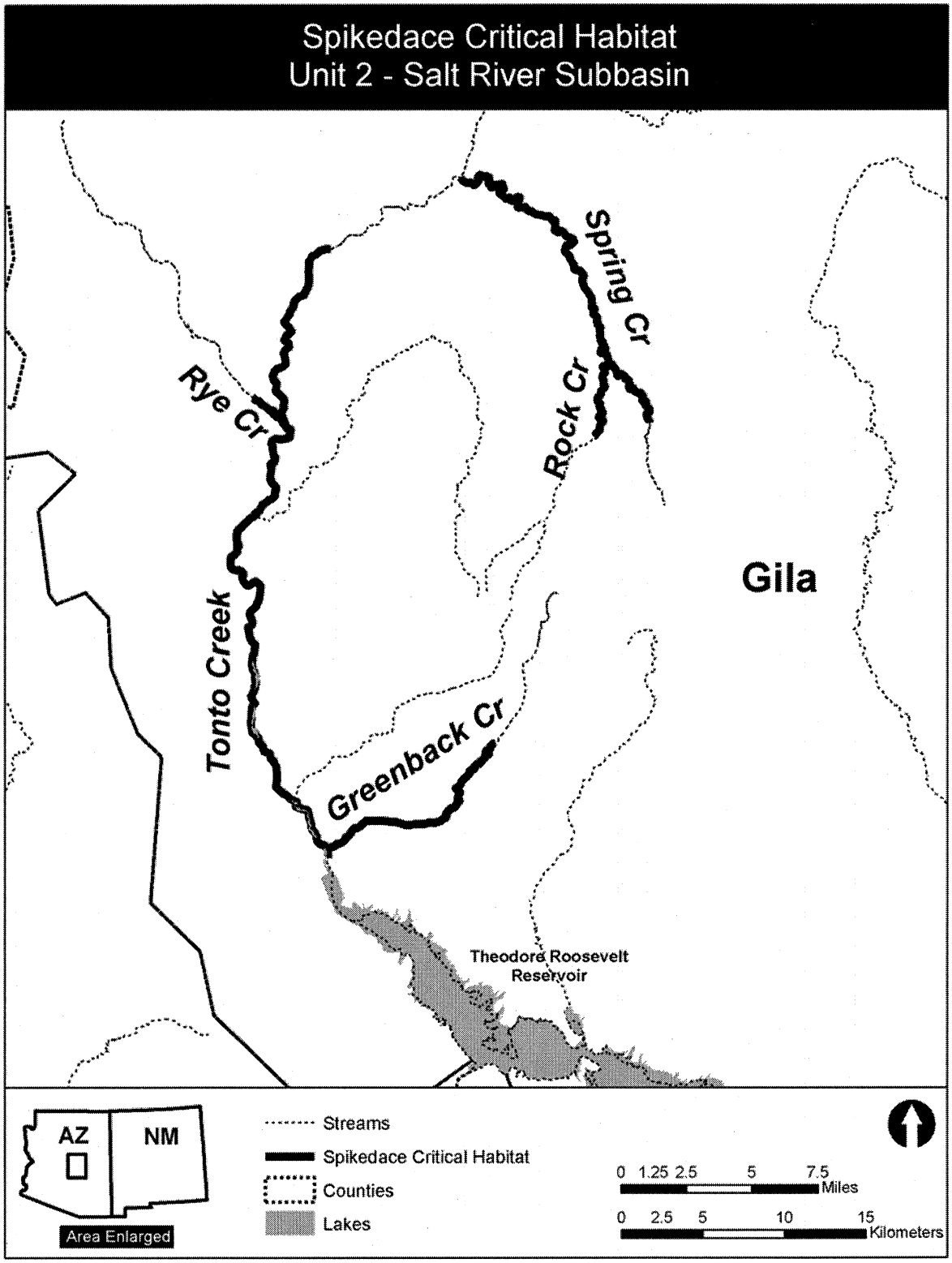
(iii) Rye Creek for approximately 2.8 km (1.8 mi) extending from the confluence with Tonto Creek in Township 8 North, Range 10 East, northeast quarter of section 24 upstream to the confluence with Brady Canyon in

Township 8 North, Range 10 East, northwest quarter of section 14.

(iv) Spring Creek for approximately 27.2 km (16.9 mi) extending from the confluence with the Tonto River at Township 10 North, Range 11 East, southeast quarter of section 36 upstream to the confluence with Sevenmile Canyon at Township 8 North, Range 13 East, northern boundary of section 20.

(v) Rock Creek for approximately 5.8 km (3.6 mi) extending from the confluence with Spring Creek at Township 8 North, Range 12 East, southeast quarter of section 1 upstream to the confluence with Buzzard Roost Canyon at Township 8 North, 12 East, center of section 24.

(vi) **Note:** Map of Unit 2, Salt River Subbasin (Map 3), follows.



(9) Unit 3: San Pedro River Subbasin, Cochise, Graham, Pima and Pinal Counties, Arizona.

(i) San Pedro River for approximately 60.0 km (37.2 mi) extending from the International Boundary with Mexico in Township 24 South, Range 22 East, Section 19 downstream to the confluence with the Babocomari River in the San Juan de las Boquillas y Nogales land grant.

(ii) Aravaipa Creek for approximately 44.9 km (27.9 mi) extending from the confluence with the San Pedro River in Township 7 South, Range 16 East, center of section 9 upstream to the confluence with Stowe Gulch in Township 6 South, Range 19 East, southeast quarter of the northeast quarter of section 35.

(iii) Deer Creek—3.7 km (2.3 mi) of the creek extending from the confluence with Aravaipa Creek at Township 6 South, Range 18 East, section 14 upstream to the boundary of the Aravaipa Wilderness at Township 6 South, Range 19 East, section 18.

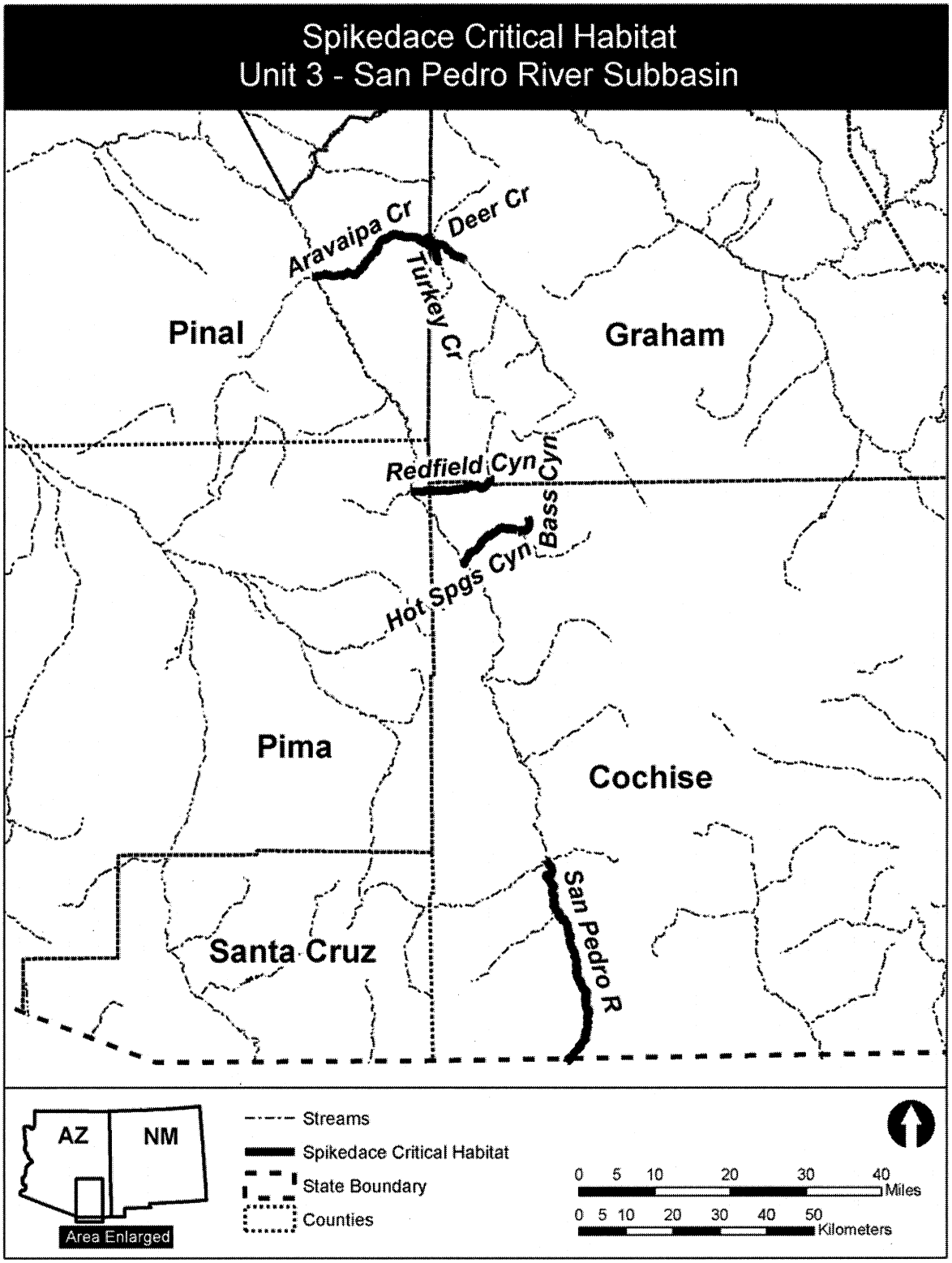
(iv) Turkey Creek—4.3 km (2.7 mi) of the creek extending from the confluence with Aravaipa Creek at Township 6 South, Range 19 East, section 19 upstream to the confluence with Oak Grove Canyon at Township 6 South, Range 19 east, section 32.

(v) Hot Springs Canyon for approximately 19.0 km (11.8 mi) extending from the confluence with the San Pedro River in Township 13 South, Range 19 East, center of section 23 upstream to the confluence with Bass Canyon in Township 12 South, Range 20 East, northeast quarter of section 36.

(vi) Redfield Canyon for approximately 22.5 km (14.0 mi) extending from the confluence with the San Pedro River in Township 11 South, Range 18 East, southwest quarter of section 34 upstream to the confluence with Sycamore Canyon in Township 11 South, Range 20 East, northwest quarter of section 28.

(vii) Bass Canyon for approximately 5.5 km (3.4 mi) from the confluence with Hot Springs Canyon in Township 12 South, Range 20 East, northeast quarter of section 36 upstream to the confluence with Pine Canyon in Township 12 South, Range 21 East, center of section 20.

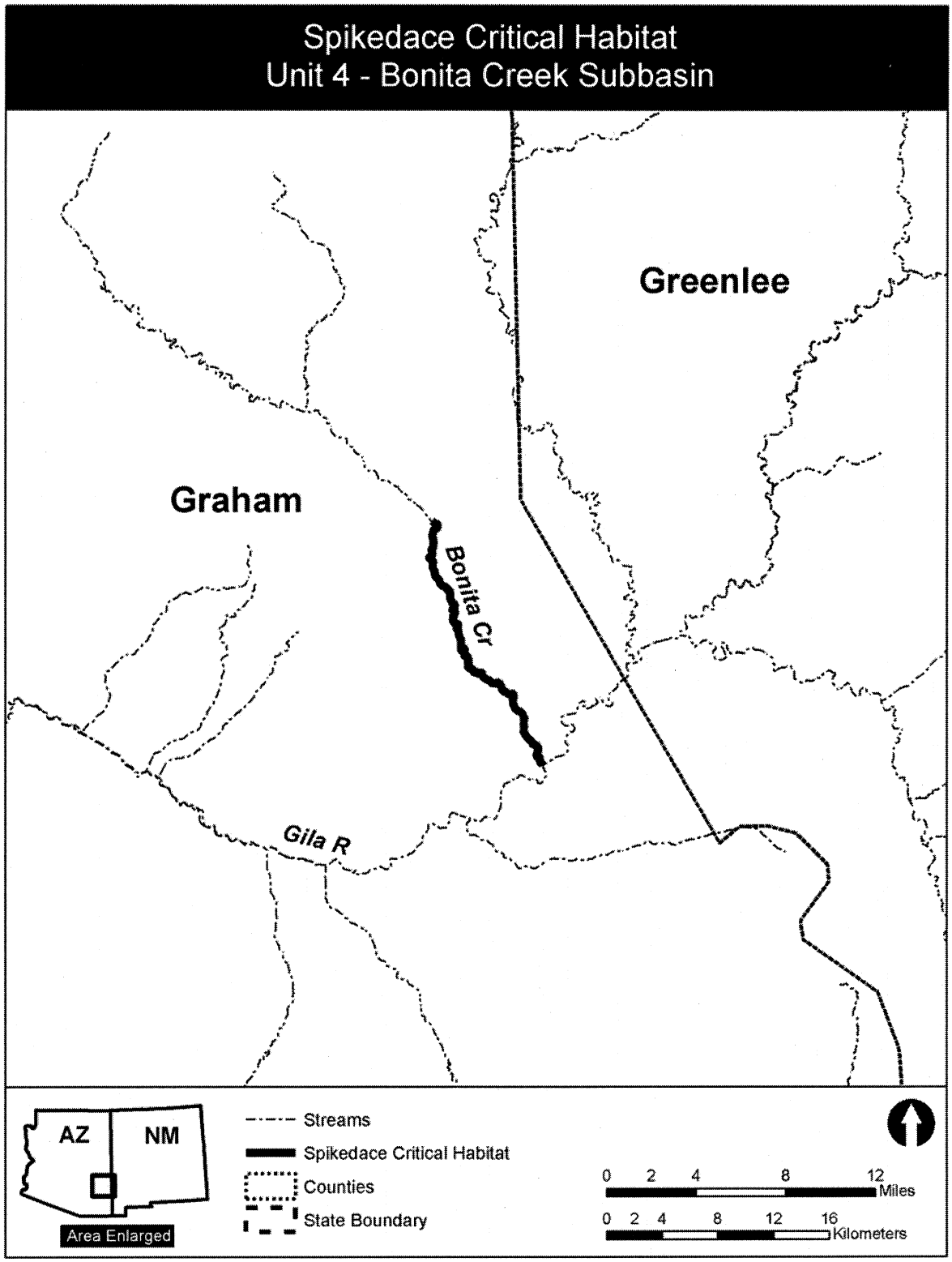
(viii) **Note:** Map of Unit 3, San Pedro River Subbasin (Map 4), follows.



(10) Unit 4: Bonita Creek Subbasin, Graham County, Arizona.

(i) Bonita Creek for approximately 23.8 km (14.8 mi) from the confluence with the Gila River in Township 6 South, Range 28 East, southeast quarter of section 21 upstream to the confluence with Martinez Wash in Township 4 South, Range 27 East, southeast quarter of Section 27.

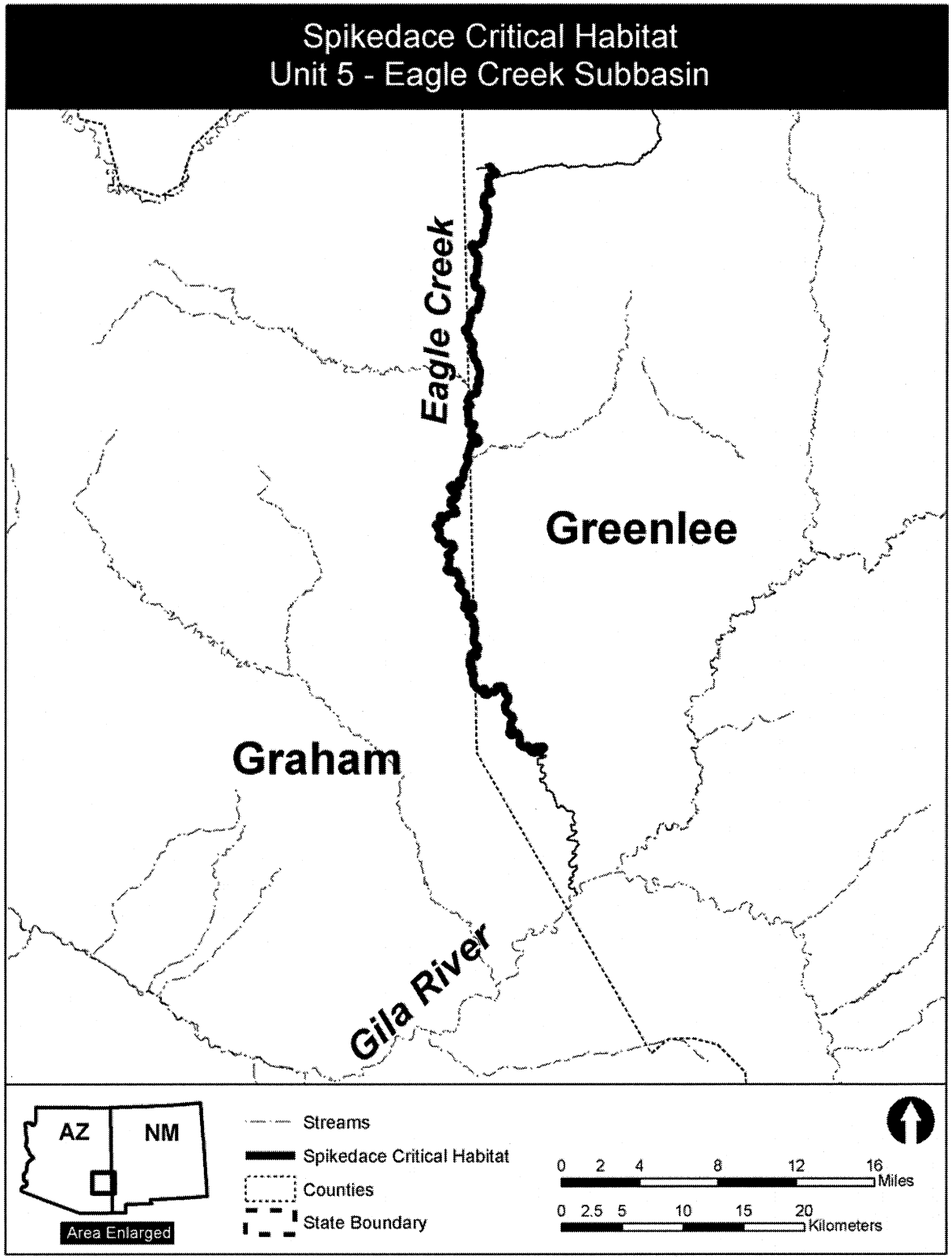
(ii) **Note:** Map of Unit 4, Bonita Creek Subbasin (Map 5), follows.



(11) Unit 5: Eagle Creek Subbasin, Graham and Greenlee Counties, Arizona.

(i) Eagle Creek for approximately 75 km (46.9 mi) from the Freeport McMoRan diversion dam at Township 4 South, Range 28 East, southwest quarter of section 23 upstream to the confluence of East Eagle Creek in Township 2 North, Range 28 East, southwest quarter of section 20.

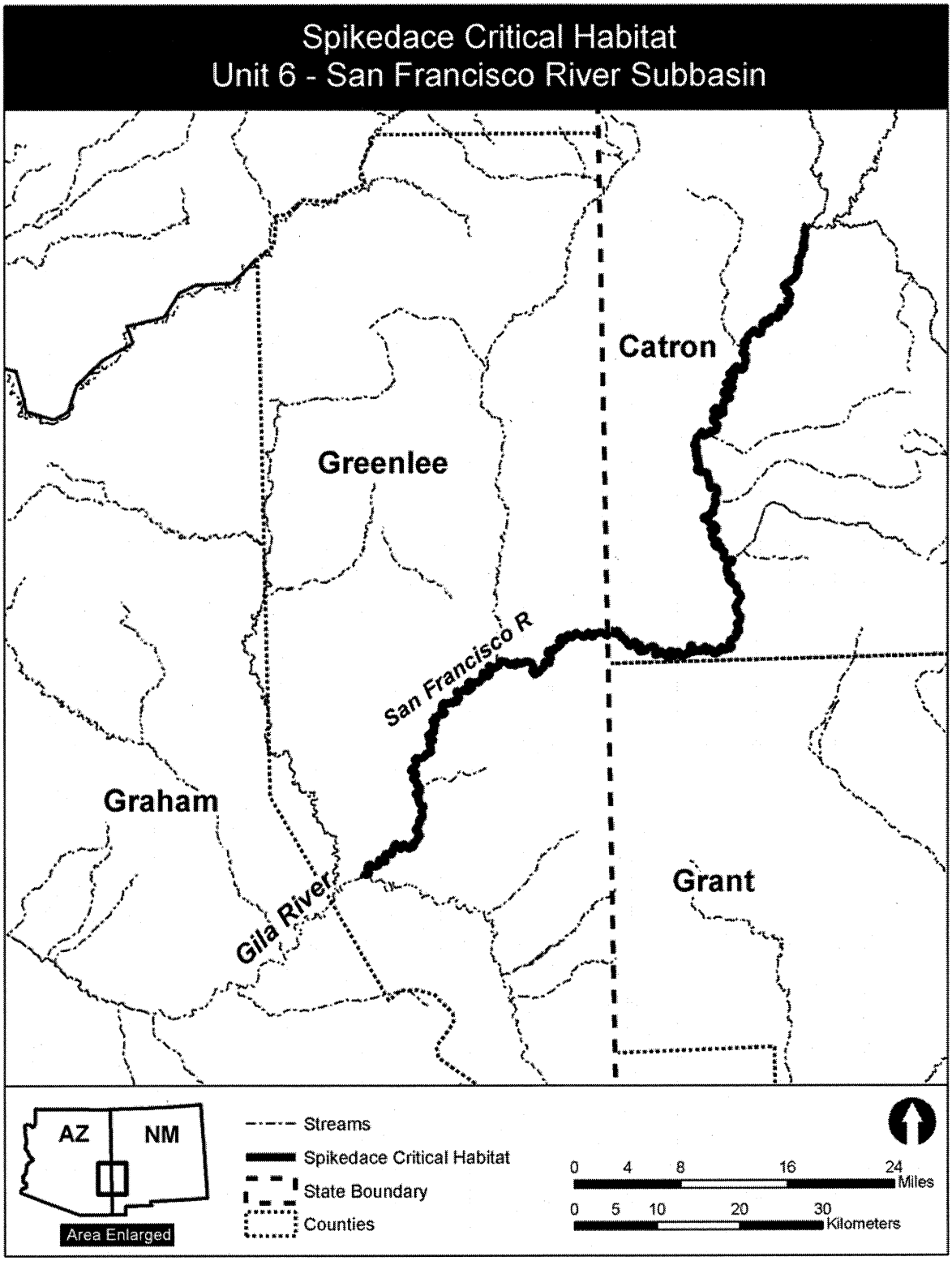
(ii) **Note:** Map of Unit 5, Eagle Creek Subbasin (Map 6), follows.



(12) Unit 6: San Francisco River Subbasin, Greenlee County, Arizona, and Catron County, New Mexico.

(i) San Francisco River for approximately 181.0 km (112.3 mi) of the San Francisco River extending from the confluence with the Gila River in Township 5 South, Range 29 East, southeast quarter of section 21 upstream to the confluence with the Tularosa River in Township 7 South, Range 19 West, southwest quarter of section 23.

(ii) **Note:** Map of Unit 6, San Francisco River Subbasin (Map 7), follows.



(13) Unit 7: Blue River Subbasin, Greenlee County, Arizona, and Catron County, New Mexico.

(i) Blue River for approximately 81.4 km (50.6 mi) from the confluence with the San Francisco River at Township 2S., Range 31 East, southeast quarter of section 31 upstream to the confluence of Campbell Blue and Dry Blue Creeks at Township 7 South, Range 21 West, southeast quarter of section 6.

(ii) Campbell Blue Creek for approximately 12.4 km (7.7 mi) from the confluence of Dry Blue and Campbell Blue Creeks at Township 7 South, Range 21 West, southeast quarter of section 6 to the confluence with Coleman Canyon in Township 4.5 North, Range 31 East, southwest quarter of the northeast quarter of section 32.

(iii) Little Blue Creek for approximately 5.1 km (3.1 mi) from the confluence with the Blue River at Township 1 South, Range 31 East,

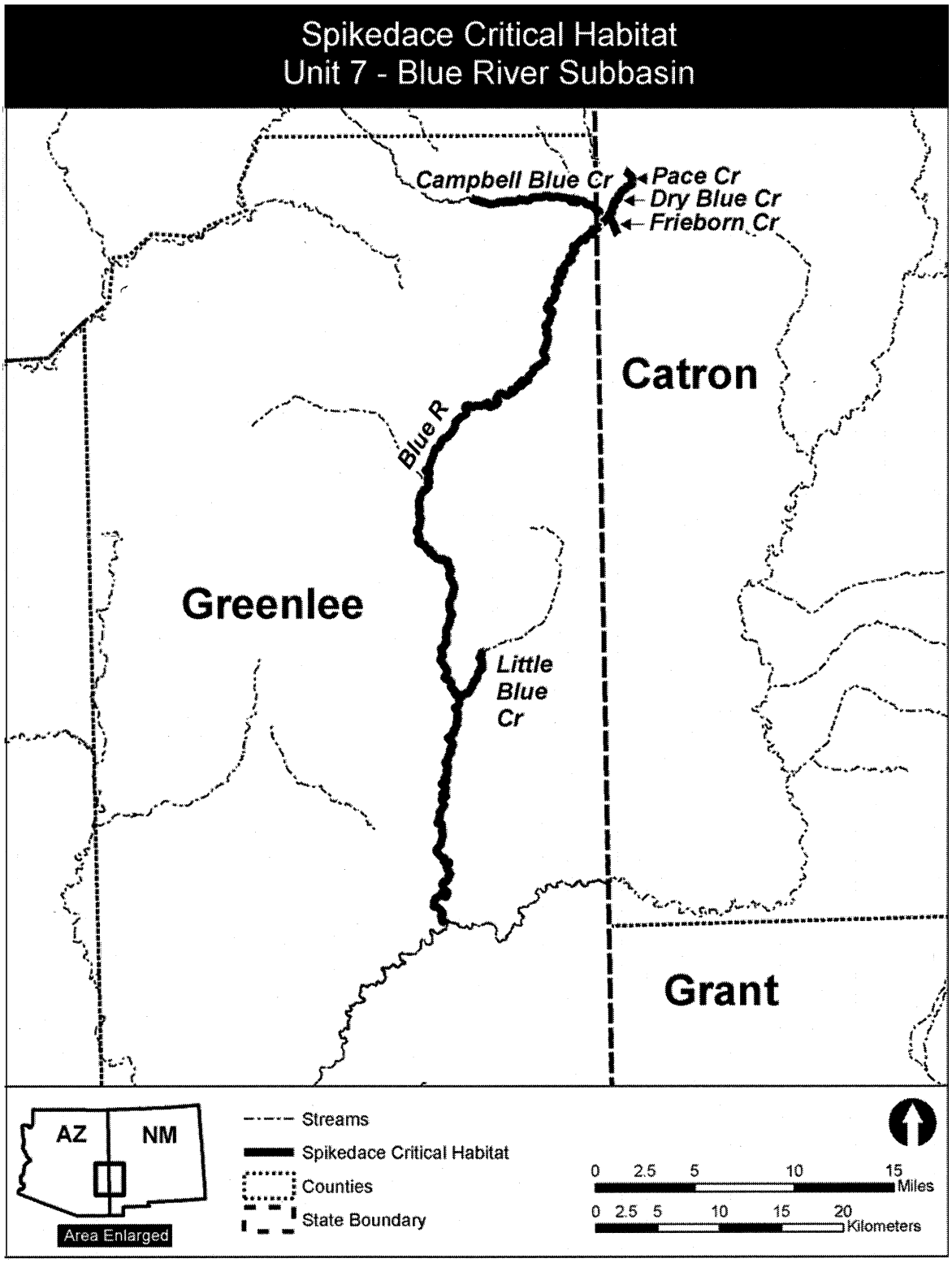
center Section 5 upstream to the mouth of a canyon at Township 1 North, Range 31 East, northeast quarter of section 29.

(iv) Pace Creek for approximately 1.2 km (0.8 mi) from the confluence with Dry Blue Creek at Township 6 South, Range 21 West, southwest quarter of Section 28 upstream to a barrier falls at Township 6 South, Range 21 West, northeast quarter of section 29.

(v) Frieborn Creek for approximately 1.8 km (1.1 mi) from the confluence with Dry Blue Creek at Township 7 South, Range 21 West, southwest quarter of the northwest quarter of section 5 upstream to an unnamed tributary flowing from the south in Township 7 South, Range 21 West, northeast quarter of southwest quarter of section 8.

(vi) Dry Blue Creek for approximately 4.7 km (3.0 mi) from the confluence with Campbell Blue Creek at Township 7 South, Range 21 West, southeast quarter of Section 6 upstream to the confluence with Pace Creek in Township 6 South, Range 21 West, southwest quarter of section 28.

(vii) **Note:** Map of Unit 7, Blue River Subbasin (Map 8), follows.



(14) Unit 8: Gila River Subbasin, Catron, Grant, and Hidalgo Counties, New Mexico.

(i) Gila River for approximately 165.1 km (102.6 mi) from the confluence with Moore Canyon at Township 18 South, Range 21 West, southeast quarter of the southwest quarter of Section 32 upstream to the confluence of the East and West Forks of the Gila River at Township 13 South, Range 13 West, center of Section 8.

(ii) West Fork Gila River for approximately 13.0 km (8.1 mi) from the confluence with the East Fork Gila River at Township 13 South, Range 13 West, center of section 8 upstream to the confluence with EE Canyon at Township 12 South, Range 14 West, east boundary of Section 21.

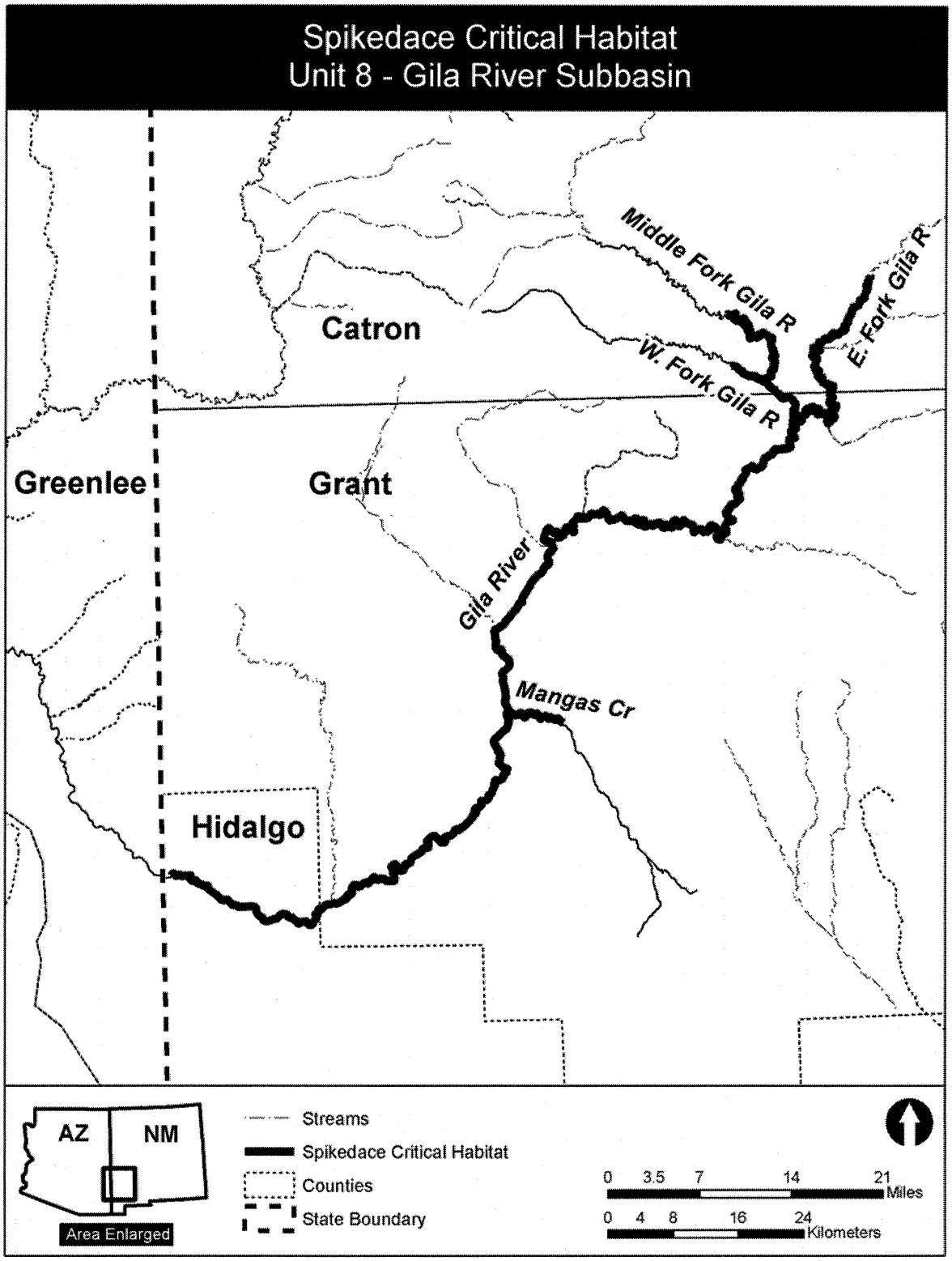
(iii) Middle Fork Gila River for approximately 12.5 km (7.7 mi) of the Middle Fork Gila River extending from the confluence with West Fork Gila

River at Township 12 South, Range 14 West, southwest quarter of section 25 upstream to the confluence of Big Bear Canyon in Township 12 South, Range 14 West, southwest quarter of section 2.

(iv) East Fork Gila River for approximately 42.1 km (26.2 mi) extending from the confluence with West Fork Gila River at Township 13 South, Range 13 West, center of Section 8 upstream to the confluence of Beaver and Taylor Creeks in Township 11 South, Range 12 West, northeast quarter of section 17.

(v) Mangas Creek for approximately 9.1 km (5.7 mi) extending from the confluence with the Gila River at Township 17 South, Range 16 West, southwest quarter of section 5 upstream to the confluence with Blacksmith Canyon at Township 17 South, Range 17 West, northwest quarter of section 3.

(vi) **Note:** Map of Unit 8, Gila River Subbasin (Map 9), follows.



Authority

The authority for this section is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: October 13, 2010.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010–26477 Filed 10–27–10; 8:45 am]

BILLING CODE 4310–55–C

Federal Register

Thursday,
October 28, 2010

Part IV

Federal Reserve System

12 CFR Part 226
Truth in Lending; Interim Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 226

Regulation Z; Docket No. R–1394

RIN AD–7100–56

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Interim final rule; request for public comment.

SUMMARY: The Board is publishing for public comment an interim final rule amending Regulation Z (Truth in Lending). The interim rule implements Section 129E of the Truth in Lending Act (TILA), which was enacted on July 21, 2010, as Section 1472 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. TILA Section 129E establishes new requirements for appraisal independence for consumer credit transactions secured by the consumer's principal dwelling. The amendments are designed to ensure that real estate appraisals used to support creditors' underwriting decisions are based on the appraiser's independent professional judgment, free of any influence or pressure that may be exerted by parties that have an interest in the transaction. The amendments also seek to ensure that creditors and their agents pay customary and reasonable fees to appraisers. The Board seeks comment on all aspects of the interim final rule.

DATES: This interim final rule is effective December 27, 2010, except that the removal of § 226.36(b) is effective April 1, 2011.

Compliance Date: To allow time for any necessary operational changes, compliance with this interim final rule is optional until April 1, 2011.

Comments: Comments must be received on or before December 27, 2010.

ADDRESSES: You may submit comments, identified by Docket No. R–1394 and RIN No. AD–7100–56, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Address to Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments will be made available on the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Jamie Z. Goodson, Attorney, or Lorna M. Neill, Senior Attorney; Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, Washington, DC 20551, at (202) 452–2412 or (202) 452–3667. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

The Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.,* seeks to promote the informed use of consumer credit by requiring disclosures about its costs and terms. TILA requires additional disclosures for loans secured by consumers' homes and permits consumers to rescind certain transactions that involve their principal dwelling. TILA directs the Board to prescribe regulations to carry out the purposes of the law and specifically authorizes the Board, among other things, to issue regulations that contain such classifications, differentiations, or other provisions, or that provide for such adjustments and exceptions for any class of transactions, that in the Board's judgment are necessary or proper to effectuate the purposes of TILA, facilitate compliance with TILA, or prevent circumvention or evasion of TILA. 15 U.S.C. 1604(a). TILA is implemented by the Board's Regulation Z, 12 CFR part 226. An Official Staff Commentary interprets the requirements of the regulation and provides guidance to creditors in applying the rules to specific transactions. *See* 12 CFR part 226, Supp. I.

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") was signed into law.[1] Section 1472 of the Dodd-Frank Act amended TILA to establish new requirements for appraisal independence. Specifically, the appraisal independence provisions in the Dodd-Frank Act:

- Prohibit coercion, bribery and other similar actions designed to cause an appraiser to base the appraised value of the property on factors other than the appraiser's independent judgment;
- Prohibit appraisers and appraisal management companies from having a financial or other interest in the property or the credit transaction;
- Prohibit a creditor from extending credit if it knows, before consummation, of a violation of the prohibition on coercion or of a conflict of interest;
- Mandate that the parties involved in the transaction report appraiser misconduct to state appraiser licensing authorities;
- Mandate the payment of reasonable and customary compensation to a "fee appraiser" (*e.g.,* an appraiser who is not the salaried employee of the creditor or the appraisal management company hired by the creditor); and
- Provides that when the Board promulgates the interim final rule, the Home Valuation Code of Conduct, the current standard for appraisal independence for loans purchased by Fannie Mae and Freddie Mac, will have no further force or effect.[2]

These provisions are contained in TILA Section 129E, which applies to any consumer credit transaction that is secured by the consumer's principal dwelling. TILA Section 129E(g)(1) authorizes the Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Federal Housing Finance Authority ("FHFA"), and the Consumer Financial Protection Bureau to issue rules and guidelines. TILA Section 129E(g)(2), however, requires the Board to issue interim final regulations to implement the appraisal independence requirements within 90 days of enactment of the Dodd-Frank Act. As discussed below, the Board finds there is good cause for issuing an interim final rule without opportunity for advance notice and comment.

Appraisal independence. Over the years concerns have been raised about the need to ensure that appraisals are provided free of any coercion or improper influence. The Board and the other federal banking agencies have jointly issued regulations and supervisory guidance on appraisal independence.[3] However, the guidance

[1] Public Law 111–203, 124 Stat. 1376.

[2] "Home Valuation Code of Conduct" (HVCC), available at *http://www.fhfa.gov/webfiles/2302/HVCCFinalCODE122308.pdf.*

[3] *See, e.g.,* the Board's regulation at 12 CFR 225.65, and its guidance, available at *http://www.federalreserve.gov/boarddocs/srletters/1994/sr9455.htm.* Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) was enacted to protect federal financial

is limited to federally supervised institutions. Based on concerns about consumers obtaining home-secured loans based on misstated appraisals, in 2008, the Board used its authority under the Home Ownership and Equity Protection Act (HOEPA) to prohibit a creditor or mortgage broker from coercing or influencing an appraiser to misstate the value of a consumer's principal dwelling (2008 Appraisal Independence Rules). 12 CFR 226.36(b); 15 U.S.C. 1639(l)(2). The 2008 Appraisal Independence Rules took effect on October 1, 2009. Section 1472 of the Dodd-Frank Act essentially codifies the 2008 Appraisal Independence Rules, and expands on the protections in those rules. This interim final rule incorporates the provisions in the 2008 Appraisal Independence Rules. Thus, the Board is removing the 2008 Appraisal Independence Rules effective on April 1, 2010.

In December 2008, Fannie Mae and Freddie Mac ("the GSEs") announced the Home Valuation Code of Conduct (HVCC), which established appraisal independence standards for loans the GSEs would purchase. The HVCC is based on an agreement between the GSEs, New York State Attorney General Andrew Cuomo, and the FHFA. The HVCC provides that, among other things, only a creditor or its agent may select, engage, and compensate an appraiser and that a creditor must ensure that its loan production staff do not influence the appraisal process or outcome. As noted, however, the Dodd-Frank Act mandates that the HVCC shall have no effect, once the Board issues this interim final rule.[4]

II. Summary of the Interim Final Rule

The interim final rule applies to a person who extends credit or provides services in connection with a consumer credit transaction secured by a consumer's principal dwelling. Although TILA and Regulation Z generally apply only to persons to whom the obligation is initially made payable and that regularly engage in extending consumer credit, TILA Section 129E and the interim final rule apply to persons that provide services without regard to whether they also extend consumer credit by originating mortgage loans.[5] Thus, the interim final rule applies to creditors, appraisal management companies, appraisers, mortgage brokers, realtors, title insurers and other firms that provide settlement services.

Other scope issues. The interim final rule applies to appraisals for any consumer credit transaction secured by the consumer's principal dwelling. Covering consumer credit transactions is consistent with the scope of TILA generally, which only applies to credit extended for personal, family or household purposes. However, the scope of the interim final rule is broader than the 2008 Appraisal Independence Rules; those rules apply to closed-end loans but not to home-equity lines of credit (HELOCs). The broader scope is required by Section 1472 of the Dodd-Frank Act, which does not limit coverage to closed-end loans and also covers HELOCs.

In addition, with a few exceptions, the interim final rule applies to any person who performs valuation services, performs valuation management functions, and to any valuation of the consumer's principal dwelling, not just to a licensed or certified "appraiser," an "appraisal management company," or to a formal "appraisal." This approach implements the statutory provisions and is consistent with the 2008 Appraisal Independence Rules, and is designed to ensure that consumers are protected regardless of the valuation method chosen by the creditor, and to prevent circumvention of the appraisal independence rules. These provisions are discussed in more detail in the section-by-section analysis below.

Coercion and prohibited extensions of credit. Consistent with the Dodd-Frank Act, the interim final rule prohibits certain practices that the Board's 2008 HOEPA rules also prohibit. First, the interim final rule prohibits covered persons from engaging in coercion, bribery, and other similar actions designed to cause anyone who prepares a valuation to base the value of the property on factors other than the person's independent judgment. The interim final rule adds examples from the Dodd-Frank Act and the Board's 2008 HOEPA rules of actions that do and do not constitute unlawful coercion. Second, the interim final rule prohibits a creditor from extending credit based on a valuation if the creditor knows, at or before consummation, that (a) coercion or other similar conduct has occurred, or (b) that the person who prepares a valuation or who performs valuation management services has a prohibited interest in the property or the transaction as discussed below, *unless* the creditor uses reasonable diligence to determine that the valuation does not materially misstate the value of the property.

Conflicts of interest. The interim final rule provides that a person who prepares a valuation or who performs valuation management services may not have an interest, financial or otherwise, in the property or the transaction. The Dodd-Frank Act does not expressly ban the use of in-house appraisers or affiliates. However, because the Act prohibits appraisers from having an "indirect financial interest" in the transaction, it is possible to interpret the Act to prohibit creditors from using in-house staff appraisers and affiliated appraisal management companies (AMCs). The interim final rule clarifies that an employment relationship or affiliation does not, by itself, violate the prohibition. The interim final rule also contains establishes a safe harbor and specific criteria for establishing firewalls between the appraisal function and the loan production function, to prevent conflicts of interest. Special guidance on firewalls is provided for small institutions, because they likely cannot completely separate appraisal and loan production staff. Small institutions are those with assets of $250 million or less.

Mandatory reporting of appraiser misconduct. The interim final rule provides that a creditor or settlement service provider involved in the transaction who has a reasonable basis to believe that an appraiser has not complied with ethical or professional requirements for appraisers under applicable federal or state law, or the Uniform Standards of Appraisal Practice (USPAP) must report the failure to comply to the appropriate state licensing agency. The interim final rule limits the duty to report compliance failures to those that are likely to affect the value assigned to the property. The interim final rule also provides that a person has a "reasonable basis" to believe an appraiser has not complied with the law or applicable standards, only if the person has knowledge or evidence that would lead a reasonable person under the circumstances to believe that a material failure to comply has occurred.

Customary and reasonable rate of compensation for fee appraisers. Under the interim final rule, a creditor and its agent must pay a fee appraiser at a rate

and public policy interests in real estate transactions. 12 U.S.C. 3339. It requires the Board, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the National Credit Union Administration (the federal banking agencies) to adopt regulations on the preparation and use of appraisals by federally regulated financial institutions. 12 U.S.C. 3331.

[4] TILA Section 129E(j), 15 U.S.C. 1639e(j).

[5] Under the interim final rule, a person provides a service if he provides a "settlement service" as defined in the Real Estate Settlement Procedures Act, 12 U.S.C. 2602(3). *See* § 226.42(b)(1).

that is reasonable and customary in the geographic market where the property is located. The rule provides two presumptions of compliance. Under the first, a creditor and its agent is presumed to have paid a customary and reasonable fee if the fee is reasonably related to recent rates paid for appraisal services in the relevant geographic market, and, in setting the fee, the creditor or its agent has:

- Taken into account specific factors, which include, for example, the type of property and the scope of work; and
- Not engaged in any anticompetitive actions, in violation of state or federal law, that affect the appraisal fee, such as price-fixing or restricting others from entering the market.

Second, a creditor or its agent would also be presumed to comply if it establishes a fee by relying on rates established by third party information, such as the appraisal fee schedule issued by the Veteran's Administration, and/or fee surveys and reports that are performed by an independent third party (the Act provides that these surveys and reports must not include fees paid by AMCs).

III. Legal Authority

Rulemaking Authority

As noted above, TILA Section 105(a) directs the Board to prescribe regulations to carry out the act's purposes. 15 U.S.C. 1604(a). In addition, TILA Section 129E, added by the Dodd-Frank Act, includes several grants of rulemaking authority to implement the provisions of that section. Specifically, Section 129E(g)(1) authorizes the Board, the other federal banking agencies, the Federal Housing Finance Agency, and the Consumer Financial Protection Bureau to jointly issue rules, guidelines, and policy statements "with respect to acts or practices that violate appraisal independence in the provision of mortgage lending services * * * within the meaning of subsections (a), (b), (c), (d), (e), (f), (h), and (i)." 15 U.S.C. 1639e(g)(1). Second, Section 129E(g)(2) directs the Board to prescribe interim final regulations no later than 90 days after the law's enactment date, "defining with specificity acts or practices that violate appraisal independence in the provision of mortgage lending services" and "defining any terms in this section or such regulations." 15 U.S.C. 1639e(g)(2). The Board's interim final regulations under Section 129E(g)(2) are deemed to be rules prescribed by the agencies jointly. Third, Section 129E(h), authorizes the Board, the banking agencies, the FHFA and the Consumer Financial Protection Bureau to jointly issue rules regarding appraisal report portability. 15 U.S.C. 1639e(h).

The Board is issuing this interim final rule pursuant to its general authority in Section 105(a) and the specific authority conferred by Section 129E(g)(2) to implement the appraisal independence provisions in Section 129E. Some industry representatives have asserted that the appraiser compensation provisions in Section 129E(i) do not relate to appraisal independence and, therefore, should not be addressed by the Board's interim final rules issued under Section 129E(g)(2). The Board concludes, however, that the legislative directive to issue interim final rules includes the appraiser compensation provisions in Section 129E(i). In particular, the Board believes that its authority under Section 129E(g)(2) should be read consistently with the authority granted in Section 129E(g)(1), which expressly identifies the compensation provision in Section 129E(i) as an "appraisal independence" provision.

Authority To Issue Interim Final Rule Without Notice and Comment

The Administrative Procedures Act (APA), 5 U.S.C. 551 *et seq.,* generally requires public notice before promulgation of regulations. *See* 5 U.S.C. 553(b). The APA also provides an exception, however, when there is good cause because notice and public procedure is impracticable. 5 U.S.C. 553(b)(B). The Board finds that for this interim rule there is "good cause" to conclude that providing notice and an opportunity to comment would be impracticable and, therefore, is not required. The Board's finding of good cause is based on the following considerations. Congress imposed a 90 day deadline for issuing the interim final rule. Providing notice and an opportunity to comment is impracticable, because 90 days does not provide sufficient time for the Board to prepare and publish proposed regulations, provide a period for comment, and publish in the **Federal Register** before the statutory deadline. Even if the Board were able to publish proposed rules for public comment, the comment period would have been too short to afford interested parties sufficient time to prepare well-researched comments or to afford time for the Board to conduct a meaningful review and analysis of those comments. Consequently, the Board finds that the use of notice-and-comment procedures before issuing these rules would be impracticable. Interested parties will still have an opportunity to submit comments in response to this interim final rule before permanent final rules are issued.

Moreover, the Board believes that the Dodd-Frank Act's mandate that the Board issue interim final rules that will be effective before the issuance of permanent rules also supports the Board's determination that notice and comment are impracticable. If the legislation had contemplated a notice and comment period, the rules issued by the Board could have been referred to as "final rules" rather than "interim final rules." The term "interim final regulations" or "interim final rules" has long been recognized to mean rules that an agency issues without first giving notice of a proposed rule and having a public comment period.[6]

IV. Section-by-Section Analysis

Section 226.5b Requirements for Home-Equity Plans

Section 1472 of the Dodd-Frank Act adds to TILA a new Section 129E that establishes appraiser independence requirements for a consumer credit transaction secured by the consumer's principal dwelling. 15 U.S.C. 1639e. TILA Section 129E applies to both open- and closed-end consumer credit transactions secured by the consumer's principal dwelling, as discussed in detail below in the section-by-section analysis of § 226.42. Accordingly, new comment 5b–7 is being adopted to clarify that home-equity plans subject to § 226.5b that are secured by the consumer's principal dwelling also are subject to the requirements of new TILA Section 129E and § 226.42.

Section 226.42 Valuation Independence

Overview

This part discusses the implementation of the appraisal independence provisions added to TILA by the Dodd-Frank Act by this interim final rule. TILA Section 129E(a) prohibits persons that extend credit or provide any service for a consumer credit transaction secured by the consumer's principal dwelling (covered transaction) from engaging in "any acts or practices that violate appraisal independence as described in or pursuant to regulations prescribed under [TILA Section 129E]." 15 U.S.C.

[6] *See, e.g.,* Office of the Federal Register, "A Guide to the Rulemaking Process, *http://www.federalregister.gov/learn/the_rulemaking_process.pdf;* Administrative Conference of the U.S., Recommendation 95–4 (1995); U.S. Government Accountability Office, Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules, GAO/GGD–98–126, 7 (1998); American Bar Ass'n, A Guide to Federal Agency Rulemaking, 3rd Ed., 83–Y4 (2006).

1639e(a). This provision applies to both closed- and open-end extensions of credit. TILA Section 129E(b) describes certain acts and practices that violate appraisal independence. 15 U.S.C. 1639e(b). TILA Section 129E(c) also specifies certain acts and practices that are deemed to be permissible. 15 U.S.C. 1639e(c). Under TILA Section 129E(f), a creditor that knows about a violation of the appraiser independence standards or a prohibited conflict of interest at or before consummation of the transaction is prohibited from extending credit based on the appraisal unless the creditor documents that it has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of such dwelling. 15 U.S.C. 1639e(f).

TILA Section 129E(b) and (c) are substantially similar to the appraisal regulations that the Board issued in 2008, which became effective on October 1, 2009. 15 U.S.C. 1639e(b), (c). *See* § 226.36(b); 73 FR 44522, 44604 (Jul. 30, 2008) (2008 Appraisal Independence Rules). The Board's 2008 Appraisal Independence Rules prohibit creditors and mortgage brokers and their affiliates from directly or indirectly coercing, influencing, or otherwise encouraging an appraiser to misstate or misrepresent the value of the consumer's principal dwelling. *See* § 226.36(b)(1). However, the 2008 rules apply only to closed-end mortgage loans. The prohibition on certain extensions of credit in TILA Section 129E(f) also is substantially similar to § 226.36(b)(2) of the Board's 2008 Appraisal Independence Rules. 15 U.S.C. 1639e(f).

The Board is removing § 226.36(b), effective April 1, 2011, the mandatory compliance date for this interim final rule. The Board is removing § 226.36(b) because the provision is substantially similar to TILA Section 129E(b), (c), and (f), implemented in § 226.42 by this interim final rule. Through March 31, 2011, creditors, mortgage brokers, and their affiliates may comply with either § 226.36(b) or new § 226.42. If such persons comply with § 226.42, they are deemed to comply with § 226.36(b).

TILA Section 129E also adds provisions not covered by the Board's 2008 Appraisal Independence Rules. For a covered transaction, TILA Section 129E(d) prohibits an appraiser that conducts and an appraisal management company that procures or facilitates an appraisal of the consumer's principal dwelling from having a direct or indirect interest in the dwelling or the covered transaction, as discussed in detail below in the section-by-section analysis of § 226.42(d). Under TILA Section 129E(f), a creditor that knows about a violation of the conflicts of interest provisions under TILA Section 129E(d) is prohibited from extending credit based on the appraisal, unless the creditor documents that it has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of such dwelling. 15 U.S.C. 1639e(f). TILA Section 129E(e) imposes a requirement for reporting certain compliance failures by appraisers to state appraiser certifying and licensing agencies. 15 U.S.C. 1539e(e). TILA Section 129E(i) provides that lenders and their agents must compensate fee appraisers at a rate that is "customary and reasonable for appraisal services performed in the market area of the property being appraised."[7] 15 U.S.C. 1639e(i).

42(a) Scope

TILA Section 129E(a) generally prohibits acts or practices that violate appraisal independence "in extending credit or in providing any services" for a consumer credit transaction secured by the consumer's principal dwelling. 15 U.S.C. 1639e(a). Thus, the coverage of the prohibition in Section 129E is not limited to creditors, mortgage brokers, and their affiliates, as is the case with the Board's 2008 Appraisal Independence Rules contained in § 226.36(b). Section 129E also covers open-end credit plans secured by the consumer's principal dwelling, which are not covered by the Board's 2008 rules. *See* comment 42(a)-1. Consistent with the statute, this interim final rule applies only to transactions secured by the principal dwelling of the consumer who obtains credit. *See* comment 42(a)–2.

42(b) Definitions

42(b)(1) "Covered Person"

This interim final rule uses the term "covered person" in defining the persons that are subject to the prohibition on coercion and similar practices in TILA Section 129E(b) and the mandatory reporting requirement in TILA Section 129E(e). 15 U.S.C. 1639e(b), (e). TILA Section 129E(a) prohibits an act or practice that violates appraisal independence "in extending credit or in providing any services" for a covered transaction. Consistent with the statutory language, the Board is defining "covered persons" to include a creditor with respect to a covered transaction or a person that provides "settlement services," as defined under the Real Estate Settlement Procedures Act (RESPA), in connection with a covered transaction. *See* § 226.42(b)(1).

The Board notes that "settlement services" under RESPA is a broad class of activities, covering any service provided in connection with settlement, including rendering of credit reports, providing legal services, preparing documents, surveying real estate, and pest inspections. Some providers of settlement services may, as a practical matter, have little opportunity or incentive to coerce or influence an appraiser, or to have a reasonable basis to believe that an appraiser has not complied with USPAP or other applicable authorities. In such cases, the benefits of the rule may not justify applying it to these parties, however, by the same token, these entities may have little or no compliance burden under the circumstances. The Board solicits comment on whether some settlement service providers should be exempt from some or all of the interim final rule's requirements.

Examples of "covered persons" include creditors, mortgage brokers, appraisers, appraisal management companies, real estate agents, title insurance companies, and other persons that provide "settlement services" as defined under RESPA. *See* comment 42(b)(1)–1. The Board notes that persons that perform "settlement services" include persons that conduct appraisals. *See* 12 U.S.C. 2602(3). Comment 42(b)(1)–2 clarifies that the following persons are not "covered persons": (1) The consumer who obtains credit through a covered transaction; (2) a person secondarily liable for a covered transaction, such as a guarantor; and (3) a person that resides in or will reside in the consumer's principal dwelling but will not be liable on the covered transaction, such as a non-obligor spouse.

42(b)(2) "Covered Transaction"

TILA Section 129E applies to "a consumer credit transaction secured by the principal dwelling of the consumer." 15 U.S.C. 1639e. This interim rule refers to such a transaction as a "covered transaction," for simplicity. For purposes of § 226.42, the existing provisions of Regulation Z and accompanying commentary apply in determining what constitutes a principal dwelling. *See* comment 42(b)(1)–1. Regulation Z provides that, for the purposes of the consumer's right to rescind certain loans secured by the consumer's principal dwelling, a consumer may have only one principal dwelling at a time. *See, e.g.,*

[7] This interim final rule does not implement TILA Section 129E(h), which authorizes the Board and other specified Federal agencies to jointly issue regulations concerning appraisal report portability. Public Law 111–203, 124 Stat. 2187 (to be codified at 15 U.S.C. 1639e(h)).

§ 226.2(a)(19), 226.2(a)(24), comment 2(a)(24)–3.

42(b)(3) "*Valuation*"

TILA Section 129E uses the terms "appraisal" and "appraiser" without defining the terms. In some cases, a creditor might engage a person not certified or licensed under state law to estimate a dwelling's value in connection with a covered transaction, such as when a creditor engages a real estate agent to provide an estimate of market value.[8] The Board believes that TILA Section 129E applies to acts or practices that compromise the independent estimation of the value of the consumer's principal dwelling, without regard to whether the creditor uses a licensed or certified appraiser or another person to produce a valuation. Therefore, this interim final rule uses the broader term "valuation" and refers to a person that prepares a "valuation" rather than use the terms "appraisal" and "appraiser," for purposes of the following provisions: (1) The prohibition on causing or attempting to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of a person that prepares valuations, through coercion or certain other similar acts or practices, under § 226.42(c); (2) the prohibition on having an interest in the consumer's principal dwelling or the transaction, under § 226.42(d); and (3) the prohibition on extending credit where a creditor knows of a violation of § 226.42(c) or (d) unless certain conditions are met under § 226.42(e). This is consistent with the 2008 Appraisal Independence Rules, which define "appraiser" broadly to mean a person who engages in the business of providing assessments of the value of dwellings.[9]

Section 226.42(b)(5) uses the term "valuation" to mean an estimate of the value of the consumer's principal dwelling in written or electronic form, other than one produced solely by an automated model or system. This definition is consistent with the definition of "appraisal" in the Uniform Standards of Professional Appraisal Practice (USPAP) as "an opinion of value."[10] As used in § 226.42(b)(5), the term "valuation" applies to an estimate of the value of the consumer's principal dwelling whether or not a person applies USPAP in preparing such estimate. Comment 42(b)(3)–1 clarifies that a "valuation" is an estimate of value prepared by a natural person, such as an appraisal report prepared by an appraiser or an estimate of market value prepared by a real estate agent. Comment 42(b)(3)–1 also clarifies that the term includes photographic or other information included with an estimate of value. Comment 42(b)(3)–1 clarifies further that a "valuation" includes an estimate provided or viewed electronically, such as an estimate transmitted via electronic mail or viewed using a computer.

Comment 42(b)(3)–2 clarifies that, although a "valuation" does not include an estimate of value produced exclusively using an automated model or system, a "valuation" includes an estimate of value developed by a natural person based in part on an estimate produced using an automated model or system. The Board solicits comment on the exclusion of automated valuation models from the definition of "valuation" below, in the section-by-section analysis of § 226.42(c). Comment 42(b)(3)–3 clarifies that an estimate of the value of the consumer's principal dwelling includes an estimate of a range of values for the consumer's principal dwelling.

42(b)(4) "*Valuation Management Functions*"

This interim final rule uses the term "valuation management functions" to refer to a variety of administrative activities undertaken in connection with the preparation of a valuation. The term "valuation management functions" is used in implementing TILA Section 129E(b)(1), which prohibits causing or attempting to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of a person that prepares valuations, through coercion or certain other similar acts or practices. 15 U.S.C. 1639e(b)(1). The term "valuation management functions" also is used in implementing TILA Section 129E(d), which provides that an appraisal management company may not have an interest in a covered transaction or the consumer's principal dwelling. 15 U.S.C. 1639e(d). This interim final rule applies that prohibition on conflicts of interest to a person that performs administrative functions in connection with valuations of the consumer's principal dwelling, even if the person is not an "appraisal management company" (for example, a company that employs appraisers or an appraisal reviewer employed by a creditor), as discussed below in the section-by-section analysis of § 226.42(b)(d). This interim final rule therefore uses the term "valuation management functions" rather than "appraisal management" for purposes of § 226.42(d).

Section 226.42(b)(4) defines "valuation management functions" to mean (1) recruiting, selecting, or retaining a person to prepare a valuation; (2) contracting with or employing a person to prepare a valuation; (3) managing or overseeing the process of preparing a valuation (including by providing administrative services such as receiving orders for and receiving a valuation, submitting a completed valuation to creditors and underwriters, collecting fees from creditors and underwriters for services provided in connection with a valuation, and compensating a person that prepare valuations); or (4) reviewing or verifying the work of a person that prepares valuations. The term is used in § 226.42(c) and (d), which are discussed in detail below.

42(c) Valuation of Consumer's Principal Dwelling

TILA Section 129E(b) provides that, for purposes of TILA Section 129E(a), acts or practices that violate appraisal independence include: (1) Causing or attempting to cause the value assigned to the property to be based on a factor other than the independent judgment of an appraiser, by compensating, coercing, extorting, colluding with, instructing, inducing, bribing, or intimidating a person conducting or involved in an appraisal; (2) mischaracterizing, or suborning any mischaracterization of, the appraised value of the property securing the extension of credit; (3) seeking to influence an appraiser or otherwise to encourage a targeted value in order to facilitate the making or pricing of the transaction; and (4) withholding or threatening to withhold timely payment for an appraisal report or for appraisal services rendered when the appraisal report or services are provided for in accordance with the contract between the parties. 15 U.S.C. 1639e(b).

[8] Section 1473(r) of the Dodd-Frank Act adds new Section 1126 to FIRREA, which prohibits the use of a real estate broker's opinion of value "as the primary basis" of determining the value of the consumer's principal dwelling in certain types of transactions. Public Law 111–203, 124 Stat. 2198 (to be codified at 12 U.S.C. 3355).

[9] For purposes of the provisions requiring payment of a customary and reasonable rate to appraisers and reporting of appraisers' failure to comply with USPAP or ethical or professional requirements to the appropriate state appraiser certifying and licensing agencies, this interim final rule limits persons considered "appraisers" to persons subject to the state agencies' jurisdiction. § 226.36(f), (g).

[10] *See* Appraisal Standards Bd., Appraisal Fdn., USPAP (2010) at U–1; see also Appraisal Standards Bd., Appraisal Fdn., Advisory Op. 18 (stating that "the output of an [automated valuation model] is not, by itself, an appraisal" but may become the basis of an appraisal if credible).

TILA Section 129E(c) provides that TILA Section 129E(b) shall not be construed as prohibiting a mortgage lender, mortgage broker, mortgage banker, real estate broker, appraisal management company, employee of an appraisal management company, consumer, or any other person with an interest in a real estate transaction from asking an appraiser to: (1) Consider additional, appropriate property information, including information regarding additional comparable properties to make or support an appraisal; (2) provide further detail, substantiation, or explanation for the appraiser's value conclusion; or (3) correct errors in the appraisal report. 15 U.S.C. 1639e(c).

TILA Section 129E(b) and (c) are substantially similar to the 2008 Appraisal Independence Rules. 15 U.S.C. 1639e(b), (c); § 226.36(b). The Board is implementing TILA Section 129E(b) and (c) in § 226.42(c), pursuant to its authority under TILA Section 129E(g)(2) to prescribe interim final regulations defining with specificity acts or practices that violate appraisal independence in the provision of mortgage lending services or mortgage brokerage services for a covered transaction and any terms under TILA Section 129E or such regulations. 15 U.S.C. 1639e(g)(2). The prohibitions of certain acts and practices under TILA Section 129E(b) that are substantially similar to the Board's 2008 Appraisal Independence Rules are implemented in § 226.42(c)(1). The prohibition on "mischaracterizing or suborning any mischaracterization of the appraised value of property securing the extension of credit" under TILA Section 129E(b)(2), which has no direct corollary in the 2008 Appraisal Independence Rules, is implemented in § 226.42(c)(2). 15 U.S.C. 1639e(b)(2). TILA Section 129E(c), regarding acts and practices that are permissible under TILA Section 129E, is implemented in § 226.42(c)(3).

42(c)(1) Coercion

TILA Section 129E(b)(1) prohibits a person with an interest in the underlying transaction to compensate, coerce, extort, collude, instruct, induce, bribe, or intimidate a person, appraisal management company, firm, or other entity conducting or involved in an appraisal, or attempting to do so, for the purpose of causing the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of the appraiser. 15 U.S.C. 1639e(b)(1). Section 226.42(c)(1) implements and is substantially similar to TILA Section 129E(b)(1). Section 226.42(c)(1) uses the terms "covered person" and "covered transaction" and refers to persons that prepare "valuations" or perform "valuation management functions," for clarity and comprehensiveness, as discussed above in the section-by-section analysis of § 226.42(b). Also, § 226.42(c)(1) uses the term "person" to implement the reference in TILA Section 129E(b)(1) to certain acts or practices directed towards a "person, appraisal management company, firm, or other entity," for simplicity. 15 U.S.C. 1639e(b)(1). TILA Section 103(d) provides that "person" means a natural person or an organization, and § 226.2(a)(22) clarifies that an organization includes a corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit. 15 U.S.C. 1602(d).

Prohibited acts and practices. Consistent with TILA Section 129E(b)(1), § 226.42(c)(1) provides that no person shall attempt to or cause the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of a person that prepares valuations, through coercion, extortion, inducement, bribery or intimidation of, compensation or instruction to, or collusion with a person that prepares a valuation or a person that performs valuation management functions. Comment 42(c)(1)–1 provides that the terms used for those prohibited actions have the meaning given them by applicable state law or contract. *See* § 226.2(b)(3). In some cases, state law may define one of the terms in a context that is not applicable to a covered transaction, for example, where state law defines "bribery" to mean the offering, giving, soliciting, or receiving of something of value to influence the action of an official in the discharge of his or her public duties. The Board believes, however, that the terms used in TILA Section 129E(b)(1) and § 226.42(c)(1) cover a range of acts and practices sufficiently broad to address a wide variety of actions that compromise the independent estimation of the value of the consumer's principal dwelling. Further, § 226.42(c)(1)(i) provides examples of actions that violate § 226.42(c)(1), as discussed below. 15 U.S.C. 1639e(b)(1).

Comment 42(c)(1)–2 clarifies that a covered person does not violate § 226.42(c)(1) if the person does not engage in an act or practice set forth in § 226.42(c)(1) for the purpose of causing the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of a person that prepares valuations. For example, comment 42(c)(1)–2 states that requesting that a person that prepares a valuation take certain actions, such as considering additional, appropriate property information, does not violate § 226.42(c), because such request does not supplant the independent judgment of the person that prepares a valuation. *See* § 226.42(c)(3)(i). Also, comment 42(c)(1)–2 clarifies that a covered person may provide incentives, such as additional compensation, to a person that prepares valuations or performs valuation management functions, as long as the covered person does not cause or attempt to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of a person that prepares valuations. The Board notes, however, that provisions of federal law other than § 226.42(c)(1) or state law may apply in determining whether or not a covered person may engage in certain acts or practices in connection with valuations of the consumer's principal dwelling.

Person that prepares valuations. Comment 42(c)(1)–3 clarifies that § 226.42(c)(1) is violated if a covered person attempts to or causes the value assigned by a person that prepares valuations to be based on a factor other than the independent judgment of the person that prepares valuations through coercion or certain other acts or practices, whether or not the person that prepares valuations is a state-licensed or state-certified appraiser. For example, comment 42(c)(1)(1)–3 clarifies that a covered person violates § 226.42(c)(1) by seeking to coerce a real estate agent to assign a market value to the consumer's principal dwelling based on a factor other than the real estate agent's independent judgment, in connection with a covered transaction. Although § 226.42(c)(1) broadly prohibits certain acts and practices directed toward any person who prepares valuations, the Board notes that in some cases applicable law or guidance may call for a creditor to obtain an appraisal prepared by a state-licensed or state-certified appraiser for a covered transaction. For example, the federal financial institution regulatory agencies require the creditors they supervise to obtain an appraisal by a state-certified appraiser for certain federally-related mortgage transactions.[11]

Indirect acts or practices. Comment 42(c)(1)–4 clarifies that § 226.42(c)(1) may be violated indirectly, for example,

[11] *See,* Board: 12 CFR 225.63(a); OCC: 12 CFR 34.43(a); FDIC: 12 CFR 323.3(a); OTS: 12 CFR 564.3(a); NCUA: 12 CFR 722.3(a).

where a creditor attempts to cause the value an appraiser engaged by an appraisal management company assigns to the consumer's principal dwelling to be based on a factor other than the appraiser's independent judgment. Thus, the commentary provides that it is a violation to threaten to withhold future business from a title company affiliated with an appraisal management company unless the valuation ordered through the appraisal management company assigns a value to the consumer's principal dwelling that meets or exceed a minimum threshold.

Automated valuation systems. Under this interim final rule, § 226.42(c)(1) does not apply in connection with the development or use of an automated model or system that estimates value. (The definition of "valuation" does not include an estimate of value produced exclusively using such an automated system. *See* § 226.42(b)(3).) The Board requests comment, however, on whether creditors or other persons exercise or attempt to exercise improper influence over persons that develop an automated model or system for estimating the value of the consumer's principal dwelling.

42(c)(1)(i)

TILA Sections 129E(b)(3) and (4) provide that the following actions violate appraisal independence: (1) Seeking to influence an appraiser to assign a targeted value to facilitate the making or pricing of a covered transaction; and (2) withholding or threatening to withhold timely payment for an appraisal report provided or for appraisal services rendered in accordance with the parties' contract. 15 U.S.C. 1639e(b)(3), (4). The Board believes that the prohibition on causing or attempting to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of the person that prepares a valuation, through coercion, inducement, intimidation, and certain other acts and practices, encompass the acts and practices prohibited by TILA Section 129E(b)(3) and (4). This interim rule therefore uses the acts and practices prohibited by TILA Section 129E(b)(3) and (4) as examples of acts and practices prohibited by TILA Section 129E(b)(1). (This interim final rule implements the prohibition under TILA Section 129E(b)(2) of "mischaracterizing" the value of the consumer's principal dwelling separately from the other provisions of TILA Section 129E(b), because that provision may be violated without outside pressure, as discussed below in the section-by-section analysis of § 226.42(c)(2). 15 U.S.C. 1639e(b).)

Section 226.42(c)(1)(i)(A) and (B) implement TILA Section 129E(b)(3) and (4) and are substantially similar to existing § 226.36(b)(1)(C) and (D). In addition, § 226.42(c)(1)(i)(D) through (E) mirror current § 226.36(b)(1)(i)(A), (B), and (E). The examples provided in § 226.42(c)(1)(i) illustrate cases where prohibited action is taken towards a person that prepares valuations. The Board notes that § 226.42(c)(1) nevertheless applies to prohibited acts and practices directed towards a person that performs valuation management functions or such person's affiliate. *See* comment 42(c)(1)(i)–1. As used in the examples of prohibited actions, the terms "specific value" and "predetermined threshold" includes a predetermined minimum, maximum, or range of values. *See* comment 42(c)(1)(i)–2. Further, although the examples assume a covered person's actions are designed to cause the value assigned to the consumer's principal dwelling to equal or exceed a certain amount, the rule also applies to cases where a covered person's prohibited actions are designed to cause the value assigned to the dwelling to be below a certain amount. *See id.*

42(c)(1)(i)(A)

TILA Section 129E(b)(3) prohibits a covered person from seeking to influence a person that prepares valuations, or otherwise encouraging the reporting of a targeted value for the consumer's principal dwelling, to facilitate the making or pricing of a covered transaction. 15 U.S.C. 1639e(b)(3). This provision is substantially similar to current § 226.36(b)(1)(ii)(C), which prohibits "telling an appraiser a minimum reported value of the consumer's principal dwelling that is needed to approve the loan." Section 226.42(c)(1)(i)(A) implements TILA Section 129E(b)(3), with minor revisions for clarity.

42(c)(1)(i)(B)

TILA Section 129E(b)(4) provides that appraisal independence is violated if a person withholds or threatens to withhold timely payment for a valuation or for services rendered to provide a valuation, when the valuation or the services are provided in accordance with the contract between the parties. 15 U.S.C. 1639e(b)(4). This provision is substantially similar to current § 226.36(b)(1)(ii)(D), which prohibits "failing to compensate an appraiser because the appraiser does not value the consumer's principal dwelling at or above a certain amount." Section 226.42(c)(2)(i)(B) implements TILA Section 129E(b)(4), with minor revisions for clarity. The Board notes that withholding compensation for breach of contract or substandard performance of services does not violate § 226.42(c)(1). *See* § 226.42(c)(3)(v).

42(c)(1)(i)(C), (D), and (E)

TILA Section 129E(b)(1) prohibits certain acts or practices that cause or attempt to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of a person that prepares valuations. 15 U.S.C. 1639e(b)(1). The Board believes that the acts and practices currently prohibited under § 226.36(b)(1)(i)(A) through (E) are prohibited by TILA Section 129E(b)(1). Therefore, the interim final rule includes the examples of prohibited practices provided in current § 226.36(b)(1)(ii)(A), (B), and (E) in new § 226.42(c)(2)(i)(C), (D), and (E).

Section 226.42(c)(1)(i)(C) provides that an example of an action that violates § 226.42(c)(1) is implying to a person that prepares valuations that current or future retention of the person depends on the amount at which the person estimates the value of the consumer's principal dwelling. Section 226.42(c)(1)(i)(D) provides that an example of an action that violates § 226.42(c)(1) is excluding a person that prepares valuations from consideration for future engagement because the person reports a value for the consumer's principal dwelling that does not meet or exceed a predetermined threshold. A "predetermined threshold" includes a predetermined minimum, maximum, or range of values. *See* comment 42(c)(1)(i)–2. Section 226.42(c)(1)(i)(E) provides that an example of an action that violates § 226.42(c)(1) is conditioning the compensation paid to a person that prepares valuations on consummation of a covered transaction. The examples provided under § 226.42(c)(1)(i) are illustrative, not exhaustive, and other actions may violate § 226.42(c)(1).

42(c)(2) Mischaracterization of Value

TILA Section 129E(b)(2) prohibits mischaracterizing or suborning any mischaracterization of the appraised value of property securing a covered transaction. 15 U.S.C. 1639e(b)(2). The Board implements that prohibition separately from the prohibition under § 226.42(c)(1) of causing or attempting to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of a person that prepares valuations, through coercion and other similar acts and practices.

This is because a person may mischaracterize such value without any outside pressure. This interim final rule implements TILA Section 129E(b)(2) in § 226.42(c)(2).

42(c)(2)(i) Misrepresentation

Section 226.42(c)(2)(i) provides that a person that prepares valuations shall not materially misrepresent the value of the consumer's principal dwelling in a valuation. Section 226.42(c)(2)(i) applies specifically to persons that prepare valuations, because such persons represent that the value they assign to the consumer's principal dwelling is consistent with their opinion regarding such value. Section 226.42(c)(2)(i) provides that a *bona fide* error is not a mischaracterization. The Board believes that Congress intended to prohibit the intentional misrepresentation of the value of the consumer's principal dwelling, not *bona fide* errors. Comment 42(c)(2)(i)–1 clarifies that a person misrepresents the value of the consumer's principal dwelling by assigning a value to such dwelling that does not reflect the person's opinion of such dwelling's value. For example, comment 42(c)(2)(i)–1 clarifies that an appraiser violates § 226.42(c)(2)(i) if the appraiser estimates that the value of such dwelling is $250,000 applying USPAP but assigns a value of $300,000 to such dwelling in a Uniform Residential Appraisal Report.

42(c)(2)(ii) Falsification or Alteration

TILA Section 129E(b)(2) prohibits "mischaracterizing or suborning any mischaracterization" of the value of the consumer's principal dwelling. 15 U.S.C. 1639e(b)(2). That provision is implemented in § 226.42(c)(2)(ii). Section 226.42(c)(2)(ii) provides that no covered person shall falsify, and no covered person other than a person that prepares valuations shall materially alter, a valuation. An alteration is material for purposes of § 226.42(c)(2)(ii) if the alteration is likely to significantly affect the value assigned to the consumer's principal dwelling.

Alterations to a valuation generally should be made by the person that prepares the valuation, because the valuation reflects that person's estimate of the value of the consumer's principal dwelling. (Covered persons may request that a person that prepares a valuation take certain actions, including correct errors in the valuation, however. *See* § 226.42(c)(3).) The Board solicits comment, however, on whether there are specific types of alterations that other persons may make that do not affect the value assigned to the consumer's dwelling and therefore should not be deemed material for purposes of § 226.42(c)(2)(ii).

42(c)(2)(iii) Inducement of Mischaracterization

Section 226.42(c)(2)(iii) provides that no covered person shall induce a person to violate the prohibitions under § 226.42(c)(2)(i) or (ii). For example, comment 42(c)(2)(iii)–1 clarifies that a loan originator may not coerce a loan underwriter to alter an appraisal report to increase the value assigned to the consumer's principal dwelling.

42(c)(3) Permitted Actions

TILA Section 129E(c) provides that TILA Section 129E(b) shall not be construed to prohibit a mortgage lender, mortgage broker, mortgage banker, real estate broker, appraisal management company, employee of an appraisal management company, consumer, or any other person with an interest in a real estate transaction from asking an appraiser to undertake certain actions. 15 U.S.C. 1639e(c). To implement TILA Section 129E(c), § 226.42(c)(3) provides examples of actions that do not violate § 226.42(c)(1) or (2). The Board notes that the examples provided under § 226.42(c)(3) are illustrative, not exhaustive, and there are other actions that are permitted under § 226.42(c)(1) or (2).

42(c)(3)(i), (ii), and (iii)

TILA Section 129E(c)(1) provides that it is permissible under TILA Section 129E(b) to ask an appraiser to consider additional property information, including information regarding comparable properties. 15 U.S.C. 1639e(c)(1). TILA Section 129E(c)(2) provides that it is permissible under TILA Section 129E(b) to ask an appraiser to provide further detail, substantiation, or explanation for the appraiser's value conclusion. 15 U.S.C. 1639e(c)(1). TILA Section 129E(c)(3) provides that it is permissible under TILA Section 129E(b) to ask an appraiser to correct errors in an appraisal report. 15 U.S.C. 1639e(c)(3). TILA Section 129E(c)(1) through (3) are substantially similar to current § 226.36(b)(1)(ii)(A) through (C). The interim final rule implements TILA Section 129E(c)(1) through (3) in § 226.42(c)(3)(i) through (iii).

42(c)(3)(iv), (v), and (vi)

The Board believes that the acts and practices allowed under current § 226.36(b)(1)(ii)(D) through (F) do not compromise the exercise of independent judgment in estimating the value of the consumer's principal dwelling. The Board therefore includes the examples of permitted practices provided under current § 226.36(b)(1)(ii)(D) through (F) in new § 226.42(c)(3)(iv) through (vi). Section 226.42(c)(3)(iv) provides that an example of an action that does not violate § 226.42(c)(1) or (2) is obtaining multiple valuations for the consumer's principal dwelling to select the most reliable valuation. Section 226.42(c)(3)(iv) is substantially similar to current § 226.36(b)(1)(ii)(D) but omits the statement in that provision that obtaining multiple appraisals is permitted under § 226.36(b) "as long as the creditor adheres to a policy of selecting the most reliable appraisal, rather than the appraisal that states the highest value." That statement is omitted because it may suggest an unintended distinction between selecting the valuation that states the highest value and selecting the valuation that states the lowest value. No substantive change is intended.

Section 226.42(c)(3)(v) provides that an example of an action that does not violate § 226.42(c)(1) or (2) is withholding compensation for breach of contract or substandard performance of services. Section 226.42(c)(3)(vi) provides that example of an action that does not violate § 226.42(c)(1) or (2) is taking action permitted or required by applicable federal or state statute, regulation, or agency guidance. Section 226.42(b)(3)(v) and (vi) are substantially similar to current § 226.36(b)(1)(ii)(E) and (F).

42(d) Prohibition on Conflicts of Interest

Background

Section 226.42(d) implements TILA Section 129E(d), which states that "no certified or licensed appraiser conducting, and no appraisal management company procuring or facilitating, an appraisal in connection with a consumer credit transaction secured by the principal dwelling of a consumer may have a direct or indirect interest, financial or otherwise, in the property or transaction involving the appraisal." This new TILA provision is generally consistent with longstanding Federal banking agency appraisal regulations and supervisory guidance applicable to federally-regulated depository institutions. The federal banking agency regulations require that appraisers employed by the institution extending credit (termed "staff appraisers" in the regulations) be "independent of the lending, investment, and collection functions and not involved, except as an appraiser, in the transaction, and have no direct or indirect interest, financial

or otherwise, in the property." [12] The federal banking agency regulations also prohibit appraisers who are not employees of the institution extending credit, but rather hired on a contract basis (termed "fee appraisers" in the regulations) from having a "direct or indirect interest, financial or otherwise, in the property or the transaction." [13]

Federal Banking Agency Appraisal Guidance

Reaffirming independence standards in federal banking agency appraisal regulations, the federal banking agencies have issued Interagency Appraisal and Evaluation Guidelines (Interagency Guidelines). The Interagency Guidelines state that the collateral valuation process "should be isolated from the institution's loan production process," and that a person providing an appraisal or evaluation "should be independent of the loan and collection functions of the institution and have no interest, financial or otherwise, in the property or the transaction." [14] The Interagency Guidelines acknowledge, however, that for some creditors, such as small or rural institutions or branches, separating loan production staff from collateral valuation staff may not always be possible or practical because the only individual qualified to analyze the real estate collateral may also be a loan officer, other officer, or director of the institution. In these cases, the Interagency Guidelines state that, "[t]o ensure their independence, lending officials, officers, or directors should abstain from any vote or approval involving loans on which they performed an appraisal or evaluation." [15]

More recently, the federal banking agencies proposed similar guidance in the Proposed Interagency Appraisal and Evaluation Guidelines (Proposed Interagency Guidelines).[16] In addition to incorporating the existing guidance stated above, the Proposed Interagency Guidelines advise institutions to "establish reporting lines independent of loan production for staff that order, accept, and review appraisals and evaluations." For institutions unable to achieve absolute lines of independence between the collateral valuation and loan production processes, the Proposed Interagency Guidelines advise that an institution should nonetheless "be able to demonstrate clearly that it has prudent safeguards to isolate its collateral valuation program from influence or interference from the loan production process."

HVCC

The HVCC, which covers appraisals performed by state-licensed or state-certified appraisers for loans sold to Fannie Mae and Freddie Mac, also incorporates several provisions to prohibit conflicts of interest in the appraisal process.

First, the HVCC regulates the process of selecting and communicating with a person or entity involved in conducting an appraisal. Specifically, (1) members of the creditor's loan production staff; and (2) any person who (i) is compensated on a commission basis based on whether the loan closes, or (ii) reports ultimately to any officer of the creditor who is not independent of loan production, may not do the following:

- Select, retain, recommend, or influence the selection of any appraiser for a particular appraisal assignment or for inclusion on a list or panel of approved or disapproved appraisers; or
- Have "substantive communications" with an "appraiser or appraisal management company" involving or impacting valuation, including ordering or managing an appraisal assignment.[17]

Second, the HVCC prohibits the creditor from using any appraisal prepared by a person or entity that may have a conflict of interest. In particular, a creditor may not use any appraisal prepared by an appraiser employed by: (1) The creditor; (2) an affiliate of the creditor; (3) an entity owned wholly or partly by the creditor; or (4) an entity that wholly or partly owns the creditor. A creditor also may not use an appraisal prepared by any appraiser employed, engaged as an independent contractor, or otherwise retained by "any appraisal company or appraisal management company" affiliated with, or that wholly or partly owns or is owned by the creditor or an affiliate of the creditor.[18] A creditor may use in-house staff appraisers, however, to: (1) Order appraisals; (2) review appraisals, both pre- and post-loan funding; (3) develop, deploy, or use internal AVMs; and (4) prepare appraisals for transactions other than mortgage origination transactions, such as "loan workouts," if the appraiser complies with the terms of the HVCC.[19]

Third, the HVCC permits the creditor to use appraisals otherwise prohibited above, as long as the creditor adheres to a list of requirements designed to ensure the independence of any person involved in conducting or managing the appraisal, such as that, among other requirements:

- The appraiser must report to a function independent of the creditor's sales or loan production function;
- The creditor's loan production staff may have no role in selecting, retaining, recommending, or influencing the selection of an appraiser; and
- The appraiser must not be compensated based on the appraiser's conclusion of value or whether the loan closes.[20]

Fourth, the HVCC prohibits a creditor from using an appraisal prepared by an entity affiliated with, or that wholly or partly owns or is owned by, another entity performing settlement services for the same transaction, *unless* the entity performing the appraisal has adopted policies and procedures to implement the HVCC, including training and disciplinary rules on appraiser independence.[21]

The HVCC exempts from compliance with the second, third, and fourth provisions described above, "institutions (including non-banking institutions) that meet the definition of a 'small bank' as set forth in the Community Reinvestment Act,[22] and which Freddie Mac or Fannie Mae determines would suffer hardship due to the provisions, and which otherwise adhere with [the HVCC]." [23]

[12] Board: 12 CFR 226.65(a); OCC: 12 CFR 34.45(a); FDIC: 12 CFR 323.5(a); OTS: 12 CFR 564.5(a); NCUA: 12 CFR 722.5(a). The regulations define "appraisal" to mean "a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of an adequately described property as of a specific date(s), supported by the presentation and analysis of relevant market information." Board: 12 CFR 226.62(a); OCC: 12 CFR 34.42(a); FDIC: 12 CFR 323.2(a); OTS: 12 CFR 564.2(a); NCUA: 12 CFR 722.2(a). "State-certified appraiser" and "state-licensed appraiser" are defined at, respectively, 12 CFR 226.62(j) and (k); OCC: 12 CFR 34.42(j) and (k); FDIC: 12 CFR 323.2(j) and (k); OTS: 12 CFR 564.2(j) and (k); NCUA: 12 CFR 722.2(j) and (k).

[13] Board: 12 CFR 226.65(b); OCC: 12 CFR 34.45(b); FDIC: 12 CFR 323.5(b); OTS: 12 CFR 564.5(b); NCUA: 12 CFR 722.5(b).

[14] Board, OCC, FDIC, OTS, Interagency Appraisal and Evaluation Guidelines, SR 94–55 (Oct. 28, 1994) (Interagency Guidelines).

[15] *Id.*

[16] Board, OCC, FDIC, OTS, NCUA, Proposed Interagency Appraisal and Evaluation Guidelines, 73 FR 69647, Nov. 19, 2008 (Proposed Interagency Guidelines).

[17] HVCC, Part III.B.

[18] *Id.* Part IV.A.

[19] *Id.* Part IV.C.

[20] *Id.* Part IV.B.

[21] *Id.* Part IV.C.

[22] "Small bank" is defined in the Community Reinvestment Act (CRA) as "any regulated financial institution with aggregate assets of not more than $250,000,000." 12 U.S.C. 2908. However, adjusting asset threshold amounts for inflation, regulations implementing the CRA define "small bank" as "a bank that, as of December 31 of either of the prior two calendar years, had assets of less than $1.098 billion." 12 CFR 228.12(u). These regulations also define the term "intermediate small bank," meaning "a small bank with assets of at least $274 million as of December 31 of both of the prior two calendar years and less than $1.098 billion as of December 31 of either of the prior two calendar years." *Id.*

[23] HVCC, Part IV.D.

The Interim Final Rule

The Board recognizes that the literal language of the statutory prohibition on having a "direct or indirect interest, financial or otherwise" in the property or transaction can be interpreted to mean that a person or entity preparing a valuation or performing valuation management functions should be deemed to have a prohibited interest merely by token of being employed or owned by the creditor. An employee of the creditor could be deemed to have an "indirect" interest in the transaction, for example, because he or she might receive financial benefits, such as higher bonuses or more valuable stock options, as a result of the creditor's loan volume rising. Similarly, under this interpretation, an AMC providing both valuation management functions and title services, including title insurance, for the same transaction could be deemed to have an "indirect" interest in the transaction if the entity profits when title insurance is purchased at closing.

The Board believes, however, that interpreting the statute in this way would be impractical and thus would not be the most effective way to further the purpose of the conflicts of interest prohibition in TILA Section 129E(d)–promoting a healthy mortgage market by ensuring independent valuations. A broad prohibition could interfere with the functioning of many creditors and providers of valuations and valuation management functions, potentially disrupting the mortgage market at a vulnerable time. The Board also notes that, according to the legislative history of TILA Section 129E(d), the conflicts of interest provision "should not be construed as to prohibit work by staff appraisers within a financial institution or other organization, if such an entity has established firewalls, consistent with those outlined in the [HVCC], between the origination group and the appraisal unit designed to ensure the independence of appraisal results and reviews." [24]

The Board understands that many AMCs are wholly or partly owned by creditors, or share a common corporate parent with a creditor, and manage appraisals for a sizable share of the dwelling-secured consumer credit market. The Board is also aware that a few larger creditors still have a segregated in-house collateral valuation function. Some creditor representatives have informally reported to the Board that, based on their experience and quality control testing, appraisals performed by an in-house collateral valuation function are of higher quality than appraisals performed by third parties, including those ordered through third-party AMCs. These creditors might reasonably prefer using in-house appraisals, or appraisals performed through an appraisal company wholly owned by the creditor, to protect both consumers and their own safety and soundness.

In addition, the Board is concerned that small creditors with few staff members, such as institutions or branches in rural areas, could not comply with an overly broad prohibition on conflicts of interest. These entities, particularly in rural areas, may not have the option of choosing a third party to perform or manage collateral valuations. They may need to rely on a single in-house staff member to perform multiple functions, such as, for example, serving as both a loan officer and an appraiser.

For these reasons, the Board's interim final rule:

- Generally prohibits conflicts of interest in the valuation process, as prescribed by TILA Section 129E(d);
- Provides a safe harbor to ensure compliance with the conflicts of interest prohibition by a creditor's in-house valuation staff or affiliated AMC or appraisal company if firewalls and other specified safeguards are in place; and
- Provides a safe harbor to ensure compliance with the conflicts of interest prohibition by a person who prepares valuations or performs valuation management functions in a particular transaction in addition to performing another settlement service, or whose affiliate performs another settlement service, if firewalls and other specified safeguards are in place.

The interim final rule establishes alternative safe harbor safeguards for smaller creditors that are unable to establish firewalls due to practical problems, such as having a limited number of employees.

These provisions are discussed in turn below.

42(d)(1)(i) In General

Section 226.42(d)(1)(i) prohibits a person preparing a valuation or performing valuation management functions for a consumer credit transaction secured by the consumer's principal dwelling from having a direct or indirect interest, financial or otherwise, in the property or transaction for which the valuation is or will be performed. This provision implements TILA Section 129E(d), but uses different terminology (for reasons explained in the section-by-section analysis to § 226.42(b)). Specifically, the term "person preparing valuations" replaces the term "licensed or certified appraiser"; the term "person performing valuation management functions" replaces the term "appraisal management company"; and the term "valuation" replaces the term "appraisal." By using these terms, the interim final rule's conflict of interest provision applies to any form of valuing a property on which a creditor relies to extend consumer credit secured by the consumer's principal dwelling.

Prohibited Interest in the Property

Comment 42(d)(1)(i)–1 clarifies that a person preparing a valuation or performing valuation management functions for a covered transaction has a prohibited interest in the property if the person has any ownership or reasonably foreseeable ownership interest in the property. The comment further clarifies that a person who seeks a mortgage to purchase a home has a reasonably foreseeable ownership interest in the property securing the mortgage, and therefore is not permitted to prepare the valuation or perform valuation management functions for that mortgage transaction under § 226.42(d)(1)(i). This example is illustrative, and is not intended to be exhaustive; other prohibited interests in the covered property may arise, depending on the facts of a particular transaction.

Prohibited Interest in the Transaction

Comment 42(d)(1)(i)–2 clarifies that a person preparing a valuation or performing valuation management functions has a prohibited interest in the transaction under § 226.42(d)(1)(i) if that person or an affiliate of that person also serves as a loan officer of the creditor, mortgage broker, real estate broker, or other settlement service provider for the transaction, and the safe harbor conditions for settlement service providers under § 226.42(d)(4) (discussed below in the section-by-section analysis of that provision) are not satisfied. The comment further clarifies that a person also has a prohibited interest in the transaction if the person is compensated or otherwise receives financial or other benefits based on whether the transaction is consummated. Under these circumstances, the comment explains, the person is not permitted to prepare the valuation or perform valuation management functions for the transaction under § 226.42(d)(1)(i). The

[24] U.S. House of Reps., Comm. on Fin. Services, Report on H.R. 1728, Mortgage Reform and Anti-Predatory Lending Act, No. 111–94, 95 (May 4, 2009) (House Report). The conflict of interest provision adopted in TILA Section 129E(d) appears in Title VI, § 602, of H.R. 1728.

Board notes that these examples of prohibited interests are generally consistent with conflicts of interest provisions in the HVCC.[25] Again, these examples are not intended to be an exhaustive list of prohibited conflicts of interest in covered transactions; others may arise, depending on the circumstances surrounding a particular transaction.

42(d)(1)(ii) Employees and Affiliates of Creditors; Providers of Multiple Settlement Services

Employees and Affiliates of Creditors

Section 226.42(d)(1)(ii)(A) provides that, in any covered transaction, no person violates paragraph (d)(1)(i) of this section based solely on the fact that the person is an employee or affiliate of the creditor. Comment 226.42(d)(1)(ii)–1 explains that, in general, a creditor may use employees or affiliates to prepare a valuation or perform valuation management functions without violating § 226.42(d)(1)(i). The comment clarifies, however, that whether an employee or affiliate has a direct or indirect interest in the property or transaction that creates a prohibited conflict of interest under § 226.42(d)(1)(i) depends on the facts and circumstances of a particular case, including the structure of the employment or affiliate relationship.

Providers of Multiple Settlement Services

Section 226.42(d)(1)(ii)(B) provides that, in any covered transaction, no person violates paragraph (d)(1)(i) of this section based solely on the fact that the person provides a settlement service in addition to preparing valuations or performing valuation management functions, or based solely on the fact that the person's affiliate performs another settlement service. Comment 42(d)(1)(ii)–2 explains that, in general, a person who prepares a valuation or perform valuation management functions for a covered transaction may perform another settlement service for the same transaction without violating § 226.42(d)(1)(i), or the person's affiliate may provide another settlement service for the transaction. The comment clarifies, however, that whether the person has a direct or indirect interest in the property or transaction that creates a prohibited conflict of interest under § 226.42(d)(1)(i) depends on the facts and circumstances of a particular case.

[25] HVCC, Part IV.A and IV.C.

42(d)(2) Employees and Affiliates of Creditors With Assets of More Than $250 Million for Both of the Past Two Calendar Years; 42(d)(3) Employees and Affiliates of Creditors With Assets of $250 Million or Less for Either of the Past Two Calendar Years

Background

As discussed above, one interpretation of TILA Section 129E(d) is that it prohibits entities related to a creditor by ownership and a creditor's in-house appraisal staff from involvement in the collateral valuation process for that creditor. For many creditors and providers of valuations and valuation management services, complying with the statute under this interpretation would be impractical or impossible.

The Board believes that an interpretation of the statute more consistent with Congress's intent is one that recognizes that appropriate firewalls and safeguards can ensure the integrity of the valuation process in certain situations where conflicts might otherwise arise, such as where the person preparing a valuation is the employee of the creditor. The Board also notes that federal banking agency guidance and the HVCC permit creditors to use appraisals prepared by in-house appraisers or affiliated AMCs if they establish firewalls and other safeguards to separate the collateral valuation function from the loan production functions.[26] Appraisers, creditors, and others have informed the Board that the HVCC requirements for firewalls and safeguards, as an alternative to a strict prohibition on direct or indirect conflicts of interest, have generally been effective in ensuring that appraisers provide objective and independent valuations. Again, the legislative history of TILA Section 129E(d) evinces Congress's approval of this approach, stating that the conflict of interest provision "should not be construed as to prohibit work by staff appraisers within a financial institution or other organization, if such an entity has established firewalls, consistent with those outlined in the [HVCC], between the origination group and the appraisal unit designed to ensure the independence of appraisal results and reviews."[27]

Thus, the interim final rule creates two safe harbors for compliance with the prohibition on conflicts of interest under § 226.42(d) for persons who prepare valuations or perform valuation management functions and are also employees or affiliates of the creditor:

(1) One for transactions in which the creditor had assets of more than $250 million as of December 31st for both of the past two calendar years (§ 226.42(d)(2)); and

(2) The other for transactions in which the creditor had assets of $250 million or less as of December 31st for either of the past two calendar years (§ 226.42(d)(3)).

These safe harbors incorporate several firewall and safeguard requirements from the HVCC as well as, for smaller institutions, the federal banking agencies' appraisal regulations and supervisory guidance. As discussed below, the safe harbor conditions under § 226.42(d)(2) and (d)(3) impose obligations on creditors and also require that certain additional conditions be met. If the creditor meets these obligations and the other safe harbor conditions are satisfied, the creditor generally may rely on valuations prepared by its in-house staff or for which its affiliate performed valuation management functions for any covered transaction without violating the regulation.

The interim final rule differentiates between creditors with assets of over $250 million and creditors with assets of $250 million or less for at least three reasons. First, without allowances for staff and other limitations of smaller creditors, these creditors may decrease their consumer lending operations due to an inability to comply with the statute and implementing regulation. This reduction in credit availability could harm many consumers, undermining the goals of the Dodd-Frank Act to protect and benefit consumers. Second, the federal banking agencies have long recognized that smaller institutions may be unable to achieve strict separation between its collateral valuation and loan production functions; therefore, some firewalls and safeguards appropriate for larger institutions are not for smaller institutions. Third, distinguishing between larger and smaller institutions is consistent with the HVCC, which the statute indicates the interim final rule is intended to replace. See TILA Section 129E(j). As discussed earlier, the HVCC exempts from its conflict of interest and firewall rules all institutions (both depositories and nondepositories) meeting the asset threshold for defining a "small bank" under the Community Reinvestment Act. Therefore, this distinction is generally familiar in the

[26] *See* Interagency Guidelines, SR 94–55; HVCC, Part IV.B.

[27] House Report at 95.

industry and should not cause undue confusion.[28]

The Board requests comment on whether the $250 million asset size threshold, some other asset size threshold, or other factors are appropriate for applying the different safe harbor conditions to different types of institutions.

42(d)(2) Employees and Affiliates of Creditors With Assets of More Than $250 Million for Both of the Past Two Calendar Years

Section 226.42(d)(2) provides that, in a transaction in which the creditor had assets of more than $250 million as of December 31st for both of the past two calendar years, a person preparing valuations or performing valuation management functions who is employed by or affiliated with the creditor does not have a conflict of interest in violation of § 226.42(d)(1)(i) of this section based on the person's employment or affiliate relationship with the creditor if:

(1) The compensation of the person preparing a valuation or performing valuation management functions is not based on the value arrived at in any valuation;

(2) The person preparing a valuation or performing valuation management functions reports to a person who is not part of the creditor's loan production function (as defined in § 226.42(d)(5)(i)) and whose compensation is not based on the closing of the transaction to which the valuation relates; and

(3) No employee, officer or director in the creditor's loan production function is directly or indirectly involved in selecting, retaining, recommending or influencing the selection of the person to prepare a valuation or perform valuation management functions, or to be included in or excluded from a list of approved persons who prepare valuations or perform valuation management functions.

Comment 42(d)(2)–1 clarifies that § 226.42(d)(2) creates a safe harbor for a person who prepares valuation or performs valuation management functions for a covered transaction and is an employee or affiliate of the creditor. Such a person will not be deemed to have an interest prohibited under § 226.42(d)(1)(i) on the basis of the employment or affiliate relationship with the creditor if the conditions in § 226.42(d)(2) are satisfied. In addition, the comment explains that, in general, in any covered transaction with a creditor that had assets of more than $250 million for the past two years, the creditor may use its own employee or affiliate to prepare a valuation or perform valuation management functions for a particular transaction if the safe harbor conditions described in § 226.42(d)(2) are satisfied without violating the regulation. The comment also states that, if the safe harbor conditions in § 226.42(d)(2) are not satisfied, whether a person preparing valuations or performing valuation management functions has violated § 226.42(d)(1)(i) depends on all of the facts and circumstances. The three conditions for the safe harbor under § 226.42(d)(2) are discussed in turn below.

Condition one: Compensation. The first condition is that the compensation of the person preparing a valuation or performing valuation management functions may not be based on the value arrived at in any valuation for the transaction. The Board believes that whether the loan closes depends on the conclusion of value; therefore the interim final rule prohibits, as a condition of this safe harbor, basing an appraiser's compensation on the conclusion of value but does not expressly prohibit basing the appraiser's compensation on whether the transaction closes. If this condition is met, the person will not have a stake in stating a certain value, which might color his or her judgment as to the value of the home.

Condition two: Reporting. The second condition requires that the person performing valuations or valuation management functions report to a person who is not part of the creditor's loan production function, or whose compensation is not based on the closing of the transaction to which the valuation relates. The Board believes that this condition is important to ensuring that persons instrumental in the collateral valuation process are not subject to pressure to misrepresent collateral value from managers or similar authorities whose primary objective is increasing loan volume, not obtaining an independent valuation. The Board also notes that this condition is similar to requirements in the HVCC, such as that "the appraiser or, if an affiliate, the company for which the appraiser works," report to a function of the creditor "independent of sales or loan production."[29] It is reflected in the Proposed Interagency Guidance as well, which advises institutions to "establish reporting lines independent of loan production for staff that order, accept, and review appraisals and evaluations."[30]

Comment 42(d)(2)(ii)–1 clarifies the prohibition on reporting to a person who is part of the creditor's loan production function. To this end, the comment provides the following example: if a person preparing a valuation is directly supervised or managed by a loan officer or other person in the creditor's loan production function (as defined in § 226.42(d)(5)(i), or by a person who is directly supervised or managed by a loan officer, the condition under § 226.42(d)(2)(ii) is not met.

Comment 42(d)(2)(ii)–2 clarifies the prohibition on reporting to a person whose compensation is based on the transaction closing. To this end, the comment provides the following example: assume an appraisal management company performs valuation management functions for a transaction in which the creditor is an affiliate of the appraisal management company. If the employee of the appraisal management company who is in charge of valuation management for that transaction is supervised by a person who earns a commission or bonus based on the percentage of closed transactions for which the appraisal management company provides valuation management functions, the condition under § 226.42(d)(2)(ii) is not met.

Condition three: Selection. The third condition requires that employees, officers, and directors in the creditor's loan production function not be directly or indirectly involved in selecting, retaining, recommending or influencing the selection of the person to perform a particular valuation or to be included in or excluded from a list or panel of approved persons who perform valuations. This safe harbor condition is intended to curtail coercion of appraisers that occurs through giving or withholding assignments, or removing the appraiser from, or including the appraiser on, a panel or list of persons approved to perform valuations. This condition is also intended to prevent loan sales or production staff from interfering with the independence of the valuation by choosing appraisers who pay be perceived to give especially high or low values.

Comment 42(d)(2)(ii)–2 clarifies the prohibition on any employee, officer or director in the creditor's loan production function (as defined in § 226.42(d)(4)(ii)) from direct or indirect involvement in selecting, retaining,

[28] 12 U.S.C. 2908; HVCC, Part IV.E.

[29] HVCC, Part IV.B(1). *See also id.,* Part III.B.

[30] Proposed Interagency Guidelines, 73 FR at 69652.

recommending or influencing the selection of the person to perform a valuation or valuation management functions for a covered transaction, or to be included in or excluded from a list or panel of approved persons who prepare valuations or perform valuation management functions. To this end, the comment provides the following example: if the person who selects the person who will prepare the valuation for a covered transaction is supervised by an employee of the creditor who also supervises loan officers, the condition in § 226.42(d)(2)(iii) is not met.

The Board requests comment on the appropriateness of the three conditions required under § 226.42(d)(2) for inclusion in the final rule.

42(d)(3) Employees and Affiliates of Creditors With Assets of $250 Million or Less for Either of the Past Two Calendar Years

Section 226.42(d)(3) provides a safe harbor for compliance with the prohibition on conflicts of interest under § 226.42(d)(1)(i) for employees and affiliates of creditors with assets of $250 million or less as of December 31st for either of the past two calendar years. Specifically, § 226.42(d)(3) provides that, in a transaction in which the creditor had assets of $250 million or less for either of the past two calendar years, a person who prepares valuations or performs valuation management functions and who is employed by or affiliated with the creditor does not have a conflict of interest in violation of § 226.42(d)(1)(i) based on the person's employment or affiliate relationship with the creditor if:

(1) The compensation of the person preparing a valuation or performing valuation management functions is not based the value arrived at in any valuation; and

(2) The creditor requires that any employee, officer or director of the creditor who orders, performs, or reviews a valuation for a covered transaction abstain from participating in any decision to approve, not approve, or set the terms of that transaction.

Comment 42(d)(3)–1 states that § 226.42(d)(3) creates a safe harbor for compliance with the general prohibition on conflicts of interest under § 226.42(d)(1)(i) by persons who prepare valuations or perform valuation management functions for a covered transaction and are employees or affiliates of the creditor. This comment explains that, in any covered transaction with a creditor that had assets of $250 million or less for either of the past two years, the creditor generally may use its own employee or affiliate to prepare a valuation or perform valuation management functions for a particular transaction, as long as the safe harbor conditions described in § 226.42(d)(3) are satisfied. The comment also explains that, if the safe harbor conditions in § 226.42(d)(3) are not satisfied, whether a person preparing valuations or performing valuation management functions has violated § 226.42(d)(1) depends on all of the facts and circumstances. The two conditions for the safe harbor under § 226.42(d)(3) are discussed in turn below.

Condition one: Compensation. The first condition is that the compensation of the person preparing a valuation or performing valuation management functions may not be based on the value arrived at in any valuation for the transaction. This condition parallels the condition applicable in transactions with larger creditors under § 226.42(d)(2)(i), discussed above. The Board believes that this condition, which in effect prohibits "direct" conflicts of interest in the transaction, is equally appropriate in transactions with smaller creditors as in those with larger creditors.

Condition two: Safeguards. The second condition is that the creditor must require that any employee, officer or director of the institution who orders, performs, or reviews the valuation for a particular transaction abstain from participation in any decision to approve, not approve, or set the terms of that transaction. The Board recognizes that smaller institutions may have difficulty complying with a condition that requires the person conducting the valuation or performing valuation management functions to report to a person independent of the creditor's sales or loan production functions (§ 226.42(d)(2)(ii)) or that prohibits employees in the creditor's loan production functions from being directly or indirectly involved in selecting, retaining, recommending or influencing the selection of a person to perform a particular valuation or to be included in or excluded from a list or panel of approved persons who perform valuations (§ 226.42(b)(2)(iii)). As discussed above, smaller institutions may have only a few employees, so each employee may have to perform multiple functions, including roles involving both collateral valuation and loan production tasks.

For these reasons, the condition in § 226.42(d)(3)(ii) replaces, for smaller creditors, the two conditions applicable to larger creditors described above, which require bright-line isolation of the collateral valuation function from the loan production function (§ 226.42(d)(2)(ii) and (d)(2)(iii)). This safe harbor condition tailored for smaller creditors incorporates provisions included in federal banking agency guidance for small or rural institutions regarding how to ensure independent valuations and protect against conflicts of interest in the collateral valuation process—namely, that a creditor should separate its collateral valuation function from its loan production function and that, to this end, any employee, officer or director of the institution who orders, performs, or reviews the valuation for a particular transaction should abstain from any vote or approval involving that transaction.[31]

The Board requests comment on the appropriateness of the two conditions of the safe harbor under § 226.42(d)(3) for inclusion in the final rule.

42(d)(4) Settlement Service Providers

The Board recognizes that AMCs and appraisal companies or firms are sometimes affiliated with other settlement service providers, such as title companies, and that some AMCs and appraisal companies provide services related to collateral valuation in addition to other settlement services for the same transaction. The Board believes that interpreting the statute to prohibit these AMCs and appraisal companies from providing valuation services and other settlement services in the same transaction in all cases would be contrary to the purposes of the statute; it could disrupt the businesses of many appraisal firms, appraisal management companies, and the creditors for which they provide services, to the detriment of the overall mortgage market. It also could reduce efficiencies created by "one-stop shopping" for settlement services, which can lower overall mortgage costs for consumers. The Board believes that providing a safe harbor consisting of appropriate firewalls and safeguards will ensure the integrity of the valuation process in accordance with the statute; by including this safe harbor, the interim final rule gives providers of multiple settlement services and the creditors for which they provide services an incentive to implement measures to secure valuation independence.

Section 226.42(d)(4) provides alternative safe harbors for compliance with the prohibition on conflicts of interest under § 226.42(d)(1)(i) by persons who prepare valuations or perform valuation management functions for a covered transaction and

[31] Interagency Guidelines, SR 94–55.

provide other settlement services for the same transaction, or whose affiliate provides settlement services. The Board notes that this provision is generally consistent with a similar provision in the HVCC, which prohibits a creditor from using an appraisal prepared by an entity affiliated with another entity that is engaged by the creditor to provide other settlement services for the same transaction, unless the entity providing the appraisal has adopted written policies and procedures implementing the HVCC, including adequate training and disciplinary rules on appraiser independence, and has mechanisms in place to report and discipline anyone who violates the policies and procedures.[32]

As with the safe harbors for employees and affiliates of creditors (§ 226.42(d)(2) and (d)(3)), the interim final rule's safe harbors for multiple settlement service providers differ depending on whether the creditor in the transaction had assets of $250 million or more as of December 31st for the past two calendar years (§ 226.42(d)(4)(i)) or assets of $250 million or less as of December 31st for either of the past two calendar years (§ 226.42(d)(4)(ii)).

Paragraph 42(d)(4)(i)

Under § 226.42(d)(4)(i), in a transaction in which the creditor had assets of more than $250 million for both of the past two calendar years, a person preparing a valuation or performing valuation management functions in addition to performing another settlement service, or whose affiliate performs another settlement service, will not be deemed to have interest prohibited under § 226.42(d)(1)(i) based on the fact that the person or the person's affiliate performs another settlement service for the transaction, as long as the conditions in § 226.42(d)(2)(i) (iii) are met. As discussed earlier, the conditions in § 226.42(d)(2)(i) (iii) are designed to ensure the independence of persons involved with valuations for transactions with larger creditors. Thus they require that:

(1) The compensation of the person preparing a valuation or performing valuation management functions is not based on the value arrived at in any valuation;

(2) The person preparing a valuation or performing valuation management functions reports to a person who is not part of the creditor's loan production function, and whose compensation is not based on the closing of the transaction to which the valuation relates; and

(3) No employee, officer or director in the creditor's loan production function is directly or indirectly involved in selecting, retaining, recommending or influencing the selection of the person to prepare a valuation or perform valuation management functions, or to be included in or excluded from a list of approved persons who prepare valuations or perform valuation management functions.

Comment 42(d)(4)(i)–1 explains that, even if the conditions in paragraph (d)(4)(i) are satisfied, however, the person preparing a valuation or performing valuation management functions may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. The comment further explains that, in general, in any covered transaction with a creditor that had assets of more than $250 million for the past two years, a person preparing a valuation or performing valuation management functions, or its affiliate, may provide another settlement service for the same transaction, as long as the conditions described in paragraph (d)(4)(i) are satisfied. This comment also explains that, if the safe harbor conditions in § 226.42(d)(4)(i) are not satisfied, whether a person preparing valuations or performing valuation management functions has violated § 226.42(d)(1) depends on all of the facts and circumstances.

Comment 42(d)(4)(i) 2 explains that the safe harbor under § 226.42(d)(4)(i) is available if the condition specified in § 226.42(d)(2)(ii), among others, is met. Section 226.42(d)(2)(ii) prohibits a person preparing a valuation or performing valuation management functions from reporting to a person whose compensation is based on the closing of the transaction to which the valuation relates. This comment provides the following example to clarify the meaning of this prohibition: Assume an appraisal management company performs both valuation management functions and title services, including providing title insurance, for the same covered transaction. If the appraisal management company employee in charge of valuation management functions for the transaction is supervised by the title insurance agent in the transaction, whose compensation depends in whole or in part on whether title insurance is sold at the loan closing, the condition in § 226.42(d)(2)(ii) is not met.

Paragraph 42(d)(4)(ii)

Under § 226.42(d)(4)(ii), in a transaction in which the creditor in a covered transaction had assets of $250 million or less as of December 31st for either of the past two calendar years, a person performing valuations or valuation management functions in addition to performing another settlement service, or whose affiliate performs another settlement service, will not be deemed to have an interest prohibited under § 226.42(d)(1)(i) based on the fact that the person or the person's affiliate performs another settlement service for the transaction if the conditions in § 226.42(d)(3)(i)–(ii) are met.

Comment 42(d)(4)(ii)–1 explains that, even if the conditions in § 226.42(d)(4)(ii) are satisfied, however, the person may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. Thus, this comment explains that, in general, in any covered transaction in which the creditor had assets of $250 million or less for either of the past two years, a person preparing a valuation or performing valuation management functions, or its affiliate, may provide another settlement service for the same transaction, as long as the conditions described in § 226.42(d)(4)(i) are satisfied. The comment further explains that, if the conditions in § 226.42(d)(4)(i) are not satisfied, whether a person preparing valuations or performing valuation management functions has violated § 226.42(d)(1)(i) depends on all of the facts and circumstances.

The Board requests comment on the appropriateness of the conditions under which persons preparing valuations or performing valuations management functions for a transaction in addition to performing another settlement service for the same transaction, or whose affiliate performs another settlement service for the same transaction, will be deemed in compliance with the prohibition on conflicts of interest under § 226.42(d)(1)(i).

[32] HVCC, Part IV.C. More precisely, this provision of the HVCC prohibits use of an appraisal report "by an entity that is *affiliated with, or that owns or is owned, in whole or in part by,* another entity that is engaged by the lender to provide other settlement services," unless certain conditions are met. *Id.* (emphasis added). The Board's Regulation Y defines "affiliate" as "any company that controls, is controlled by, or is under common control with, another company." 12 CFR 225.2(a). Therefore, in the interim final rule and this **SUPPLEMENTARY INFORMATION**, the Board uses the term "affiliate" to include an entity that owns or is owned by another entity, as well as entities with a common owner.

42(d)(5) Definitions

Section 226.42(d)(5) provides three definitions for purposes of § 226.42(d): "loan production function"; "settlement service"; and "affiliate."

42(d)(5)(i) Loan Production Function

Section 226.42(d)(5)(i) provides that the term "loan production function" means an employee, officer, director, department, division, or other unit of a creditor with responsibility for generating covered transactions, approving covered transactions, or both. This definition is generally consistent with the Federal banking agencies' use of the term "loan production function" or "loan production staff."[33] The term appears in § 226.42(d)(2)(ii) and (d)(2)(iii), which require that, respectively, (1) a person preparing the valuation or performing valuation management functions report to a person independent of the creditor's loan production function, and (2) no employee in the creditor's loan production function be directly or indirectly involved in selecting, retaining, recommending or influencing the selection of a person to prepare a particular valuation or valuation management functions, or to be included in or excluded from a list of approved persons who prepare valuations or perform valuation management functions.

Comment 42(d)(5)(i)–1 clarifies the meaning of "loan production function." This comment states that a creditor's "loan production function" includes retail sales staff, loan officers, and any other employee of the creditor with responsibility for taking a loan application, offering or negotiating loan terms or whose compensation is based on loan processing volume. This comment clarifies that a person is not considered part of a creditor's loan production function solely because part of the person's compensation includes a general bonus not tied to specific transactions or percentage of closed transactions, or a profit sharing plan that benefits all employees. The comment further clarifies that a person solely responsible for credit administration or risk management is also not considered part of a creditor's loan production function. The comment explains that credit administration and risk management includes, for example, loan underwriting, loan closing functions (*e.g.,* loan documentation), disbursing funds, collecting mortgage payments and otherwise servicing the loan (*e.g.,* escrow management and payment of taxes), monitoring loan performance, and foreclosure processing.

42(d)(5)(ii) Settlement Service

As discussed above, the interim final rule provides a safe harbor for persons who prepare valuations or perform valuation management functions that also perform another settlement service for the same transaction, or whose affiliate performs another settlement service for the same transaction. *See* § 226.42(d)(4). Section 42(d)(5)(ii) defines "settlement service" to have the same meaning as in the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq.* The Board notes that this definition is consistent with the definition used in the HVCC regarding its analogous provision on providers of multiple settlement services.[34]

42(d)(5)(iii) Affiliate

Section 226.42(d)(5)(iii) provides that the term "affiliate" has the same meaning as in the Board's Regulation Y, 12 CFR 225.62(a), which defines "affiliate" as "any company that controls, is controlled by, or is under common control with, another company." This term is used in § 226.42(d)(2), (3), and (4), to identify the persons covered by the prohibition on conflicts of interest and safe harbors for complying with the general prohibition under § 226.42(d)(1).

42(e) When Extension of Credit Prohibited

TILA Section 129E(f) provides that, in connection with a covered transaction, a creditor who knows at or before loan consummation of a violation of the independence standards established in TILA Section 129E(b) or (d) (regarding misrepresentation of value and conflicts of interest, respectively) must not extend credit based on such appraisal, unless the creditor documents that it has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of the consumer's principal dwelling. 15 U.S.C. 1639e(b), (d), (f). Section 226.42(e) implements TILA Section 129E(f). Section 226.42(e) uses the term "valuation" to ensure that the protections in TILA Section 129E(f) apply to a covered transaction even if a creditor uses a valuation that is not a formal "appraisal" performed in accordance with USPAP by a licensed or certified appraiser, as discussed above in the section-by-section analysis of § 226.42(b)(3). Section 226.42(e) is substantially similar to existing § 226.36(b)(2).

Comment 42(e)–1 clarifies that a creditor will be deemed to have acted with reasonable diligence under § 226.42(e) if the creditor extends credit based on a valuation other than the valuation subject to the restriction in § 226.42(e). This is consistent with current comment 36(b)(2)–1. Comment 42(e)(1)–1 clarifies further, however, that a creditor need not obtain a second valuation to document that the creditor has acted with reasonable diligence to determine that the valuation does not materially misstate or misrepresent the value of the consumer's principal dwelling. Comment 42(e)–1 provides an example in which an appraiser notifies a creditor that a covered person had tried—and failed—to get the appraiser to inflate the value assigned to the consumer's principal dwelling. Comment 42(e)(1)–1 clarifies that if the creditor reasonably determines and documents that the appraisal had not misstated the dwelling's value, the creditor could extend credit based on the appraisal. This example is based on supplementary information provided in connection with proposed § 226.36(b)(2), which was adopted substantially as proposed. *See* 73 FR 1672, 1701 (Jan. 9, 2008); *see also* 73 FR 44522, 44568 (Jul. 30, 2008) (discussing the adoption of § 226.36(b)). The example is provided for clarity, and no substantive change is intended.

The interim final rule does not mandate specific due diligence procedures for creditors to follow when they suspect a violation of § 226.42(c) or (d). In addition, under the interim final rule, a violation of § 226.42(e) does not establish a basis for voiding loan agreements. That is, even if a creditor knows of a violation of § 226.42(c) or (d) and nevertheless extends credit in violation of § 226.42(e), this violation does not itself void the consumer's loan agreement with the creditor. Whether the loan agreement is valid is a matter determined by state or other applicable law. The Board notes that applicable federal or state regulations may require creditors to take certain steps in the event the creditor knows about problems with a valuation. The foregoing discussion is consistent with the Board's statements regarding due diligence and the impact of any violation on a creditor's contract under current § 226.36(b)(2). *See* 73 FR 44522, 44568 (Jul. 30, 2008).

42(f) Customary and Reasonable Compensation

Section § 226.42(f) implements TILA Section 129E(i), which requires

[33] *See, e.g.,* Proposed Interagency Guidelines, 73 FR at 69661.

[34] HVCC, Part IV.C.

creditors and their agents to compensate fee appraisers (appraisers who are not their employees) at a rate that is "customary and reasonable for appraisal services in the market area of the property being appraised." TILA Section 129E(i)(1). The statute states that evidence for reasonable and customary fees may be established by objective third-party information, such as government agency fee schedules, academic studies, and independent private sector surveys. "Such fee studies," the statute stipulates, "shall not include assignments ordered by known appraisal management companies." The statute does not define "appraisal management company." In addition, the statute provides that if an appraisal involves a "complex assignment," the customary and reasonable fee may reflect "the increased time, difficulty, and scope of the work required for such an appraisal and include an amount over and above the customary and reasonable fee for non-complex assignments." TILA Section 129E(i)(3). The statute does not define "complex" and "non-complex" assignments.

The Board interprets the statutory language of TILA Section 129E(i) to signify that the marketplace should be the primary determiner of the value of appraisal services, and hence the customary and reasonable rate of compensation for fee appraisers. The "customary and reasonable" compensation provision that Congress adopted as part of TILA is identical to a requirement included in a HUD Mortgagee Letter obligating FHA lenders to ensure that appraisers are paid "at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised." [35] HUD's statements regarding this provision recognize the role of the marketplace in determining rates for appraisal services and the importance of accounting for factors that can cause variations in what is a customary and reasonable amount of compensation on a transaction-by-transaction basis.[36] Similarly, TILA Section 129E(i) focuses on the marketplace by permitting use of objective market information to determine rates. The statute also makes allowances for factors that the marketplace acknowledges add to the complexity of an appraisal and thus value of appraisal services in a given transaction, such as "increased time, difficulty, and scope of work." TILA Section 129E(i)(1) and (3).

Accordingly, the interim final rule and alternative presumptions of compliance are designed to be consistent with this approach. The interim final rule is not intended to prohibit a creditor and an appraiser from negotiating a rate for an assignment in good faith, nor is it intended to prohibit a creditor from communicating to a fee appraiser the rates that had been submitted by the other appraisers solicited for the assignment as part of this negotiation. In addition, the interim final rule is not intended to prevent appraisers and creditors from negotiating volume-based discounts for a creditor that provides multiple appraisal assignments to a fee appraiser. *See* comment 42(f)(1)–5.

Specifically, the interim final rule provides that fee appraisers must be paid a customary and reasonable fee for appraisal services performed in the geographic market in which the property being appraised is located. *See* § 226.42(f)(1). In addition, the interim final rule provides two alternative ways in which creditors and their agents may qualify for a presumption of compliance with this requirement.

First presumption of compliance (§ 226.42(f)(2)). A creditor and its agent are presumed to compensate a fee appraiser at a customary and reasonable rate if:

- The amount of compensation is reasonably related to recent rates for appraisal services performed in the geographic market of the property. The creditor or its agent must identify recent rates and make any adjustments necessary to account for specific factors, such as the type of property, the scope of work, and the fee appraiser's qualifications; and
- The creditor and its agent do not engage in any anticompetitive actions in violation of state or federal law that affect the rate of compensation paid to fee appraisers, such as price-fixing or restricting others from entering the market.

Second presumption of compliance (§ 226.42(f)(3)). A creditor and its agent are also presumed to comply if the creditor or its agent establishes a fee by relying on rates in the geographic market of the property being appraised established by objective third-party information, including fee schedules, studies, and surveys prepared by independent third parties such as government agencies, academic institutions, and private research firms. The interim final rule follows the statute in requiring that fee schedules, studies, and surveys, or information derived from them, used to qualify for this presumption of compliance must exclude compensation paid to fee appraisers for appraisals ordered by appraisal management companies (defined in § 226.42(f)(4)(iii)).

The first presumption of compliance described above (§ 226.42(f)(2)) reflects the Board's interpretation of the statutory requirement that fees paid to fee appraisers be "customary": to be "customary," the fee must be reasonably related to recent rates for appraisal services in the relevant geographic market. This first presumption of compliance also reflects the Board's interpretation of the statutory requirement that the fee be "reasonable": to be "reasonable," the fee should be adjusted as necessary to account for factors in addition to geographic market that affect the level of compensation appropriate in a given transaction, such as the type of property and the scope of work. The Board recognizes, however, that if some creditors or AMCs dominate the market through illegal anticompetitive acts, "recent rates" may be an inaccurate measure of what a "reasonable" fee should be. Thus, to qualify for the presumption of compliance, a creditor and its agents also must not commit anticompetitive acts in violation of state or federal law that affect the compensation of fee appraisers.

The second presumption of compliance (§ 226.42(f)(3)) is intended to give effect to TILA Section 129E(i)(1) which expressly permits creditors and their agents to use third-party information to determine customary and reasonable fees. *See* TILA Section 129E(i)(1). The Board believes that the statute supports a presumption of compliance if the creditor or agent based the fee paid to a fee appraiser on objective, third-party market information regarding recent rates for appraisal services that meet the statutory requirements for this information. Thus, in keeping with the statute, the interim final rule stipulates that any fee schedule, survey, or study relied on to qualify for this presumption of compliance may not include fees for

[35] HUD, "Appraiser Independence," Mortgagee Letter 2009–28 (Sept. 18, 2009).

[36] See, HUD, "Frequently Asked Questions—Reasonable Fees/Time," *available at http://portal.hud.gov/portal/page/portal/HUD/groups/appraisers*: "FHA believes that the marketplace best determines what is reasonable and customary in terms of fees. The fee is [the] result of a business decision, which may or may not be negotiated, between the appraiser and the client. * * * Given that a reasonable and customary fee depends on the complexity of the assignment and the expertise needed to perform and report a credible and accurate appraisal of the property, the fee will vary depending on the property type, the purpose of the assignment and the scope of work and, therefore, cannot be easily defined as an objective number." *See http://www.hud.gov/offices/hsg/sfh/appr/faqs_fees-time.pdf.*

appraisals ordered by companies that publicly hold themselves out as appraisal management companies (defined in § 226.42(f)(4)(ii)).

Public Input

In adopting this interim final rule, the Board considered written comments from representatives of appraisers, AMCs and creditors, as well as views expressed by these parties during conference calls with Board staff. Appraisers expressed concerns that AMCs may have recently gained significant control over the residential appraisal market as a result of unintended consequences of the HVCC. Under the HVCC, mortgage brokers are not permitted to order appraisals, and a creditor's in-house appraisers may not perform the appraisal unless strict firewalls to safeguard appraisal independence are in place.[37] The HVCC also prohibits the creditor's "loan production" and certain other staff from having "substantive communications" with appraisers and AMCs, which include ordering or managing an appraisal assignment.[38] To minimize the risk of violating these and similar restrictions, many creditors reportedly have chosen to rely on AMCs as a "middle-man" to select appraisers and generally manage the creditor's appraisal function. According to some, appraisers willing to work for AMCs are often inexperienced in general or in the relevant geographic area and produce poor quality appraisals, undermining consumers' well-being and creditors' safety and soundness.

On the other hand, representatives of AMCs expressed concerns that, depending on how the term "customary and reasonable" rate is interpreted, requiring AMCs to compensate fee appraisers at a rate that is customary and reasonable may force them to raise overall costs charged to creditors—and ultimately to consumers—for appraisals ordered through AMCs. AMC representatives expressed concerns that AMCs would have to pay higher fees to appraisers while still performing management functions for which they would need to charge creditors as well. AMC representatives stated that reputable AMCs have strong quality control systems and produce sound appraisals, and that they perform functions that individual appraisers would have to perform themselves were they not engaged by an AMC. These include marketing appraisal services and handling administrative matters such as submitting the appraisal to the creditor and billing the creditor.

AMC representatives also raised concerns that appropriate appraisal fee studies do not exist and argued that the costs of performing the appraisal itself and the various management functions associated with each appraisal can vary by transaction, complicating the process of determining a generally applicable customary and reasonable rate. These parties argued that an interim final rule implementing TILA Section 129E's "customary and reasonable" rate provision is premature because greater study of the issue is required to avoid a rule that will create undue compliance challenges and litigation risk.

Coverage—"Appraisals" and "Fee Appraisers"

Unlike other provisions of § 226.42, § 226.42(f) does not replace the statutory terms "appraisal" and "appraiser" with terms that cover a broader range of methods for valuing collateral and persons who estimate collateral value. However, the statute clearly states that the persons who must receive customary and reasonable compensation are "fee appraisers," and that the term "fee appraiser" means: (1) State-licensed or state-certified appraisers and, generally, (2) entities that employ state-licensed or state-certified appraisers to perform appraisals and are compensated for the performance of appraisals (as opposed to entities that merely manage the appraisal process). *See* TILA Section 129E(i)(2).

42(f)(1) Requirement To Provide Customary and Reasonable Compensation to Fee Appraisers

Section 226.42(f)(1) requires that, in any covered transaction (defined in § 226.42(b)(1)), the creditor and its agents must compensate a fee appraiser for performing appraisal services at a rate that is customary and reasonable for comparable appraisal services performed in the geographic market of the property being appraised. This provision states that, for purposes of § 226.42(f), "agents" of the creditor do not include any fee appraiser defined in § 226.42(f)(4)(i).

Agents of the Creditor

The reference to "agents" in § 226.42(f)(1) is not intended to signify that agents of creditors are not included in other places where the term "creditor" appears in Regulation Z. To the contrary, the term "creditor" used throughout Regulation Z includes agents of the creditor, as determined by applicable state law. The Board believes that Congress was especially concerned that AMCs, serving as creditors' agents in managing the appraisal process, be covered by this provision. Consequently, the regulatory text follows the statutory language, which applies the requirement to pay fee appraisers customary and reasonable fees to both "a lender and its agent."

Comment 42(f)(1)–1 clarifies that whether a person is an "agent" of the creditor is determined by applicable law. This comment also confirms the regulatory exclusion of "fee appraisers" as defined in § 226.42(f)(4)(i) from the meaning of "agent" of the creditor for purposes of § 226.42(f). The comment explains that, therefore, fee appraisers are not required to pay other fee appraisers customary and reasonable compensation under § 226.42(f).

The Board believes that the express exclusion of "fee appraisers" from the meaning of "agents" is consistent with Congress's intention regarding the parties that should be required to pay fee appraisers customary and reasonable compensation. As discussed in more detail in the section-by-section of § 226.42(f)(4)(i) (defining "fee appraiser"), TILA Section 129E(i)(2) defines "fee appraisers" to which customary and reasonable fees should be paid to mean (1) individual state-licensed or state-certified appraisers (natural persons), and (2) companies or firms that employ individual state-licensed or state-certified appraisers and receive compensation for performing appraisals. In this way, the statute reflects that natural persons as well as appraisal companies or firms may contract with creditors and AMCs to perform appraisals. Appraisal companies or firms that contract with AMCs to perform appraisals typically have state-licensed or state-certified appraisers on staff to perform appraisals. These staff appraisers meet the definition of "fee appraiser" under the statute; thus, a strict interpretation of the statute would require appraisal companies to pay their staff appraisers at a "customary and reasonable" rate. The Board understands, however, that these companies or firms often pay their appraisers on an hourly basis and provide their employees with office services as well as health insurance and other employment benefits. Requiring that they pay their staff appraisers "customary and reasonable" fees for each appraisal assignment could be unduly financially burdensome for these entities, and ultimately could undermine their viability as an avenue for appraisal services. The Board believes that this result would harm consumers by reducing competition in the appraisal services industry.

[37] *See* HVCC, Part IV.A and IV.B.

[38] *See Id.* Part III.B.

The Board requests comment on whether the final rule should define "agent" to exclude fee appraisers or any other parties.

Geographic Market of the Property Being Appraised

As noted, TILA Section 129E(i) requires payment of customary and reasonable compensation to fee appraisers for appraisal services performed "in the market area of the property being appraised." Section 226.42(f)(1), (f)(2), and (f)(3) (discussed below) substitute the term "geographic market" for the statutory term "market area." Comment 42(f)(1)–2 clarifies that, for purposes of § 226.42(f), the "geographic market of the property being appraised" means the geographic market relevant to the appropriate compensation levels for appraisal services.[39] This comment explains that, depending on the facts and circumstances, the relevant geographic market may be a state, metropolitan statistical area (MSA), metropolitan division, area outside of an MSA, county, or other geographic area. The comment provides two examples. First, assume that fee appraisers who normally work in County A generally accept $400 to appraise an attached single-family property in County A. Assume also that *very few or no* fee appraisers who normally work only in contiguous County B will accept a rate comparable to $400 to appraise an attached single-family property in County A. The relevant geographic market for an attached single-family property in County A may reasonably be defined as County A.

Second, assume that fee appraisers who normally work only in County A generally accept $400 to appraise an attached single-family property located in County A. Assume also that *many* fee appraisers who normally work only in contiguous County B will accept a rate comparable to $400 to appraise an attached single-family property located in County A. The relevant geographic market for an attached single-family property in County A may reasonably be defined to include both County A and County B.

Failure To Perform Contractual Obligations

A few creditors and AMC representatives requested that the Board clarify whether creditors and their agents could withhold an appraiser's fee for failing to meet contractual obligations. Comment 42(f)(1)–3 clarifies that § 226.42(f)(1) does not prohibit a creditor or its agent from withholding compensation from a fee appraiser for failing to meet contractual obligations, such as for failing to provide the appraisal report or violating state or federal appraisal laws in performing the appraisal. The Board requests comment on whether the Board should specify particular types of contractual obligations that, if breached, would warrant withholding compensation without violating § 226.42(f).

Agreement That Fee Is Customary and Reasonable

Comment 42(f)(1)–4 clarifies that a document signed by a fee appraiser indicating that the appraiser agrees that the fee paid to the appraiser is "customary and reasonable" does not by itself create a presumption of compliance with § 226.42(f) or otherwise satisfy the requirement to compensate a fee appraiser at a customary and reasonable rate. In the Board's view, a fee appraiser's agreement that a fee is "customary and reasonable" is insufficient to establish that the fee meets the statutory "customary and reasonable" standard. Objective factors or information such as that set forth in § 226.42(f)(2) and (f)(3) (discussed below) generally should support the creditor's or agent's determination of the appropriate amount of compensation to pay a fee appraiser for a particular appraisal assignment. In theory, the fact that an appraiser is willing to accept a particular fee for an appraisal assignment may bear on whether the fee is customary, reasonable, or both. However, an appraiser may be willing to accept a low fee because the appraiser is new to the industry and wishes to establish herself, or simply because the appraiser needs any work he can obtain in a slow housing market. In addition, the Board understands that some AMCs have begun requiring fee appraisers to agree that the fee is "customary and reasonable" as a condition of obtaining the appraisal assignment. In these situations, the Board believes that an appraiser's agreement that a fee is "customary and reasonable" is an unreliable measure of whether the fee in fact meets the statutory standard.

Volume-Based Discounts

The Board recognizes that competition and efficiencies may both be enhanced when market participants negotiate volume-based discounts for services. For this reason, comment 42(f)(1)–5 clarifies that § 226.42(f)(1) does not prohibit a fee appraiser and a creditor (or its agent) from agreeing to compensation based on transaction volume, so long as the compensation is customary and reasonable. For example, assume that a fee appraiser typically receives $300 for appraisals from creditors with whom it does business; the fee appraiser, however, agrees to reduce the fee to $280 for a particular creditor, in exchange for a minimum number of assignments from the creditor. The Board requests comment on whether further guidance is needed concerning the permissibility of volume-based discounts under § 226.42(f)(1).

42(f)(2) Presumption of Compliance

Section 226.42(f)(2) provides that a creditor and its agents will be presumed to comply with the requirement to compensate a fee appraiser at a customary and reasonable rate if the creditor or its agent satisfy two conditions.

First, the creditor or its agents must compensate the fee appraiser in an amount that is reasonably related to recent rates paid for comparable appraisal services performed in the geographic market of the property being appraised. In determining this amount, the creditor or its agent must review the factors below and make any adjustments to recent rates paid in the relevant geographic market necessary to ensure that the amount of compensation is reasonable:

(1) The type of property;

(2) The scope of work;

(3) The time in which the appraisal services are required to be performed;

(4) Fee appraiser qualifications;

(5) Fee appraiser experience and professional record; and

(6) Fee appraiser work quality.

Second, the creditor and its agents must not engage in any anticompetitive acts in violation of state or federal law that affect the compensation paid to fee appraisers, including—

(1) Entering into any contracts or engaging in any conspiracies to restrain trade through methods such as price fixing or market allocation, as prohibited under section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, or any other relevant antitrust laws; or

(2) Engaging in any acts of monopolization such as restricting any person from entering the relevant geographic market or causing any person to leave the relevant geographic market, as prohibited under section 2 of the Sherman Antitrust Act, 15 U.S.C. 2, or any other relevant antitrust laws.

[39] For further discussion of "relevant geographic markets," *see, e.g.,* U.S. Dept. of Justice and Federal Trade Commission, "Horizontal Merger Guidelines," § 4.2 (Aug. 19, 2010), found at *http://www.justice.gov/atr/public/guidelines/hmg-2010.html#4f.*

Comment 42(f)(2)–1 explains that creditor and its agent are presumed to comply with the requirement to pay a fee appraiser at a customary and reasonable rate under § 226.42(f)(1) if the creditor or its agent meets the conditions specified in § 226.42(f)(2), stated above, in determining the compensation. The comment clarifies that these conditions are not requirements for compliance with § 226.42(f)(1), but that, if met, they create a presumption that the creditor or its agent has complied. The comment further clarifies that a person may rebut this presumption with evidence that the amount of compensation paid to a fee appraiser was not customary and reasonable. The creditor would have met the conditions in § 226.42(f)(2), so this evidence must be distinguishable from allegations that the creditor or its agent failed to satisfy the conditions in § 226.42(f)(2). Finally, the comment explains that, if a creditor or its agent does not meet one of the conditions in § 226.42(f)(2), the creditor's and its agent's compliance with the requirement to pay a fee appraiser at a customary and reasonable rate is determined based on all of the facts and circumstances without a presumption of either compliance or violation.

Paragraph 42(f)(2)(i)

Compensation Must Be Reasonably Related to Recent Rates

As explained in comment 42(f)(2)(i)–1, the first element of the presumption of compliance under § 226.42(f)(2) requires creditor or its agent to engage in a two-step process to determine the appropriate compensation. First, the creditor or its agent must identify recent rates paid for comparable appraisal services in the relevant geographic market. Second, once recent rates have been identified, the creditor or its agent must review the factors listed in § 226.42(f)(2)(i)(A)–(F) and make any adjustments to recent rates appropriate to ensure that the amount of compensation is appropriate for the current transaction.

Comment 42(f)(2)(i)–2 further explains the first step in this process, which requires the creditor or its agents to identify recent rates for appraisal services in the geographic market of the property being appraised. Specifically, this comment clarifies that whether rates may reasonably be considered "recent" depends on the facts and circumstances, but that generally a rate would be considered "recent" if it had been charged within one year of the creditor's or its agent's reliance on this information to qualify for the presumption of compliance under § 226.42(f)(2). This comment also states that, for purposes of the presumption of compliance under § 226.42(f)(2), a creditor or its agent may gather information about recent rates by using a reasonable method that provides information about rates for appraisal services in the geographic market of the relevant property. The comment further provides that a creditor or its agent may, but is not required to, use or perform a fee survey. As indicated by this comment, qualifying for this presumption of compliance does not require that a creditor use third-party information that excludes appraisals ordered by AMCs, for example, as required to qualify for the presumption of compliance available under § 226.42(f)(3), discussed below. The Board requests comment on whether additional guidance regarding how creditors may identify recent rates is needed, and solicits views on what guidance in particular may be helpful.

Comment 42(f)(2)(i)–3 provides guidance on the second step in the process, which requires the creditor or its agent to review the factors listed in paragraph (f)(2)(i)(A)–(F) to determine appropriate rate for the current transaction may be determined. For further clarification, this comment provides an example: If the recent rates identified by the creditor or its agent were solely for appraisal assignments in which the scope of work required consideration of two comparable properties, but the current transaction required an appraisal that considered three comparable properties, the creditor or its agent might reasonably adjust the rate by an amount that reasonably accounts for the increased scope of work.

The factors that must be considered in this second step for determining the appropriate rate of fee appraiser compensation are listed in § 226.42(f)(i)(A)–(F) and discussed in turn below. Appraisal assignments vary and appraisers have different skills and experience, and these variations and differences may legitimately contribute to determining what level of compensation for a particular assignment is reasonable. For example, an appraisal requiring an interior inspection may be more expensive to perform and may warrant greater compensation than an appraisal requiring only an exterior or "drive-by" inspection. Similarly, an appraisal of a dwelling in a rural area with several additional outbuildings and significant acreage in real property might be more expensive to perform and may warrant higher compensation for the appraiser than an appraisal of a detached single-family dwelling in a suburban area. As discussed earlier, the statute itself acknowledges these variances, by expressly permitting a creditor or its agent to pay an appraiser more for a "complex" assignment than for a comparatively "non-complex" assignment. TILA Section 129E(i)(3).

At the same time, the Board recognizes that each of these factors may not in all transactions determine the quality of an appraisal and the value of appraisal services. For example, an appraiser with 20 years of experience appraising properties may not necessarily provide a higher quality appraisal than an appraiser with five years of experience. Thus, the interim final rule states that the rate must be adjusted as "necessary" to ensure a reasonable rate, and does not specify exact percentages or amounts by which compensation should vary based on each factor.

Type of property. After the creditor or its agent identifies recent rates in the relevant geographic market, the first factor that must be accounted for is the type of property. *See* § 226.42(f)(2)(i)(A). Comment 42(f)(2)(i)(A)–1 provides several examples of different property types that may appropriately bear on the value of appraisal services: Detached or attached single-family property, condominium or cooperative unit, or manufactured home. The property type may contribute to, for example, the difficulty or ease of a particular appraisal assignment, and thus can affect the value of appraisal services.

Scope of work. The second factor that must be accounted for is the scope of work. See § 226.42(f)(2)(i)(B). Comment 42(f)(2)(i)(B) clarifies that relevant elements of the scope of work to consider would include the type of inspection (for example, exterior only or both interior and exterior) and the number of comparable properties that the appraiser is required to review to perform the assignment. To comply with USPAP, appraisers must identify the extent of work and analysis required to obtain credible results for an appraisal assignment.[40] The scope of work may vary based on a number of factors, such as the extent to which the property must be inspected, the type and extent of data that must be researched, and the type and extent of analyses required to reach credible conclusions. Thus, the compensation of an appraiser may reasonably be higher

[40] *See* The Appraisal Foundation, *Uniform Standards of Professional Appraisal Practice* (USPAP), ed. 2010–2011, "Scope of Work Rule," U–13.

where the scope of work required for the appraisal is more extensive than the scope of work required for another appraisal performed by the same appraiser.

The time in which the appraisal services are required to be performed. The third factor is the time in which the appraisal services are required to be performed or "turnaround" time. *See* § 226.42(f)(2)(i)(C). Concerns have been expressed to the Board that a quick turnaround time is sometimes over-emphasized in determining whether to hire an appraiser and how much to pay the appraiser, to the detriment of the appraisal's quality. The Board recognizes that required turnaround time can be a legitimate factor to consider in determining an appraiser's rate, but stresses that appraiser competency and accurate appraisals should be a creditor's chief concerns, not how quickly the assignment can be performed. As reflected in the remaining factors discussed below, and consistent with longstanding federal banking agency supervisory guidance, the Board expects creditors and their agents to select an appraiser foremost on the basis of whether the appraiser has the requisite education, expertise and competence to complete the assignment.[41]

Fee appraiser qualifications. The fourth factor is the fee appraiser's professional qualifications. *See* § 226.42(f)(2)(i)(D). Comment 42(f)(2)(i)(D)–1 clarifies that professional qualifications that appropriately affect the value of appraisal services include whether the appraiser is state-licensed or state-certified in accordance with the minimum criteria issued by the Appraisal Qualifications Board of the Appraisal Foundation.[42] For example, a state-licensed appraiser could legitimately command a higher rate for appraisal services than an appraiser-in-training who has not yet received a license. Relevant qualifications may also include the appraiser's completion of continuing education courses on effective appraisal methods and related topics.

Comment 42(f)(2)(i)(D)–2 clarifies that permitting a creditor to consider an appraiser's qualifications does not override state or federal laws prohibiting the exclusion of an appraiser from consideration for an assignment solely by virtue of membership or lack of membership in any particular appraisal organization.[43] The Board and other federal banking agencies recognize that fellow members of a particular appraisal organization may favor one another in selecting an appraiser for a given assignment, creating an unfair playing field for other appraisers. For this reason, federal banking agency regulations prohibit excluding a state-licensed or state-certified appraiser from consideration for an assignment for a federally related transaction solely by virtue of membership or lack of membership in any particular appraisal organization. The Board requests comment on whether the final rule should expressly prohibit basing an appraiser's *compensation* on an appraiser's membership or lack of membership in particular appraisal organization.

Fee appraiser experience and professional record. The fifth factor is the professional record and experience of the fee appraiser. *See* § 226.42(f)(2)(i)(E). Comment 42(f)(2)(i)(E)–1 clarifies that the fee appraiser's level of experience may include, for example, the fee appraiser's years of service as a state-licensed or state-certified appraiser, or years of service appraising properties in a particular geographical area or of a particular type. In the Board's view, a fee for appraisal services may reasonably be higher when the fee appraiser has been state-licensed or state-certified for 15 years and has been appraising properties in the relevant geographic area during all that time than when the fee appraiser is more recently licensed and has appraised properties in that area for only six months.

Comment 42(f)(2)(i)(E)–1 further clarifies that, regarding the appraiser's professional record, a creditor or its agent may consider, for example, whether an appraiser has a past record of suspensions, disqualifications, debarments, or judgments for waste, fraud, abuse or breach of legal or professional standards. The Board expects that a creditor or its agent would exercise caution in engaging an appraiser with a blemished professional record, and would carefully scrutinize the appraiser's work. A creditor or its agent might reasonably pay less for the appraiser's services than for the services of an appraiser with an unblemished record.

Fee appraiser work quality. The sixth factor is the quality of the appraiser's work. *See* § 226.42(f)(2)(i)(F). Comment 42(f)(2)(i)(F)–1 clarifies that "work quality" in this factor principally comprises the soundness of the appraiser's appraisal assignments; the fee appraiser's work quality may include, for example, the past quality of appraisals performed by the appraiser based on the written performance and review criteria of the creditor or agent of the creditor. A creditor or its agent might reasonably pay an appraiser with an excellent performance history at a higher rate than an appraiser with a performance history showing problems with past assignments.

The Board solicits comment on whether the factors in § 226.42(f)(2)(i)(A)–(F) are appropriate, and whether other factors should be included.

Paragraph 42(f)(2)(ii)

No Anticompetitive Acts

As noted above, the Board recognizes that if some creditors or AMCs dominate the market through illegal anticompetitive acts, "recent rates" identified under § 226.42(f)(2)(i) may be an inaccurate measure of what a "reasonable" fee should be. Thus, under § 226.42(f)(2)(ii), to qualify for the presumption of compliance afforded under § 226.42(f)(2), a creditor and its agents must not engage in any anticompetitive acts in violation of state or federal law that affect the compensation of fee appraisers, including—

(1) Entering into any contracts or engaging in any conspiracies to restrain trade through methods such as price fixing or market allocation, as prohibited under section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, or any other relevant antitrust laws (§ 226.42(f)(2)(ii)(A)); or

(2) Engaging in any acts of monopolization such as restricting any person from entering the relevant geographic market or causing any person to leave the relevant geographic market, as prohibited under section 2 of the Sherman Antitrust Act, 15 U.S.C. 2, or any other relevant antitrust laws (§ 226.42(f)(2)(ii)(B)).

Comment 42(f)(2)(ii)–1 explains that, under § 226.42(f)(2)(ii)(A), a creditor or its agent would not qualify for § 226.42(f)(2)'s presumption of compliance if it engaged in any acts to restrain trade such as entering into a price fixing or market allocation agreement that affect the compensation of fee appraisers. For example, if appraisal management company A and appraisal management company B agreed to compensate fee appraisers at no more than a specific rate or range of

[41] *See* Interagency Guidelines, SR 94–55; *see also* Proposed Interagency Guidelines, 73 FR at 69652.

[42] Appraiser Qualifications Board, The Appraisal Foundation, "The Real Property Appraiser Qualification Criteria" (Apr. 2010).

[43] *See* Board: 12 CFR 225.66(a); OCC: 12 CFR 34.46(a); FDIC: 12 CFR 323.6(a); OTS: 12 CFR 564.6(a); NCUA: 12 CFR 722.6(a).

rates, neither appraisal management company would qualify for the presumption of compliance. Likewise, if appraisal management company A and appraisal management company B agreed that appraisal management company A would limit its business to a certain portion of the relevant geographic market and appraisal management company B would limit its business to a different portion of the relevant geographic market, and as a result each appraisal management company unilaterally set the fees paid to fee appraisers in their respective portions of the market, neither appraisal management company would qualify for the presumption of compliance under paragraph (f)(2).

Comment 42(f)(ii)–2 explains that, under § 226.42(f)(2)(ii)(B), a creditor or its agent would not qualify for § 226.42(f)(2)'s presumption of compliance if it engaged in any act of monopolization such as restricting entry into the relevant geographic market or causing any person to leave the relevant geographic market, resulting in anticompetitive effects that affect the compensation paid to fee appraisers. For example, if only one appraisal management company exists or is predominant in a particular market area, that appraisal management company might not qualify for the presumption of compliance if it entered into exclusivity agreements with all creditors in the market or all fee appraisers in the market, such that other appraisal management companies had to leave or could not enter the market. Whether this behavior would be considered an anticompetitive act that affects the compensation paid to fee appraisers depends on all of the facts and circumstances, including applicable law.

The Board requests comment on whether additional guidance is needed regarding anticompetitive acts that would disqualify a creditor or its agent from the presumption of compliance under § 226.42(f)(2).

42(f)(3) Alternative Presumption of Compliance

Rates Based on Objective Third-Party Information

Section 226.42(f)(3) provides creditors and their agents with an alternative means to qualify for a presumption of compliance with the requirement to pay fee appraisers at a customary and reasonable rate under § 226.42(f)(1). Specifically, a creditor and its agents are presumed to comply with the requirement if the creditor or its agents determine the amount of compensation paid to the fee appraiser by relying on rates in the geographic market of the property being appraised that satisfies three conditions. First, the information must be established by objective third-party information, including fee schedules, studies, and surveys prepared by independent third parties such as government agencies, academic institutions, and private research firms (§ 226.42(f)(3)(i)). Second, it must be based on recent rates paid to a representative sample of providers of appraisal services in the geographic market of the property being appraised or the fee schedules of those providers (§ 226.42(f)(3)(ii)). Third, in the case of fee schedules, studies, and surveys, such fee schedules, studies and surveys or information derived from them must exclude compensation paid to fee appraisers for appraisals ordered by an AMC, as defined in § 226.42(f)(4)(iii).

Regarding this third condition, the Board recognizes that the express statutory language states, "Fee *studies* shall exclude assignments ordered by known appraisal management companies." TILA Section 129E(i)(1)(emphasis added). However, the Board does not see a meaningful distinction between, for example, a fee "study" and a fee "survey," both of which require at least some evaluation of gathered data. The Board also is not aware of a rationale consistent with the statute that would treat fee studies differently than fee surveys or fee schedules. The Board requests comment, however, on whether studies and surveys should be treated differently for the purposes of this rule.

Comment 42(f)(3)–1 explains that a creditor and its agent are presumed to comply with § 226.42(f)(1) if the creditor or its agent determine the compensation paid to a fee appraiser based on information about rates that satisfies the three conditions discussed above. This comment clarifies that reliance on information satisfying these conditions is not a requirement for compliance with § 226.42(f)(1), but creates a presumption that the creditor or its agent has complied. The comment further clarifies that a person may rebut this presumption with evidence that the rate of compensation paid to a fee appraiser by the creditor or its agent is not customary and reasonable. The creditor or its agent would already have satisfied the presumption of compliance by relying on information meeting the three conditions; therefore, evidence rebutting the presumption would have to be based on facts or information other than third-party information satisfying the presumption of compliance conditions of § 226.42(f)(3). This comment also explains that, if a creditor or its agent does not rely on information that meets the conditions in § 226.42(f)(3), the creditor's and its agent's compliance with the requirement to compensate fee appraisers at a customary and reasonable rate is determined based on all of the facts and circumstances without a presumption of either compliance or violation.

Comment 42(f)(3)–2 clarifies that the term "geographic market" is explained in comment 42(f)(1)–2. *See* the section-by-section analysis to § 226.42(f)(1). Comment 42(f)(3)–3 clarifies that whether rates may reasonably be considered "recent" under § 226.42(f)(3) depends on the facts and circumstances. Generally, however, "recent" rates would include rates charged within one year of the creditor's or its agent's reliance on this information to qualify for the presumption of compliance under § 226.42(f)(3).

In discussions with Board staff, concerned parties argued that existing appraisal fee schedules, surveys and studies have various flaws and thus may not be reliable indicators of customary and reasonable rates for appraisals in all home-secured consumer credit transactions. In preparing this interim final rule, the Board did not identify appraisal fee schedules, surveys or studies that would be appropriate to designate as a "safe harbor" for creditors and their agents to comply with § 226.42(f)(1). The Board solicits comment on whether and on what basis the final rule should give creditors or their agents a safe harbor for relying on a fee study or similar source of compiled appraisal fee information. The Board also requests comment on what additional guidance may be needed regarding third-party rate information on which a creditor and its agents may appropriately rely to qualify for the presumption of compliance.

42(f)(4) Definitions

Section 226.24(f)(4) defines three terms for purposes of § 226.42(f): "Fee appraiser," "appraisal services," and "appraisal management company."

Fee Appraiser

First, the term "fee appraiser" is defined to mean—

(1) A natural person who is a state-licensed or state-certified appraiser and receives a fee for performing an appraisal, but who is not an employee of the person engaging the appraiser (§ 226.42(f)(4)(i)(A)); or

(2) An organization that, in the ordinary course of business, employs state-licensed or state-certified

appraisers to perform appraisals, receives a fee for performing appraisals, and is not subject to the requirements of section 1124 of FIRREA, 12 U.S.C. 3331 *et seq.* (§ 226.42(f)(4)(i)(B)).

The interim final rule's definition of "fee appraiser" is intended to be consistent with the statute, as well as the Board's longstanding use of the term and with the meaning of "fee appraiser" generally accepted in the appraisal industry.[44] Thus, the interim final rule specifies that a fee appraiser includes a natural person who is a state-licensed or state-certified appraiser hired on a contract or other non-permanent basis to perform appraisal services.

Comment 42(f)(4)(i)–1 clarifies that the term "organization" in § 226.42(f)(4)(i)(B) includes a corporation, partnership, proprietorship, association, cooperative, or other business entity and does not include a natural person. Section 226.42(f)(4)(i)(B) also cross-references section 1124 of FIRREA. The Dodd-Frank Act added Section 1124 to FIRREA. Section 1124 requires the federal banking agencies and the FHFA to issue rules that require AMCs (as newly defined in FIRREA Section 1121) to register with state appraiser certifying and licensing agencies according to minimum criteria set by these rules.[45] Thus, only entities that perform appraisals and that would not be required to register under the new rules satisfy the definition of fee appraiser. Unlike AMCs as defined under FIRREA and commonly known in the industry, these entities do not merely perform managerial tasks regarding the appraisal process, but oversee individual appraisers whom they employ to perform the appraisal. The definition of "appraisal management company" for purposes of the registration requirement under FIRREA is further addressed below in the discussion of the interim final rule's definition of "appraisal management company" under § 226.42(f)(4)(iii).

Appraisal Services

Section 226.42(f)(4)(ii) states that, for purposes of § 226.42(f), "appraisal services" include only the services required to perform the appraisal, such as defining the scope of work, inspecting the property, reviewing necessary and appropriate public and private data sources (for example, multiple listing services, tax assessment records and public land records), developing and rendering an opinion of value, and preparing and submitting the appraisal report. The Board understands that agents of the creditor such as AMCs split the total appraisal fee between the AMC (for appraisal management functions) and the appraiser (for the appraisal). The interim final rule is thus intended to clarify that the customary and reasonable rate applies to compensation for tasks that the fee appraiser performs, not the entire cost of the appraisal (including management functions).

Appraisal Management Company

Section 226.42(f)(4)(iii) defines an "appraisal management company" in § 226.42(f) as any person authorized to do the following actions on behalf of the creditor—(1) recruit, select, and retain appraisers; (2) contract with appraisers to perform appraisal assignments; (3) manage the process of having an appraisal performed, including providing administrative duties such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and underwriters, collecting fees from creditors and underwriters for services provided, and compensating appraisers for services performed; or (4) review and verify the work of appraisers. This definition is based on the new definition of "appraisal management company" in the Dodd-Frank Act's amendments to FIRREA, for purposes of requiring AMCs to register with the appropriate state appraiser certifying and licensing agency and related purposes.[46] The sole difference between the definitions is that the definition under FIRREA limits the meaning of AMC to entities that oversee a network or panel of more than 15 certified or licensed appraisers in a state or 25 or more nationally within a given year.

For purposes of FIRREA's requirement that AMCs register, the Board understands that Congress may have sought to relieve smaller entities from administrative burdens by excluding them from this requirement. It is not clear, however, that FIRREA's more limited definition of AMC is appropriate under TILA Section 129E(i); this TILA provision is a technical requirement regarding the content of fee studies rather than a direct administrative obligation imposed on AMCs. The interim final rule therefore does not limit the meaning of "appraisal management company" to entities with an appraiser panel of a particular size. The Board requests comment on whether the interim final rule's definition of "appraisal management company" is appropriate for the final rule.

42(g) Mandatory Reporting

TILA Section 129E(e) requires certain persons to report an appraiser to the applicable state appraiser certifying and licensing agency if the person has a reasonable basis to believe the appraiser is failing to comply with USPAP, is violating applicable laws, or is otherwise engaging in unethical or unprofessional conduct. 15 U.S.C. 1639e(e). This provision applies to creditors, mortgage brokers, real estate brokers, appraisal management companies, and any other persons providing a service for a covered transaction. The interim final rule implements this requirement in § 226.42(g). The Act does not expressly define the term "appraiser" for purposes of TILA Section 129E(e). TILA Section 129E(e) is intended to enable state certifying and licensing agencies to exercise the authority granted to them under state law. Therefore, for purposes of § 226.42(g), an "appraiser" is a natural person who provides opinions of the value of dwellings and is required to be licensed or certified under the laws of the state in which the consumer's principal dwelling or otherwise is subject to the jurisdiction of the state appraiser certifying and licensing agency. *See* comment 42(g)–6.

42(g)(1) Reporting Required

Section 226.42(g)(1) requires reporting of a failure to comply with USPAP or of an ethical or professional requirement under applicable state or federal statute or regulation only if the failure to comply is material, that is, likely to significantly affect the value assigned to the consumer's principal dwelling. Further, § 226.42(g) clarifies that reporting of a failure to comply with an ethical or professional requirement is required only if the requirement is codified in an applicable state or federal statute or regulation (ethical or professional requirement). Other statutes or regulations may contain broader reporting requirements, however.

The Board interprets TILA Section 129E(e) to apply only to a material failure to comply with USPAP or a codified standard of ethical or professional conduct. The Board believes that this interpretation is consistent with the Act's purpose of ensuring that values assigned to a consumer's principal dwelling are assigned free of any coercion or inappropriate influence, so that

[44] *See, e.g.,* 12 CFR 225.65; Interagency Guidelines, SR 94–55 (Oct. 28, 1994).

[45] *See* Dodd-Frank Act, Section 1473(f) (amending FIRREA Sections 1121 and 1124), Public Law 111–203, 124 Stat. 2191–2192 (to be codified at 12 U.S.C. 3332 and 3353, respectively).

[46] *Id.*

creditors base their underwriting decisions on appraisals that do not misstate the value of the dwelling. Thus, the interim final rule mandates reporting failures to comply that would affect the value assigned to the dwelling. The Board solicits comment on whether reporting should be required only if a material failure to comply causes the value assigned to the consumer's principal dwelling to differ from the value that would have been assigned had the material failure to comply not occurred by more than a certain tolerance, for example, by 10 percent or more.

Reasonable basis. TILA Section 129E(e) requires reporting only if a covered person has a "reasonable basis to believe" that an appraiser has not complied with USPAP or ethical or professional requirements. 15 U.S.C. 1639e(e). Comment 42(g)(1)–1 states that a covered person has a reasonable basis to believe that an appraiser has materially failed to comply with USPAP or ethical or professional requirements if the person has actual knowledge or information that would lead a reasonable person to believe that the appraiser has materially failed to comply with USPAP or such requirements.

Examples of material failures to comply. Comment 42(g)(1)–2 provides the following examples of a material failure to comply: (1) Materially mischaracterizing the value of the consumer's principal dwelling, in violation of § 226.42(c)(2); (2) performing an appraisal in a grossly negligent manner, in violation of a USPAP rule; and (3) accepting an appraisal assignment on the condition that the appraiser will assign a value equal to or greater than the purchase price to the consumer's principal dwelling, in violation of a USPAP rule. Comment 42(g)(1)–3 clarifies that § 226.42(g)(1) does not require reporting of failure to comply that is not material within the meaning of § 226.42(g)(1). For example, an appraiser's disclosure of confidential information, in violation of applicable state law, or an appraiser's failure to maintain errors and omissions insurance, in violation of applicable state law, would not be material for purposes of § 226.42(g)(1).

Coverage of reporting requirement. TILA Section 129E(e) provides that any mortgage lender, mortgage broker, mortgage banker, real estate broker, appraisal management company, employee of an appraisal management company, or any other person "involved in a real estate transaction" must report failures to comply with USPAP or ethical or professional requirements. 15 U.S.C. 1639e(e). Section 226.42(g)(1) provides that a "covered person" must report a material failure to comply. *See* § 226.42(b)(1). Comment 42(g)(1)–4 clarifies that "covered persons" required to report an appraiser's material failure to with USPAP or ethical or professional requirements in connection with a covered transaction include creditors, mortgage brokers, appraisers, appraisal management companies, real estate agents, and other persons that provide "settlement services" as defined under RESPA and regulations implementing RESPA.

Comment 42(g)(1)–5 clarifies that the following persons are not "covered persons" required to report an appraiser's material failure to comply with USPAP or ethical or professional requirements: (1) The consumer who obtains credit through a covered transaction; (2) a person secondarily liable for a covered transaction, such as a guarantor; and (3) a person that resides in or will reside in the consumer's principal dwelling but will not be liable on the covered transaction, such as a non-obligor spouse. Comments 42(g)(1)–4 and –5 are consistent with commentary on the definition of "covered person," discussed in detail above in the section-by-section analysis of § 226.42(b)(2).

42(g)(2) Timing of Reporting

TILA Section 129E(e) does not establish a time by which a person must report a failure to comply with USPAP or ethical or professional requirements. Section 226.42(g)(2) provides that a covered person must report a material failure to comply within a reasonable period of time after the person determines that there is a reasonable basis to believe that such a material failure to comply has occurred. The Board requests comment on what constitutes a reasonable period of time within which to report a material failure to comply under § 226.42(g).

42(g)(3) Definition

Section 226.42(g) requires covered persons to report a failure to comply to the appropriate "state agency." Consistent with the statute, § 226.42(g)(3) defines the term "state agency" to mean the "state appraiser certifying and licensing agency" as defined by Title XI of FIRREA, codified under 12 U.S.C. 3350(1), and any implementing regulations. Section 226.42(g)(3) clarifies that the agency for the state in which the consumer's principal dwelling is located is the appropriate agency to which to report a material failure to comply.

V. Effective Date and Mandatory Compliance Date

This interim final rule is effective on December 27, 2010 and compliance with it is mandatory for all applications received by a creditor on or after April 1, 2011. The Dodd-Frank Act does not provide effective or mandatory compliance dates for rules implementing TILA Section 129E. Appraisers have generally urged the Board to act quickly to put the interim rule in place, noting that the Dodd-Frank Act effectively sunsets the HVCC when the Board's interim final rule is promulgated. Some industry representatives, on the other hand, have stated that they will need sufficient lead time to implement the interim final rule.

Under TILA Section 105(d), certain of the Board's disclosure requirements are to have an effective date of October 1 that follows the issuance by at least six months. 15 U.S.C. 1604(d). However, the Board may at its discretion lengthen the implementation period for creditors to adjust their forms to accommodate new requirements, or shorten the period where the Board finds that such action is necessary to prevent unfair or deceptive disclosure practices. There is no similar effective date provision for non-disclosure requirements. The Riegle Community Development and Regulatory Improvement Act of 1994, however, requires that agency regulations which impose additional reporting, disclosure and other requirements on insured depository institutions take effect on the first day of a calendar quarter following publication in final form. 12 U.S.C. 4802(b).

The Board believes a mandatory compliance date of April 1, 2011 will provide creditors and others subject to the rule sufficient time to take the steps necessary to comply. Although some provisions in the interim final rule are similar to existing § 226.36(b), the interim final rule contains new requirements, such as the reasonable and customary fee requirement. In addition, the rule covers HELOCs, whereas existing § 226.36(b) applies only to closed-end loans secured by the consumer's principal dwelling. The rule's new requirements will likely require creditors and AMCs to change their systems, adjust policies, and train staff. The Board believes that five months should be sufficient for these purposes. Accordingly, the interim final rule is mandatory for consumer credit transactions secured by the consumer's principal dwelling in which an application is received by the creditor on or after April 1, 2011.

As noted, certain provisions of this interim final rule are substantially similar to the provisions of current § 226.36(b). The Board is therefore removing § 226.36(b) and related staff commentary, effective April 1, 2011, for applications received on or after that date. Section 226.36(b) remains in effect until compliance with this interim final rule becomes mandatory, and it applies to credit applications received before April 1, 2011, even if the credit is not extended until after that date. Thus, if a creditor receives an application for a loan that will be secured by the consumer's principal dwelling on March 20, 2011, and the loan is consummated on May 1, 2011, § 226.36(b) applies to that transaction. The Board notes, however, that covered persons may wish to comply with this interim final rule before April 1, 2011, and may do so. Compliance with § 226.42 constitutes compliance with § 226.36(b). Accordingly, creditors, mortgage brokers, and their affiliates subject to § 226.36(b) may comply with this interim final rule for applications received by creditors before April 1, 2011, in lieu of complying with § 226.36(b).

VI. Initial Regulatory Flexibility Analysis

In accordance with section 4 of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* the Board is publishing an initial regulatory flexibility analysis for the interim final rule. The RFA generally requires an agency to assess the impact a rule is expected to have on small entities.[47] Based on its analysis and for the reasons stated below, the Board believes that this interim final rule will have a significant economic impact on a substantial number of small entities. The Board invites comments on the effect of the interim final rule on small entities.

A. Reasons for the Interim Final Rule

As discussed above in the **SUPPLEMENTARY INFORMATION**, Section 1472 of the Dodd-Frank Act amended TILA by inserting a new section 129E. Section 129E makes it unlawful to engage in any act that violates appraisal independence in consumer credit transactions secured by the consumer's principal dwelling. The Dodd-Frank Act requires the Board to prescribe interim final rules within 90 days of enactment to define with specificity the acts or practices that violate appraisal independence.

B. Summary of the Dodd-Frank Act

As discussed above in the **SUPPLEMENTARY INFORMATION**, the Dodd-Frank Act prohibits any person, in extending credit or providing services, from violating appraisal independence for consumer credit transactions secured by the consumer's principal dwelling. The Dodd-Frank Act specifies that practices that violate appraisal independence include: (1) Coercing or otherwise influencing any person, appraisal management company, firm or other entity conducting or involved in an appraisal for the purpose of causing the appraised value to be based on any factor other than the appraiser's independent judgment; (2) mischaracterizing or suborning any mischaracterization of the appraised value; (3) seeking to influence or encourage a target value in order to make or price a transaction; and (4) withholding or threatening to withhold timely payment for appraisal services or reports.

The Dodd-Frank Act also prohibits appraisers and appraisal management companies from having direct or indirect interest, financial or otherwise, in the property or transaction. In addition, the Dodd-Frank Act prohibits a creditor from extending credit if the creditor knows before consummation that a violation of the prohibition on appraiser coercion or the conflict of interest provision has occurred, unless the creditor performs due diligence. Under the Dodd-Frank Act, a creditor or any person providing services in connection with the transaction who has a reasonable basis to believe an appraiser is failing to comply with the Uniform Standards of Professional Appraisal Practice, or is engaging in unethical or unprofessional conduct in violation of applicable law, must refer the issue to the state appraiser certifying and licensing agency. The Dodd-Frank Act also requires that creditors and their agents compensate fee appraisers at a customary and reasonable rate for the market area of the property appraised.

C. Statement of Objectives and Legal Basis

The **SUPPLEMENTARY INFORMATION** sets forth the objectives and the legal basis for the interim final rule. In summary the objectives of the interim final rule are to ensure that appraisals used to support creditors' underwriting decisions for consumer credit transactions secured by the consumer's principal dwelling are based on the appraiser's independent professional judgment, free of any influence or pressure that may be exerted by parties that have an interest in the transaction. The amendments also seek to ensure that creditors and their agents pay customary and reasonable fees to appraisers.

The legal basis for the interim final rule is in Sections 105(a) and 129E(g) of TILA. A more detailed discussion of the Board's rulemaking authority is set forth in part III of the **SUPPLEMENTARY INFORMATION**.

D. Description of Small Entities to Which the Interim Final Rule Would Apply

The interim final rule would apply to any creditor or person who provides settlement services in connection with an extension of consumer credit secured by the principal dwelling of the consumer. Because of this, the requirements of the interim final rule will apply to a substantial number of parties, which include banks, credit unions, mortgage companies, mortgage brokers, appraisers, appraisal management companies, title insurance companies, and realtors. The Board is not aware of a reliable source for the total number of small entities likely to be affected by the final rule, but provides the following information and estimates about certain entities subject to the interim final rule.

Depository institutions and mortgage companies. The Board can identify through data from Reports of Condition and Income (call reports) the approximate numbers of small depository institutions that will be subject to the final rule. Based on March 2010 call report data, approximately 8,845 small institutions would be subject to the final rule. Approximately 15,658 depository institutions in the United States filed call report data, approximately 11,148 of which had total domestic assets of $175 million or less and thus were considered small entities for purposes of the Regulatory Flexibility Act. Of 3,898 banks, 523 thrifts and 6,727 credit unions that filed call report data and were considered small entities, 3,776 banks, 496 thrifts, and 4,573 credit unions, totaling 8,845 institutions, extended mortgage credit. For purposes of this analysis, thrifts include savings banks, savings and loan entities, co-operative banks and industrial banks.

[47] Under standards the U.S. Small Business Administration sets (SBA), an entity is considered "small" if it had $175 million or less in assets for banks and other depository institutions; and $6.5 million or less in revenues for non-bank mortgage lenders, mortgage brokers, and loan servicers. U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, available at *http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

Further, 1,507 non-depository institutions (independent mortgage companies, subsidiaries of a depository institution, or affiliates of a bank holding company) filed HMDA reports in 2009 for 2008 lending activities. Based on the small volume of lending activity reported by these institutions, most are likely to be small entities.

Similarly, the Board cannot identify with certainty the number of mortgage brokers, appraiser, realtors, appraisal management companies, or title insurance companies subject to the rule that also qualify as small entities. The Board can, however, attempt to estimate approximate total numbers of each group.

Mortgage brokers. In its 2008 proposed rule under HOEPA, 73 FR 1672, 1720; Jan. 9, 2008, the Board noted that, according to the National Association of Mortgage Brokers (NAMB), there were 53,000 mortgage brokerage companies in 2004 that employed an estimated 418,700 people.[48] On the other hand, the U.S. Census Bureau's 2002 Economic Census indicates that there were only 17,041 "mortgage and nonmortgage loan brokers" in the United States at that time.[49] The Census Bureau's 2007 Economic Census preliminary data indicate that there are approximately 24,299 "mortgage and nonmortgage loan brokers establishments" with approximately 134,507 employees.[50]

Appraisers. The Census Bureau's 2007 Economic Census preliminary data indicate that there are approximately 16,018 "offices of real estate appraisers" employing 43,999 employees.[51] Based on information provided by the Appraisal Subcommittee the Board estimates that, as of October 2010, there are approximately 93,429 individual, licensed appraisers. That number includes some appraisers that do not conduct appraisals of 1–4 family residential properties.

Realtors. According to the National Association of Realtors' September 2010 Monthly membership report, there are at least 1,088,919 Realtors in the United States that would be subject to the interim final rule.[52] The Census Bureau's 2007 Economic Census preliminary data, however, indicate approximately 108,651 "offices of real estate agents and brokers" with 360,560 total employees.[53]

Appraisal management companies. The Board is not aware of any source of information about the number of appraisal management companies.

Title insurance companies. While the Census Bureau has not yet released data for title insurance companies, according to the Census Bureau's 2006 Statistics of U.S. Business, there were approximately 6,943 "direct title insurance carriers" which employ approximately 105,145 payroll employees.[54]

Title, abstract, and settlement services. Preliminary data from the Census Bureau's 2007 Economic Census indicate that there were approximately 12,160 title, abstract, and settlement offices employing 18,749,687 employees.[55]

Surveying and Mapping. Preliminary data from the Census Bureau's 2007 Economic Census indicate that there were approximately 9,690 surveying and mapping establishments (excluding establishments that provide geophysical services) employing 69,941 employees.[56]

Escrow agents. The Census Bureau's 2007 Economic Census does not contain a separate category for escrow agents but rather includes escrow agents in the category "Other activities related to real estate." (That category excludes lessors of real estate, offices of real estate agents and brokers, real estate property managers, and offices of real estate appraisers.) Preliminary data from the 2007 Economic Census indicate that approximately 16,504 establishments, employing 72,058 employees, were in that category.[57] The Board is not aware of a comprehensive source of data specifically regarding the number of establishments providing escrow services.

Extermination and pest control services. Preliminary data from the Census Bureau's 2007 Economic Census indicate that approximately 12,523 establishments, employing 96,140 employees, provided extermination and pest control services.[58]

Legal services providers. Preliminary data from the Census Bureau's 2007 Economic Census indicate that there were approximately 189, 486 legal services establishments employing 1,199,306 employees, including approximately 174,523 lawyers' offices employing 1,107,394 employees.[59]

Credit bureaus. Preliminary data from the Census Bureau's 2007 Economic Census indicate that there were approximately 813 credit bureaus employing 19,866 employees.[60]

It is unclear exactly how many of these parties subject to the rule would meet the small business requirements. The Board believes, however, that most mortgage brokers, appraisers, realtors, title insurance companies, title abstract and settlement service providers, surveying and mapping establishments, escrow services providers, exterminators and pest control providers, and legal services providers are small entities. The Board notes that some of these entities may, as a practical matter, have little opportunity or incentive to coerce or influence an appraiser, or to have a reasonable basis to believe that an appraiser has not complied with USPAP or other applicable authorities. In such cases, these entities may have little or no compliance burden. As noted in the **SUPPLEMENTARY INFORMATION**, the Board is soliciting comment on whether some settlement service providers should be exempt from some or all of the interim final rule's requirements.

E. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The compliance requirements of the final rules are described in the **SUPPLEMENTARY INFORMATION**. As indicated above, creditors and mortgage brokers currently are subject to the 2008 Appraisal Independence Rules, which are essentially codified in section 1472 of the Dodd-Frank Act. The interim final rule, consistent with the Dodd-Frank

[48] *http://www.namb.org/namb/Industry Facts.asp?SnID=719224934.* This page of the NAMB Web site, however, no longer provides an estimate of the number of mortgage brokerage companies.

[49] *http://www.census.gov/prod/ec02/ec0252a1us.pdf* (NAICS code 522310).

[50] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0752I1&-ib_type=NAICS2007&-NAICS2007=522310.*

[51] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0753I1&-ib_type=NAICS2007&-NAICS2007=531320.*

[52] *http://www.realtor.org/wps/wcm/connect/2b353d80442806058dc6ed34cafa6d66/09-2010.pdf?MOD=AJPERES&CACHEID=2b353d80442806058dc6ed34cafa6d66.*

[53] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0753I1&-ib_type=NAICS2007&-NAICS2007=531210.*

[54] *http://www.census.gov/epcd/susb/latest/us/US524127.HTM.*

[55] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0754I1&-NAICS2007=541191&-ib_type=NAICS2007&-geo_id=&-_industry=541191&-_lang=en&-fds_name=EC0700A1.*

[56] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0754I1&-ib_type=NAICS2007 NAICS2007&-NAICS2007=541370.*

[57] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0753I1&-ib_type=NAICS2007&-NAICS2007=531390.*

[58] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0756I1&-NAICS2007=561710&-ib_type=NAICS2007&-geo_id=&-_industry=561710&-_lang=en&-fds_name=EC0700A1.*

[59] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0754I1&-NAICS2007=5411/541110&-ib_type=NAICS2007&-_industry=541110&-_lang=en&-fds_name=EC0700A1.*

[60] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-ds_name=EC0756I1&-NAICS2007=561450&-ib_type=NAICS2007&-geo_id=&-_industry=561450&-_lang=en&-fds_name=EC0700A1.*

Act, expands the parties covered by those provisions to persons who provide settlement services in connection with a covered transaction. Moreover, as discussed in the **SUPPLEMENTARY INFORMATION**, the Dodd-Frank Act expands the requirements for appraisal independence significantly beyond the requirements in the 2008 Appraisal Independence Rules. The effect of the interim final rule on small entities is unknown. Some small entities would be required, among other things, to modify their systems to comply with the interim final rules. The precise costs to small entities of updating their systems are difficult to predict.

F. Other Federal Rules

The Board has not identified any federal rules that conflict with the proposed interim final rule. The Board has identified, however, several federal rules that overlap to varying degrees with the requirements of the interim final rule. Title XI of FIRREA, enacted in 1989, provides that the Board and the other banking agencies must issue regulations for appraisal standards. These regulations include provisions on appraisal independence which overlap with the interim final rule.[61] In addition, the Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq.,* and the Board's Regulation B, 12 CFR 202.14, require creditors to provide a copy of an appraisal report used in connection with an application for credit secured by a dwelling.[62] As noted, the 2008 Appraisal Independence Rules addressed appraiser independence; those rules, however, are removed effective on April 1, 2011, the mandatory compliance date for the interim final rule.

Additionally, both the Veteran's Administration and Federal Housing Administration provide guidance related to appraiser fees which overlap with the interim final rule. The VA provides a specific appraiser fee schedule for VA loans, while FHA Roster appraisers are compensated at a rate that is customary and reasonable for the market area of the property.[63]

G. Significant Alternatives to the Interim Final Rule

As noted above, the final rule implements the statutory requirements of the Dodd-Frank Act. The Board has implemented these requirements to minimize burden while retaining benefits and protections for consumers. As discussed above in parts of the **SUPPLEMENTARY INFORMATION** the Board has provided small institutions, defined as creditors with assets of $250 million or less as of December 31 of either of the two preceding calendar years, with an alternative safe harbor to the prohibition on conflicts of interest that is tailored to the circumstances of small creditors. The Board welcomes comment on any significant alternatives that would minimize the impact of the interim final rule on small entities.

The Board also welcomes further information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the interim final rule to small business.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Board reviewed the interim final rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is required by this final rule is found in Subpart E—Special Rules for Certain Home Mortgage Transactions—12 CFR 226.42(g). The Board may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control number is 7100–0199.

This information collection is required to provide benefits for consumers and is mandatory (15 U.S.C. 1601 *et seq.*). Since the Board does not collect any information, no issue of confidentiality arises. The respondents/recordkeepers for this interim final rulemaking are creditors, appraisal management companies, appraisers, mortgage brokers, realtors, title insurers and other firms that provide settlement services (covered person(s)).

TILA and Regulation Z are intended to ensure effective disclosure of the costs and terms of credit to consumers. For closed-end loans, such as mortgage and installment loans, cost disclosures are required to be provided prior to consummation. Special disclosures are required in connection with certain products, such as reverse mortgages, certain variable-rate loans, and certain mortgages with rates and fees above specified thresholds. To ease the burden and cost of complying with Regulation Z (particularly for small entities), the Board provides model forms, which are appended to the regulation. TILA and Regulation Z also contain rules concerning credit advertising. Creditors are required to retain evidence of compliance with Regulation Z for 24 months (12 CFR 226.25), but Regulation Z does not specify the types of records that must be retained.

Under the PRA, the Board accounts for the paperwork burden associated with Regulation Z for the state member banks and other entities supervised by the Board that engage in activities covered by Regulation Z and, therefore, are respondents under the PRA. Appendix I of Regulation Z defines the institutions supervised by the Federal Reserve System as: State member banks, branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other Federal agencies account for the paperwork burden imposed on the entities for which they have administrative enforcement authority under TILA.

The current total annual burden to comply with the provisions of Regulation Z is estimated to be 1,497,362 hours for the 1,138 institutions supervised by the Federal Reserve that are deemed to be respondents for the purposes of the PRA.

As discussed in the preamble, the Board is adopting a rule that requires reporting of a violation of Uniform Standards of Professional Appraisal Practice (USPAP) or of a standard of ethical or professional conduct under applicable state or federal statute or regulation only if the violation is material, that is, if the violation is likely to affect the value assigned to a covered property. The new reporting requirement will impose a one-time increase in the total annual burden under Regulation Z for respondents supervised by the Federal Reserve involved in the extension of consumer credit that is secured by the principal dwelling of the consumer. The Board estimates that 567 respondents[64]

[61] Board: 12 CFR 225.65; OCC: 12 CFR 34.45; FDIC: 12 CFR 323.5; OTS: 12 CFR 564.5; NCUA: 12 CFR 722.5. The agencies have also issued supervisory guidance on appraisal independence: *See, e.g.,* Interagency Guidelines, SR 94–55.

[62] Section 1474 of the Dodd-Frank Act amends the ECOA's requirement to provide a copy of the appraisal report to the consumer. Public Law 111–203, 124 Stat. 2199 (to be codified at 15 U.S.C. 1691).

[63] Veterans Administration fee schedule, (as of Apr. 7, 2010), available at *http://www.benefits.va.gov/homeloans/fee_timeliness.asp;* Appraiser Independence HUD Mortgagee Letter 2009–28 (Sept. 18, 2009).

[64] Based on loan transactions reported for 2009 under the Home Mortgage Disclosure Act (HMDA), 12 U.S.C. 2801 *et seq.;* 12 CFR part 203, the Board estimates that 567 institutions engaged in such

Continued

supervised by the Federal Reserve will take, on average, 40 hours (one business week) to update their systems, internal procedure manuals, and provide training for relevant staff to comply with the new reporting requirements in § 226.42(g)(1).[65] This revision is estimated to result in a one-time increase in burden by 22,680 hours.

Accordingly, the Board estimates that the new reporting requirement will increase the total annual burden on a one-time basis for respondents supervised by the Federal Reserve from 1,497,362 to 1,520,042 hours.[66] This total estimated burden increase represents averages for all respondents supervised by the Federal Reserve. The Board expects that the amount of time required to implement each of the changes for a given institution may vary based on the size and complexity of the respondent.

The other Federal financial institution supervisory agencies (the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA)) are responsible for estimating and reporting to OMB the total paperwork burden for the domestically chartered commercial banks, thrifts, and Federal credit unions and U.S. branches and agencies of foreign banks for which they have primary administrative enforcement jurisdiction under TILA Section 108(a), 15 U.S.C. 1607(a). These agencies may, but are not required to, use the Board's methodology for estimating burden. Using the Board's method, the total current estimated annual burden for the approximately 16,200 domestically chartered commercial banks, thrifts, and federal credit unions and U.S. branches and agencies of foreign banks supervised by the Board, OCC, OTS, FDIC, and NCUA under TILA would be approximately 21,813,445 hours. The final rule will impose a one-time increase in the estimated annual burden for the estimated 6,543 institutions thought to engage in mortgage transactions by 261,720 hours. The total annual burden is estimated to be 22,075,165 hours. The above estimates represent an average across all respondents and reflect variations between institutions based on their size, complexity, and practices.

The Board has a continuing interest in the public's opinions of its collections of information. At any time, comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for enhancing the quality of information collected and ways for reducing the burden on respondent. Comments on the collection of information may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100–0199), Washington, DC 20503.

List of Subjects in 12 CFR Part 226

Consumer protection, Federal Reserve System, Mortgages, Truth in lending.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board amends Regulation Z, 12 CFR part 226, as set forth below:

PART 226—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 226 is revised to read as follows:

Authority: 12 U.S.C. 3806; 15 U.S.C. 1604, 1637(c)(5), 1639(l); Pub. L. 111–24 § 2, 123 Stat. 1734; Pub. L. 111–203 § 1472(a), 124 Stat. 1376, 2188 (to be codified at 15 U.S.C. 1639e).

Subpart E—Special Rules for Certain Home Mortgage Transactions

§ 226.36 [Amended]

■ 2. Effective April 1, 2011, § 226.36 is amended by removing and reserving paragraph (b).

■ 3. Effective December 27, 2010, new section 226.42 is added to read as follows:

§ 226.42 Valuation independence.

(a) *Scope.* This section applies to any consumer credit transaction secured by the consumer's principal dwelling.

(b) *Definitions.* For purposes of this section:

(1) "Covered person" means a creditor with respect to a covered transaction or a person that provides "settlement services," as defined in 12 U.S.C. 2602(3) and implementing regulations, in connection with a covered transaction.

(2) "Covered transaction" means an extension of consumer credit that is or will be secured by the consumer's principal dwelling, as defined in § 226.2(a)(19).

(3) "Valuation" means an estimate of the value of the consumer's principal dwelling in written or electronic form, other than one produced solely by an automated model or system.

(4) "Valuation management functions" means:

(i) Recruiting, selecting, or retaining a person to prepare a valuation;

(ii) Contracting with or employing a person to prepare a valuation;

(iii) Managing or overseeing the process of preparing a valuation, including by providing administrative services such as receiving orders for and receiving a valuation, submitting a completed valuation to creditors and underwriters, collecting fees from creditors and underwriters for services provided in connection with a valuation, and compensating a person that prepares valuations; or

(iv) Reviewing or verifying the work of a person that prepares valuations.

(c) *Valuation of consumer's principal dwelling*—(1) *Coercion.* In connection with a covered transaction, no covered person shall or shall attempt to directly or indirectly cause the value assigned to the consumer's principal dwelling to be based on any factor other than the independent judgment of a person that prepares valuations, through coercion, extortion, inducement, bribery, or intimidation of, compensation or instruction to, or collusion with a person that prepares valuations or performs valuation management functions.

(i) Examples of actions that violate paragraph (c)(1) include:

(A) Seeking to influence a person that prepares a valuation to report a minimum or maximum value for the consumer's principal dwelling;

(B) Withholding or threatening to withhold timely payment to a person that prepares a valuation or performs valuation management functions because the person does not value the consumer's principal dwelling at or above a certain amount;

(C) Implying to a person that prepares valuations that current or future retention of the person depends on the amount at which the person estimates the value of the consumer's principal dwelling;

(D) Excluding a person that prepares a valuation from consideration for future engagement because the person reports a value for the consumer's principal dwelling that does not meet or exceed a predetermined threshold; and

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mortgage transactions are supervised by the Federal Reserve.

[65] The Board believes that, on a continuing basis, since financial institutions are familiar with the existing provisions Title XI of FIRREA (12 U.S.C. 3348) and the Interagency Guidelines (SR letter 94–55) which require similar reporting, implementation of requirements in § 226.42(g) should not be overly burdensome.

[66] The burden estimate for this rulemaking does not include the burden addressing changes to implement the following provisions announced in separate rulemakings:

- Closed-End Mortgages (Docket No. R–1366) (74 FR 43232) (75 FR 58470),
- Home-Equity Lines of Credit (Docket No. R–1367) (74 FR 43428), or
- Reverse Mortgages (Docket No. R–1390) (75 FR 58539).

(E) Conditioning the compensation paid to a person that prepares a valuation on consummation of the covered transaction.

(2) *Mischaracterization of value*—(i) *Misrepresentation.* In connection with a covered transaction, no person that prepares valuations shall materially misrepresent the value of the consumer's principal dwelling in a valuation. A misrepresentation is material for purposes of this paragraph (c)(2)(i) if it is likely to significantly affect the value assigned to the consumer's principal dwelling. A *bona fide* error shall not be a misrepresentation.

(ii) *Falsification or alteration.* In connection with a covered transaction, no covered person shall falsify and no covered person other than a person that prepares valuations shall materially alter a valuation. An alteration is material for purposes of this paragraph (c)(2)(ii) if it is likely to significantly affect the value assigned to the consumer's principal dwelling.

(iii) *Inducement of mischaracterization.* In connection with a covered transaction, no covered person shall induce a person to violate paragraph (c)(2)(i) or (ii) of this section.

(3) *Permitted actions.* Examples of actions that do not violate paragraph (c)(1) or (c)(2) include:

(i) Asking a person that prepares a valuation to consider additional, appropriate property information, including information about comparable properties, to make or support a valuation;

(ii) Requesting that a person that prepares a valuation provide further detail, substantiation, or explanation for the person's conclusion about the value of the consumer's principal dwelling;

(iii) Asking a person that prepares a valuation to correct errors in the valuation;

(iv) Obtaining multiple valuations for the consumer's principal dwelling to select the most reliable valuation;

(v) Withholding compensation due to breach of contract or substandard performance of services; and

(vi) Taking action permitted or required by applicable federal or state statute, regulation, or agency guidance.

(d) *Prohibition on conflicts of interest*—(1)(i) *In general.* No person preparing a valuation or performing valuation management functions for a covered transaction may have a direct or indirect interest, financial or otherwise, in the property or transaction for which the valuation is or will be performed.

(ii) *Employees and affiliates of creditors; providers of multiple settlement services.* In any covered transaction, no person violates paragraph (d)(1)(i) of this section based solely on the fact that the person—

(A) Is an employee or affiliate of the creditor; or

(B) Provides a settlement service in addition to preparing valuations or performing valuation management functions, or based solely on the fact that the person's affiliate performs another settlement service.

(2) *Employees and affiliates of creditors with assets of more than $250 million for both of the past two calendar years.* For any covered transaction in which the creditor had assets of more than $250 million as of December 31st for both of the past two calendar years, a person subject to paragraph (d)(1)(i) of this section who is employed by or affiliated with the creditor does not have a conflict of interest in violation of paragraph (d)(1)(i) of this section based on the person's employment or affiliate relationship with the creditor if:

(i) The compensation of the person preparing a valuation or performing valuation management functions is not based on the value arrived at in any valuation;

(ii) The person preparing a valuation or performing valuation management functions reports to a person who is not part of the creditor's loan production function, as defined in paragraph (d)(5)(i) of this section, and whose compensation is not based on the closing of the transaction to which the valuation relates; and

(iii) No employee, officer or director in the creditor's loan production function, as defined in paragraph (d)(5)(i) of this section, is directly or indirectly involved in selecting, retaining, recommending or influencing the selection of the person to prepare a valuation or perform valuation management functions, or to be included in or excluded from a list of approved persons who prepare valuations or perform valuation management functions.

(3) *Employees and affiliates of creditors with assets of $250 million or less for either of the past two calendar years.* For any covered transaction in which the creditor had assets of $250 million or less as of December 31st for either of the past two calendar years, a person subject to paragraph (d)(1)(i) of this section who is employed by or affiliated with the creditor does not have a conflict of interest in violation of paragraph (d)(1)(i) of this section based on the person's employment or affiliate relationship with the creditor if:

(i) The compensation of the person preparing a valuation or performing valuation management functions is not based the value arrived at in any valuation; and

(ii) The creditor requires that any employee, officer or director of the creditor who orders, performs, or reviews a valuation for a covered transaction abstain from participating in any decision to approve, not approve, or set the terms of that transaction.

(4) *Providers of multiple settlement services.* For any covered transaction, a person who prepares a valuation or performs valuation management functions in addition to performing another settlement service for the transaction, or whose affiliate performs another settlement service for the transaction, does not have a conflict of interest in violation of paragraph (d)(1)(i) of this section as a result of the person or the person's affiliate performing another settlement service for the transaction if:

(i) The creditor had assets of more than $250 million as of December 31st for both of the past two calendar years and the conditions in paragraph (d)(2)(i)–(iii) are met; or

(ii) The creditor had assets of $250 million or less as of December 31st for either of the past two calendar years and the conditions in paragraph (d)(3)(i)–(ii) are met.

(5) *Definitions.* For purposes of this paragraph, the following definitions apply:

(i) *Loan production function.* The term "loan production function" means an employee, officer, director, department, division, or other unit of a creditor with responsibility for generating covered transactions, approving covered transactions, or both.

(ii) *Settlement service.* The term "settlement service" has the same meaning as in the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq.*

(iii) *Affiliate.* The term "affiliate" has the same meaning as in Regulation Y, 12 CFR 225.2(a).

(e) *When extension of credit prohibited.* In connection with a covered transaction, a creditor that knows, at or before consummation, of a violation of paragraph (c) or (d) of this section in connection with a valuation shall not extend credit based on the valuation, unless the creditor documents that it has acted with reasonable diligence to determine that the valuation does not materially misstate or misrepresent the value of the consumer's principal dwelling. For purposes of this paragraph (e), a valuation materially misstates or misrepresents the value of the consumer's principal dwelling if the valuation contains a misstatement or misrepresentation that affects the credit

decision or the terms on which credit is extended.

(f) *Customary and reasonable compensation*—(1) *Requirement to provide customary and reasonable compensation to fee appraisers.* In any covered transaction, the creditor and its agents shall compensate a fee appraiser for performing appraisal services at a rate that is customary and reasonable for comparable appraisal services performed in the geographic market of the property being appraised. For purposes of paragraph (f) of this section, "agents" of the creditor do not include any fee appraiser as defined in paragraph (f)(4)(i) of this section.

(2) *Presumption of compliance.* A creditor and its agents shall be presumed to comply with paragraph (f)(1) if—

(i) The creditor or its agents compensate the fee appraiser in an amount that is reasonably related to recent rates paid for comparable appraisal services performed in the geographic market of the property being appraised. In determining this amount, a creditor shall review the factors below and make any adjustments to recent rates paid in the relevant geographic market necessary to ensure that the amount of compensation is reasonable:

(A) The type of property,

(B) The scope of work,

(C) The time in which the appraisal services are required to be performed,

(D) Fee appraiser qualifications,

(E) Fee appraiser experience and professional record, and

(F) Fee appraiser work quality; and

(ii) The creditor and its agents do not engage in any anticompetitive acts in violation of state or federal law that affect the compensation paid to fee appraisers, including—

(A) Entering into any contracts or engaging in any conspiracies to restrain trade through methods such as price fixing or market allocation, as prohibited under section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, or any other relevant antitrust laws; or

(B) Engaging in any acts of monopolization such as restricting any person from entering the relevant geographic market or causing any person to leave the relevant geographic market, as prohibited under section 2 of the Sherman Antitrust Act, 15 U.S.C. 2, or any other relevant antitrust laws.

(3) *Alternative presumption of compliance.* A creditor and its agents shall be presumed to comply with paragraph (f)(1) if the creditor or its agents determine the amount of compensation paid to the fee appraiser by relying on information about rates that:

(i) Is based on objective third-party information, including fee schedules, studies, and surveys prepared by independent third parties such as government agencies, academic institutions, and private research firms;

(ii) Is based on recent rates paid to a representative sample of providers of appraisal services in the geographic market of the property being appraised or the fee schedules of those providers; and

(iii) In the case of information based on fee schedules, studies, and surveys, such fee schedules, studies, or surveys, or the information derived therefrom, excludes compensation paid to fee appraisers for appraisals ordered by appraisal management companies, as defined in paragraph (f)(4)(iii) of this section.

(4) *Definitions.* For purposes of this paragraph (f), the following definitions apply:

(i) *Fee appraiser.* The term "fee appraiser" means—

(A) A natural person who is a state-licensed or state-certified appraiser and receives a fee for performing an appraisal, but who is not an employee of the person engaging the appraiser; or

(B) An organization that, in the ordinary course of business, employs state-licensed or state-certified appraisers to perform appraisals, receives a fee for performing appraisals, and is not subject to the requirements of section 1124 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3331 *et seq.*).

(ii) *Appraisal services.* The term "appraisal services" means the services required to perform an appraisal, including defining the scope of work, inspecting the property, reviewing necessary and appropriate public and private data sources (for example, multiple listing services, tax assessment records and public land records), developing and rendering an opinion of value, and preparing and submitting the appraisal report.

(iii) *Appraisal management company.* The term "appraisal management company" means any person authorized to perform one or more of the following actions on behalf of the creditor—

(A) Recruit, select, and retain fee appraisers;

(B) Contract with fee appraisers to perform appraisal services;

(C) Manage the process of having an appraisal performed, including providing administrative services such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and underwriters, collecting fees from creditors and underwriters for services provided, and compensating fee appraisers for services performed; or

(D) Review and verify the work of fee appraisers.

(g) *Mandatory reporting*—(1) *Reporting required.* Any covered person that reasonably believes an appraiser has not complied with the Uniform Standards of Professional Appraisal Practice or ethical or professional requirements for appraisers under applicable state or federal statutes or regulations shall refer the matter to the appropriate state agency if the failure to comply is material. For purposes of this paragraph (g)(1), a failure to comply is material if it is likely to significantly affect the value assigned to the consumer's principal dwelling.

(2) *Timing of reporting.* A covered person shall notify the appropriate state agency within a reasonable period of time after the person determines that there is a reasonable basis to believe that a failure to comply required to be reported under paragraph (g)(1) of this section has occurred.

(3) *Definition.* For purposes of this paragraph (g), "state agency" means "state appraiser certifying and licensing agency" under 12 U.S.C. 3350(1) and any implementing regulations. The appropriate state agency to which a covered person must refer a matter under paragraph (g)(1) of this section is the agency for the state in which the consumer's principal dwelling is located.

■ 4. In Supplement I to Part 226:

■ A. Under *Section 226.1—Authority, Purpose, Coverage, Organization, Enforcement and Liability,* paragraph 1(d)(5)–1 is revised.

■ B. Under *Section 226.5b—Requirements for Home-equity Plans,* new paragraph 7 is added.

■ C. Effective April 1, 2011, under *Section 226.36—Prohibited Acts or Practices in Connection with Credit Secured by a Consumer's Principal Dwelling,* the headings *36(b) Misrepresentation of the value of consumer's principal dwelling* and *36(b)(2) When extension of credit prohibited* and paragraphs 36(b)(2)–1 and –2 are removed.

■ D. Effective December 27, 2010, new *Section 226.42 Valuation Independence* is added.

Supplement I to Part 226—Official Staff Interpretations

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Section 226.1—Authority, Purpose, Coverage, Organization, Enforcement and Liability

* * * * *

Paragraph 1(d)(5).

1. *Effective dates.*

i. The Board's revisions published on July 30, 2008 (the "final rules") apply to covered loans (including refinance loans and assumptions considered new transactions under § 226.20) for which the creditor receives an application on or after October 1, 2009, except for the final rules on advertising, escrows, and loan servicing. But see comment 1(d)(3)–1. The final rules on escrow in § 226.35(b)(3) are effective for covered loans (including refinancings and assumptions in § 226.20) for which the creditor receives an application on or after April 1, 2010; but for such loans secured by manufactured housing on or after October 1, 2010. The final rules applicable to servicers in § 226.36(c) apply to all covered loans serviced on or after October 1, 2009. The final rules on advertising apply to advertisements occurring on or after October 1, 2009. For example, a radio ad occurs on the date it is first broadcast; a solicitation occurs on the date it is mailed to the consumer. The following examples illustrate the application of the effective dates for the final rules.

A. *General.* A refinancing or assumption as defined in § 226.20(a) or (b) is a new transaction and is covered by a provision of the final rules if the creditor receives an application for the transaction on or after that provision's effective date. For example, if a creditor receives an application for a refinance loan covered by § 226.35(a) on or after October 1, 2009, and the refinance loan is consummated on October 15, 2009, the provision restricting prepayment penalties in § 226.35(b)(2) applies. However, if the transaction were a modification of an existing obligation's terms that does not constitute a refinance loan under § 226.20(a), the final rules, including for example the restriction on prepayment penalties, would not apply.

B. *Escrows.* Assume a consumer applies for a refinance loan to be secured by a dwelling (that is not a manufactured home) on March 15, 2010, and the loan is consummated on April 2, 2010. The escrow rule in § 226.35(b)(3) does not apply.

C. *Servicing.* Assume that a consumer applies for a new loan on August 1, 2009. The loan is consummated on September 1, 2009. The servicing rules in § 226.36(c) apply to the servicing of that loan as of October 1, 2009.

(ii) The interim final rule on appraisal independence in § 226.42 published on October 28, 2010 is mandatory on April 1, 2011, for open- and closed-end extensions of consumer credit secured by the consumer's principal dwelling. Section 226.36(b), which is substantially similar to § 226.42(b) and (e), is removed effective April 1, 2011. Applications for closed-end extensions of credit secured by the consumer's principal dwelling that are received by creditors before April 1, 2011, are subject to § 226.36(b) regardless of the date on which the transaction is consummated. However, parties subject to § 226.36(b) may, at their option, choose to comply with § 226.42 instead of § 226.36(b), for applications received before April 1, 2011. Thus, an application for a closed-end extension of credit secured by the consumer's principal dwelling that is received by a creditor on March 20, 2011, and consummated on May 1, 2011, is subject to § 226.36(b), however, the creditor may choose to comply with § 226.42 instead. For an application for open- or closed-end credit secured by the consumer's principal dwelling that is received on or after April 1, 2011, the creditor must comply with § 226.42.

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Section 226.5b—Requirements for Home-Equity Plans

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7. *Appraisals and other valuations.* For consumer credit transactions subject to § 226.5b and secured by the consumer's principal dwelling, creditors and other persons must comply with the requirements for appraisals and other valuations under § 226.42.

* * * * *

Section 226.42—Valuation Independence

42(a) Scope.

1. *Open- and closed-end credit.* Section 226.42 applies to both open-end and closed-end transactions secured by the consumer's principal dwelling.

2. *Consumer's principal dwelling.* Section 226.42 applies only if the dwelling that will secure a consumer credit transaction is the principal dwelling of the consumer who obtains credit.

42(b) Definitions.

Paragraph 42(b)(1).

1. *Examples of covered persons.* "Covered persons" include creditors, mortgage brokers, appraisers, appraisal management companies, real estate agents, and other persons that provide "settlement services" as defined under the Real Estate Settlement Procedures Act and implementing regulations. *See* 12 U.S.C. 2602(3).

2. *Examples of persons not covered.* The following persons are not "covered persons" (unless, of course, they are creditors with respect to a covered transaction or perform "settlement services" in connection with a covered transaction):

i. The consumer who obtains credit through a covered transaction.

ii. A person secondarily liable for a covered transaction, such as a guarantor.

iii. A person that resides in or will reside in the consumer's principal dwelling but will not be liable on the covered transaction, such as a non-obligor spouse.

Paragraph 42(b)(2).

1. *Principal dwelling.* The term "principal dwelling" has the same meaning under § 226.42(b) as under §§ 226.2(a)(24), 226.15(a), and 226.23(a). *See* comments 2(a)(24)–3, 15(a)–5, and 23(a)–3.

Paragraph 42(b)(3).

1. *Valuation.* A "valuation" is an estimate of value prepared by a natural person, such as an appraisal report prepared by an appraiser or an estimate of market value prepared by a real estate agent. The term includes photographic or other information included with a written estimate of value. A "valuation" includes an estimate provided or viewed electronically, such as an estimate transmitted via electronic mail or viewed using a computer.

2. *Automated model or system.* A "valuation" does not include an estimate of value produced exclusively using an automated model or system. However, a "valuation" includes an estimate of value developed by a natural person based in part on an estimate of value produced using an automated model or system.

3. *Estimate.* An estimate of the value of the consumer's principal dwelling includes an estimate of a range of values for the consumer's principal dwelling.

42(c) Valuation for consumer's principal dwelling.

42(c)(1) Coercion.

1. *State law.* The terms "coercion," "extortion," "inducement," "bribery," "intimidation," "compensation," "instruction," and "collusion" have the meanings given to them by applicable state law or contract. *See* § 226.2(b)(3).

2. *Purpose.* A covered person does not violate § 226.42(c)(1) if the person does not engage in an act or practice set forth in § 226.42(c)(1) for the purpose of causing the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of a person that prepares valuations. For example, requesting that a person that prepares a valuation take certain actions, such as consider additional, appropriate property information, does not violate § 226.42(c), because such request does not supplant the independent judgment of the person that prepares a valuation. *See* § 226.42(c)(3)(i). A covered person also may provide incentives, such as additional compensation, to a person that prepares valuations or performs valuation management functions under § 226.42(c)(1), as long as the covered person does not cause or attempt to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of the person that prepares valuations.

3. *Person that prepares valuations.* For purposes of § 226.42, the term "valuation" includes an estimate of value regardless of whether it is an appraisal prepared by a state-certified or -licensed appraiser. *See* comment 42(b)(5)–1. A person that prepares valuations may or may not be a state-licensed or state-certified appraiser. Thus a person violates § 226.42(c)(1) by engaging in prohibited acts or practices directed towards any person that prepares or may prepare a valuation of the consumer's principal dwelling for a covered transaction. For example, a person violates § 226.42(c)(1) by seeking to coerce a real estate agent to assign a value to the consumer's principal dwelling based on a factor other than the independent judgment of the real estate agent, in connection with a covered transaction.

4. *Indirect acts or practices.* Section 226.42(c)(1) prohibits both direct and indirect attempts to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the independent judgment of the person that prepares the valuation, through coercion and certain other acts and practices. For example, a creditor violates § 226.42(c)(1) if the creditor attempts to cause the value an appraiser engaged by an appraisal management company assigns to the consumer's principal dwelling to be

based on a factor other than the appraiser's independent judgment, by threatening to withhold future business from a title company affiliated with the appraisal management company unless the appraiser assigns a value to the dwelling that meets or exceed a minimum threshold.

Paragraph 42(c)(1)(i).

1. *Applicability of examples.* Section 226.42(c)(1)(i) provides examples of coercion of a person that prepares valuations. However, § 226.42(c)(1)(i) also applies to coercion of a person that performs valuation management functions or its affiliate. *See* § 226.42(c)(1); comment 42(c)(1)–4.

2. *Specific value or predetermined threshold.* As used in the examples of actions prohibited under § 226.42(c)(1), a "specific value" and a "predetermined threshold" include a predetermined minimum, maximum, or range of values. Further, although the examples assume a covered person's prohibited actions are designed to cause the value assigned to the consumer's principal dwelling to equal or exceed a certain amount, the rule applies equally to cases where a covered person's prohibited actions are designed to cause the value assigned to the dwelling to be below a certain amount.

42(c)(2) Mischaracterization of value.

42(c)(2)(i) Misrepresentation.

1. *Opinion of value.* Section 226.42(c)(2)(i) prohibits a person that performs valuations from misrepresenting the value of the consumer's principal dwelling in a valuation. Such person misrepresents the value of the consumer's principal dwelling by assigning a value to such dwelling that does not reflect the person's opinion of the value of such dwelling. For example, an appraiser misrepresents the value of the consumer's principal dwelling if the appraiser estimates that the value of such dwelling is $250,000 applying the standards required by the Uniform Standards of Professional Appraisal Standards but assigns a value of $300,000 to such dwelling in a Uniform Residential Appraisal Report.

42(c)(2)(iii) Inducement of mischaracterization.

1. *Inducement.* A covered person may not induce a person to materially misrepresent the value of the consumer's principal dwelling in a valuation or to falsify or alter a valuation. For example, a loan originator may not coerce a loan underwriter to alter an appraisal report to increase the value assigned to the consumer's principal dwelling.

42(d) Prohibition on conflicts of interest.

42(d)(1)(i) In general.

1. *Prohibited interest in the property.* A person preparing a valuation or performing valuation management functions for a covered transaction has a prohibited interest in the property under paragraph (d)(1)(i) if the person has any ownership or reasonably foreseeable ownership interest in the property. For example, a person who seeks a mortgage to purchase a home has a reasonably foreseeable ownership interest in the property securing the mortgage, and therefore is not permitted to prepare the valuation or perform valuation management functions for that mortgage transaction under paragraph (d)(1)(i).

2. *Prohibited interest in the transaction.* A person preparing a valuation or performing valuation management functions has a prohibited interest in the transaction under paragraph (d)(1)(i) if that person or an affiliate of that person also serves as a loan officer of the creditor, mortgage broker, real estate broker, or other settlement service provider for the transaction and the conditions under paragraph (d)(4) are not satisfied. A person also has a prohibited interest in the transaction if the person is compensated or otherwise receives financial or other benefits based on whether the transaction is consummated. Under these circumstances, the person is not permitted to prepare the valuation or perform valuation management functions for that transaction under paragraph (d)(1)(i).

42(d)(1)(ii) Employees and affiliates of creditors; providers of multiple settlement services.

1. *Employees and affiliates of creditors.* In general, a creditor may use employees or affiliates to prepare a valuation or perform valuation management functions without violating paragraph (d)(1)(i). However, whether an employee or affiliate has a direct or indirect interest in the property or transaction that creates a prohibited conflict of interest under paragraph (d)(1)(i) depends on the facts and circumstances of a particular case, including the structure of the employment or affiliate relationship.

2. *Providers of multiple settlement services.* In general, a person who prepares a valuation or perform valuation management functions for a covered transaction may perform another settlement service for the same transaction, or the person's affiliate may perform another settlement service, without violating paragraph (d)(1)(i). However, whether the person has a direct or indirect interest in the property or transaction that creates a prohibited conflict of interest under paragraph (d)(1)(i) depends on the facts and circumstances of a particular case.

42(d)(2) Employees and affiliates of creditors with assets of more than $250 million for both of the past two calendar years.

1. *Safe harbor.* A person who a prepares valuation or performs valuation management functions for a covered transaction and is an employee or affiliate of the creditor will not be deemed to have an interest prohibited under paragraph (d)(1)(i) on the basis of the employment or affiliate relationship with the creditor if the conditions in paragraph (d)(2) are satisfied. Even if the conditions in paragraph (d)(2) are satisfied, however, the person may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. Thus, in general, in any covered transaction in which the creditor had assets of more than $250 million for both of the past two years, the creditor may use its own employee or affiliate to prepare a valuation or perform valuation management functions for a particular transaction, as long as the conditions described in paragraph (d)(2) are satisfied. If the conditions in paragraph (d)(2) are not satisfied, whether a person preparing a valuation or performing valuation management functions has violated paragraph (d)(1)(i) depends on all of the facts and circumstances.

Paragraph 42(d)(2)(ii).

1. *Prohibition on reporting to a person who is part of the creditor's loan production function.* To qualify for the safe harbor under paragraph (d)(2), the person preparing a valuation or performing valuation management functions may not report to a person who is part of the creditor's loan production function (as defined in paragraph (d)(4)(ii) and comment 42(d)(4)(ii)–1). For example, if a person preparing a valuation is directly supervised or managed by a loan officer or other person in the creditor's loan production function, or by a person who is directly supervised or managed by a loan officer, the condition under paragraph (d)(2)(ii) is not met.

2. *Prohibition on reporting to a person whose compensation is based on the transaction closing.* To qualify for the safe harbor under paragraph (d)(2), the person preparing a valuation or performing valuation management functions may not report to a person whose compensation is based on the closing of the transaction to which the valuation relates. For example, assume an appraisal management company performs valuation management functions for a transaction in which the creditor is an affiliate of the appraisal management company. If the employee of the appraisal management company who is in charge of valuation management functions for that transaction is supervised by a person who earns a commission or bonus based on the percentage of closed transactions for which the appraisal management company provides valuation management functions, the condition under paragraph (d)(2)(ii) is not met.

Paragraph 42(d)(2)(iii).

1. *Direct or indirect involvement in selection of person who prepares a valuation.* In any covered transaction, the safe harbor under paragraph (d)(2) is available if, among other things, no employee, officer or director in the creditor's loan production function (as defined in paragraph (d)(4)(ii) and comment 42(d)(4)(ii)–1) is directly or indirectly involved in selecting, retaining, recommending or influencing the selection of the person to prepare a valuation or perform valuation management functions, or to be included in or excluded from a list or panel of approved persons who prepare valuations or perform valuation management functions. For example, if the person who selects the person to prepare the valuation for a covered transaction is supervised by an employee of the creditor who also supervises loan officers, the condition in paragraph (d)(2)(iii) is not met.

42(d)(3) Employees and affiliates of creditors with assets of $250 million or less for either of the past two calendar years.

1. *Safe harbor.* A person who prepares a valuation or performs valuation management functions for a covered transaction and is an employee or affiliate of the creditor will not be deemed to have interest prohibited under paragraph (d)(1)(i) on the basis of the employment or affiliate relationship with the

creditor if the conditions in paragraph (d)(2) are satisfied. Even if the conditions in paragraph (d)(2) are satisfied, however, the person may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. Thus, in general, in any covered transaction in which the creditor had assets of $250 million or less for either of the past two calendar years, the creditor may use its own employee or affiliate to prepare a valuation or perform valuation management functions for a particular transaction, as long as the conditions described in paragraph (d)(3) are satisfied. If the conditions in paragraph (d)(3) are not satisfied, whether a person preparing valuations or performing valuation management functions has violated paragraph (d)(1)(i) depends on all of the facts and circumstances.

42(d)(4) Providers of multiple settlement services.

Paragraph 42(d)(4)(i).

1. *Safe harbor in transactions in which the creditor had assets of more than $250 million for both of the past two calendar years.* A person preparing a valuation or performing valuation management functions in addition to performing another settlement service for the same transaction, or whose affiliate performs another settlement service for the transaction, will not be deemed to have interest prohibited under paragraph (d)(1)(i) as a result of the person or the person's affiliate performing another settlement service if the conditions in paragraph (d)(4)(i) are satisfied. Even if the conditions in paragraph (d)(4)(i) are satisfied, however, the person may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. Thus, in general, in any covered transaction with a creditor that had assets of more than $250 million for the past two years, a person preparing a valuation or performing valuation management functions, or its affiliate, may provide another settlement service for the same transaction, as long as the conditions described in paragraph (d)(4)(i) are satisfied. If the conditions in paragraph (d)(4)(i) are not satisfied, whether a person preparing valuations or performing valuation management functions has violated paragraph (d)(1)(i) depends on all of the facts and circumstances.

2. *Reporting.* The safe harbor under paragraph (d)(4)(i) is available if the condition specified in paragraph (d)(2)(ii), among others, is met. Paragraph (d)(2)(ii) prohibits a person preparing a valuation or performing valuation management functions from reporting to a person whose compensation is based on the closing of the transaction to which the valuation relates. For example, assume an appraisal management company performs both valuation management functions and title services, including providing title insurance, for the same covered transaction. If the appraisal management company employee in charge of valuation management functions for the transaction is supervised by the title insurance agent in the transaction, whose compensation depends in whole or in part on whether title insurance is sold at the loan closing, the condition in paragraph (d)(2)(ii) is not met.

Paragraph 42(d)(4)(ii).

1. *Safe harbor in transactions in which the creditor had assets of $250 million or less for either of the past two calendar years.* A person preparing a valuation or performing valuation management functions in addition to performing another settlement service for the same transaction, or whose affiliate performs another settlement service for the transaction, will not be deemed to have an interest prohibited under paragraph (d)(1)(i) as a result of the person or the person's affiliate performing another settlement service if the conditions in paragraph (d)(4)(ii) are satisfied. Even if the conditions in paragraph (d)(4)(ii) are satisfied, however, the person may have a prohibited conflict of interest on other grounds, such as if the person performs a valuation for a purchase-money mortgage transaction in which the person is the buyer or seller of the subject property. Thus, in general, in any covered transaction in which the creditor had assets of $250 million or less for either of the past two years, a person preparing a valuation or performing valuation management functions, or its affiliate, may provide other settlement services for the same transaction, as long as the conditions described in paragraph (d)(4)(i) are satisfied. If the conditions in paragraph (d)(4)(i) are not satisfied, whether a person preparing valuations or performing valuation management functions has violated paragraph (d)(1)(i) depends on all of the facts and circumstances.

42(d)(5) Definitions.

Paragraph 42(d)(5)(i).

1. *Loan production function.* One condition of the safe harbors under paragraphs (d)(3) and (d)(4)(ii), involving transactions in which the creditor had assets of more than $250 million for both of the past two calendar years, is that the person who prepares a valuation or performs valuation management functions must report to a person who is not part of the creditor's "loan production function." A creditor's "loan production function" includes retail sales staff, loan officers, and any other employee of the creditor with responsibility for taking a loan application, offering or negotiating loan terms or whose compensation is based on loan processing volume. A person is not considered part of a creditor's loan production function solely because part of the person's compensation includes a general bonus not tied to specific transactions or a specific percentage of transactions closing, or a profit sharing plan that benefits all employees. A person solely responsible for credit administration or risk management is also not considered part of a creditor's loan production function. Credit administration and risk management includes, for example, loan underwriting, loan closing functions (*e.g.,* loan documentation), disbursing funds, collecting mortgage payments and otherwise servicing the loan (*e.g.,* escrow management and payment of taxes), monitoring loan performance, and foreclosure processing.

42(e) When extension of credit prohibited.

1. *Reasonable diligence.* A creditor will be deemed to have acted with reasonable diligence under § 226.42(e) if the creditor extends credit based on a valuation other than the valuation subject to the restriction in § 226.42(e). A creditor need not obtain a second valuation to document that the creditor has acted with reasonable diligence to determine that the valuation does not materially misstate or misrepresent the value of the consumer's principal dwelling, however. For example, assume an appraiser notifies a creditor before consummation that a loan originator attempted to cause the value assigned to the consumer's principal dwelling to be based on a factor other than the appraiser's independent judgment, through coercion. If the creditor reasonably determines and documents that the appraisal does not materially misstate or misrepresent the value of the consumer's principal dwelling, for purposes of § 226.42(e), the creditor may extend credit based on the appraisal.

42(f) Customary and reasonable compensation.

42(f)(1) Requirement to provide customary and reasonable compensation to fee appraisers.

1. *Agents of the creditor.* Whether a person is an agent of the creditor is determined by applicable law; however, a "fee appraiser" as defined in paragraph (f)(4)(i) is not an agent of the creditor for purposes of paragraph (f), and therefore is not required to pay other fee appraisers customary and reasonable compensation under paragraph (f).

2. *Geographic market.* For purposes of paragraph (f), the "geographic market of the property being appraised" means the geographic market relevant to compensation levels for appraisal services. Depending on the facts and circumstances, the relevant geographic market may be a state, metropolitan statistical area (MSA), metropolitan division, area outside of an MSA, county, or other geographic area. For example, assume that fee appraisers who normally work only in County A generally accept $400 to appraise an attached single-family property in County A. Assume also that *very few or no* fee appraisers who work only in contiguous County B will accept a rate comparable to $400 to appraise an attached single-family property in County A. The relevant geographic market for an attached single-family property in County A may reasonably be defined as County A. On the other hand, assume that fee appraisers who normally work only in County A generally accept $400 to appraise an attached single-family property in County A. Assume also that *many* fee appraisers who normally work only in contiguous County B will accept a rate comparable to $400 to appraise an attached single-family property in County A. The relevant geographic market for an attached single-family property in County A may reasonably be defined to include both County A and County B.

3. *Failure to perform contractual obligations.* Paragraph (f)(1) does not prohibit a creditor or its agent from withholding compensation from a fee appraiser for failing to meet contractual obligations, such as

failing to provide the appraisal report or violating state or federal appraisal laws in performing the appraisal.

4. *Agreement that fee is* "*customary and reasonable.*" A document signed by a fee appraiser indicating that the appraiser agrees that the fee paid to the appraiser is "customary and reasonable" does not by itself create a presumption of compliance with § 226.42(f) or otherwise satisfy the requirement to pay a fee appraiser at a customary and reasonable rate.

5. *Volume-based discounts.* Section 226.42(f)(1) does not prohibit a fee appraiser and a creditor (or its agent) from agreeing to compensation based on transaction volume, so long as the compensation is customary and reasonable. For example, assume that a fee appraiser typically receives $300 for appraisals from creditors with whom it does business; the fee appraiser, however, agrees to reduce the fee to $280 for a particular creditor, in exchange for a minimum number of assignments from the creditor.

42(f)(2) Presumption of compliance.

1. *In general.* A creditor and its agent are presumed to comply with paragraph (f)(1) if the creditor or its agent meets the conditions specified in paragraph (f)(2) in determining the compensation paid to a fee appraiser. These conditions are not requirements for compliance but, if met, create a presumption that the creditor or its agent has complied with § 226.42(f)(1). A person may rebut this presumption with evidence that the amount of compensation paid to a fee appraiser was not customary and reasonable for reasons unrelated to the conditions in paragraph (f)(2)(i) or (f)(2)(ii). If a creditor or its agent does not meet one of the non-required conditions set forth in paragraph (f)(2), the creditor's and its agent's compliance with paragraph (f)(1) is determined based on all of the facts and circumstances without a presumption of either compliance or violation.

42(f)(2)(i) Presumption of compliance.

1. *Two-step process for determining customary and reasonable rates.* Paragraph (f)(2)(i) sets forth a two-step process for a creditor or its agent to determine the amount of compensation that is customary and reasonable in a given transaction. First, the creditor or its agent must identify recent rates paid for comparable appraisal services in the relevant geographic market. Second, once recent rates have been identified, the creditor or its agent must review the factors listed in paragraph (f)(2)(i)(A)–(F) and make any appropriate adjustments to the rates to ensure that the amount of compensation is reasonable.

2. *Identifying recent rates.* Whether rates may reasonably be considered "recent" depends on the facts and circumstances. Generally, "recent" rates would include rates charged within one year of the creditor's or its agent's reliance on this information to qualify for the presumption of compliance under paragraph (f)(2). For purposes of the presumption of compliance under paragraph (f)(2), a creditor or its agent may gather information about recent rates by using a reasonable method that provides information about rates for appraisal services in the geographic market of the relevant property; a creditor or its agent may, but is not required to, use or perform a fee survey.

3. *Accounting for factors.* Once recent rates in the relevant geographic market have been identified, the creditor or its agent must review the factors listed in paragraph (f)(2)(i)(A)–(F) to determine the appropriate rate for the current transaction. For example, if the recent rates identified by the creditor or its agent were solely for appraisal assignments in which the scope of work required consideration of two comparable properties, but the current transaction required an appraisal that considered three comparable properties, the creditor or its agent might reasonably adjust the rate by an amount that accounts for the increased scope of work, in addition to making any other appropriate adjustments based on the remaining factors.

Paragraph 42(f)(2)(i)(A).

1. *Type of property.* The type of property may include, for example, detached or attached single-family property, condominium or cooperative unit, or manufactured home.

Paragraph 42(f)(2)(i)(B).

1. *Scope of work.* The scope of work may include, for example, the type of inspection (such as exterior only or both interior and exterior) or number of comparables required for the appraisal.

Paragraph 42(f)(2)(i)(D).

1. *Fee appraiser qualifications.* The fee appraiser qualifications may include, for example, a state license or certification in accordance with the minimum criteria issued by the Appraisal Qualifications Board of the Appraisal Foundation, or completion of continuing education courses on effective appraisal methods and related topics.

2. *Membership in professional appraisal organization.* Paragraph 42(f)(2)(i)(D) does not override state or federal laws prohibiting the exclusion of an appraiser from consideration for an assignment solely by virtue of membership or lack of membership in any particular appraisal organization. *See, e.g.,* 12 CFR 225.66(a).

Paragraph 42(f)(2)(i)(E).

1. *Fee appraiser experience and professional record.* The fee appraiser's level of experience may include, for example, the fee appraiser's years of service as a state-licensed or state-certified appraiser, or years of service appraising properties in a particular geographical area or of a particular type. The fee appraiser's professional record may include, for example, whether the fee appraiser has a past record of suspensions, disqualifications, debarments, or judgments for waste, fraud, abuse or breach of legal or professional standards.

Paragraph 42(f)(2)(i)(F).

1. *Fee appraiser work quality.* The fee appraiser's work quality may include, for example, the past quality of appraisals performed by the appraiser based on the written performance and review criteria of the creditor or agent of the creditor.

Paragraph 42(f)(2)(ii).

1. *Restraining trade.* Under § 226.42(f)(2)(ii)(A), creditor or its agent would not qualify for the presumption of compliance under paragraph (f)(2) if it engaged in any acts to restrain trade such as entering into a price fixing or market allocation agreement that affect the compensation of fee appraisers. For example, if appraisal management company A and appraisal management company B agreed to compensate fee appraisers at no more than a specific rate or range of rates, neither appraisal management company would qualify for the presumption of compliance. Likewise, if appraisal management company A and appraisal management company B agreed that appraisal management company A would limit its business to a certain portion of the relevant geographic market and appraisal management company B would limit its business to a different portion of the relevant geographic market, and as a result each appraisal management company unilaterally set the fees paid to fee appraisers in their respective portions of the market, neither appraisal management company would qualify for the presumption of compliance under paragraph (f)(2).

2. *Acts of monopolization.* Under § 226.42(f)(2)(ii)(B), a creditor or its agent would not qualify for the presumption of compliance under paragraph (f)(2) if it engaged in any act of monopolization such as restricting entry into the relevant geographic market or causing any person to leave the relevant geographic market, resulting in anticompetitive effects that affect the compensation paid to fee appraisers. For example, if only one appraisal management company exists or is predominant in a particular market area, that appraisal management company might not qualify for the presumption of compliance if it entered into exclusivity agreements with all creditors in the market or all fee appraisers in the market, such that other appraisal management companies had to leave or could not enter the market. Whether this behavior would be considered an anticompetitive act that affects the compensation paid to fee appraisers depends on all of the facts and circumstances, including applicable law.

42(f)(3) Alternative presumption of compliance.

1. *In general.* A creditor and its agent are presumed to comply with paragraph (f)(1) if the creditor or its agent determine the compensation paid to a fee appraiser based on information about customary and reasonable rates that satisfies the conditions in paragraph (f)(3) for that information. Reliance on information satisfying the conditions in paragraph (f)(3) is not a requirement for compliance with paragraph (f)(1), but creates a presumption that the creditor or its agent has complied. A person may rebut this presumption with evidence that the rate of compensation paid to a fee appraiser by the creditor or its agent is not customary and reasonable based on facts or information other than third-party information satisfying the conditions of this paragraph (f)(3). If a creditor or its agent does not rely on information that meets the conditions in paragraph (f)(3), the creditor's and its agent's compliance with paragraph (f)(1) is determined based on all of the facts and circumstances without a presumption of either compliance or violation.

2. *Geographic market.* The meaning of "geographic market" for purposes of

paragraph (f) is explained in comment (f)(1)–1.

3. *Recent rates.* Whether rates may reasonably be considered "recent" depends on the facts and circumstances. Generally, "recent" rates would include rates charged within one year of the creditor's or its agent's reliance on this information to qualify for the presumption of compliance under paragraph (f)(3).

42(f)(4) Definitions.

42(f)(4)(i) Fee appraiser.

1. *Organization.* The term "organization" in paragraph 42(d)(4)(i)(B) includes a corporation, partnership, proprietorship, association, cooperative, or other business entity and does not include a natural person.

42(g) Mandatory reporting.

42(g)(1) Reporting required.

1. *Reasonable basis.* A person reasonably believes that an appraiser has materially failed to comply with the Uniform Standards of Professional Appraisal Practice established by the Appraisal Standards Board of the Appraisal Foundation (as defined in 12 U.S.C. 3350(9) (USPAP) or ethical or professional requirements for appraisers under applicable state or federal statutes or regulations if the person possesses knowledge or information that would lead a reasonable person in the same circumstances to conclude that the appraiser has materially failed to comply with USPAP or such statutory or regulatory requirements.

2. *Material failure to comply.* For purposes of § 226.42(g)(1), a material failure to comply is one that is likely to affect the value assigned to the consumer's principal dwelling. The following are examples of a material failure to comply with USPAP or ethical or professional requirements:

i. Mischaracterizing the value of the consumer's principal dwelling in violation of § 226.42(c)(2)(i).

ii. Performing an assignment in a grossly negligent manner, in violation of a rule under USPAP.

iii. Accepting an appraisal assignment on the condition that the appraiser will report a value equal to or greater than the purchase price for the consumer's principal dwelling, in violation of a rule under USPAP.

3. *Other matters.* Section 226.42(g)(1) does not require reporting of a matter that is not material under § 226.42(g)(1), for example:

i. An appraiser's disclosure of confidential information in violation of applicable state law.

ii. An appraiser's failure to maintain errors and omissions insurance in violation of applicable state law.

4. *Examples of covered persons.* "Covered persons" include creditors, mortgage brokers, appraisers, appraisal management companies, real estate agents, other persons that provide "settlement services" as defined under the Real Estate Settlement Procedures Act and implementing regulations. *See* 12 U.S.C. 2602(3); § 226.42(b)(1).

5. *Examples of persons not covered.* The following persons are not "covered persons" (unless, of course, they are creditors with respect to a covered transaction or perform "settlement services" in connection with a covered transaction):

i. The consumer who obtains credit through a covered transaction.

ii. A person secondarily liable for a covered transaction, such as a guarantor.

iii. A person that resides in or will reside in the consumer's principal dwelling but will not be liable on the covered transaction, such as a non-obligor spouse.

6. *Appraiser.* For purposes of § 226.42(g)(1), an "appraiser" is a natural person who provides opinions of the value of dwellings and is required to be licensed or certified under the laws of the state in which the consumer's principal dwelling is located or otherwise is subject to the jurisdiction of the appraiser certifying and licensing agency for that state. *See* 12 U.S.C. 3350(1).

By order of the Board of Governors of the Federal Reserve System, October 18, 2010.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2010–26671 Filed 10–27–10; 8:45 am]

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Thursday,
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Part V

Securities and Exchange Commission

17 CFR Parts 229, 240, and 249
Shareholder Approval of Executive Compensation and Golden Parachute Compensation; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 240, and 249

[Release Nos. 33–9153; 34–63124; File No. S7–31–10]

RIN 3235–AK68

Shareholder Approval of Executive Compensation and Golden Parachute Compensation

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to our rules to implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to shareholder approval of executive compensation and "golden parachute" compensation arrangements. Section 951 of the Dodd-Frank Act amends the Securities Exchange Act of 1934 by adding Section 14A, which requires companies to conduct a separate shareholder advisory vote to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S–K or any successor to Item 402. Section 14A also requires companies to conduct a separate shareholder advisory vote to determine how often an issuer will conduct a shareholder advisory vote on executive compensation. In addition, Section 14A requires companies soliciting votes to approve merger or acquisition transactions to provide disclosure of certain "golden parachute" compensation arrangements and, in certain circumstances, to conduct a separate shareholder advisory vote to approve the golden parachute compensation arrangements.

DATES: Comments should be received on or before November 18, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–31–10 on the subject line; or
- Use the Federal Rulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–31–10. This file number should be included on the subject line if e-mail is used. To help us 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/proposed.shtml*). Comments are also 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 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Scott Hodgdon, Attorney-Adviser, at (202) 551–3430, Anne Krauskopf, Senior Special Counsel, at (202) 551–3500, or Perry Hindin, Special Counsel, at (202) 551–3440, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: We are proposing new Rule 14a–21 and amendments to Rules 14a–4,[1] 14a–6,[2] 14a–8[3] and a new Item 24 and amendments to Item 5 to Schedule 14A[4] and amendments to Item 3 to Schedule 14C[5] under the Securities Exchange Act of 1934 ("Exchange Act").[6] We are also proposing amendments to Item 402[7] of Regulation S–K,[8] Item 1011[9] of Regulation M–A,[10] Item 15 of Schedule 13E–3,[11] Item 8 of Schedule 14D–9,[12] Item 9B in Part II of Form 10–K,[13] and Item 5(c) in Part II of Form 10–Q.[14]

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I. Background and Summary

Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act")[15] amends the Exchange Act by adding new Section 14A. New Section 14A(a)(1) requires that "[n]ot less frequently than once every 3 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy

[1] 17 CFR 240.14a–4.
[2] 17 CFR 240.14a–6.
[3] 17 CFR 240.14a–8.
[4] 17 CFR 240.14a–101.
[5] 17 CFR 240.14c–101.
[6] 15 U.S.C. 78a *et seq.*
[7] 17 CFR 229.402.
[8] 17 CFR 229.10 *et seq.*
[9] 17 CFR 229.1011.
[10] 17 CFR 229.1000 *et seq.*
[11] 17 CFR 240.13e–100.
[12] 17 CFR 240.14d–101.
[13] 17 CFR 249.310.
[14] 17 CFR 249.308a.
[15] Public Law 111–203 (July 21, 2010).

solicitation rules of the Commission require compensation disclosure"[16] must also "include a separate resolution subject to shareholder vote to approve the compensation of executives,"[17] as disclosed pursuant to Item 402 of Regulation S–K, or any successor to Item 402 (a "say-on-pay" vote). The shareholder vote to approve executive compensation required by Section 14A(a)(1) "shall not be binding on the issuer or the board of directors of an issuer."[18]

Section 951 of the Act also adds new Section 14A(a)(2) to the Exchange Act, requiring that, "[n]ot less frequently than once every 6 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to determine"[19] whether the shareholder vote to approve the compensation of executives "will occur every 1, 2, or 3 years."[20] As discussed below, this shareholder vote "shall not be binding on the issuer or the board of directors of an issuer."[21]

In addition, Section 951 of the Act amends the Exchange Act by adding new Section 14A(b)(1), which requires that, in any proxy or consent solicitation material for a meeting of shareholders "at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of an issuer, the person making such solicitation shall disclose in the proxy or consent solicitation material, in a clear and simple form in accordance with regulations to be promulgated by the Commission, any agreements or understandings that such person has with any named executive officers of such issuer (or of the acquiring issuer, if such issuer is not the acquiring issuer) concerning any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to the acquisition, merger, consolidation, sale or other disposition of all or substantially all of the assets of the issuer."[22] These compensation arrangements are often referred to as "golden parachute" compensation. Such disclosure must include the aggregate total of all such compensation that may be paid or become payable to or on behalf of such named executive officer, and the conditions upon which it may be paid or become payable.[23] Under Section 14A(b)(2), "unless such agreements or understandings have been subject to [the periodic vote described in Section 14A(a)(1)],"[24] a separate shareholder vote to approve such agreements or understandings and compensation as disclosed is also required.[25] As with the annual shareholder vote to approve the compensation of executives and the shareholder vote on the frequency of such votes, this shareholder vote "shall not be binding on the issuer or the board of directors of an issuer."[26]

None of the shareholder votes required pursuant to Section 14A (including the shareholder vote to approve executive compensation, the shareholder vote on the frequency of such votes, and the shareholder vote to approve golden parachute compensation) is binding on an issuer or its board of directors or is to be construed "as overruling a decision by such issuer or board of directors."[27] These shareholder votes also do not "create or imply any change to the fiduciary duties of such issuer or board of directors"[28] nor do they "create or imply any additional fiduciary duties for such issuer or board of directors."[29] In addition, these votes will not be construed "to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation."[30]

Section 14A(a)(3) requires that both the initial shareholder vote on executive compensation and the initial vote on the frequency of votes on executive compensation be included in proxy statements "for the first annual or other meeting of the shareholders occurring after the end of the 6-month period beginning on the date of enactment" of the Act.[31] Thus, the statute requires separate resolutions subject to shareholder vote to approve executive compensation and to approve the frequency of say-on-pay votes for proxy statements relating to an issuer's first annual or other meeting of the shareholders occurring on or after January 21, 2011, whether or not the Commission has adopted rules to implement Section 14A(a). Because Section 14A(a) applies to shareholder meetings taking place on or after January 21, 2011, any proxy statements, whether in preliminary or definitive form, even if filed prior to this date, for meetings taking place on or after January 21, 2011, must include the separate resolutions for shareholders to approve executive compensation and the frequency of say-on-pay votes required by Section 14A(a) without regard to whether the amendments proposed in this release have been adopted by that time.[32]

With respect to the disclosure of golden parachute arrangements in accordance with Commission regulations in merger proxy statements required by Section 14A(b)(1), we note that the statute similarly references a 6-month period beginning on the date of enactment of the Act. However, because the statute requires such disclosure "in accordance with regulations to be promulgated by the Commission,"[33] the golden parachute compensation arrangements disclosure under proposed new Item 402(t) and a separate

[16] Exchange Act Section 14A(a)(1). Section 951 of the Act includes the language "or other meeting of the shareholders," which is similar to corresponding language in Section 111(e)(1) of the Emergency Economic Stabilization Act of 2008, or EESA, 12 U.S.C. 5221. We have previously considered this language in connection with companies required to provide a separate shareholder vote on executive compensation so long as the company has outstanding obligations under the Troubled Asset Relief Program, or TARP. *See Shareholder Approval of Executive Compensation of TARP Recipients,* Release No. 34–61335 (Jan. 12, 2010) [75 FR 2789] (hereinafter, the "TARP Adopting Release"). We continue to view this provision to require a separate shareholder vote on executive compensation only with respect to an annual meeting of shareholders for which proxies will be solicited for the election of directors, or a special meeting in lieu of such annual meeting. Similarly, proposed Rules 14a–21(a) and (b) are intended to result in issuers conducting the required advisory votes in connection with the election of directors, the proxy materials for which are required to include disclosure of executive compensation.

[17] Exchange Act Section 14A(a)(1).

[18] Exchange Act Section 14A(c).

[19] Exchange Act Section 14A(a)(2).

[20] Exchange Act Section 14A(a)(2).

[21] Exchange Act Section 14A(c).

[22] Exchange Act Section 14A(b)(1).

[23] Exchange Act Section 14A(b)(1).

[24] Exchange Act Section 14A(b)(2).

[25] Exchange Act Section 14A(b)(2).

[26] Exchange Act Section 14A(c). For a more detailed discussion of the advisory nature of the shareholder votes required by Section 951 of the Act, *see* Section II.B.6 below.

[27] Exchange Act Section 14A(c)(1).

[28] Exchange Act Section 14A(c)(2).

[29] Exchange Act Section 14A(c)(3).

[30] Exchange Act Section 14A(c)(4). In addition, Exchange Act Section 14A(d) provides that every institutional manager subject to Exchange Act Section 13(f) [15 U.S.C. 78m(f)] shall report at least annually how it voted on any shareholder vote required by Section 951 of the Act, including the shareholder vote on executive compensation, the shareholder vote on the frequency of shareholder votes on executive compensation, and the golden parachute compensation vote, unless such vote is otherwise required to be reported publicly by rule or regulation of the Commission. Amendments to our rules to implement this requirement will be proposed in a separate rulemaking.

[31] Exchange Act Section 14A(a)(3).

[32] For a discussion of the relationship between Section 14A and the required shareholder votes on executive compensation for companies subject to EESA with outstanding obligations under TARP, *see* Section II.C.3 below.

[33] Exchange Act Section 14A(b)(1).

resolution to approve golden parachute compensation arrangements pursuant to Rule 14a–21(c) would not be required for merger proxy statements relating to a meeting of shareholders until the effective date of our rules implementing Section 14A(b)(1).

We are proposing Rule 14a–21 to provide a separate shareholder vote to approve executive compensation, to approve the frequency of such votes on executive compensation and to approve golden parachute compensation arrangements in connection with merger transactions. We are also proposing a new Item 24 of Schedule 14A to provide disclosure regarding the effect of the shareholder votes required by Rule 14a–21, including disclosure of the non-binding nature of the votes. In addition, our proposed amendments to Item 5 of Schedule 14A, Item 3 of Schedule 14C, Item 1011 of Regulation M–A, Item 8 of Schedule 14D–9, and Item 15 of Schedule 13E–3 would require additional disclosure regarding golden parachute arrangements in connection with mergers, Rule 13e–3 [34] going-private transactions and tender offers.

We are also proposing amendments to Item 402 of Regulation S–K to address the issuer's response to the shareholder vote on executive compensation in Compensation Discussion and Analysis, and to prescribe disclosure about golden parachute compensation arrangements in proposed new Item 402(t). Finally, we are proposing amendments to Form 10–K and Form 10–Q to require disclosure about whether and how the issuer will implement the results of the shareholder advisory vote on the frequency of shareholder votes on executive compensation.

II. Discussion of the Proposed Amendments

A. Shareholder Approval of Executive Compensation

1. Proposed Rule 14a–21(a)

We are proposing Rule 14a–21(a), pursuant to which issuers [35] would be required, not less frequently than once every three years, to provide a separate shareholder advisory vote in proxy statements to approve the compensation of executives. Proposed Rule 14a–21(a) would specify that the separate shareholder vote on executive compensation is required only when proxies are solicited for an annual or other meeting of security holders for which our rules require the disclosure of executive compensation pursuant to Item 402 of Regulation S–K. Proposed Rule 14a–21(a) would require a separate shareholder vote to approve the compensation of executives for the first annual or other such meeting of shareholders occurring on or after January 21, 2011,[36] the first day after the end of the 6-month period beginning on the date of enactment of the Act.

Proposed Rule 14a–21(a) would specify how an issuer must provide a separate shareholder advisory vote to approve the compensation of its named executive officers, as defined in Item 402(a)(3) [37] of Regulation S–K. In accordance with Section 14A(a)(1), shareholders would vote to approve the compensation of the issuer's named executive officers, as such compensation is disclosed in Item 402 [38] of Regulation S–K, including the Compensation Discussion and Analysis ("CD&A"), the compensation tables and other narrative executive compensation disclosures required by Item 402.[39] Smaller reporting companies [40] are subject to scaled executive compensation disclosure requirements and are not required to include a CD&A. Therefore, for smaller reporting companies, the shareholders would vote to approve the compensation of the named executive officers, as disclosed under Items 402(m) [41] through 402(q) [42] of Regulation S–K. We are also proposing an instruction to new Rule 14a–21 to specify that Rule 14a–21 does not change the scaled disclosure requirements for smaller reporting companies and that smaller reporting companies would not be required to provide a CD&A in order to comply with Rule 14a–21.[43]

Consistent with Section 14A, the compensation of directors, as disclosed pursuant to Item 402(k) [44] and by Item 402(r) [45] is not subject to the shareholder advisory vote. In addition, if an issuer includes disclosure pursuant to Item 402(s) [46] of Regulation S–K about the issuer's compensation policies and practices as they relate to risk management and risk-taking incentives, these policies and practices would not be subject to the shareholder advisory vote required by Section 14A(a)(1) as they relate to the issuer's compensation for employees generally. We note, however, that to the extent that risk considerations are a material aspect of the issuer's compensation policies or decisions for named executive officers, the issuer is required to discuss them as part of its CD&A,[47] and therefore such disclosure would be considered by shareholders when voting on executive compensation.

Our proposed rule would not require issuers to use any specific language or form of resolution to be voted on by shareholders. However, the shareholder vote must relate to all executive compensation disclosure set forth pursuant to Item 402 of Regulation S–K. New Section 14A(a)(1) of the Exchange Act requires that the shareholder vote must be "to approve the compensation of executives, as disclosed pursuant to [Item 402 of Regulation S–K] or any successor thereto." [48] In our view, a vote to approve a proposal on a different subject matter, such as a vote to approve only compensation policies and procedures, would not satisfy the requirement of Section 14A(a)(1) or proposed Rule 14a–21(a).[49]

Request for Comment

(1) Should we include more specific requirements regarding the manner in which issuers should present the

[34] 17 CFR 240.13e–3.

[35] Our proposed rules would apply to issuers who have a class of equity securities registered under Section 12 [15 U.S.C. 78*l*] of the Exchange Act and are subject to our proxy rules. The application of this provision to companies subject to EESA with outstanding obligations under TARP is discussed in Section II.C.3 below.

[36] Section 14A(a)(3) requires the shareholder advisory votes beginning with "the first annual or other meeting of the shareholders occurring after the end of the 6-month period beginning on the date of enactment" of Section 951 of the Act. The Act was enacted on July 21, 2010.

[37] 17 CFR 229.402(a)(3).

[38] If disclosure of golden parachute compensation arrangements pursuant to proposed Item 402(t) is included in an annual meeting proxy statement, such disclosure would be included in the disclosure subject to the shareholder advisory vote under Rule 14a–21(a). We are not proposing, however, to require that such disclosure under Item 402(t) be included in all annual meeting proxy statements.

[39] While not required, our rules "would not preclude an issuer from seeking more specific shareholder opinion through separate votes on cash compensation, golden parachute policy, severance or other aspects of compensation." *See* Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010, S. Rep. No. 111–176 at 133 (2010).

[40] As defined in Rule 12b–2 [17 CFR 240.12b–2], these generally are companies with a public float of less than $75 million as of the last day of their most recently completed second fiscal quarter.

[41] 17 CFR 229.402(m).

[42] 17 CFR 229.402(q).

[43] In connection with the shareholder vote on executive compensation for companies subject to EESA with outstanding obligations under TARP, we adopted a similar instruction to Rule 14a–20. *See* TARP Adopting Release, *supra* note 16, at 75 FR 2795.

[44] 17 CFR 229.402(k).

[45] 17 CFR 229.402(r).

[46] 17 CFR 229.402(s).

[47] *See Proxy Disclosure Enhancements,* Release No. 33–9089 (Dec. 16, 2009) [74 FR 68334] at note 38.

[48] Exchange Act Section 14A(a)(1).

[49] *See* the corresponding discussion in the TARP Adopting Release, *supra* note 16, at 75 FR 2791, note 14.

shareholder vote on executive compensation? For example, should we designate the specific language to be used and/or require issuers to frame the shareholder vote to approve executive compensation in the form of a resolution? If so, what specific language or form of resolution should be used?

(2) Would it be appropriate to exempt smaller reporting companies from the shareholder vote to approve executive compensation? Please explain the reasons why an exemption would, or would not, be appropriate. Would the proposed amendments be disproportionately burdensome for smaller reporting companies? [50]

(3) Should we establish compliance dates to phase-in effectiveness of our proposed rules? Are there other transition issues that our rules should address?

(4) Section 14A(a)(1), like Section 111(e) of the EESA, does not specify which shares are entitled to vote in the shareholder vote to approve executive compensation, nor does this section direct the Commission to adopt rules addressing this point. As in our implementation of EESA Section 111(e), we are not proposing to address this question in our rules. Should our rules implementing Section 14A(a)(1) address this question? If so, how, and on what basis?

2. Proposed Item 24 to Schedule 14A

We are also proposing a new Item 24 to Schedule 14A. Pursuant to this item, issuers would be required to disclose in a proxy statement for an annual meeting (or other meeting of shareholders for which our rules require executive compensation disclosure) that they are providing a separate shareholder vote on executive compensation and to briefly explain the general effect of the vote, such as whether the vote is non-binding.[51] This is similar to the approach taken by the Commission in connection with disclosure requirements about the shareholder vote on executive compensation for companies subject to EESA.[52]

Request for Comment

(5) Are there other disclosures that should be provided by issuers regarding the shareholder vote on executive compensation? If so, what kinds of disclosure would be useful to shareholders?

3. Proposed Amendments to Item 402(b) [53] of Regulation S–K

In connection with our implementation of Section 14A(a)(1), we are also proposing amendments to Item 402(b) of Regulation S–K. Item 402 requires the disclosure of executive compensation and includes requirements prescribing narrative and tabular disclosure, as well as separate scaled disclosure requirements for smaller reporting companies.[54] Item 402(b) contains the CD&A requirement. CD&A is intended to be a narrative overview that puts into context the executive compensation disclosure provided elsewhere in response to the requirements of Item 402. The CD&A disclosure requirement is principles-based, in that it identifies the disclosure concept and provides several non-exclusive examples. Under Item 402(b)(1), issuers must explain all material elements of their named executive officers' compensation by addressing mandatory principles-based topics in their CD&A:

- What are the objectives of the company's compensation programs?
- What is the compensation program designed to reward?
- What is each element of compensation?
- Why does the company choose to pay each element?
- How does the company determine the amount (and, where applicable, the formula) for each element?
- How do each element and the company's decisions regarding that element fit into the company's overall compensation objectives and affect decisions regarding other elements?

Item 402(b)(2) of Regulation S–K sets forth certain non-exclusive examples of the kind of information that an issuer should address in its CD&A, depending upon the facts and circumstances.

Our proposals would amend Item 402(b) to require issuers to address in CD&A whether and, if so, how their compensation policies and decisions have taken into account the results of shareholder advisory votes on executive compensation. This proposed new disclosure is not mandated by Section 951 of the Act, but we believe that a requirement to provide that information would facilitate better investor understanding of issuers' compensation decisions. We note that the shareholder advisory vote on executive compensation will apply to all issuers, and as a result, we view information about how issuers have responded to such votes as more in the nature of a mandatory principles-based topic than an example. The manner in which individual issuers may respond to such votes in determining executive compensation policies and decisions will likely vary depending upon facts and circumstances. Accordingly, the proposal would amend Item 402(b)(1) to require issuers to address in CD&A whether, and if so, how they have considered the results of previous shareholder votes on executive compensation required by Section 14A and Rule 14a–20 [55] in determining compensation policies and decisions and, if so, how that consideration has affected their compensation policies and decisions.[56]

Smaller reporting companies are subject to scaled disclosure requirements in Item 402 of Regulation S–K and are not required to include a CD&A. We are not proposing to add a specific requirement for smaller reporting companies to provide disclosure about how previous votes pursuant to Section 14A affected compensation policies and decisions because we believe such information would not be as valuable outside the context of a complete CD&A covering the full range of matters required to be

[50] Section 951 of the Act establishes a new Section 14A(e) of the Exchange Act, which provides that we may, by rule or order, exempt an issuer or class of issuers from the requirements of Section 14A(a) and (b). In determining whether to make an exemption under this subsection, we are directed to take into account, among other considerations, whether the requirements of Section 14A(a) and 14A(b) disproportionately burden small issuers. We are also soliciting comment on a number of issues relating to smaller reporting companies as discussed further in Section II.E below.

[51] Section 14A(a) does not require additional disclosure with respect to the non-binding nature of the vote. We are proposing to require additional disclosure so that information about the advisory nature of the vote is available to shareholders before they vote.

[52] *See* Item 20 of Schedule 14A; TARP Adopting Release, *supra* note 16, at 75 FR 2790.

[53] 17 CFR 229.402(b).

[54] Item 402 also includes requirements to disclose director compensation (Items 402(k) and 402(r)) and the issuer's compensation policies as they relate to risk management (Item 402(s)). As noted above, disclosure pursuant to these paragraphs is beyond the scope of the shareholder advisory vote to approve executive compensation. Similarly, as noted in note 38 above, disclosure pursuant to proposed Item 402(t) is beyond the scope of the shareholder advisory vote to approve executive compensation unless the issuer includes that disclosure in its annual meeting proxy statement.

[55] 17 CFR 240.14a–20. Because companies with outstanding indebtedness under the TARP will continue to have an annual say-on-pay vote until they repay all such indebtedness, we are proposing that these votes be addressed by issuers in CD&A as well. The treatment of companies subject to EESA with outstanding obligations under TARP is discussed in Section II.C.3 below.

[56] Reporting companies are currently required to disclose, pursuant to Item 5.07 of Form 8–K [17 CFR 249.208a], the results of a shareholder vote within four business days after the end of the meeting at which the vote is held. We are not proposing any additional disclosure on Form 8–K for a company to discuss the results of the votes required by Exchange Act Section 14A, though companies may voluntarily provide additional disclosure.

addressed by Item 402(b). However, we note that pursuant to Item 402(o)[57] of Regulation S–K, smaller reporting companies are required to provide a narrative description of any material factors necessary to an understanding of the information disclosed in the Summary Compensation Table. If consideration of prior executive compensation advisory votes is such a factor for a particular issuer, disclosure would be required pursuant to Item 402(o).

Request for Comment

(6) Should we amend Item 402(b) to require disclosure of the consideration of the results of the shareholder advisory vote on executive compensation in CD&A as proposed? If not, please explain why not.

(7) Should the requirement to discuss the issuer's consideration of the results of the shareholder vote be included in Item 402(b)(1) as a mandatory principles-based topic, as proposed, or should it be included in Item 402(b)(2) as a non-exclusive example of information that should be addressed, depending upon materiality under the individual facts and circumstances? In this regard, commentators should explain the reasons why they recommend either approach.

(8) Should the proposed requirement for CD&A discussion of the issuer's consideration of previous shareholder advisory votes be revised to relate only to consideration of the most recent shareholder advisory votes?

(9) For smaller reporting companies, should we instead require disclosure to address the consideration of previous shareholder advisory votes on executive compensation? Would such information be valuable outside the context of a complete CD&A? Would the existing requirements under Item 402(o) of Regulation S–K, pursuant to which smaller reporting companies must provide a narrative disclosure of any material factors necessary to an understanding of the information disclosed in the Summary Compensation Table, be sufficient information for investors in smaller reporting companies?

B. Shareholder Approval of the Frequency of Shareholder Votes on Executive Compensation

1. Proposed Rule 14a–21(b)

Under proposed Rule 14a–21(b), issuers would be required, not less frequently than once every six years, to provide a separate shareholder advisory vote in proxy statements for annual meetings to determine whether the shareholder vote on the compensation of executives required by Section 14A(a)(1) "will occur every 1, 2, or 3 years."[58] Proposed Rule 14a–21(b) would also clarify that the separate shareholder vote on the frequency of shareholder votes on executive compensation would be required only in a proxy statement solicited for an annual or other meeting of shareholders for which our rules require compensation disclosure.[59] Under proposed Rule 14a–21(b), issuers would be required to provide the separate shareholder vote on the frequency of the say-on-pay vote for the first annual or other such meeting of shareholders occurring on or after January 21, 2011.[60]

Request for Comment

(10) Should we include more specific requirements regarding the manner in which issuers should present the shareholder vote on the frequency of shareholder votes on executive compensation? For example, should we designate the specific language to be used and/or require issuers to frame the shareholder vote on the frequency of shareholder votes to approve executive compensation in the form of a resolution? If so, what specific language or form of resolution should be used?

(11) Should a new issuer be permitted to disclose the frequency of its say-on-pay votes in the registration statement for its initial public offering and be exempted from conducting say-on-pay and frequency votes until the year disclosed? For example, if an issuer discloses in its initial public offering prospectus that it will conduct a say-on-pay vote every two years, should we exempt it from the requirements of Section 14A(a)(1) and 14A(a)(2) for its first annual meeting as a reporting company?

(12) Section 14A(a)(2) does not specify which shares are entitled to vote in the shareholder vote on the frequency of the shareholder vote to approve executive compensation, nor does this section direct the Commission to adopt rules addressing this point. We are not proposing to address this question in our rules, but should our rules implementing Section 14A(a)(2) address this question? If so, how, and on what basis?

2. Proposed Item 24 of Schedule 14A

In addition to disclosure regarding the vote on executive compensation, issuers would be required to disclose in the proxy statement that they are providing a separate shareholder advisory vote on the frequency of the shareholder advisory vote on executive compensation. Item 24 of Schedule 14A would also require issuers to briefly explain the general effect of this vote, such as whether the vote is non-binding.[61] As noted above, this is similar to the approach taken by the Commission in connection with disclosure requirements about the shareholder vote on executive compensation for companies subject to EESA.

Request for Comment

(13) Should we require disclosure about the general effect of this shareholder advisory vote? Is such disclosure useful to shareholders?

(14) Are there other disclosures that should be provided by issuers regarding the shareholder vote on the frequency of say-on-pay votes? If so, what kinds of disclosure would be useful to shareholders?

3. Proposed Amendment to Rule 14a–4

Section 14A(a)(2) requires a shareholder advisory vote on whether say-on-pay votes will occur every 1, 2, or 3 years. Thus, shareholders must be given four choices: Whether the shareholder vote on executive compensation will occur every 1, 2, or 3 years, or to abstain from voting on the matter. In our view, Section 14A(a)(2) does not allow for alternative formulations of the shareholder vote, such as proposals that would provide shareholders with two substantive choices (*e.g.,* to hold a separate shareholder vote on executive compensation every year or less frequently), or only one choice (*e.g.,* a company proposal to hold shareholder votes every two years). We would expect that the board of directors will include a recommendation as to how shareholders should vote on the frequency of shareholder votes on

[57] 17 CFR 229.402(o).

[58] Exchange Act Section 14A(a)(2).

[59] As discussed above in note 16, proposed Rule 14a–21(b) would require issuers to conduct the required advisory vote in connection with the election of directors, when our rules call for disclosure of executive compensation. In our view, a separate shareholder vote on the frequency of shareholder votes on executive compensation is required only with respect to an annual meeting of shareholders for which proxies will be solicited for the election of directors or a special meeting in lieu of such annual meeting.

[60] *See* Section II.C.3 below for a discussion of the application of this section to companies subject to EESA with outstanding obligations under TARP.

[61] As discussed above in note 51, Section 14A(a) does not require additional disclosure with respect to the non-binding nature of the vote. We are proposing to require additional disclosure so that information about the advisory nature of the vote is available to shareholders before they vote.

executive compensation. However, the issuer must make clear in these circumstances that the proxy card provides for four choices (every 1, 2, or 3 years, or abstain) and that shareholders are not voting to approve or disapprove the issuer's recommendation. Accordingly, we are proposing amendments to our proxy rules to reflect the statutory requirement that shareholders must be provided the opportunity to cast an advisory vote on whether the shareholder vote on executive compensation required by Section 14A(a)(1) of the Exchange Act will occur every 1, 2, or 3 years, or to abstain from voting on the matter.[62]

Specifically, we are proposing amendments to Rule 14a–4 under the Exchange Act, which provides requirements as to the form of proxy that issuers are required to include with their proxy materials, to require that issuers present four choices to their shareholders. Under existing Rule 14a–4, the form of proxy is required to provide means whereby the person solicited is afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter to be acted upon, other than elections to office.[63] The proposed amendments would revise this standard to permit proxy cards to reflect the choice of 1, 2, or 3 years, or abstain, for these votes.

Request for Comment

(15) Will the four choices available to shareholders for the frequency of shareholder votes on executive compensation be sufficiently clear?

(16) Will issuers, brokers, transfer agents, and data processing firms be able to accommodate four choices (*i.e.,* 1, 2, or 3 years, or abstain) for a single line item on a proxy card? What technical or processing difficulties do such a change to the proxy card present? If there are technical or processing difficulties, are there practical ways to mitigate them?

4. Proposed Amendment to Rule 14a–8

We are also proposing an amendment to Rule 14a–8 under the Exchange Act to add a note to Rule 14a–8(i)(10) that would clarify the status of shareholder proposals that seek an advisory shareholder vote on executive compensation or that relate to the frequency of shareholder votes approving executive compensation. Rule 14a–8 provides eligible shareholders with an opportunity to include a proposal in an issuer's proxy materials for a vote at an annual or special meeting of shareholders. An issuer generally is required to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within one of the rule's 13 substantive bases for exclusion.[64] One of the substantive bases for exclusion, Rule 14a–8(i)(10), provides that an issuer may exclude a shareholder proposal that has already been substantially implemented.

We believe that under certain conditions, an issuer's response to the say-on-pay and related frequency votes in Section 951 of the Act may be viewed as having substantially implemented subsequent shareholder proposals that seek a vote on the same matters. We are proposing to add a new note to Rule 14a–8(i)(10) to permit the exclusion of a shareholder proposal that would provide a say-on-pay vote or seeks future say-on-pay votes or that relates to the frequency of say-on-pay votes, provided the issuer has adopted a policy on the frequency of say-on-pay votes that is consistent with the plurality of votes cast in the most recent vote in accordance with Rule 14a–21(b).[65] As noted in Section I above, a "say-on-pay" vote is defined as a separate resolution subject to shareholder vote to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S–K, or any successor to Item 402.

As a result of this proposed amendment, if an issuer implements the results of the advisory vote of its shareholders as to how often it will solicit votes to approve the compensation of its executives, it would be permitted to exclude shareholder proposals that propose a vote on the approval of executive compensation as disclosed pursuant to Item 402 of Regulation S–K or on the frequency of such votes, including those drafted as requests to amend the issuer's governing documents, so long as the issuer has adopted a policy on the frequency of say-on-pay votes that is consistent with the plurality of votes cast in the most recent vote required by Rule 14a–21(b) and provides a vote on frequency at least as often as required by Section 14A(a)(2). For example, if in the first vote under Rule 14a–21(b) the largest number of votes were cast for a two-year frequency for future shareholder votes on executive compensation, and the issuer discloses that it has approved a policy to hold the vote every two years, a shareholder proposal seeking a different frequency could be excluded so long as the issuer seeks votes on executive compensation every two years and provides a vote on frequency at least every six years as required by Section 14A(a)(2).

We believe that, in these circumstances, additional shareholder proposals on frequency generally would unnecessarily burden the company and its shareholders given the company's substantial implementation of a plurality shareholder vote regarding the frequency of say-on-pay votes. For the same reasons, a shareholder proposal that would provide an advisory vote or seek future advisory votes on executive compensation with substantially the same scope as the vote required by Rule 14a–21(a) would be subject to exclusion under Rule 14a–8(i)(10).[66]

Section 14A(c)(4) provides that the shareholder advisory votes required by Sections 14A(a) and (b) may not be construed "to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation." As proposed to be amended, Rule 14a–8(i)(10) would only provide a basis for exclusion of a say-on-pay proposal if the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the plurality of votes cast in the most recent shareholder vote. Otherwise, simply having the required vote on frequency would not restrict or limit the ability of a shareholder to have a say-on-

[62] Because the shareholder vote on the frequency of voting on executive compensation is advisory, we do not believe that it is necessary to prescribe a standard for determining which frequency has been "adopted" by the shareholders. As discussed in the following section, however, for purposes of Rule 14a–8 we are proposing that an issuer may exclude as "substantially implemented" a shareholder proposal that seeks a say-on-pay vote or that relates to the frequency of say-on-pay votes only if the issuer has implemented a say-on-pay voting frequency that is consistent with the vote of a plurality of the votes cast. For that rule, we are proposing a plurality standard because the proxy card will have three substantive choices (1, 2, or 3 years), and as a consequence there may be situations where none of these three frequencies has been supported by a majority of the votes cast or shares represented at a meeting.

[63] Rule 14a–4(b)(1).

[64] These substantive bases for exclusion are set forth in Rule 14a–8(i).

[65] More specifically, to exclude such shareholder proposals, the issuer must have adopted the voting frequency receiving the greatest number of votes in the most recent advisory vote on the frequency of say-on-pay votes. We are prescribing this voting standard solely for purposes of determining the scope of the exclusion under Rule 14a–8(i)(10), and not for the purpose of determining whether a particular voting frequency should be considered to have been adopted or approved by shareholder vote as a matter of state law.

[66] A shareholder proposal that proposes a periodic say-on-pay vote would not be excludable under Rule 14–8(i)(10) if the issuer does not adopt a frequency policy that is consistent with the plurality of votes cast in the most recent shareholder vote pursuant to Rule 14a–21(b).

pay proposal included in the company's proxy materials.

Request for Comment

(17) Is it necessary or appropriate to prescribe a standard, such as a plurality, as proposed, for resolving whether issuers have substantially implemented the shareholders' vote on the frequency of the vote on executive compensation for purposes of Rule 14a–8? Is a standard other than plurality appropriate? Should the standard vary if the company's capital structure includes multiple classes of voting stock (*e.g.,* where classes elect different subsets of the board of directors)?

(18) Is the proposed amendment to Rule 14a–8(i)(10) appropriate? Should we, as proposed, allow the exclusion of shareholder proposals that propose say-on-pay votes with substantially the same scope as the votes required by Rule 14a–21(a)? If not, please explain why not.

(19) Should we, as proposed, permit the exclusion of shareholder proposals that seek to provide say-on-pay votes more or less regularly than the frequency endorsed by a plurality of votes cast in the most recent vote required under Rule 14a–21(b), as described above? Are there other circumstances under which shareholder proposals relating to the frequency of say-on-pay votes should be considered substantially implemented and subject to exclusion under Rule 14a–8(i)(10)?

(20) Should we amend Rule 14a–8(i)(10) to address other specific factual scenarios that are likely to occur as a result of the implementation of Section 951 and our related rules? Are there other specific facts and circumstances under which Rule 14a–8(i)(10) should permit or prohibit the exclusion of shareholder proposals that seek say-on-pay votes?

(21) Should the proposed note to Rule 14a–8(i)(10) be available if the issuer has materially changed its compensation program in the time period since the most recent say-on-pay vote required by Section 14A(a)(1) and Rule 14a–21(a) or the most recent frequency vote required by Section 14A(a)(2) and Rule 14a–21(b)?

5. Proposed Amendments to Form 10–K and Form 10–Q

Issuers are currently required to disclose the results of shareholder votes pursuant to Item 5.07 of Form 8–K within four business days following the day the shareholder meeting ends. The rules we propose today would not alter this requirement. We are proposing amendments to Form 10–K and Form 10–Q to require additional disclosure regarding the issuer's action as a result of the shareholder vote on the frequency of shareholder votes on executive compensation in accordance with Section 14A.[67]

Our proposed amendments to Item 9B of Form 10–K and new Item 5(c) of Part II of Form 10–Q would require an issuer to disclose, in the quarterly report on Form 10–Q covering the period during which the shareholder advisory vote occurs, or in the annual report on Form 10–K if the shareholder advisory vote occurs during the issuer's fourth quarter, its decision regarding how frequently it will conduct shareholder advisory votes on executive compensation in light of the results of the shareholder vote on frequency. Because the shareholder vote to determine the frequency of shareholder votes on executive compensation is advisory and non-binding on the issuer, we are proposing disclosure in the Form 10–Q (or the Form 10–K for shareholder meetings taking place during the fourth quarter) to notify shareholders on a timely basis whether the issuer's determination regarding frequency will follow the results of the shareholder vote.

Request for Comment

(22) Should we require, as proposed, disclosure in a Form 10–Q or Form 10–K regarding the issuer's plans with respect to the frequency of its shareholder votes to approve executive compensation? Would this disclosure be useful for investors?

(23) Would the proposed Form 10–Q or Form 10–K disclosure notify shareholders on a timely basis of the issuer's determination regarding the frequency of the say-on-pay vote? Should this disclosure instead be included in the Form 8–K reporting the voting results otherwise required to be filed within four business days after the end of the shareholder meeting, or in a separate Form 8–K required to be filed within four business days of when an issuer determines how frequently it will conduct shareholder votes on executive compensation in light of the results of the shareholder vote on frequency?

(24) Would the amendments to Form 10–Q and 10–K, as proposed, allow an issuer sufficient time to analyze the results of the shareholder votes on the frequency of shareholder votes on executive compensation and reach a conclusion on how it should respond? Should the issuer's plans with respect to the frequency of such shareholder votes instead be required to be disclosed no later than in the Form 10–Q or Form 10–K for the next full time period ended subsequent to the vote (for example, if the vote occurs in the second quarter of the issuer's fiscal year, the disclosure would be required no later than in the Form 10–Q for the third quarter)?

6. Effect of Shareholder Vote

Although the language in Section 951 of the Act indicates that the separate resolution subject to shareholder vote is "to determine" the frequency of the shareholder vote on executive compensation, in light of new Section 14A(c) of the Exchange Act, we believe this shareholder vote, and all shareholder votes required by Section 951 of the Act, are intended to be non-binding on the issuer or the issuer's board of directors. Under new Section 14A(c), the shareholder votes referred to in Section 14A(a) and Section 14A(b) (which includes all votes under Section 951 of the Act) "shall not be binding on the issuer or the board of directors of an issuer."[68] As proposed, new Item 24 of Schedule 14A would include language to require disclosure regarding the general effect of the shareholder advisory votes, such as whether the vote is non-binding.[69]

Request for Comment

(25) Under the proposed rules, the shareholder vote on the frequency of the say-on-pay vote would not bind the issuer or board of directors of the issuer. Are there other ways to provide for a vote "to determine" the frequency of the say-on-pay resolution that are consistent with the Section 14A(c) rule of construction that the vote "shall not be binding"?

C. Issues Relating to Both Shareholder Votes Required by Section 14A(a)

1. Proposed Amendments to Rule 14a–6

Rule 14a–6(a) generally requires issuers to file proxy statements in preliminary form at least ten calendar days before definitive proxy materials are first sent to shareholders, unless the items included for a shareholder vote in the proxy statement are limited to specified matters. During the time before final proxy materials are filed, our staff has the opportunity to comment on the disclosures and issuers

[67] A company may, but is not required to, provide additional disclosure in Item 5.07 of Form 8–K regarding any of the shareholder votes required by Section 951 of the Act and how the results of these votes affect its plans for the future.

[68] Exchange Act Section 14A(c).

[69] Even though each of the shareholder advisory votes required by Section 14A is non-binding pursuant to the rule of construction in Section 14A(c), we believe these votes could play a role in an issuer's executive compensation decisions.

are able to incorporate the staff's comments in their final proxy materials. However, an issuer is not required to file preliminary materials if the only matters to be acted upon are:

- The election of directors,
- The election, approval or ratification of the accountants,
- Approval or ratification of certain employee benefits plans or plan amendments,
- Shareholder proposals under Rule 14a–8,[70] and
- Shareholder votes to approve executive compensation for companies with outstanding indebtedness under the TARP, in accordance with the EESA.[71]

Absent an amendment to Rule 14a–6(a), a proxy statement that includes a solicitation for either the shareholder vote on the approval of executive compensation or the approval of the frequency of the votes approving executive compensation required by Sections 14A(a)(1) and 14A(a)(2) would need to be filed in preliminary form. Because the shareholder vote on executive compensation and the shareholder vote on the frequency of such shareholder votes would be required for all issuers, we view them as similar to the other items specified in Rule 14a–6(a) that do not require a preliminary filing.[72]

We are proposing to amend Rule 14a–6(a) to add the shareholder votes on executive compensation and the frequency of shareholder votes on executive compensation required by Section 14A(a) to the list of items that do not trigger a preliminary filing.[73] Under the proposed amendments, a proxy statement that includes a solicitation with respect to either of these shareholder votes would not trigger a requirement that the issuer file the proxy statement in preliminary form, so long as any other matters to which the solicitation relates include only the other matters specified by Rule 14a–6(a).

Request for Comment

(26) Should we amend Rule 14a–6(a) under the Exchange Act as proposed so that issuers are not required to file a preliminary proxy statement as a consequence of providing a separate shareholder vote on executive compensation in accordance with Rule 14a–21(a)? If not, please explain why not.

(27) Should we amend Rule 14a–6(a) under the Exchange Act as proposed so that issuers are not required to file a preliminary proxy statement as a consequence of providing a separate shareholder vote on the frequency of shareholder votes on executive compensation in accordance with Rule 14a–21(b)? If not, please explain why not.

(28) Should we amend Rule 14a–6(a) under the Exchange Act so that issuers are not required to file a preliminary proxy statement as a consequence of providing any other separate shareholder vote on executive compensation? If so, please explain in what circumstances.

2. Broker Discretionary Voting

Section 957 of the Act amends Section 6(b) of the Exchange Act[74] to direct national securities exchanges to change their rules to prohibit broker discretionary voting of uninstructed shares in certain matters, including shareholder votes on executive compensation. The national securities exchanges have begun to amend their rules regarding broker discretionary voting on executive compensation matters to implement this requirement.[75] Under these amended exchange rules, for issuers with a class of securities listed on a national securities exchange, broker discretionary voting of uninstructed shares would not be permitted for a shareholder vote on executive compensation or a shareholder vote on the frequency of the shareholder vote on executive compensation.[76]

3. Relationship to Shareholder Votes on Executive Compensation for TARP Companies

Issuers that have received financial assistance under the Troubled Asset Relief Program, or TARP, are required to conduct a separate annual shareholder vote to approve executive compensation during the period in which any obligation arising from the financial assistance provided under the TARP remains outstanding.[77]

Because the vote required to approve executive compensation pursuant to the Emergency Economic Stabilization Act of 2008, or EESA, is effectively the same vote that would be required under Section 14A(a)(1), we believe that a shareholder vote to approve executive compensation under Rule 14a–20 for issuers with outstanding indebtedness under the TARP would satisfy Rule 14a–21(a). Consequently, we would not require issuers who conduct an annual shareholder vote to approve executive compensation pursuant to EESA to conduct a separate shareholder vote on executive compensation under Section 14A(a)(1) until such issuers have repaid all indebtedness under the TARP. These issuers would be required to include a separate shareholder advisory vote on executive compensation pursuant to Section 14A(a)(1) and proposed Rule 14a–21(a) for the first annual meeting of shareholders after the issuer has repaid all outstanding indebtedness under the TARP.

Even though issuers with outstanding indebtedness under the TARP have a separate statutory requirement to provide an annual shareholder vote on executive compensation so long as they are indebted under the TARP, these issuers would be required, pursuant to Section 14A(a)(2) of the Exchange Act, to provide a separate shareholder advisory vote on the frequency of shareholder votes on executive compensation for the first annual or other such meeting of shareholders on or after January 21, 2011. In our view, however, because such issuers have a requirement to conduct an annual shareholder advisory vote on executive compensation so long as they are indebted under the TARP, a shareholder

[70] Rules 14a–6(a)(5) and (6) specify other proposals by investment companies registered under the Investment Company Act of 1940 [15 U.S.C. 80a–1 *et seq.*], the inclusion of which does not compel filing of preliminary materials.

[71] *See* Rule 14a–6(a)(7) [17 CFR 240.14a–6(a)(7)].

[72] In our view, a preliminary filing requirement for the shareholder votes on executive compensation and the frequency of such votes would impose unnecessary administrative burdens and preparation and processing costs associated with the filing and processing of proxy material that would unlikely be selected for review in preliminary form. *See Proxy Rules—Amendments to Eliminate Filing Requirements for Certain Preliminary Proxy Material; Amendments With Regard to Rule 14a–8, Shareholder Proposals,* Release No. 34–25217 (Dec. 21, 1987) [52 FR 48982].

[73] In the recent release relating to the similar shareholder votes for companies subject to EESA with outstanding indebtedness under the TARP program, we received comments regarding whether a preliminary proxy statement should be required for shareholder votes on executive compensation for TARP companies. While some commentators argued that a preliminary proxy statement should be required, other commentators argued persuasively that the burdens of such an approach outweighed the costs. As a result, we decided to eliminate the requirement for a preliminary proxy statement for shareholder votes on executive compensation for TARP companies. *See* TARP Adopting Release, *supra* note 16, at 75 FR 2791.

[74] 15 U.S.C. 78f(b).

[75] *See, e.g., Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change to Amend NYSE Rule 452 and Listed Company Manual Section 402.08 to Eliminate Broker Discretionary Voting on Executive Compensation Matters,* Release No. 34–62874, SR–NYSE–2010–59 (Sept. 9, 2010).

[76] Broker discretionary voting in connection with merger or acquisition transactions is not permitted under current rules of the national securities exchanges. *See, e.g.,* NYSE Rule 452.

[77] Section 111(e) of the Emergency Economic Stabilization Act of 2008, 12 U.S.C. 5221. *See also* Rule 14a–20.

advisory vote on the frequency of such votes while the issuer remains subject to a requirement to conduct such votes on an annual basis would not serve a useful purpose.

We have considered, therefore, whether issuers with outstanding indebtedness under the TARP should be subject to the requirements of Section 14A(a)(2) of the Exchange Act. We do not believe it is necessary or appropriate in the public interest or consistent with the protection of investors to require an issuer to conduct a shareholder advisory vote on the frequency of the shareholder advisory vote on executive compensation when the issuer already is required to conduct advisory votes on executive compensation annually regardless of the outcome of such frequency vote. Because Section 14A(a)(2) would burden TARP issuers and their shareholders with an additional vote while providing little benefit to either the issuer or its shareholders, we believe an exemption by rule is appropriate, pursuant to both the exemptive authority granted by Section 14A(e) of the Exchange Act [78] and the Commission's general exemptive authority pursuant to Section 36(a)(1) of the Exchange Act.[79] As a result, Rule 14a–21(b), as proposed, would exempt issuers with outstanding indebtedness under the TARP from the requirements of Rule 14a–21(b) and Section 14A(a)(2) until the issuer has repaid all outstanding indebtedness under the TARP. Similar to the approach for shareholder advisory votes under Rule 14a–21(a), these issuers would be required to include a separate shareholder advisory vote on the frequency of shareholder advisory votes on executive compensation pursuant to Section 14A(a)(2) and proposed Rule 14a–21(b) for the first annual meeting of shareholders after the issuer has repaid all outstanding indebtedness under the TARP.

Request for Comment

(29) Should issuers who have outstanding indebtedness under the TARP be required to conduct a shareholder advisory vote under Rule 14a–21(a) for the first annual meeting after the issuer has repaid all outstanding indebtedness under the TARP? Should we amend Rule 14a–20 to reflect this requirement?

(30) Should issuers who have outstanding indebtedness under the TARP satisfy Rule 14a–21(a) when such issuers conduct a shareholder advisory vote to approve executive compensation pursuant to Rule 14a–20? Should we reflect this position in Rule 14a–21(a)?

(31) Should issuers who have outstanding indebtedness under the TARP be exempted, as proposed, from the requirement to conduct a shareholder advisory vote under Section 14A(a)(2) and Rule 14a–21(b) until the first annual meeting after the issuer has repaid all outstanding indebtedness under the TARP? Is our proposed approach consistent with the purposes of Section 951 of the Act? Instead, should issuers who have outstanding indebtedness under the TARP be required to provide the shareholder vote on frequency at a time when they are still required to provide an annual vote under EESA? Should such an issuer be permitted, at its discretion, to conduct a shareholder advisory vote on frequency while it has outstanding indebtedness under the TARP and, if such vote is held, not be required to conduct such a vote at its first annual meeting after it has repaid all outstanding indebtedness under the TARP?

D. Disclosure of Golden Parachute Arrangements and Shareholder Approval of Golden Parachute Arrangements

1. General

Section 14A(b)(1) of the Exchange Act requires all persons making a proxy or consent solicitation seeking shareholder approval of an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all of an issuer's assets to provide disclosure, in accordance with rules we promulgate, of any agreements or understandings that the soliciting person has with its named executive officers (or that it has with the named executive officers of the acquiring issuer) concerning compensation that is based on or otherwise relates to the merger transaction. In addition, Section 14A(b)(1) requires disclosure of any agreements or understandings that an acquiring issuer has with its named executive officers and that it has with the named executive officers of the target company in transactions in which the acquiring issuer is making a proxy or consent solicitation in seeking shareholder approval of an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all of an issuer's assets. Section 14A(b)(1) of the Exchange Act requires the disclosure to be in a "clear and simple form in accordance with regulations to be promulgated by the Commission" and to include "the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of such executive officer." [80]

Under existing Commission rules, a target company soliciting shareholder approval of a merger is required to describe briefly any substantial interest, direct or indirect, by security holdings or otherwise, of any person who has been an executive officer or director since the beginning of the last fiscal year in any matter to be acted upon.[81] In response to this requirement, target companies often include disclosure in their proxy statements about compensation arrangements that may be payable to a target company's executive officers and directors in connection with the transaction. In addition, under our existing rules, companies are required to include in annual reports and annual meeting proxy statements detailed information in accordance with Item 402(j) of Regulation S–K about payments that may be made to named executive officers upon termination of employment or in connection with a change in control.[82] The Item 402(j) disclosure is provided based on year-end information and various assumptions, and generally does not

[78] Exchange Act Section 14A(e) provides that "the Commission may, by rule or order, exempt an issuer or class of issuers from the requirement" under Sections 14A(a) or 14A(b). Section 14A(e) further provides that "in determining whether to make an exemption under this subsection, the Commission shall take into account, among other considerations, whether the requirements under [Section 14A(a) and 14A(b)] disproportionately burdens small issuers." In proposing the exemption, the Commission considered whether the requirements of Section 14A(a) and (b) as applied to TARP recipients to conduct a shareholder advisory vote on the frequency of say-on-pay votes could disproportionately burden small issuers. As described further in Section II.E below, we have also considered whether the provision as a whole disproportionately burdens small issuers. We note, in addition, that to the extent a TARP recipient is a small issuer, it would be subject to the exemption.

[79] 15 U.S.C. 78 mm(a)(1). Exchange Act Section 36(a)(1) provides that "the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."

[80] Exchange Act Section 14A(b)(1).

[81] Item 5 of Schedule 14A.

[82] *See* Item 402(j) of Regulation S–K [17 CFR 229.402(j)], Item 8 of Schedule 14A, and Item 11 of Form 10–K. Item 402(j) disclosure is required in both Annual Reports on Form 10–K and in annual meeting proxy statements, though such disclosure is typically provided in annual meeting proxy statements and incorporated into the Form 10–K by reference pursuant to General Instruction G(3) of Form 10–K. References to "annual meeting proxy statements" in this context are meant to encompass both locations for the disclosure.

reflect any actual termination or termination event.[83]

While the Commission's existing rules require disclosure about golden parachute arrangements as described above, they do not include detailed requirements for such disclosures that are applicable to proxy or consent solicitations to approve the transaction, as required by Section 14A(b)(1) of the Exchange Act. Consequently, in order to implement the disclosure requirements of Section 14A(b)(1), we are proposing to amend Schedule 14A to require disclosure with respect to golden parachute compensation arrangements in proxy or consent solicitations in connection with an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all assets, in accordance with new proposed Item 402(t) of Regulation S–K. As described below, although not required by Section 14A(b)(1), we are also proposing to amend the disclosure requirements of other, similar forms, so that comparable golden parachutes disclosure would be required in other, similar transactions.[84] We are not proposing to amend the requirements for golden parachutes disclosure in annual meeting proxy statements, although, as described below, under our proposal companies would be permitted to provide disclosure in annual meeting proxies in accordance with the new requirement.[85]

Section 14A(b)(1) requires disclosure of agreements or understandings between the person conducting the solicitation and any named executive officers of the issuer or any named executive officers of the acquiring issuer if the person conducting the solicitation is not the acquiring issuer. In the typical case, the soliciting person is the target company in a merger transaction since target company shareholder approval is ordinarily required to approve a merger under state law. Consistent with Section 14A(b)(1) of the Exchange Act, agreements or understandings between a target issuer conducting a solicitation and its named executive officers would be subject to disclosure under proposed Item 402(t). In addition, because golden parachute compensation arrangements also may involve agreements or understandings between the acquiring company and the named executive officers of the target company, we have formulated proposed Item 402(t) to require disclosure of this compensation in addition to the disclosure mandated by Section 14A(b)(1). As proposed, Item 402(t) would require disclosure of all golden parachute compensation relating to the merger among the target and acquiring companies and the named executive officers of each in order to cover the full scope of golden parachute compensation applicable to the transaction.[86]

2. Proposed Item 402(t) of Regulation S–K

As noted above, Section 14A(b)(1) of the Exchange Act requires disclosure of the golden parachute compensation in any proxy or consent solicitation to approve an acquisition, merger, consolidation or proposed sale or disposition of all or substantially all assets to be "in a clear and simple form in accordance with regulations to be promulgated by the Commission" and to include "the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of such executive officer."[87] To satisfy these requirements for proxy or consent solicitations for these transactions, proposed Item 402(t) of Regulation S–K would require disclosure of named executive officers' golden parachute arrangements in both tabular and narrative formats.[88] We are proposing the following new table:

GOLDEN PARACHUTE COMPENSATION

Name (a)	Cash ($) (b)	Equity ($) (c)	Pension/ NQDC ($) (d)	Perquisites/ benefits ($) (e)	Tax reimbursement ($) (f)	Other ($) (g)	Total ($) (h)
PEO.							
PFO.							
A.							
B.							
C.							

The table would present quantitative disclosure of the individual elements of compensation that an executive would receive that are based on or otherwise relate to the merger, acquisition, or similar transaction, and the total for each named executive officer.[89] Elements that would be separately quantified and included in the total would be any cash severance payment (*e.g.,* base salary, bonus, and pro-rata non-equity incentive plan[90]

[83] *See* Instruction 1 to Item 402(j), which requires quantitative disclosure applying the assumptions that the triggering event took place on the last business day of the issuer's last completed fiscal year, and the price per share of the issuer's securities is the closing market price as of that date. Where a triggering event has actually occurred for a named executive officer who was no longer serving as a named executive officer of the issuer at the end of the last completed fiscal year, Instruction 4 to Item 402(j) requires Item 402(j) disclosure for that named executive officer only for that triggering event.

[84] *See* Section II.D.3 below.

[85] *See* Sections II.D.2 and II.D.4 below.

[86] As described below, however, because any agreements between a soliciting target company's named executive officers and the acquiring company are beyond the scope of the disclosure required by Section 14A(b)(1), such agreements would not be subject to the Rule 14a–21(c) shareholder advisory vote required by Section 14A(b)(2) and Rule 14a–21(c). *See* discussion of Rule 14a–21(c) in Section II.D.4 below.

[87] Exchange Act Section 14A(b)(1).

[88] Proposed Instruction 1 to Item 402(t) would provide that disclosure would be required for individuals covered by Items 402(a)(3)(i), (ii), and (iii), and for smaller reporting companies, the individuals covered by Items 402(m)(2)(i) and (ii). Accordingly, issuers would not have to provide Item 402(t) information with respect to individuals who would have been among the most highly compensated executive officers but for the fact that they were not serving as an executive officer at the end of the last completed fiscal year, for whom Item 402 information otherwise is required by Item 402(a)(3)(iv), and for smaller reporting companies by Item 402(l)(2)(iii).

[89] Proposed Item 402(t)(2) of Regulation S–K.

[90] As defined in Item 402(a)(6)(iii) of Regulation S–K.

compensation payments) (column (b)); the dollar value of accelerated stock awards, in-the-money option awards for which vesting would be accelerated, and payments in cancellation of stock and option awards (column (c)); pension and nonqualified deferred compensation benefit enhancements (column (d)); perquisites and other personal benefits and health and welfare benefits (column (e)); and tax reimbursements (*e.g.,* Internal Revenue Code Section 280G tax gross-ups) (column (f)). We have proposed an "Other" column of the table for any additional elements of compensation not specifically includable in the other columns of the table (column (g)). This column, like the columns for the other elements, would require footnote identification of each separate form of compensation reported. The final column in the table would require disclosure, for each named executive officer, of the aggregate total of all such compensation (column (h)).[91] As proposed, the table would require separate footnote identification of amounts attributable to "single-trigger" arrangements and amounts attributable to "double-trigger" arrangements, so that shareholders can readily discern these amounts.[92]

As noted above, issuers are currently required to provide disclosure in annual reports on Form 10–K and in annual meeting proxy statements of potential payments upon termination or change-in-control for their named executive officers under Item 402(j) of Regulation S–K. That item, which does not typically apply to merger proxies, requires disclosure regarding each contract, agreement, plan or arrangement, whether written or unwritten, that provides for payments to a named executive officer at, following, or in connection with termination or change in control of the issuer.[93] We considered whether making the disclosure requirements in Item 402(j) applicable to transactions enumerated in Section 14A(b)(1), rather than adopting a new disclosure item for purposes of Section 14A(b)(1), would be an appropriate approach to satisfy the requirements of the Act. It appears, however, that certain elements required by Section 14A(b)(1) are not included in Item 402(j). Specifically, we believe that the requirement in Section 14A(b)(1) to present the information in a clear and simple form is most appropriately satisfied through the use of tabular disclosure, and Item 402(j) does not require disclosure in tabular format. In addition, Item 402(j) does not require disclosure about arrangements that do not discriminate in scope, terms or operation in favor of executive officers and that are available generally to all salaried employees,[94] permits exclusion of *de minimis* perquisites and other personal benefits,[95] and does not require presentation of an aggregate total of all compensation that is based on or otherwise relates to a transaction.[96]

We also considered whether it would be appropriate to amend Item 402(j) to include the elements required by Section 14A(b)(1), rather than adopting a new disclosure item. Section 14A(b)(1) addresses only compensation that is "based on or otherwise relates to an acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of the issuer." In comparison, Item 402(j) requires disclosure of potential payments in connection with "any termination, including without limitation resignation, severance, retirement or a constructive termination of a named executive officer, or a change in control of the registrant or a change in the named executive officer's responsibilities."[97] Although we could amend Item 402(j) to mandate disclosure of all the elements required by Section 14A(b)(1) for every termination scenario covered by the item, we believe such an approach would impose significant new burdens on issuers. Alternatively, although we could amend Item 402(j) to include the disclosure elements required by Section 14A(b)(1) only with respect to change in control of the issuer, we believe that such an approach could result in a disclosure presentation that would be confusing to investors. Consequently, we are proposing the new item requirements described above.

In a proxy statement soliciting shareholder approval of a merger or similar transaction, Item 402(t)'s tabular quantification of dollar amounts based on issuer stock price would be required to be based on the closing price per share as of the latest practicable date.[98] Where Item 402(t) disclosure is included in an annual meeting proxy statement,[99] such amounts would be calculated based on the closing market price per share of the issuer's securities on the last business day of the issuer's last completed fiscal year,[100] consistent with quantification standards used in Item 402(j).[101]

The tabular disclosure required by Item 402(t) would require quantification with respect to any agreements or understandings, whether written or unwritten, between each named executive officer and the acquiring company or the target company, concerning any type of compensation, whether present, deferred or contingent, that is based on or otherwise relates to an acquisition, merger, consolidation, sale or other disposition of all or substantially all assets. As described above, the proposed table would quantify cash severance, equity awards that are accelerated or cashed out, pension and nonqualified deferred compensation enhancements, perquisites, and tax reimbursements. In addition, the proposed table would require disclosure and quantification of the value of any other compensation related to the transaction.[102]

However, Item 402(t) would require tabular and narrative disclosure only of compensation that is based on or otherwise relates to the transaction. As proposed, Item 402(t), like Item

[91] Exchange Act Section 14A(b)(1) requires disclosure of "the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of such executive officer."

[92] A "double-trigger" arrangement requires that the executive's employment be terminated without cause or that the executive resign for good reason within a limited period of time after the change-in-control to trigger payment. A "single-trigger" arrangement does not require such a termination or resignation after the change-in-control to trigger payment.

[93] The circumstances covered by Item 402(j) include, without limitation, resignation, severance, retirement, a constructive termination of a named executive officer, a change in control of the registrant, or a change in a named executive officer's responsibilities.

[94] Instruction 5 to Item 402(j).

[95] *See* Instruction 2 to Item 402(j), which permits exclusion of perquisites and other personal benefits or property if the aggregate amount of such compensation will be less than $10,000.

[96] We are also proposing conforming changes to Item 402(a)(6)(ii) [17 CFR 229.402(a)(6)(ii)] and Item 402(m)(5)(ii) [17 CFR 229.402(m)(5)(ii)] of Regulation S–K to clarify that information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the company and that are generally available to all salaried employees must be included in disclosure pursuant to proposed Item 402(t).

[97] Item 402(j) of Regulation S–K.

[98] Proposed Instruction 1 to Item 402(t)(2).

[99] A company may choose to include the disclosure in the annual meeting proxy statement in order for the Section 14A(a)(1) shareholder vote to satisfy the exception from the merger proxy separate shareholder vote. *See* Section II.D.4 below.

[100] Proposed Instruction 2 to Item 402(t)(2).

[101] *See* Instruction 1 to Item 402(j).

[102] We have proposed an Instruction 3 to Item 402(t)(2) to provide, like Instruction 1 to Item 402(j), that in the event uncertainties exist as to the provision of payments and benefits, or the amounts involved, the issuer is required to make a reasonable estimate applicable to the payment or benefit and disclose material assumptions underlying such estimate in its disclosure. Unlike Item 402(j), as proposed Item 402(t) would not permit the disclosure of an estimated range of payments.

402(j),[103] would not require separate disclosure or quantification with respect to compensation disclosed in the Pension Benefits Table and Nonqualified Deferred Compensation Table. Item 402(t) also would not require disclosure or quantification of previously vested equity awards. Because these amounts are vested without regard to the transaction, we do not view them as compensation "that is based on or otherwise relates to" the transaction. Similarly, the proposed table would not require disclosure and quantification of compensation from bona fide post-transaction employment agreements to be entered into in connection with the merger or acquisition transaction, as we do not view future employment arrangements as compensation "that is based on or otherwise relates to" the transaction.[104]

Pursuant to the proposed narrative disclosure requirements,[105] to implement the statutory mandate to disclose the conditions upon which the compensation may be paid or become payable, Item 402(t) would require issuers to describe any material conditions or obligations applicable to the receipt of payment, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, their duration, and provisions regarding waiver or breach.[106] We have also proposed a requirement to provide a description of the specific circumstances that would trigger payment,[107] whether the payments would or could be lump sum, or annual, and their duration, and by whom the payments would be provided,[108] and any material factors regarding each agreement.[109] These proposed narrative items are modeled on the narrative disclosure currently required with respect to termination and change-in-control agreements.[110] An issuer seeking to satisfy the exception from the separate merger proxy shareholder vote under Section 14A(b)(2) and Rule 14a–21(c) by including Item 402(t) disclosure in an annual meeting proxy statement soliciting the shareholder vote required by Section 14A(a)(1) and Rule 14a–21(a)[111] would be able to satisfy Item 402(j) disclosure requirements with respect to a change-in-control of the issuer by providing the disclosure required by Item 402(t).[112] The issuer would, however, still be obligated to include in an annual meeting proxy statement disclosure in accordance with Item 402(j) about payments that may be made to named executive officers upon termination of employment.

Request for Comment

(32) Should Item 402(t) disclosure be required only in the context of an extraordinary transaction, as proposed? Should we extend the Item 402(t) disclosure requirement to annual meeting proxy statements generally, or in annual meeting proxy statements in which the shareholder advisory vote required by Section 14A(a)(1) is solicited? Would this disclosure be useful in annual meeting proxy statements in the absence of an actual transaction, or are the existing compensation disclosure requirements applicable to annual meeting proxy statements sufficient? Should we amend Item 402(j) to cover the matters required by Section 14A(b)(1) that are not otherwise required by that Item, rather than adopt proposed Item 402(t)?

(33) As proposed, Item 402(t) would require disclosure of all golden parachute compensation relating to the merger among the target and acquiring companies and the named executive officers of each in order to cover the full scope of golden parachute compensation applicable to the transaction. Would it be potentially confusing to require disclosure under Item 402(t) that relates to golden parachute compensation of a broader group of individuals than required by Section 14A(b)(1)?

(34) Does proposed Item 402(t) tabular disclosure capture "any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to" the transaction? Will proposed Item 402(t) elicit disclosure of all elements of golden parachute compensation that may be paid or become payable and the aggregate total thereof "in a clear and simple form"? If not, what specific revisions are necessary to accomplish these objectives?

(35) Should we also require tabular disclosure of previously vested equity and pension benefits and require the total amount to include those amounts? For example, should the value of vested pension and nonqualified deferred compensation be presented so that shareholders may easily compare that value to the value of any enhancements attributable to the change-in-control transaction? Similarly, should the value of previously vested restricted stock and the in-the-money value of previously vested options be presented so that shareholders can compare these amounts to the value of awards for which vesting would be accelerated? Would inclusion of these amounts in the total overstate the amount of compensation payable as a result of the transaction?

(36) In the table, will the proposed footnote identification of amounts of single-trigger and double-trigger compensation elements effectively highlight amounts payable on each basis? If not, should these elements be highlighted by disclosing them in separate columns, or by some other means? Is this information useful to investors?

(37) Are there any elements captured by the "Other" column that should be presented separately, or in a different manner? If so, please explain why and how.

(38) Should employment agreements that named executive officers of the target issuer enter into with the acquiring issuer for services to be performed in the future be excluded from the table, as proposed? Are such agreements used to induce target executives to support the transaction? Should such employment agreements instead be required to be quantified and included in the table? If such agreements should be quantified, should they be quantified separately, such as in a separate table, or is there a better way to present such agreements? If quantification is appropriate, should we specify how employment agreements should be quantified, for example by requiring a reasonable estimate applicable to the payment or benefit and disclosure of material assumptions underlying such estimates, or a valuation based on projected first year annual compensation, or average annual basis, or a present value for this compensation? If so, please explain.

(39) In proxy statements soliciting shareholder approval of a merger or similar transaction, we are proposing

[103] *See* Instruction 3 to Item 402(j).

[104] Information regarding such future employment agreements is subject to disclosure pursuant to Item 5(a) of Schedule 14A to the extent that such agreements constitute a "substantial interest" in the matter to be acted upon, as well as Item 5(b)(xii).

[105] Proposed Item 402(t)(3) of Regulation S–K.

[106] Proposed Item 402(t)(3)(iii) of Regulation S–K.

[107] Proposed Item 402(t)(3)(i) of Regulation S–K.

[108] Proposed Item 402(t)(3)(ii) of Regulation S–K.

[109] Proposed Item 402(t)(3) of Regulation S–K. Such material factors would include, for example, provisions regarding modifications of outstanding options to extend the vesting period or the post-termination exercise period, or to lower the exercise price.

[110] Item 402(j) of Regulation S–K.

[111] This exception is discussed in Section II.D.4 below.

[112] We note also that one example of material information to be addressed in CD&A is the basis for selecting particular termination or change-in-control events as triggering payment (*e.g.,* the rationale for providing a single trigger for payment in the event of a change-in-control). *See* Item 402(b)(2)(xi) of Regulation S–K.

that the tabular quantification of dollar amounts based on issuer stock price be based on the closing price per share as of the latest practicable date. Is this measurement date appropriate? Would a different measurement, such as the average closing price over the first five business days following the public announcement of the transaction, more accurately reflect the amounts payable to the named executive officers in connection with the transaction? If so, explain why.

(40) The proposed narrative disclosure would explain by whom payments would be provided. Are any additional instructions needed to provide clarity with respect to the tabular disclosure in circumstances where separate payments would be made by the target issuer and the acquiring issuer? Should a separate table be required where golden parachute compensation is payable to named executive officers of the acquiring issuer, as well as named executive officers of the target issuer?

(41) Will the proposed narrative disclosure adequately describe the conditions upon which the golden parachute compensation may be paid or become payable to or on behalf of each named executive officer? What, if any, additional disclosure is needed to accomplish this objective? What, if any, disclosure that we have proposed to require is not necessary to accomplish this objective? Explain why.

(42) Are there other items of narrative disclosure that would be useful for investors? For example, should we require issuers to describe the basis for selecting each form of payment and to describe why it chose the various forms of compensation? [113]

(43) As proposed, many of the table's columns would report more than one element of golden parachute compensation, with footnote quantification of the individual elements. Would it facilitate investor understanding to present in separate columns any of those individual elements, such as the different components of cash severance? If so, explain which elements and why. Would additional columns make the table too complex?

(44) As proposed, issuers would not have to provide Item 402(t) information with respect to individuals who would have been among the most highly compensated executive officers but for the fact that they were not serving as an executive officer at the end of the last completed fiscal year.[114] Should Item 402(t) information be required if such individuals remain employed by the issuer at the time of the proxy solicitation? If so, explain why. Also, as proposed, issuers would have to provide Item 402(t) information with respect to all individuals who served as the principal executive officer or principal financial officer of the issuer during the last completed fiscal year or who were among the issuer's other most highly compensated executive officers at the end of that year,[115] even if such persons are no longer employed by the issuer at the time of the proxy solicitation. Would Item 402(t) disclosure with respect to such an individual serve a useful purpose or should we exclude former employees from the disclosure requirement?

3. Amendments to Schedule 14A, Schedule 14C, Schedule 14D–9, Schedule 13E–3, and Item 1011 of Regulation M–A

We are proposing amendments to Items 5(a) and (b) of Schedule 14A under the Exchange Act, as well as conforming changes to Item 3 of Schedule 14C, Item 1011(b) of Regulation M–A, Item 15 of Schedule 13E–3 and Item 8 of Schedule 14D–9. These amendments would be consistent with the goals of Section 14A(b)(1) by requiring that the disclosure set forth in Item 402(t) of Regulation S–K be included in any proxy or consent solicitation material seeking shareholder approval of an acquisition, merger, consolidation, or proposed sale or other distribution of all or substantially all the assets of the issuer. Our amendments would require such disclosure not only in a proxy or consent solicitation relating to such a transaction, as required by the Act, but also in the following:

- Information statements filed pursuant to Regulation 14C; [116]
- Proxy or consent solicitations that do not contain merger proposals but require disclosure of information under Item 14 of Schedule 14A pursuant to Note A of Schedule 14A; [117]
- Registration statements on Forms S–4 and F–4 containing disclosure relating to mergers and similar transactions; [118]
- Going private transactions on Schedule 13E–3; [119] and
- Third-party tender offers on Schedule TO [120] and Schedule 14D–9 [121] solicitation/recommendation statements.

Issuers may structure transactions in a manner that avoids implicating Section 14(a) of the Exchange Act (*e.g.,* tender offers and certain Rule 13e–3 going-private transactions), while still effectively seeking the consent of shareholders with respect to their investment decision (*e.g.,* whether or not to tender their shares or approve a going-private transaction, in instances where such going-private transactions are not subject to Regulation 14A). For these reasons, we believe requiring Item 402(t) disclosure in all such transactions furthers the purposes of Section 14A(b) of the Exchange Act and would minimize the regulatory disparity that might otherwise result from treating such transactions differently. Thus, our proposed amendments would require the Item 402(t) disclosure in whatever form the transaction takes, whether a merger, acquisition, a Rule 13e–3 going private transaction or a tender offer. The vote required by Section 14A(b)(2), however, would not be extended to transactions beyond those specified in that section.

We are also proposing to include language in Item 1011(b) of Regulation M–A that would require the bidder [122] in a third-party tender offer to provide information in its Schedule TO about a target's golden parachute arrangements but only to the extent the bidder has made a reasonable inquiry about the golden parachute arrangements and has knowledge of such arrangements, since certain bidders in non-negotiated transactions may not have access to such information. In addition, we are proposing an exception to the disclosure requirement under Item 1011(b) for both bidders and targets in third-party tender offers and filing persons in Rule 13e–3 going-private transactions where the

[113] *See* Item 402(b)(2)(xi) of Regulation S–K.

[114] Item 402(a)(3)(iv) provides that up to two such individuals are named executive officers for purposes of this item's general disclosure requirements.

[115] Such persons are named executive officers as defined in Item 402(a)(3)(i)–(iii).

[116] *See* proposed Item 3 of Schedule 14C.

[117] For example, acquiring companies may solicit proxies to approve the issuance of shares or a reverse stock split in order to conduct a merger transaction; such proxy statements would be required to include disclosure of information required under Item 14 of Schedule 14A pursuant to Note A of Schedule 14A. *See* proposed Item 5(a)(5) and Item 5(b)(3) of Schedule 14A.

[118] In addition to the proposed disclosure requirements on golden parachute arrangements in registration statements on Forms S–4 and F–4, companies will continue to be subject to the requirement to file such agreements and understandings as exhibits to these registration statements as required by Item 601(b)(10) of Regulation S–K [17 CFR 229.601(b)(10)].

[119] *See* proposed Item 15 of Schedule 13E–3.

[120] *See* proposed Item 1011(b) of Regulation M–A.

[121] *See* proposed Item 8 of Schedule 14D–9.

[122] "Bidder" is defined in Rule 14d–1(g)(2) [17 CFR 240.14d–1(g)(2)].

target or subject company is a foreign private issuer.[123] We are also proposing an exception to the disclosure obligation under Item 402(t) with respect to agreements and understandings with senior management of foreign private issuers where the target or acquirer is a foreign private issuer.[124] We believe such accommodations are appropriate in light of our long-standing accommodation to foreign private issuers regarding compensation disclosure.[125]

Request for Comment

(45) Should we require Item 402(t) disclosure, as proposed, in transactions not specifically referenced in the Act? Is this disclosure necessary to minimize potential regulatory arbitrage? If not, please explain why not.

(46) Are there any impediments to providing this disclosure in such transactions? If so, please explain.

(47) Are the proposed exceptions from the Item 402(t) disclosure requirements for bidders and target companies in third-party tender offers and filing persons in Rule 13e–3 going-private transactions where the target or subject company is a foreign private issuer appropriate? Is the proposed exception from the Item 402(t) disclosure obligation with respect to agreements or understandings with senior management of foreign private issuers appropriate? If not, why not? Are any other exceptions for transactions involving foreign private issuers necessary?

4. Proposed Rule 14a–21(c)

Section 951 of the Act also amends the Exchange Act to add Section 14A(b)(2), which generally requires a separate shareholder advisory vote on golden parachute compensation arrangements required to be disclosed under Section 14A(b)(1) in connection with mergers and similar transactions. A separate shareholder advisory vote would not be required on golden parachute compensation if disclosure of that compensation had been included in the executive compensation disclosure that was subject to a prior advisory vote of shareholders under Section 14A(a)(1) of the Exchange Act and Rule 14a–21(a).

As discussed above,[126] we are proposing new Item 402(t) of Regulation S–K to implement the compensation disclosure requirements set forth in new Section 14A(b)(1) of the Exchange Act by requiring disclosure of the full scope of golden parachute compensation applicable to the transaction. Consistent with Section 951 of the Act, whether or not Section 14A(b)(2) also requires the issuer to solicit shareholder approval of golden parachute compensation arrangements, disclosure prescribed by proposed Item 402(t) would be required in any proxy or consent solicitation for a meeting at which shareholders are asked to approve an acquisition, merger, consolidation or sale of the issuer's assets.

Under proposed Rule 14a–21(c), issuers would be required to provide a separate shareholder advisory vote in proxy statements for meetings at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all assets, consistent with Section 14A(b)(2). This advisory vote would be required only with respect to the golden parachute agreements or understandings required to be disclosed by Section 14A(b)(1), as disclosed pursuant to proposed Item 402(t) of Regulation S–K. Section 14A(b)(1) requires disclosure of any agreements or understandings between the soliciting person and any named executive officer of the issuer or any named executive officers of the acquiring issuer, if the soliciting person is not the acquiring issuer. When a target issuer conducts a proxy or consent solicitation to approve a merger or similar transaction, golden parachute compensation agreements or understandings between the acquiring issuer and the named executive officers of the target issuer are not within the scope of disclosure required by Section 14A(b)(1), and thus a shareholder vote to approve arrangements between the soliciting target issuer's named executive officers and the acquiring issuer is not required by Exchange Act Section 14A(b)(2). Consequently, we have proposed Rule 14a–21(c) to require a shareholder advisory vote only on the golden parachute compensation agreements or understandings for which Section 14A(b)(1) requires disclosure and Section 14A(b)(2) requires a shareholder vote.

As described above,[127] however, because compensation arrangements may involve agreements or understandings between the acquiring issuer and the named executive officers of the target issuer, proposed Item 402(t) of Regulation S–K would require disclosure of compensation pursuant to these arrangements, as well as the arrangements for which Section 14A(b)(1) requires disclosure, in order to require disclosure of the full scope of golden parachute compensation applicable to the transaction. In this regard, Item 402(t) of Regulation S–K would require disclosure of a broader group of agreements and understandings than required by Exchange Act Section 14A(b)(1), but proposed Rule 14a–21(c) would require a separate shareholder advisory vote only on the agreements and understandings described in Exchange Act Section 14A(b)(1). Even though agreements and understandings between the acquiring issuer and the named executive officers of the target issuer would not be subject to the Rule 14a–21(c) vote unless the acquiring issuer is soliciting proxies to approve the merger, we are proposing to require this disclosure because we believe that shareholders may find disclosure about these arrangements informative to their voting decisions regarding not only the Rule 14a–21(c) advisory vote, but also the transaction itself. Moreover, some issuers may choose to subject these arrangements to the shareholder advisory vote voluntarily because of investor interest in the full scope of golden parachute compensation applicable to the transaction or for other reasons.

Our proposed rule would not require issuers to use any specific language or form of resolution to be voted on by shareholders. This shareholder vote would not be binding on the issuer or its board of directors. In addition, consistent with Section 14A(b)(2), issuers would not be required to include in the merger proxy a separate shareholder vote on the golden parachute compensation disclosed under Item 402(t) of Regulation S–K if Item 402(t) disclosure of that compensation had been included in the executive compensation disclosure that was subject to a prior vote of shareholders under Section 14A(a)(1) of the Exchange Act and Rule 14a–21(a). In this regard, we note that Section 14A(b)(2) requires only that the golden parachute arrangements have been subject to a prior shareholder vote under Section 14A(a)(1); such arrangements need not have been approved by shareholders.

For issuers to take advantage of this exception, however, the executive compensation disclosure subject to the prior shareholder vote would need to have included Item 402(t) disclosure of the same golden parachute arrangements. Even if the annual meeting proxy statement provides some disclosure with respect to golden

[123] "Foreign private issuer" is defined in Rule 3b–4(c) [17 CFR 240.3b–4(c)].

[124] Proposed Instruction 2 to Item 402(t).

[125] *See, e.g.,* Item 402(a)(1) of Regulation S–K, and Items 6.B and 6.E.2 of Form 20–F [17 CFR 249.220f].

[126] *See* Section II.D.2 above.

[127] *See* Section II.D.2 above.

parachute arrangements,[128] the annual meeting proxy statement would need to include the disclosure required by Item 402(t) in order for the annual meeting shareholder vote under Section 14A(a)(1) and Rule 14a–21(a) to satisfy the exception from the merger proxy separate shareholder vote under Section 14A(b)(2) and Rule 14a–21(c). Consequently, we would expect that some issuers may voluntarily include Item 402(t) disclosure with their other executive compensation disclosure in annual meeting proxy statements soliciting the shareholder vote required by Section 14A(a)(1) and Rule 14–21(a) so that this exception would be available to the issuer for a potential subsequent merger or acquisition transaction. We also expect that some issuers may choose to include the new disclosure for other reasons, such as investor interest in the information.

The exception would be available only to the extent the same golden parachute arrangements previously subject to an annual meeting shareholder vote remain in effect, and the terms of those arrangements have not been modified subsequent to the Section 14A(a)(1) shareholder vote. New golden parachute arrangements, and any revisions to golden parachute arrangements that were subject to a prior Section 14A(a)(1) shareholder vote would be subject to the separate merger proxy shareholder vote requirement of Section 14A(b)(2) and Rule 14a–21(c).[129] Because a shareholder vote would already have been obtained on portions of the arrangements, however, we are proposing that only the new arrangements and revised terms of the arrangements previously subject to a Section 14A(a)(1) shareholder vote would be subject to the merger proxy separate shareholder vote under Section 14A(b)(2) and Rule 14a–21(c).

Under our proposal, issuers providing for a shareholder vote on new arrangements or revised terms would provide two separate tables under Item 402(t) of Regulation S–K in merger proxy statements.[130] One table would disclose all golden parachute compensation, including both arrangements and amounts previously disclosed and subject to a say-on-pay vote under Section 14A(a)(1) and Rule 14a–21(a) and the new arrangements or revised terms. The second table would disclose only the new arrangements or revised terms subject to the vote, so that shareholders can clearly see what is subject to the shareholder vote under Section 14A(b)(2) and Rule 14a–21(c). Similarly, in cases where Item 402(t) requires disclosure of arrangements between an acquiring company and the named executive officers of the soliciting target company, issuers should clarify whether these agreements are included in the shareholder advisory vote by providing a separate table of all agreements and understandings subject to the shareholder advisory vote required by Section 14A(b)(2) and Rule 14a–21(c), if different from the full scope of golden parachute compensation subject to Item 402(t) disclosure.[131]

Request for Comment

(48) If golden parachute arrangements have been modified or amended subsequent to being subject to the annual shareholder vote under Rule 14a–21(a), should we require the merger proxy separate shareholder vote to cover the entire set of golden parachute arrangements or should we, as proposed, require a separate vote only as to the changes to such arrangements? For example, if a new arrangement is added, would the Section 14A(b)(2) shareholder advisory vote be meaningful if shareholders do not have the opportunity to express their approval or disapproval of the full complement of compensation that would be payable?

(49) Should we exempt certain changes to golden parachute arrangements that have been altered or amended subsequent to their being subject to the annual shareholder vote under Rule 14a–21(a)? For example, should we require a separate vote under Rule 14a–21(c) if the only change is the addition of a new named executive officer not included in the prior disclosure or a change in terms that would reduce the amounts payable? Should we provide an exemption for golden parachute arrangements previously subject to an annual shareholder vote if the only change is the subsequent grant, in the ordinary course, of additional awards under an employee benefit plan, such as stock options or restricted stock, that are subject to the same acceleration terms that applied to those already covered by the previous vote? For example, if subsequent to the previous vote, additional equity awards are granted in the ordinary course pursuant to a plan, such as an annual option grant, and those awards are subject to acceleration in the event of a change in control on the same terms as earlier awards that were subject to the previous vote, should we exempt those subsequent awards? Should any other types of changes to golden parachute compensation arrangements be so exempted?

(50) Where an issuer voluntarily includes Item 402(t) disclosure in an annual meeting proxy statement to satisfy the exception from the Section 14A(b)(2) shareholder vote, should all Item 402(t) disclosure be required to be presented in one section of the document, without cross references, to facilitate shareholder understanding? If not, why not? Does proposed Instruction 6 to Item 402(t)(2) assure certainty and predictability regarding the availability of this exception? If not, what additional instructions are needed?

(51) Section 14A(b)(2) does not specify which shares are entitled to vote in the shareholder vote to approve the agreements or understandings and compensation specified in Section 14A(b)(1), nor does this section direct the Commission to adopt rules addressing this point. We are not proposing to address this question in our rules, but should our rules implementing Section 14A(b)(2) address this question? If so, how, and on what basis?

E. Treatment of Smaller Companies

Section 951 of the Act establishes a new Section 14A(e) of the Exchange Act, which provides that we may, by rule or order, exempt an issuer or class of issuers from the requirements of Sections 14A(a) and (b). In determining whether to make an exemption under this subsection, we are directed to take into account, among other considerations, whether the requirements of Sections 14A(a) and 14A(b) disproportionately burden small issuers.

Our proposed rules would not exempt small issuers from the requirements of Sections 14A(a) and 14A(b). We believe the shareholder advisory votes and

[128] *See* CD&A and Item 402(j) of Regulation S–K, and for smaller reporting companies *see* Item 402(q)(2) of Regulation S–K for the disclosure requirements applicable to annual meeting proxy statements.

[129] As proposed, if the disclosure pursuant to Item 402(t) has been updated to change only the value of the items in the Golden Parachute Compensation Table to reflect price movements in the issuer's securities, no new shareholder advisory vote under Section 14A(b)(1) would be required. However, if any terms of such agreements have changed subsequent to the prior Section 14A(a)(1) shareholder vote, a separate vote under Section 14A(b)(2) and Rule 14a–21(c) would be required. For example, we would view any change that would result in an IRC Section 280G tax gross-up becoming payable as a change in terms triggering such a separate vote.

[130] *See* proposed Instruction 6 to Item 402(t)(2) of Regulation S–K.

[131] Proposed Instruction 7 to Item 402(t)(2). As discussed above, such agreements are not required to be subject to the proposed Rule 14a–21(c) shareholder advisory vote, but issuers may voluntarily subject them to such a vote.

additional disclosure required by Section 14A and our proposed rules would be significant for investors in all issuers, including smaller reporting companies.[132] As a result, the proposed rules discussed above will all apply to smaller reporting companies, with the exception of our proposed amendment to Item 402(b) of Regulation S–K, as smaller reporting companies are not required to provide a CD&A. We do not believe that smaller reporting companies should be exempt from the say-on-pay vote, frequency of say-on-pay votes and golden parachute disclosure and vote because we believe investors have the same interest in voting on the compensation of smaller reporting companies and in clear and simple disclosure of golden parachute compensation in connection with mergers and similar transactions as they have for other issuers.

We have crafted our proposals to minimize the costs for smaller reporting companies, while providing shareholders the opportunity to express their views on the companies' compensation arrangements. For example, our proposed amendments would provide the shareholders of smaller reporting companies with the same voting rights with respect to executive compensation as shareholders of other companies subject to the proxy rules. We are not currently aware that Section 14A and our proposed rules would unduly burden smaller reporting companies. Our proposed amendments, for example, would not alter the existing scaled disclosure requirements set forth in Item 402 of Regulation S–K for smaller reporting companies, which recognize that the compensation arrangements of smaller reporting companies typically are less complex than those of other public companies.[133] Under our proposed rules, we would not alter the provision in our rules that smaller reporting companies are not required to provide a CD&A.

Our proposed rules would, however, require quantification of golden parachute arrangements in merger proxies. Smaller reporting companies are not required to provide this quantification under current Item 402(q) in annual meeting proxy statements, and would not be required to do so under our proposals unless they seek to qualify for the exception for a shareholder advisory vote on golden parachute compensation in a later merger transaction. Even though our proposed rules would impose additional disclosure requirements relating to the shareholder advisory votes required by Section 14A, we preliminarily do not believe our proposed rules would impose a significant additional cost or disproportionate burden upon smaller reporting companies. As noted above, smaller reporting companies tend to have less complex compensation arrangements[134] so the proposed additional disclosures should not add significantly to their disclosure burden. As a result, we do not believe our proposed rules would place a disproportionate burden on smaller reporting companies.

Request for Comment

(52) Should we fully, partially, or conditionally exempt smaller reporting companies or some other category of smaller companies from some or all of the requirements of Section 14A? Are the provisions of Section 14A unduly burdensome on small companies and if so, how are they unduly burdensome?

(53) Should we fully, partially, or conditionally exempt smaller reporting companies or some other category of smaller companies from any or all of our proposed rules? If so, which ones? Are any of our proposed rules unduly burdensome to smaller reporting companies and if so, how are they unduly burdensome?

(54) Are the golden parachute arrangements of smaller reporting companies relatively simple and straightforward compared to those of larger issuers? Would the disclosure of such arrangements required by proposed Item 402(t) impose an undue burden on smaller reporting companies?

(55) Should we clarify in an instruction to Rule 14a–21, as proposed, that smaller reporting companies are not required to include a CD&A in their proxy statements in order to comply with our proposed amendments?

(56) Are there any other steps that we should take to reduce the burden on smaller reporting companies?

F. Transition Matters

As noted above in Section I, Section 14A(a)(3) requires that both the initial shareholder vote on executive compensation and the initial vote on the frequency of votes on executive compensation be included in proxy statements relating to an issuer's first annual or other meeting of the shareholders occurring on or after January 21, 2011. Because Section 14A(a) applies to shareholder meetings taking place on or after January 21, 2011, any proxy statements, whether in preliminary or definitive form, even if filed prior to this date, for meetings taking place on or after January 21, 2011, must include the separate resolutions for shareholders to approve executive compensation and the frequency of say-on-pay votes required by Section 14A(a) without regard to whether the Commission has adopted rules to implement Section 14A(a) by that time. Therefore, in order to facilitate compliance with the new statute, we are addressing certain first year transition issues.

Rule 14a–6 currently requires the filing of a preliminary proxy statement at least ten days before the proxy is sent or mailed to shareholders unless the meeting relates only to the matters specified by Rule 14a–6(a). Until we take final action to implement Exchange Act Section 14A, we will not object if issuers do not file proxy material in preliminary form if the only matters that would require a filing in preliminary form are the say-on-pay vote and frequency of say-on-pay vote required by Section 14A(a).

Rule 14a–4 under the Exchange Act currently provides that persons solicited are to be afforded the choice between approval or disapproval of, or abstention with respect to, each matter to be voted on, other than elections of directors. Exchange Act Section 14A(a)(2) requires a "separate resolution subject to shareholder vote to determine whether [the say-on-pay] votes * * * will occur every 1, 2, or 3 years."[135] Until we take final action to implement Exchange Act Section 14A, we will not object if the form of proxy for a shareholder vote on the frequency of say-on-pay votes provides means whereby the person solicited is afforded an opportunity to specify by boxes a choice among 1, 2 or 3 years, or abstain. In addition, we understand that some proxy service providers may have difficulty in the short term in programming their systems to enable shareholders to vote among four choices and that their systems are currently set up to register at most three votes—for, against, abstain. If proxy service providers are not able to reprogram their

[132] "Smaller reporting company" is defined in Rule 12b–2 under the Exchange Act.

[133] *See Executive Compensation and Related Person Disclosure,* Release No. 33–8732A (Aug. 29, 2006) [71 FR 53158] (hereinafter, the "2006 Executive Compensation Release") at Section II.D.1. The scaled compensation disclosure requirements for smaller reporting companies are set forth in Item 402(1) [17 CFR 229.402(l)] through (r) [17 CFR 229.402(r)] of Regulation S–K.

[134] In adopting executive compensation disclosure requirements applicable to smaller reporting companies, we have recognized that the executive compensation arrangements of these issuers typically are less complex than those of other public companies. *See* 2006 Executive Compensation Release, *supra* note 133, at Section II.D.1.

[135] Exchange Act Section 14A(a)(2).

systems to enable shareholders to vote among four choices in time for the shareholder votes required by Section 14A(a)(2), until we take final action to implement Exchange Act Section 14A, we will not object if the form of proxy for a shareholder vote on the frequency of say-on-pay votes provides means whereby the person solicited is afforded an opportunity to specify by boxes a choice among 1, 2 or 3 years, and proxies are not voted on the frequency of say-on-pay votes matter in the event the person solicited does not select a choice among 1, 2 or 3 years.[136]

Finally, issuers with outstanding indebtedness under the TARP are already required to conduct an annual shareholder advisory vote on executive compensation until the issuer has repaid all outstanding indebtedness under the TARP. Because such issuers are subject to an annual requirement to provide a say-on-pay vote, a requirement to provide a vote on the frequency of such votes would impose unnecessary burdens on issuers and shareholders. Until we take final action to implement Exchange Act Section 14A, we will not object if an issuer with outstanding indebtedness under the TARP does not include a resolution for a shareholder advisory vote on the frequency of say-on-pay votes in its proxy statement for its annual meeting, provided it fully complies with its say-on-pay voting obligations under EESA Section 111(e).

G. General Request for Comment

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

III. Paperwork Reduction Act

A. Background

The proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[137] We are submitting the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[138] The title for the collection of information is:

(1) "Regulation 14A and Schedule 14A" (OMB Control No. 3235–0059);

(2) "Regulation 14C and Schedule 14C" (OMB Control No. 3235–0057);

(3) "Form 10–K" (OMB Control No. 3235–0063);

(4) "Form 10–Q" (OMB Control No. 3235–0070);

(5) "Form 10" (OMB Control No. 3235–0064);

(6) "Regulation S–K" (OMB Control No. 3235–0071);[139]

(7) "Schedule 14D–9" (OMB Control No. 3235–0102);

(8) "Schedule 13E–3" (OMB Control No. 3235–0007);

(9) "Schedule TO" (OMB Control No. 3235–0515);

(10) "Form S–1" (OMB Control No. 3235–0065);

(11) "Form S–4" (OMB Control No. 3235–0324);

(12) "Form S–11" (OMB Control No. 3235–0067);

(13) "Form F–4" (OMB Control No. 3235–0325); and

(14) "Form N–2" (OMB Control No. 3235–0026).

The regulations, schedules, and forms were adopted under the Securities Act and the Exchange Act, except for Form N–2, which we adopted pursuant to the Securities Act and the Investment Company Act. The regulations, forms, and schedules set forth the disclosure requirements for periodic reports, registration statements and proxy and information statements filed by companies to help shareholders make informed voting decisions. The hours and costs associated with preparing, filing and sending the form or schedule constitute reporting and cost burdens imposed by each collection of information. 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.

As discussed in more detail above, we are proposing new Rule 14a–21 under the Exchange Act and new Item 24 of Schedule 14A. Proposed Rule 14a–21 would implement the requirements of Section 14A of the Exchange Act to provide separate shareholder advisory votes on executive compensation, the frequency of shareholder votes on executive compensation, and, in connection with merger and similar transactions, golden parachute compensation arrangements. New Item 24 of Schedule 14A would require disclosure in proxy statements with respect to each of these shareholder votes. New Rule 14a–21 and new Item 24 of Schedule 14A would increase existing disclosure burdens for proxy statements by requiring:

- New disclosure about the requirement to provide separate shareholder votes on executive compensation, the frequency of shareholder votes on executive compensation and golden parachute compensation arrangements in connection with merger transactions; and
- New disclosure of the general effect of the shareholder advisory votes, such as whether such votes are non-binding.

As discussed in more detail above, we are also proposing amendments to Item 402(b) of Regulation S–K. The proposed amendments to Item 402(b) of Regulation S–K may increase existing disclosure burdens for proxy statements by requiring:

- New disclosure of whether, and if so, how the issuer has considered the results of previous shareholder votes on executive compensation required by Section 14A of the Exchange Act in determining compensation policies and decisions, and if so, how that consideration has affected the issuer's compensation decisions and policies.

As discussed in more detail above, we are also proposing new Item 402(t) of Regulation S–K and the proposed amendments to Item 1011(b) of Regulation M–A, Item 5 of Schedule 14A, Item 15 of Schedule 13E–3 and Item 8 of Schedule 14D–9. These proposed amendments would increase existing disclosure burdens for proxy statements, registration statements on Form S–4 and F–4, tender offer schedules and going private schedules by requiring:

- New tabular and narrative disclosure of understandings and agreements of named executive officers with acquiring and target companies in connection with merger, acquisition, tender offer and Rule 13e–3 going-private transactions, and disclosure of the aggregate total of all compensation that may be paid or become payable to each named executive officer.

As discussed in more detail above, we are proposing to amend Forms 10–K and 10–Q. The proposed amendments to Form 10–K and Form 10–Q would increase existing disclosure burdens for

[136] *See Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally,* Release No. 34–16356 (Nov. 21, 1979) [44 FR 68770].

[137] 44 U.S.C. 3501 *et seq.*

[138] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[139] The paperwork burden from Regulation S–K is imposed through the forms that are subject to the disclosures in Regulation S–K and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burdens imposed by Regulation S–K to be a total of one hour.

annual reports on Form 10–K and quarterly reports on Form 10–Q by requiring:

• New disclosure of the issuer's decision of how frequently to provide a separate shareholder vote on executive compensation in light of a shareholder advisory vote on the frequency of shareholder votes on executive compensation conducted pursuant to Section 14A(a)(2) of the Exchange Act.

Together, new Rule 14a–21 and new Item 24 of Schedule 14A and the proposed amendments to Item 5 of Schedule 14A and the proposed amendments to Item 402 of Regulation S–K, Item 1011 of Regulation M–A, Item 15 of Schedule 13E–3 and Item 8 of Schedule 14D–9 would implement and supplement the requirements under Section 14A of the Exchange Act and also would provide additional meaningful disclosure regarding golden parachute arrangements and regarding issuers' consideration of the shareholder votes and the impact of such votes on issuers' compensation policies and decisions. We believe these changes may result in more meaningful disclosure for investors making voting or investment decisions.

We are proposing an amendment to Rule 14a–4, which relates to the form of proxy that issuers are required to include with their proxy materials, to require that issuers present four choices to their shareholders in connection with the advisory vote on frequency. We are also proposing an amendment to Rule 14a–6 to add the shareholder votes on executive compensation and the frequency of shareholder votes on executive compensation required by Section 14A(a) to the list of items that do not trigger the filing of a preliminary proxy statement. In addition, we are proposing an amendment to Rule 14a–8, adding a note to Rule 14a–8(i)(10) to clarify the status of shareholder proposals relating to the approval of executive compensation or the frequency of shareholder votes approving executive compensation. Finally, we are proposing conforming amendments to Item 402(a) and Item 402(m) of Regulation S–K, clarifying that the disclosure required by proposed Item 402(t) includes information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees. Pursuant to these conforming amendments, issuers may continue to omit such information in connection with disclosure required by other portions of Item 402 of Regulation S–K. The proposed amendments to Rule 14a–4, Rule 14a–6, Rule 14a–8 under the Exchange Act and Item 402(a) and Item 402(m) of Regulation S–K would not increase any existing disclosure burden. We believe these proposals, if adopted, would merely clarify existing and new statutory requirements or reduce burdens otherwise arising from our proposals. As a result, these amendments would not affect any existing disclosure burden.

Compliance with the proposed amendments by affected U.S. issuers would be mandatory. Responses to the information collections would not be kept confidential and there would be no mandatory retention period for the information disclosed.

B. Burden and Cost Estimates Related to the Proposed Amendments

We anticipate that the proposed disclosure amendments would increase the burdens and costs for companies that would be subject to the proposed amendments. New Section 14A of the Exchange Act, as created by Section 951 of the Act, has already increased the burdens and costs for issuers by requiring separate shareholder votes on executive compensation and the frequency of shareholder votes on executive compensation. Section 14A also requires additional disclosure of golden parachute arrangements in proxy solicitations to approve merger transactions and a separate shareholder vote to approve such arrangements in certain circumstances. Our proposed amendments address the Act's requirements in the context of disclosure under the federal proxy rules, Regulation S–K and related forms and schedules, thereby creating only an incremental increase in the burdens and costs for such issuers. The proposed amendments will specify how issuers are to comply with Section 14A of the Exchange Act and require new disclosure with respect to comparable transactions.

For purposes of the PRA, we estimate the annual incremental paperwork burden for all companies to prepare the disclosure that would be required under our proposals to be approximately 25,192 hours of company personnel time and a cost of approximately $8,141,200 for the services of outside professionals. These estimates include the time and the cost of data gathering systems and disclosure controls and procedures, the time and cost of preparing and reviewing disclosure by in-house and outside counsel and executive officers, and the time and cost of filing documents and retaining records. In deriving our estimates, we recognize that the burdens will likely vary among individual companies based on a number of factors, including the size and complexity of their organizations, and the nature of their operations. We believe that some companies will experience costs in excess of this average in the first year of compliance with proposals and some companies may experience less than the average costs.

We derived the above estimates by estimating the average number of hours it would take an issuer to prepare and review the proposed disclosure requirements. These estimates represent the average burden for all companies, both large and small. Our estimates have been adjusted to reflect the fact that some of the proposed amendments would be required in some but not all of the above listed documents depending upon the circumstances, and would not apply to all companies.

With respect to reporting companies, the disclosure required by new Item 402(t) of Regulation S–K would be required in merger proxy and information statements, Forms S–4 and F–4, Schedule 13E–3 and certain tender offer documents and solicitation/recommendation statements. As proposed, the disclosure required by new Item 402(t) may also be included in annual meeting proxy statements on a voluntary basis.

The disclosure required by our amendments to Item 402(b) of Regulation S–K would be required in proxy and information statements as well as Forms 10, 10–K, S–1, S–4, S–11, and N–2. The proposed amendments to CD&A would not be applicable to smaller reporting companies because under current CD&A reporting requirements these companies are not required to provide CD&A in their Commission filings. Based on the number of proxy filings that were received in the 2009 fiscal year, we estimate that approximately 1,200 domestic companies are smaller reporting companies that have a public float of less than $75 million.

Our annual burden estimates are also based on other assumptions. First, we assumed that the burden hours of the proposed amendments would be comparable to the burden hours related to similar disclosure requirements under current reporting requirements, such as the disclosure required by Item 402(j). Second, we assumed that substantially all of the burdens associated with the proposed amendments to Rule 14a–21 and Item 24 would be associated with Schedule 14A as this would be the primary

disclosure document in which these items would be prepared and presented. In the case of our proposed amendments to Item 402(b) and Item 402(t) of Regulation S–K, we have assumed the burdens associated with the proposed amendments would be associated with various disclosure documents as these items will be included in a number of forms and statements. For each reporting company, we estimate that the proposed amendments would impose on average the following incremental burden hours:

- 2 hours for the proposed amendments to CD&A
- 1 hour for the proposed amendments to Item 24 of Schedule 14A
- 1 hour for the proposed amendments to Form 10–K
- 1 hour for the proposed amendments to Form 10–Q
- 20 hours for new Item 402(t) of Regulation S–K

1. Annual Meeting Proxy Statements

For purposes of the PRA, in the case of reporting companies, we estimate the annual incremental paperwork burden for proxy statements under the proposed amendments would be approximately 1 hour per form for companies that are smaller reporting companies, and 3 hours per form for companies that are non-accelerated filers (and not smaller reporting companies), accelerated filers, or large accelerated filers.[140] The estimated burden is smaller for smaller reporting companies as such issuers are not required to include a CD&A.

2. Exchange Act Periodic Reports

For purposes of the PRA, we estimate the annual incremental paperwork burden for Form 10–K under the proposed amendments would be approximately 1 hour per form.[141] We estimate the annual incremental paperwork burden for Form 10–Q under the proposed amendments would be approximately 1 hour per form. Our estimates below also account for the fact that each issuer would only be required to include additional disclosure in either the Form 10–K or one of the quarterly Form 10–Q filings each year.

3. Securities Act Registration Statements and Exchange Act Registration Statements

For purposes of the PRA, in the case of reporting companies, we estimate the annual incremental paperwork burden for Securities Act and Exchange Act registration statements under the proposed amendments would be approximately 2 hours per form, which represents the additional burden associated with our proposed amendments to CD&A. In making our estimates, we note that the additional burdens in CD&A would only apply to issuers who have conducted a prior shareholder advisory vote and would not apply, for example, to issuers making an initial filing on Form S–1 or Form S–11.

4. Merger Proxies, Tender Offer Documents and Schedule 13E–3

For purposes of the PRA, in the case of reporting companies, we estimate the annual incremental paperwork burden for merger proxy statements, registration statements on Form S–4 and F–4 to be 21 hours per form, as these forms would be required to include additional disclosures under Item 24 of Schedule 14A and Item 402(t) of Regulation S–K. We estimate the annual incremental paperwork burden for merger information statements, tender offer documents and tender offer solicitation/recommendation statements and Schedules 13E–3 to be 20 hours per form, as these forms would not be required to include additional disclosure under Item 24 of Schedule 14A.

The tables below illustrate the total annual compliance burden of the collection of information in hours and in cost under the proposed amendments for annual reports; quarterly reports; proxy and information statements; Form 10; registration statements on Forms S–1, S–4, F–4, S–11, and N–2; and Regulation S–K.[142] The burden estimates were calculated by multiplying the estimated number of responses by the estimated average amount of time it would take an issuer to prepare and review the proposed disclosure requirements. For the Exchange Act reports on Form 10–K and Form 10–Q, and the proxy statements we estimate that 75% of the burden of preparation is carried by the company internally and that 25% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour. For the registration statements on Forms S–1, S–4, F–4, S–11, and N–2, and the Exchange Act registration statement on Form 10, we estimate that 25% of the burden of preparation is carried by the issuer internally and that 75% of the burden of preparation is carried by outside professionals retained by the issuer at an average cost of $400 per hour. There is no change to the estimated burden of the collections of information under Regulation S–K because the burdens that this regulation imposes are reflected in our revised estimated burden for the forms. The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the issuer internally is reflected in hours.

TABLE 1—INCREMENTAL PAPERWORK BURDEN UNDER THE PROPOSED AMENDMENTS FOR ANNUAL REPORTS; QUARTERLY REPORTS; PROXY AND INFORMATION STATEMENTS

	Number of responses[143] (A)	Incremental burden hours/form (B)	Total incremental burden hours (C)=(A)*(B)	75% Company (D)=(C)*0.75	25% Professional (E)=(C)*0.25	Professional costs (F)=(E)*$400
10–K[144]	1,803	1	1,803	1,352	451	$180,400
10–Q	5,409	1	5,409	4,057	1,352	540,800
Form 10[145]	9	2	18	4	14	5,600
DEF 14A[146]	7,212					
Accel. Filers	6,112	3	18,336	13,752	4,584	1,833,600
SRC Filers	1,100	1	1,100	825	275	110,000

[140] Our estimate for annual proxy statements is based upon an estimated burden over a six-year period during which the shareholder advisory votes required by Section 14A(a) would not occur annually. We used a six-year period because issuers will conduct at least two shareholder advisory votes on executive compensation and at least one shareholder advisory vote on the frequency of such votes in this time period. We then estimated an average annual burden based on the average burden over the six-year period.

[141] We have assumed that the annual incremental paperwork burden under the proposed amendments to Item 402(b) of Regulation S–K would be included in the annual meeting proxy statement so that the annual incremental paperwork burden for the Form 10–K relates only to the proposed amendments to Item 9A.

[142] Figures in both tables have been rounded to the nearest whole number.

TABLE 1—INCREMENTAL PAPERWORK BURDEN UNDER THE PROPOSED AMENDMENTS FOR ANNUAL REPORTS; QUARTERLY REPORTS; PROXY AND INFORMATION STATEMENTS—Continued

	Number of responses[143] (A)	Incremental burden hours/form (B)	Total incremental burden hours (C)=(A)*(B)	75% Company (D)=(C)*0.75	25% Professional (E)=(C)*0.25	Professional costs (F)=(E)*$400
DEF 14C	582	.....	.....	.....	.....	.....
Accel. Filers	482	2	964	723	241	96,400
SRC Filers	100	0	0	0	0	$0
Reg. S–K	N/A	N/A	N/A	N/A	N/A	N/A
Total	.....	.....	27,630	20,713	.....	2,766,800

TABLE 2—INCREMENTAL PAPERWORK BURDEN UNDER THE PROPOSED AMENDMENTS FOR REGISTRATION STATEMENTS, MERGER PROXY AND INFORMATION STATEMENTS, TENDER OFFER DOCUMENTS AND SCHEDULES 13E–3

	Number of responses[147] (A)	Incremental burden hours/form (B)	Total incremental burden hours (C)=(A)*(B)	25% Company (D)=(C)*0.25	75% Professional (E)=(C)*0.75	Professional costs (F)=(E)*$400
Form S–1[148]	485	2	970	243	727	$290,800
Form S–11	22	2	44	11	33	13,200
Form S–4[149]	499	21	10,479	2,620	7,859	3,143,600
Form F–4	27	21	567	142	425	170,000
DEFM 14A	137	21	2,877	719	2,158	863,200
DEFM 14C[150]	14	20	280	70	210	84,000
Schedule TO–T[151]	50	20	1,000	250	750	300,000
Schedule 14D–9	77	20	1,540	385	1,155	462,000
Schedule 13E–3	5	20	100	25	75	30,000
Form N–2[152]	29	2	58	14	44	17,600
Reg. S–K	N/A	N/A	N/A	N/A	N/A	N/A
Total	.....	.....	17,915	4,479	.....	5,374,400

C. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
- Evaluate the accuracy of our estimate of the burden of the proposed collections of information;
- Determine whether there are ways to enhance the quality, utility, and

[143] The number of responses reflected in the table equals the actual number of forms and schedules filed with the Commission during the 2009 calendar year, adjusted to reflect the estimated number of forms and schedules that would be required to include additional disclosure under our rules as proposed. As explained below in notes 144 through 146, we have reduced the number of estimated filings to reflect that the additional disclosure requirements as proposed would only apply to a smaller number of the forms filed.

[144] We calculated the burden hours for Forms 10–K and 10–Q based on the number of proxy statements filed with the Commission during the 2009 calendar year. We assumed that there would be an aggregate equal number of Forms 10–K and 10–Q to disclose the issuer's plans with respect to the frequency vote as the number of proxy statements and further assumed that 75% of issuers would disclose this information on Form 10–Q and 25% would disclose this information on Form 10–K.

[145] The burden allocation for Form 10 uses a 25% internal to 75% outside professional allocation. We have reduced the number of estimated Form 10 filings to reflect that approximately 95% of these forms would not require additional disclosure, as new disclosure required under Item 402 as proposed would only relate to issuers in spin-off transactions that are disclosing compensation of public parent companies that have conducted a prior shareholder vote on executive compensation.

[146] The estimates for Schedule 14A and Schedule 14C are separated to reflect our estimate of the burden hours and costs related to the proposed amendments to CD&A which would be applicable to companies that are large accelerated filers, accelerated filers, and non-accelerated filers (that are not smaller reporting companies), but would not be applicable to smaller reporting companies.

[147] The number of responses reflected in the table equals the actual number of forms and schedules filed with the Commission during the 2009 calendar year, adjusted to reflect the estimated number of forms and schedules that would be required to include additional disclosure under our rules as proposed. As explained below in notes 148 through 152, we have reduced the number of estimated filings to reflect that the additional disclosure requirements as proposed would only apply to a smaller number of the forms filed.

[148] We have reduced the number of estimated Form S–1 and Form S–11 filings to reflect that approximately 60% of these forms would not require additional disclosure, as new disclosure required under Item 402 as proposed would only relate to issuers who are already public companies and have conducted a prior shareholder vote on executive compensation.

[149] We have reduced the number of estimated Form S–4 and Form F–4 filings to reflect an approximate 75% of these forms which will not relate to mergers or similar transactions but will be other transactions (*e.g.,* holding company formations and financings) to which the amended rules would not apply.

[150] We have reduced the number of estimated DEFM14C filings to reflect an approximate 15% of these forms, which will not relate to merger transactions but will involve dissolutions and similar transactions.

[151] We have reduced the number of estimated Schedules TO–T, 14D–9 and 13E–3 to reflect the approximate number of these filings to which the proposed rules would apply, based on the total number of filings from calendar year 2009. We have substantially reduced the number of Schedules 13E–3 to avoid double counting, as the majority of these forms are filed in conjunction with a DEF14A. In addition, we have reduced the number of Schedule TO–T filings as we anticipate that some bidders would incorporate by reference disclosure in Schedule 14D–9 and not incur an additional disclosure burden.

[152] We have reduced the number of estimated Form N–2 filings to reflect that 29 filings were made by business development companies during calendar year 2009, because only business development companies would be subject to the proposed disclosure required under Item 402 on Form N–2.

clarity of the information to be collected;

• Evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and

• Evaluate whether the proposed amendments will have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503 and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–31–10. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7–31–10 and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0213. Because OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if OMB receives them within 30 days of publication.

IV. Cost-Benefit Analysis

A. Introduction

We are proposing rulemaking to implement and supplement the provisions of the Dodd-Frank Act relating to shareholder approval of executive compensation and disclosure and shareholder approval of golden parachute compensation arrangements. Section 951 of the Dodd-Frank Act amends the Exchange Act by adding new Section 14A. New Section 14A(a)(1) requires companies to conduct a separate shareholder advisory vote to approve the compensation of executives. Section 14A(a)(2) requires companies to conduct a separate shareholder advisory vote to determine how often an issuer will conduct a shareholder advisory vote on executive compensation. In addition, Section 14A(b) requires companies soliciting votes to approve merger or acquisition transactions to provide disclosure of certain "golden parachute" compensation arrangements and, when such arrangements have not been included in the shareholder advisory vote on executive compensation, to conduct a separate shareholder advisory vote to approve the golden parachute compensation arrangements.[153]

We are proposing new Rule 14a–21 to implement Section 14A(a)(1) by providing separate shareholder advisory votes to approve executive compensation, to approve the frequency of such votes on executive compensation, and to approve golden parachute compensation arrangements at shareholder meetings at which shareholders are asked to approve merger transactions. In addition to the votes required by Section 14A, we are also proposing a new Item 24 of Schedule 14A to elicit disclosure, similar to our approach with respect to TARP companies providing shareholder advisory votes on executive compensation, regarding the effect of the shareholder votes required by Rule 14a–21, including whether the votes are non-binding.

Our proposed new Item 402(t) of Regulation S–K implements and supplements the statutory requirement in Section 14A(b)(1) to promulgate rules for the clear and simple disclosure of golden parachute compensation arrangements that the soliciting person has with its named executive officers (if the acquiring issuer is not the soliciting person) or that it has with the named executive officers of the acquiring issuer that relate to the merger transaction. In addition, Item 402(t), as proposed, would supplement the requirements of Section 14A(b)(1) by requiring disclosure of golden parachute compensation arrangements between the acquiring company and the named executive officers of the target company if the target company is the soliciting person.

Our proposed amendments to Item 5 of Schedule 14A would require disclosure regarding golden parachute compensation arrangements in accordance with Section 14A(b)(1) of the Exchange Act. We are also proposing that additional disclosure regarding golden parachute compensation arrangements be required in connection with other transactions. We have proposed amendments to Regulation M–A, Schedule 14D–9 and Schedule 13E–3 that would require additional disclosure regarding golden parachute compensation arrangements in connection with Rule 13e–3 going-private transactions and tender offers.

We are also proposing amendments to Item 402 of Regulation S–K to require additional Compensation Discussion and Analysis disclosure about the issuer's response to the shareholder vote on executive compensation and to provide additional disclosure about golden parachute compensation arrangements. We are also proposing amendments to Form 10–K and Form 10–Q to require disclosure regarding the issuer's action as a result of the shareholder advisory vote on the frequency of shareholder votes on executive compensation.

We are proposing an amendment to Rule 14a–4, which relates to the form of proxy that issuers are required to include with their proxy materials, to require that issuers present four choices to their shareholders in connection with the advisory vote on frequency. We are also proposing an amendment to Rule 14a–6 to add the shareholder votes on executive compensation and the frequency of shareholder votes on executive compensation required by Section 14A(a) to the list of items that do not trigger the filing of a preliminary proxy statement. In addition, we are proposing an amendment to Rule 14a–8, adding a note to Rule 14a–8(i)(10) to clarify the status of shareholder proposals relating to the approval of executive compensation or the frequency of shareholder votes approving executive compensation.

Our proposed rulemaking, which implements the relevant provisions of the Dodd-Frank Act, will directly affect most public companies as well as potential private acquirers. Our proposed rules implement the shareholder advisory vote requirements of Section 14A, promulgate rules for additional disclosure in accordance with Section 14A(b)(1), and provide for additional disclosure, not required by Section 14A, relating to the shareholder advisory votes. In addition, our proposed rules expand the required disclosure of Section 14A(b)(1) to require disclosure of arrangements between additional parties, namely agreements between the acquiring company and named executive officers of the target company, and require disclosure with respect to additional transactions, including certain tender offers and Rule 13e–3 going-private transactions. As discussed below, the enhanced disclosure required by our proposed rulemaking regarding the shareholder approval of executive

[153] According to the Dodd-Frank Wall Street Reform and Consumer Protection Act Conference Report at page 872, Section 951 is "designed to address shareholder rights and executive compensation practices."

compensation and companies' responses to shareholder votes would provide shareholders and investors with timely information about such votes that is consistent with the information required to be provided under the Act and that would enhance the operation of our rules pursuant to the Act. The enhanced disclosure regarding golden parachute compensation would provide a more complete picture of the compensation to shareholders as they consider voting and investment decisions relating to mergers and similar transactions.

B. Benefits

The proposed rulemaking is intended to implement and supplement the requirements of Section 14A of the Exchange Act as set forth in Section 951 of the Dodd-Frank Act. The proposed amendments also provide for enhanced disclosure relating to the shareholder advisory votes required by Exchange Act Section 14A and how an issuer's consideration of such votes affects its compensation policies and decisions. Our proposed rules would not only implement the shareholder advisory votes required by Section 14A, but would also require additional disclosure addressing how issuers have considered these required shareholder advisory votes, and if so, how such votes have affected the companies' compensation policies and decisions.

We believe the enhanced disclosures about the results of the shareholder advisory vote on the frequency of the approval of executive compensation would provide timely information to shareholders about the issuer's plans for future shareholder advisory votes. Our proposed enhanced disclosure and proposed amendments to the CD&A requirements in Item 402(b) of Regulation S–K about an issuer's consideration of the results of a shareholder vote to approve executive compensation and how that consideration has affected its compensation policies and decisions would benefit shareholders and other market participants by providing potentially useful information for voting and investment decisions.

Our proposed rules would also specify how the shareholder advisory votes required by Section 14A(a) relate to existing shareholder advisory votes required for issuers with outstanding indebtedness under TARP. In our view, because of the similarity of the separate annual say-on-pay vote requirements, a company with indebtedness under TARP need only provide one annual shareholder advisory vote. As we have discussed above, we have indicated that the annual shareholder advisory vote under EESA would fulfill the requirements for the shareholder vote pursuant to Section 14A(a)(1) and Rule 14a–21(a). We believe this benefits such companies by reducing confusion and burdens of the two requirements by specifying that two separate annual shareholder votes are not required. In addition, because issuers with indebtedness under TARP must conduct an annual shareholder advisory vote on executive compensation, we have proposed an exemption from the frequency vote required by Section 14A(a)(2) and Rule 14a–21(b) until the issuer repays all indebtedness under TARP. We believe this benefits such issuers and their shareholders by avoiding the cost and confusion of conducting a vote on the frequency of a shareholder advisory vote when the frequency of such a vote is mandated by another requirement.

In our proposed rules, we also provide guidance for issuers and shareholders regarding the interaction of the shareholder advisory votes required by Section 14A and shareholder proposals under Rule 14a–8 by proposing a note to Rule 14a–8(i)(10). The proposed note would reduce potential confusion among shareholders and issuers with respect to what may be excluded under our rules by providing for the exclusion of certain shareholder proposals that the company has substantially implemented, while preserving the ability of shareholders to make proposals relating to executive compensation.

New proposed Item 402(t) of Regulation S–K would require narrative and tabular disclosure of golden parachute compensation arrangements in the clear and simple form required by Section 14A(b)(1) of the Exchange Act. Because Section 14A(b)(1) requires that disclosure not only be in a clear and simple form, but also that it include an aggregate total of all golden parachute compensation for each named executive officer, we have proposed Item 402(t) to require that such disclosure appear in a table. The tabular format is designed to provide investors with clear disclosure about golden parachute compensation that is comparable across different issuers and transactions and make the information more accessible. In addition to the tabular disclosure, we are also proposing narrative disclosure to provide additional context and provide disclosure not suitable to the tabular format. Our approach is similar to the existing approach to executive compensation disclosure in Item 402 of Regulation S–K and provides a focused manner in which to present and quantify golden parachute compensation. Narrative disclosure supplements the tables by providing additional context and discussion of the numbers presented in the table. We believe that the proposed combination of narrative and tabular disclosure would provide the clearest picture of the full scope of golden parachute compensation in the clear and simple format required by Section 14A(b)(1).

Because Section 14A(b)(1)'s disclosure requirements are limited to agreements or understandings between the person conducting the solicitation and any named executive officers of the issuer or any named executive officers of the acquiring issuer if the person conducting the solicitation is not the acquiring issuer, we have formulated proposed Item 402(t) to require disclosure, in addition to the disclosure mandated by Section 14A(b)(1), of agreements or understandings between the acquiring company and the named executive officers of the target company. As proposed, Item 402(t) would require disclosure of all golden parachute compensation relating to the merger among the target and acquiring companies and the named executive officers of each in order to cover the full scope of golden parachute compensation applicable to the transaction. By providing disclosure of the full scope of golden parachute compensation, we believe issuers would provide more detailed and comprehensive information to shareholders to consider when making their voting or investment decisions.

Likewise, additional disclosure on golden parachute compensation, without regard to whether the transaction is structured as a merger, a tender offer or a Rule 13e–3 going-private transaction that is not subject to Regulation 14A, would benefit shareholders and other market participants by allowing them to timely and more accurately assess the transaction and evaluate with greater acuity the golden parachute compensation that named executive officers could expect to receive and the related potential interests such officers might have in pursuing and/or supporting a change in control transaction. While our existing disclosure requirements include much of this disclosure, the specificity and narrative and tabular format of proposed Item 402(t) would allow for a clear presentation of the full scope of the information. Furthermore, by standardizing disclosure of golden parachute compensation arrangements across different transaction structures, our proposed rules would enable

shareholders to compare more easily such compensation among various types of change in control transactions and structures. In addition, our proposed rules would also enable the shareholders of the acquirer to timely and more accurately assess the cost of the acquisition transaction in proxy statements for which additional disclosure is required pursuant to Note A of Schedule 14A where acquirer shareholders do not vote on the merger transaction but vote to approve another proposal such as the issuance of shares or a stock split.

We have proposed such disclosure in both tabular and narrative formats, with disclosure of aggregate total compensation, in accordance with the requirement of Section 14A(b)(1) that such disclosure be in a clear and simple form. To the extent investors expect to see information about all of the economic benefits that may accrue to an executive in one location of the proxy statement (including golden parachute arrangements and other compensation, such as future employment contracts), the benefit of this disclosure may be limited since, as proposed, the information about other executive compensation that may be disclosed in proxy materials would not need to be included in the tabular format pursuant to Item 402(t) of Regulation S–K.

Our proposed rulemaking would also benefit issuers by specifying how they must comply with the requirements of Exchange Act Section 14A in the context of the federal proxy rules. The proposed rulemaking would eliminate uncertainty that may exist among issuers and other market participants, if we did not propose any rules, regarding what is necessary under the Commission's proxy rules when conducting a shareholder vote required under Exchange Act Section 14A. The proposed rules would specify how the statutory requirements operate in connection with the federal proxy rules and accordingly, we believe the proposed rulemaking would promote better compliance with the requirements of Exchange Act Section 14A and reduce the amount of management time and financial resources necessary to ensure that issuers comply with their obligations under both Exchange Act Section 14A and the federal proxy rules. This would benefit issuers, their shareholders and other market participants.

C. Costs

We recognize that the proposed amendments would impose new disclosure requirements on companies and are likely to result in costs related to information collection. The proposed rulemaking that requires the disclosure of executive compensation in a tabular format is likely to result in certain costs. We expect these costs, however, to be limited since much of the compensation required to be disclosed under our proposed rulemaking is currently required to be disclosed in narrative format in the existing disclosure regime.

We have proposed new Item 402(t) to implement the requirement of Section 14A(b)(1) of the Exchange Act that we promulgate rules for disclosure of golden parachute compensation arrangements in a clear and simple form, which we believe is best provided in both narrative and tabular format. In addition to the required disclosure under Section 14A(b)(1), we have also proposed expanding the disclosure to cover agreements between the acquiring company and the named executive officers of a target company in a merger or similar transaction. Though this additional disclosure would result in certain additional costs for issuers preparing a merger proxy, we believe that the additional disclosure is appropriate in order to provide shareholders information about the full scope of golden parachute compensation applicable to the transaction. There may also be certain indirect costs to issuers and shareholders as a result of our proposed rules, as the additional disclosure of golden parachute compensation may result in increased transactional expenses in the form of additional advisers and consultants, increased time to prepare disclosure documents, and increased time and expense to negotiate compensation arrangements.

Furthermore, companies engaging in or subject to a third-party tender offer or Rule 13e–3 going-private transaction may face increased costs because of the required disclosure of golden parachute compensation arrangements, including the required table and aggregate totals, under the proposed rulemaking. In addition, companies soliciting proxies or consents for transactions for which additional disclosure is required pursuant to Note A of Schedule 14A may face increased costs as well due to the additional disclosure requirements of Item 5 of Schedule 14A. We have proposed these disclosure requirements that go beyond the requirements of Section 14A(b)(1) because we believe the proposed rules would reduce the regulatory disparity that might otherwise result from treating such transactions differently from mergers. As noted above, there may also be additional indirect costs relating to such increased disclosure, as well as costs associated with obtaining compensation information from the other parties involved in a transaction in order to fulfill the issuer's disclosure obligations.

The expanded Compensation Discussion and Analysis disclosure under the proposed rulemaking may also result in costs associated with drafting disclosure that addresses whether, and if so, how the results of a shareholder vote on executive compensation were considered in determining the issuer's compensation policies and decisions and any resultant effect on those compensation policies and decisions. Similarly, the proposed revisions to the periodic reporting requirements on Forms 10–K and 10–Q may result in costs associated with assessing the results of a shareholder vote on the frequency of shareholder votes to approve executive compensation and drafting the additional disclosure regarding the company's plans to conduct votes in the future. Some of these costs could include the cost of hiring additional advisors, such as attorneys, to assist in the analysis and drafting.

We believe that these costs would not be unduly burdensome given that most of the disclosure is covered by our existing disclosure requirements, even though we are proposing that such disclosure be included in both narrative and tabular format. In addition to the existing narrative requirements, we are proposing tabular disclosure with an aggregate total and no *de minimis* threshold for perquisites. We expect that there will be incremental costs associated with drafting the additional disclosure, but that much of the information would be readily obtainable by the parties given existing disclosure requirements and as part of the due diligence process prior to drafting the transaction documents.

In addition to the direct costs associated with the required disclosure, the proposed rule might create additional indirect costs for private companies that may be engaged in takeovers of public companies. We do not expect, however, the specific and detailed disclosure and the shareholder advisory vote regarding golden parachutes to diminish the number of takeover transactions.

Our proposed note to Rule 14a–8(i)(10) may also impose certain costs on shareholders as our proposal would permit issuers to exclude certain shareholder proposals that would otherwise not be excludable under our rules. In addition, our proposals may impose certain indirect costs on shareholders who might pursue alternative means to communicate their

positions regarding the frequency of say-on-pay votes.

For purposes of the PRA, we have estimated the collection of information burden and cost. However, we acknowledge that the PRA estimates do not reflect the full magnitude of the economic costs considered above. The estimates of total amount of time and resources spent in preparing are 25,202 labor hours and $8,142,000 costs. Of these, 15,300 labor hours and $2,040,000 are estimated for annual meeting proxy and information statements, 5,409 labor hours and $721,200 are estimated for periodic reports, 272 labor hours and $327,200 for Securities Act registration statements (excluding Forms S–4 and F–4), Exchange Act registration statements, and Investment Company Act registration statements, and 4,211 labor hours and $5,052,800 for merger proxies and information statements, registration statements on Forms S–4 and F–4, tender offer statements and Schedules 13E–3 for Rule 13e–3 transactions that are not otherwise subject to Regulation 14A.

D. Request for Comment

We request data to quantify the costs and the value of the benefits described above. We seek estimates of these costs and benefits, as well as any costs and benefits not already defined, that may result from the adoption of these proposed amendments. We also request qualitative feedback on the nature of the benefits and costs described above and any benefits and costs we may have overlooked.

V. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or "SBREFA," [154] we solicit data to determine whether the proposals constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on the potential impact of the proposed amendments on the U.S. economy on an annual basis, any potential increase in costs or prices for consumers or individual industries, and any potential effect on competition, investment or innovation. Commentators are requested to provide empirical data and other factual support for their views if possible.

VI. Consideration of Impact on the Economy, Burden on Competition, and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act [155] also requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Section 2(b) [156] of the Securities Act and Section 3(f) [157] of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider whether the action will promote efficiency, competition, and capital formation.

Our proposed amendments would implement the Section 14A requirement for shareholder advisory votes to approve executive compensation, the frequency of such votes, and golden parachute compensation arrangements in connection with merger and similar transactions. We have proposed certain additional disclosure requirements to provide investors with additional information about these required votes and to apply the required disclosure from Section 14A(b)(1) to certain other agreements and transaction structures. We do not believe that the additional disclosure we have proposed in our rulemaking would impose a burden on competition.

The proposed amendments would not only implement the requirements of Section 14A of the Exchange Act, but would also help ensure that shareholders receive disclosure regarding the required votes, the nature of an issuer's responsibilities to hold the votes under Section 14A, and the issuer's consideration of the results of the votes and the effect of such consideration on the issuer's compensation policies and decisions. The proposed amendments would also enhance the transparency of a company's compensation policies. As discussed in greater detail above, we believe these benefits would be achieved without imposing any significant additional burdens on issuers. As a result, the proposed amendments should improve the ability of investors to make informed voting and investment decisions, and, therefore lead to increased efficiency and competitiveness of the U.S. capital markets.

We believe the proposed amendments would also benefit issuers and their shareholders by specifying how issuers must comply with the Dodd-Frank Act requirements, in the context of the federal proxy rules and our disclosure rules. By specifying how issuers must comply with the shareholder advisory votes and enhanced disclosure requirements from Section 14A, our proposed rules would allow for more consistent disclosure from all entities and clearer disclosure for shareholders. By reducing uncertainty, our proposed rules would permit issuers to more efficiently plan and draft disclosure documents, including annual meeting proxy statements, merger proxies, and tender offer and going-private documents.

Our rules as proposed would require enhanced disclosure of golden parachute compensation arrangements in merger and similar transactions, regardless of how such transactions are structured. We believe the uniformity of our proposed disclosure requirements across different types of transactions would help competition as issuers would be able to structure such transactions as they see fit, without the additional disclosure required by Section 14A(b) weighing in favor of a particular transaction structure. Though our proposed rules would create additional, incremental disclosure burdens, we believe that our proposed rules would enhance capital formation by allowing for clearer disclosure, more informed voting decisions by investors, and consistency across different types of transactions.

We request comment on whether the proposed amendments, if adopted, would impose a burden on competition. We also request comment on whether the proposed amendments, if adopted, would promote efficiency, competition, and capital formation. Commentators are requested to provide empirical data and other factual support for their view to the extent possible.

VII. Initial Regulatory Flexibility Act Analysis

This initial Regulatory Flexibility Analysis (IRFA) has been prepared in accordance with the Regulatory Flexibility Act. It relates to proposed revisions to the rules under the Exchange Act regarding the proxy

[154] 5 U.S.C. 603.

[155] 15 U.S.C. 78w(a).

[156] 15 U.S.C. 77b(b).

[157] 15 U.S.C. 78c(f).

solicitation process and related executive compensation disclosures.

A. Reasons for, and Objectives of, the Proposed Action

These proposals are designed to implement the requirements of Section 951 of the Dodd-Frank Act, enhance the disclosure relating to the shareholder advisory votes required by Exchange Act Section 14A, and specify how our proxy rules would apply to such votes. Specifically, the proposals amend the proxy rules to require shareholder advisory votes to approve executive compensation, to approve the frequency of shareholder votes to approve executive compensation, and to approve golden parachute compensation arrangements in connection with merger transactions. Our proposals also require enhanced disclosure regarding an issuer's consideration of these votes and the impact of such consideration on an issuer's compensation policies and decisions.

B. Legal Basis

We are proposing the amendments pursuant to Sections 13, 14(a), 14A, 23(a), and 36 of the Exchange Act.

C. Small Entities Subject to the Proposed Action

The proposed amendments would affect some companies that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction." [158] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule 157 [159] and Exchange Act Rule 0–10(a) [160] defines a company, other than an investment company, to be a "small business" or "small organization" if it has total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,210 companies, other than investment companies, that may be considered small entities. The proposed amendments would affect small entities that have a class of securities that are registered under Section 12 of the Exchange Act. An investment company, including a business development company,[161] is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[162] We believe that certain proposals would affect small entities that are business development companies who have a class of securities registered under Section 12 of the Exchange Act. We estimate that there are approximately 32 business development companies that may be considered small entities.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed disclosure amendments are designed to enhance the disclosure regarding the shareholder advisory votes required by Section 14A of the Exchange Act and provide additional disclosure about golden parachute compensation arrangements. These amendments would require small entities to provide:

- Disclosure of the shareholder advisory votes required by Section 14A and the effects of such votes, including whether they are non-binding;
- Disclosure of golden parachute arrangements described by Section 14A(b)(1) of the Exchange Act in merger proxies, and additional disclosure not required by Section 14A(b)(1) in connection with tender offers and going private transactions; and
- Disclosure of the issuer's decision in light of the shareholder vote on the frequency of shareholder votes to approve executive compensation required by Section 14A(a)(2) of the Exchange Act as to how frequently the issuer will include a shareholder vote on the compensation of executives.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe the proposed amendments would not duplicate, overlap, or conflict with other federal rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed disclosure amendments, we considered the following alternatives:

- Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities;
- Clarifying, consolidating, or simplifying compliance and reporting requirements under the rules for small entities;
- Use of performance rather than design standards; and
- Exempting small entities from all or part of the requirements.

Currently, small entities that are smaller reporting companies under Exchange Act Rule 12b–12 are subject to some different compliance or reporting requirements under Regulation S–K and the proposed amendments would not affect these requirements.[163] Under Regulation S–K, smaller reporting companies are permitted to provide abbreviated compensation disclosure with respect to the principal executive officer and two most highly compensated executive officers for the last two completed fiscal years. Specifically, smaller reporting companies may provide the executive compensation disclosure specified in Items 402(l) through (r) of Regulation S–K, rather than the corresponding disclosure specified in Items 402(a) through (k) of Regulation S–K. Items 402(l) through (r) do not require smaller reporting companies to provide CD&A. Other than the proposed amendments to CD&A, the remaining proposed disclosure requirements would apply to smaller reporting companies to the same extent as larger issuers.

As noted above, the proposed amendments to CD&A would not apply to smaller reporting companies. We are not proposing to expand the existing scaled disclosure requirements under Item 402 of Regulation S–K, or establish additional different compliance requirements or an exemption from coverage of the proposed amendments for smaller reporting companies. The proposed amendments would provide investors with enhanced disclosure regarding the shareholder votes required by Section 14A of the Exchange Act and the issuers' consideration of the votes.

We are proposing amendments to Item 5 of Schedule 14A, as well as other forms and schedules, to implement and supplement the requirement of Section 14A(b)(1) to provide disclosure of golden parachute compensation arrangements in a clear and simple form. Under our proposed rules, all companies would be subject to the same golden parachute disclosure requirements. As proposed, Schedule 14A would require the disclosure pursuant to Item 402(t) of Regulation S–K with respect to golden parachute compensation arrangements for merger proxies. Though much of the disclosure

[158] 5 U.S.C. 601(6).

[159] 17 CFR 230.157.

[160] 17 CFR 240.0–10(a).

[161] Business development companies are a category of closed-end investment companies that are not required to register under the Investment Company Act [15 U.S.C. 80a–2(a)(48)].

[162] 17 CFR 270.0–10(a).

[163] Rule 12b–2 excludes business development companies from the definition of "smaller reporting companies."

required by our proposed amendment to Item 5 of Schedule 14A is currently required for all issuers, regardless of size, under our proposed rules such disclosure would be required to be included in a tabular format pursuant to Item 402(t) of Regulation S–K, which would include an aggregate total and specific quantification of various compensation elements. All companies, regardless of size, would also be subject to these additional disclosure requirements in connection with other transactions not required by Section 14A(b)(1), including certain tender offers and Rule 13e–3 going-private transactions.

In addition, our proposed amendments would require clear and straightforward disclosure of issuer's responses to shareholder advisory votes, and of golden parachute compensation arrangements in connection with mergers and similar transactions. We have used design rather than performance standards in connection with the proposed amendments because, based on our past experience, we believe the proposed amendments would be more useful to investors if there were specific disclosure requirements. The proposed disclosures are intended to result in more comprehensive and clear disclosure. In addition, the specific disclosure requirements in the proposed amendments would promote consistent and comparable disclosure among all companies.

We seek comment on whether we should exempt small entities from any of the proposed disclosures or scale the proposed amendments to reflect the characteristics of small entities and the needs of their investors.

G. Solicitation of Comments

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How the proposed amendments can achieve their objective while lowering the burden on small entities;
- The number of small entity companies that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entity companies discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. Statutory Authority and Text of the Proposed Amendments

The amendments described in this release are being proposed under the authority set forth in Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Sections 3(b), 6, 7, 10, and 19(a) of the Securities Act of 1933, and Sections 13, 14(a), 14A, 23(a), and 36 of the Securities Exchange Act of 1934, as amended.

List of Subjects in 17 CFR Parts 229, 240 and 249

Reporting and recordkeeping requirements, Securities.

Text of the Proposed Amendments

For the reasons set out in the preamble, the Commission proposes to amend title 17, chapter II, of the Code of Federal Regulations as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

1. The authority citation for part 229 is amended by adding authority for § 229.402 and § 229.1011 to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l,* 78m, 78n, 78o, 78u–5, 78w, 78*ll,* 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Section 229.402 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

Section 229.1011 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

* * * * *

2. Amend § 229.402 by:

a. Revising the last sentence of paragraph (a)(6)(ii);

b. Removing "and" at the end of paragraph (b)(1)(v);

c. Removing the period and adding in its place "; and" at the end of paragraph (b)(1)(vi);

d. Adding paragraph (b)(1)(vii);

e. Revising the last sentence of paragraph (m)(5)(ii); and

f. Adding paragraph (t).

The revisions read as follows:

§ 229.402 (Item 402) Executive compensation.

(a) * * *

(6) * * *

(ii) * * * Except with respect to the disclosure required by paragraph (t) of this Item, registrants may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees.

* * * * *

(b) * * *

(1) * * *

(vii) Whether and if so, how the registrant has considered the results of previous shareholder advisory votes on executive compensation required by section 14A of the Exchange Act (15 U.S.C. 78n–1) and previous shareholder advisory votes on executive compensation required by § 240.14a–20 of this chapter in determining compensation policies and decisions and, if so, how that consideration has affected the registrant's executive compensation decisions and policies.

* * * * *

(m) * * *

(5) * * *

(ii) * * * Except with respect to disclosure required by paragraph (t) of this Item, smaller reporting companies may omit information regarding group life, health, hospitalization, or medical reimbursement plans that do not discriminate in scope, terms or operation, in favor of executive officers or directors of the smaller reporting company and that are available generally to all salaried employees.

* * * * *

(t) *Golden Parachute Compensation.* (1) In connection with

(i) Any proxy or consent solicitation material providing the disclosure required by section 14A(b)(1) of the Exchange Act (15 U.S.C. 78n–1(b)(1)) or

(ii) Any proxy or consent solicitation that includes disclosure under Item 14 of Schedule 14A (§ 240.14a–101) pursuant to Note A of Schedule 14A, with respect to each named executive officer of the acquiring company and the target company, provide the information specified in paragraphs (t)(2) and (3) of this section regarding any agreement or understanding, whether written or unwritten, between such named executive officer and the acquiring company or target company, concerning any type of compensation, whether present, deferred or contingent, that is based on or otherwise relates to an

acquisition, merger, consolidation, sale or other disposition of all or substantially all assets of the issuer, as follows:

GOLDEN PARACHUTE COMPENSATION

Name (a)	Cash ($) (b)	Equity ($) (c)	Pension/ NQDC ($) (d)	Perquisites/ benefits ($) (e)	Tax reimbursement ($) (f)	Other ($) (g)	Total ($) (h)
PEO							
PFO							
A							
B							
C							

(2) The table shall include, for each named executive officer:

(i) The name of the named executive officer (column (a));

(ii) The aggregate dollar value of any cash severance payments, including but not limited to payments of base salary, bonus, and pro-rated non-equity incentive compensation plan payments (column (b));

(iii) The aggregate dollar value of:

(A) Stock awards for which vesting would be accelerated;

(B) In-the-money option awards for which vesting would be accelerated; and

(C) Payments in cancellation of stock and option awards (column (c)):

(iv) The aggregate dollar value of pension and nonqualified deferred compensation benefit enhancements (column (d));

(v) The aggregate dollar value of perquisites and other personal benefits or property, and health care and welfare benefits (column (e));

(vi) The aggregate dollar value of any tax reimbursements (column (f));

(vii) The aggregate dollar value of any other compensation that is based on or otherwise relates to the transaction not properly reported in columns (b) through (f) (column (g)); and

(viii) The aggregate dollar value of the sum of all amounts reported in columns (b) through (g) (column (h)).

Instructions to Item 402(t)(2)

1. If this disclosure is included in a proxy or consent solicitation seeking approval of an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of the registrant, or in a proxy or consent solicitation that includes disclosure under Item 14 of Schedule 14A (§ 240.14a–101) pursuant to Note A of Schedule 14A, the disclosure provided by this table shall be quantified assuming that the triggering event took place on the latest practicable date, and that the price per share of the registrant's securities is the closing market price as of the latest practicable date. Compute the dollar value of in-the-money option awards for which vesting would be accelerated by determining the difference between this price and the exercise or base price of the options.

2. If this disclosure is included in a proxy solicitation for the annual meeting at which directors are elected for purposes of subjecting the disclosed agreements or understandings to a shareholder vote under section 14A(a)(1) of the Exchange Act (15 U.S.C. 78n–1(a)(1)), the disclosure provided by this table shall be quantified assuming that the triggering event took place on the last business day of the registrant's last completed fiscal year, and the price per share of the registrant's securities is the closing market price as of that date. Compute the dollar value of in-the-money option awards for which vesting would be accelerated by determining the difference between this price and the exercise or base price of the options.

3. In the event that uncertainties exist as to the provision of payments and benefits or the amounts involved, the registrant is required to make a reasonable estimate applicable to the payment or benefit and disclose material assumptions underlying such estimates in its disclosure. In such event, the disclosure would require forward-looking information as appropriate.

4. For each of columns (b) through (g), include a footnote quantifying each separate form of compensation included in the aggregate total reported. Include the value of all perquisites and other personal benefits or property. Individual perquisites and personal benefits shall be identified and quantified as required by Instruction 4 to Item 402(c)(2)(ix) of this section. For purposes of quantifying health care benefits, the registrant must use the assumptions used for financial reporting purposes under generally accepted accounting principles.

5. For each of columns (b) through (h), include a footnote quantifying the amount payable attributable to a double-trigger arrangement (*i.e.,* amounts triggered by a change-in-control for which payment is conditioned upon the executive officer's termination without cause or resignation for good reason within a limited time period following the change-in-control), specifying the time-frame in which such termination or resignation must occur in order for the amount to become payable, and the amount payable attributable to a single-trigger arrangement (*i.e.,* amounts triggered by a change-in-control for which payment is not conditioned upon such a termination or resignation of the executive officer).

6. A registrant conducting a shareholder advisory vote pursuant to § 240.14a–21(c) of this chapter to cover new arrangements and understandings, and/or revised terms of agreements and understandings that were previously subject to a shareholder advisory vote pursuant to § 240.14a–21(a) of this chapter, shall provide two separate tables. One table shall disclose all golden parachute compensation, including both the arrangements and amounts previously disclosed and subject to a shareholder advisory vote under section 14A(a)(1) of the Exchange Act (15 U.S.C. 78n–1(a)(1)) and § 240.14a–21(a) of this chapter and the new arrangements and understandings and/or revised terms of agreements and understandings that were previously subject to a shareholder advisory vote. The second table shall disclose only the new arrangements and/or revised terms

subject to the separate shareholder vote under section 14A(b)(2) of the Exchange Act and § 240.14a–21(c) of this chapter.

7. In cases where this Item 402(t)(2) requires disclosure of arrangements between an acquiring company and the named executive officers of the soliciting target company, the registrant shall clarify whether these agreements are included in the separate shareholder advisory vote pursuant to § 240.14a–21(c) of this chapter by providing a separate table of all agreements and understandings subject to the shareholder advisory vote required by section 14A(b)(2) of the Exchange Act (15 U.S.C. 78n–1(b)(2)) and § 240.14a–21(c) of this chapter, if different from the full scope of golden parachute compensation subject to Item 402(t) disclosure.

(3) Provide a succinct narrative description of any material factors necessary to an understanding of each such contract, agreement, plan or arrangement and the payments quantified in the tabular disclosure required by this paragraph. Such factors shall include, but not be limited to a description of:

(i) The specific circumstances that would trigger payment(s);

(ii) Whether the payments would or could be lump sum, or annual, disclosing the duration, and by whom they would be provided; and

(iii) Any material conditions or obligations applicable to the receipt of payment or benefits, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, including the duration of such agreements and provisions regarding waiver or breach of such agreements.

Instruction to Item 402(t)

1. A registrant that does not qualify as a "smaller reporting company," as defined by § 229.10(f)(1) of this chapter, must provide the information required by this Item 402(t) with respect to the individuals covered by Items 402(a)(3)(i), (ii) and (iii) of this section. A registrant that qualifies as a "smaller reporting company," as defined by § 229.10(f)(1) of this chapter, must provide the information required by this Item 402(t) with respect to the individuals covered by Items 402(m)(2)(i) and (ii) of this section.

2. The obligation to provide the information in this Item 402(t) shall not apply to agreements and understandings described in paragraph (t)(1) of this section with senior management of foreign private issuers, as defined in § 240.3b–4 of this chapter.

3. Amend § 229.1011 by redesignating paragraph (b) as paragraph (c) and adding new paragraph (b):

The addition reads as follows:

§ 229.1011 (Item 1011) Additional information.

* * * * *

(b) Furnish the information required by Item 402(t)(2) and (3) of this part (§ 229.402(t)(2) and (3)) and in the tabular format set forth in Item 402(t)(1) of this part (§ 229.402(t)(1)) with respect to each named executive officer

(1) Of the subject company in a Rule 13e–3 transaction; or

(2) Of the issuer whose securities are the subject of a third-party tender offer, regarding any agreement or understanding, whether written or unwritten, between such named executive officer and the subject company, issuer, bidder, or the acquiring company, as applicable, concerning any type of compensation, whether present, deferred or contingent, that is based upon or otherwise relates to the Rule 13e–3 transaction or third-party tender offer.

Instructions to Item 1011(b)

1. The obligation to provide the information in paragraph (b) of this section shall not apply where the issuer whose securities are the subject of the Rule 13e–3 transaction or tender offer is a foreign private issuer, as defined in § 240.3b–4 of this chapter.

2. In connection with any Schedule TO (§ 240.14d–100 of this chapter), a bidder's disclosure obligation pursuant to paragraph (b) of this section need be provided only to the extent known after making reasonable inquiry.

3. For purposes of Instruction 1 to Item 402(t)(2) of this part: If the disclosure is included in a Schedule 13E–3 (§ 240.13e–100 of this chapter), TO (§ 240.14d–100 of this chapter) or 14D–9 (§ 240.14d–101 of this chapter), the disclosure provided by this table shall be quantified assuming that the triggering event took place on the latest practicable date and that the price per share of the securities of the subject company in a Rule 13e–3 transaction, or of the issuer whose securities are the subject of the third-party tender offer, is the closing market price as of the latest practicable date.

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

4. The authority citation for Part 240 is amended by adding authority for § 240.13e–100, § 240.14a–4, § 240.14a–6, § 240.14a–8, § 240.14a–21, § 240.14a–101, and § 240.14c–101 as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* 18 U.S.C. 1350, and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

Section 240.13e–100 is also issued sec. 951, under Pub. L. 111–203, 124 Stat. 1376.

Section 240.14a–4 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

Section 240.14a–6 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

Section 240.14a–8 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

Section 240.14a–21 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

Section 240.14a–101 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

Section 240.14c–101 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

* * * * *

5. Amend § 240.13e–100 by revising Item 15.

The revisions read as follows:

§ 240.13e–100 Schedule 13E–3, Transaction statement under section 13(e) of the Securities Exchange Act of 1934 and Rule 13e–3 (§ 240.13e–3) thereunder.

* * * * *

Item 15. Additional Information

Furnish the information required by Item 1011(b) and (c) of Regulation M–A (§ 229.1011(b) and (c) of this chapter).

* * * * *

6. Amend § 240.14a–4 by:

(a) adding the phrase "and votes to determine the frequency of shareholder votes on executive compensation pursuant to § 240.14a–21(b) of this chapter" at the end of the first sentence of paragraph (b)(1);

(b) adding paragraph (b)(3).

The addition reads as follows:

§ 240.14a–4 Requirements as to proxy.

* * * * *

(b) * * *

(3) A form of proxy which provides for a shareholder vote on the frequency of shareholder votes to approve the compensation of executives required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n–1(a)(2)) shall provide means whereby the person solicited is afforded an opportunity to specify by boxes a choice among 1, 2 or 3 years, or abstain.

7. Amend § 240.14a–6 by:

(a) removing "and/or" at the end of paragraph (a)(6);

(b) revising paragraph (a)(7);

(c) adding paragraph (a)(8).

The revisions read as follows:

§ 240.14a–6 Filing requirements.

(a) * * *

(7) A vote to approve the compensation of executives as required pursuant to section 14A(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78n–1(a)(1)) and § 240.14a–21(a) of this chapter, or pursuant to section 111(e)(1) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5221(e)(1)) and § 240.14a–20 of this chapter; and/or

(8) A vote to determine the frequency of shareholder votes to approve the compensation of executives as required pursuant to Section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n–1(a)(2)) and § 240.14a–21(b) of this chapter.

8. Amend § 240.14a–8 by adding *Note to paragraph (i)(10)* to read as follows:

§ 240.14a–8 Shareholder proposals.

* * * * *

(i) * * *

(10) * * *

Note to paragraph (i)(10): A company may exclude, as substantially implemented, a shareholder proposal that would provide an advisory vote or seek future advisory votes to approve the compensation of executives as disclosed pursuant to Item 402 of Regulation S–K (§ 229.402 of this chapter) or any successor to Item 402 (a "say-on-pay" vote) or that relates to the frequency of say-on-pay votes, provided the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the plurality of votes cast in the most recent shareholder vote required by § 240.14a–21(b) of this chapter.

9. Add § 240.14a–21 to read as follows:

§ 240.14a–21 Shareholder approval of executive compensation, frequency of votes for approval of executive compensation and shareholder approval of golden parachute compensation.

(a) If a solicitation is made by a registrant and the solicitation relates to an annual or other meeting of shareholders for which the rules of the Commission require executive compensation disclosure pursuant to Item 402 of Regulation S–K (§ 229.402 of this chapter), the registrant shall, for the first annual or other meeting of shareholders on or after January 21, 2011 and not less frequently than once every 3 years thereafter, include a separate resolution subject to shareholder advisory vote to approve the compensation of its named executive officers, as disclosed pursuant to Item 402 of Regulation S–K.

(b) If a solicitation is made by a registrant and the solicitation relates to an annual or other meeting of shareholders for which the rules of the Commission require executive compensation disclosure pursuant to Item 402 of Regulation S–K (§ 229.402 of this chapter), the registrant shall, for the first annual or other meeting of shareholders on or after January 21, 2011 and not less frequently than once every 6 years thereafter, include a separate resolution subject to shareholder advisory vote as to whether the shareholder vote required by paragraph (a) of this section should occur every 1, 2 or 3 years. Registrants required to provide a separate shareholder vote pursuant to § 240.14a–20 of this chapter shall include the separate resolution required by this section for the first annual or other meeting of shareholders after the registrant has repaid all obligations arising from financial assistance provided under the TARP, as defined in section 3(8) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5202(8)), and not less frequently than once every 6 years thereafter.

(c) If a solicitation is made by a registrant for a meeting of shareholders at which shareholders are asked to approve an acquisition, merger, consolidation or proposed sale or other disposition of all or substantially all the assets of the registrant, the registrant shall provide a separate shareholder vote to approve any agreements or understandings and compensation disclosed pursuant to Item 402(t) of Regulation S–K (§ 229.402(t) of this chapter), unless such agreements or understandings have been subject to a shareholder advisory vote under paragraph (a) of this section. Consistent with section 14A(b) of the Exchange Act (15 U.S.C. 78n–1(b)), any agreements or understandings between an acquiring company and the named executive officers of the registrant, where the registrant is not the acquiring company, are not required to be subject to the separate shareholder advisory vote under this paragraph.

Instructions to § 240.14a–21

1. Disclosure relating to the compensation of directors required by Item 402(k) and Item 402(r) of Regulation S–K (§ 229.402(r) of this chapter) is not subject to the shareholder vote required by paragraph (a) of this section. If a registrant includes disclosure pursuant to Item 402(s) of Regulation S–K (§ 229.402(s) of this chapter) about the registrant's compensation policies and practices as they relate to risk management and risk-taking incentives, these policies and practices would not be subject to the shareholder vote required by paragraph (a) of this section. To the extent that risk considerations are a material aspect of the registrant's compensation policies or decisions for named executive officers, the registrant is required to discuss them as part of its Compensation Discussion and Analysis under § 229.402(b) of this chapter, and therefore such disclosure would be considered by shareholders when voting on executive compensation.

2. If a registrant includes disclosure of golden parachute compensation arrangements pursuant to Item 402(t) (§ 229.402(t) of this chapter) in an annual meeting proxy statement, such disclosure would be subject to the shareholder vote required by paragraph (a) of this section.

3. Registrants that are smaller reporting companies entitled to provide scaled disclosure in accordance with Item 402(*l*) of Regulation S–K (§ 229.402(*l*) of this chapter) are not required to include a Compensation Discussion and Analysis in their proxy statements in order to comply with this section. For smaller reporting companies, the vote required by paragraph (a) of this section must be to approve the compensation of the named executive officers as disclosed pursuant to Item 402(m) through (q) of Regulation S–K (§ 229.402(m) through (q) of this chapter).

10. Amend § 240.14a–101 by:

(a) removing the dash that appears before paragraph (a) of Item 5 and adding in its place an open parenthesis;

(b) adding paragraph (a)(5) of Item 5;

(c) adding paragraph (b)(3) of Item 5;

(d) adding Item 24.

The revisions read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

Schedule 14A Information

* * * * *

Item 5. Interest of Certain Persons in Matters To Be Acted Upon.

(a) * * *

(5) If the solicitation is made on behalf of the registrant, furnish the information required by Item 402(t) of Regulation S–K (§ 229.402(t) of this chapter).

* * * * *

(b) * * *

(3) If the solicitation is made on behalf of the registrant, furnish the information required by Item 402(t) of Regulation S–K (§ 229.402(t) of this chapter).

* * * * *

Item 24. Shareholder Approval of Executive Compensation. Registrants required to provide any of the separate shareholder votes pursuant to § 240.14a–21 of this chapter shall disclose that they are providing each such vote as required pursuant to section 14A of the Securities Exchange

Act (15 U.S.C. 78n–1), and briefly explain the general effect of each vote, such as whether each such vote is non-binding.

11. Amend § 240.14c–101 by adding paragraph (c) of Item 3.

The revisions read as follows:

§ 240.14c–101 Schedule 14C. Information required in information statement.

Schedule 14C Information

* * * * *

Item 3. * * *

(c) Furnish the information required by Item 402(t) of Regulation S–K (§ 229.402(t) of this chapter).

12. Amend § 240.14d–101 by revising Item 8 to add the words "and (c)" after "Item 1011(b)".

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

13. The authority citation for part 249 is amended by adding authority for § 308a and § 310 to read as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Section 249.308a is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

Section 249.310 is also issued under sec. 951, Pub. L. 111–203, 124 Stat. 1376.

* * * * *

14. Amend Form 10–Q (referenced in § 249.308a) by adding paragraph (c) to Item 5 in Part II to read as follows:

Note: The text of Form 10–Q does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–Q

* * * * *

Part II—Other Information

* * * * *

Item 5. Other Information

* * * * *

(c) If an annual or other meeting of shareholders relating to the election of directors has occurred during the period covered by this report at which shareholders voted on the frequency of shareholder votes on the compensation of executives as required by section 14A of the Securities Exchange Act of 1934 (15 U.S.C. 78n–1), disclose the company's decision in light of such vote as to how frequently the company will include a shareholder vote on the compensation of executives for the six years subsequent to such meeting.

15. Amend Form 10–K (referenced in § 249.310) by adding a second sentence to Item 9B in Part II to read as follows:

Note: The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–K

* * * * *

Part II—Other Information

* * * * *

Item 9B. Other Information

(a) * * * If an annual or other meeting of shareholders relating to the election of directors has occurred during the fourth fiscal quarter in the period covered by this report at which shareholders voted on the frequency of shareholder votes on the compensation of executives as required by section 14A of the Securities Exchange Act of 1934 (15 U.S.C. 78n–1), disclose the company's decision in light of such vote as to how frequently the company will include a shareholder vote on the compensation of executives for the six years subsequent to such meeting.

* * * * *

Dated: October 18, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–26535 Filed 10–27–10; 8:45 am]

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October 28, 2010

Part VI

Securities and Exchange Commission

17 CFR Parts 240, 249, 270 et al.

Reporting of Proxy Votes on Executive Compensation and Other Matters; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 249, 270, and 274

[Release Nos. 34–63123; IC–29463; File No. S7–30–10]

RIN 3235–AK67

Reporting of Proxy Votes on Executive Compensation and Other Matters

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing rule and form amendments under the Securities Exchange Act of 1934 and the Investment Company Act of 1940 that, if adopted, would require an institutional investment manager that is subject to Section 13(f) of the Securities Exchange Act to report annually how it voted proxies relating to executive compensation matters as required by Section 14A of the Securities Exchange Act, which was added by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

DATES: Comments should be received on or before November 18, 2010.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–30–10 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–30–10. This file number should be included on the subject line if e-mail is used. To help us 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/proposed.shtml*). Comments are also 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 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Alberto H. Zapata, Senior Counsel; Michael C. Pawluk, Branch Chief; or Mark T. Uyeda, Assistant Director, at (202) 551–6784, Office of Disclosure Regulation, Division of Investment Management, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission ("Commission") is proposing new rule 14Ad–1 under the Securities Exchange Act of 1934 ("Exchange Act") [1] and amendments to Form N–PX [2] under the Exchange Act and the Investment Company Act of 1940 ("Investment Company Act").[3] The Commission is also proposing a technical amendment to rule 30b1–4 under the Investment Company Act.[4]

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I. Background

Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"),[5] enacted on July 21, 2010, added new Section 14A to the Exchange Act.[6] Section 14A requires issuers to provide shareholders with a vote on certain executive compensation matters, and it requires certain institutional investment managers to report how they voted on those matters.

Section 14A(a) requires that a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure include: (1) Not less frequently than once every three years, a separate resolution subject to shareholder vote to approve executive compensation; and (2) not less frequently than once every six years, a separate resolution subject to shareholder vote to determine whether the required executive compensation votes will occur every one, two, or three years. Section 14A(b) requires that any proxy or consent or authorization relating to a meeting at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of an issuer include a separate resolution subject to shareholder vote to approve executive compensation agreements and understandings that relate to the transaction unless these agreements or understandings were subject to a shareholder vote under Section 14A(a). The requirements for a vote on executive compensation and on the frequency of the executive compensation vote required by Section 14A(a) are effective for shareholder meetings occurring on or after January 21, 2011.[7] The requirement for the vote on executive compensation agreements and understandings that relate to certain transactions required by Section 14A(b) will be effective when the Commission's rules implementing that provision become effective. In a companion release, we are proposing rules to implement the voting requirements of Sections 14A(a) and (b) of the Exchange Act.[8]

Section 14A(d) of the Exchange Act requires that every institutional investment manager subject to Section 13(f) of the Exchange Act report at least annually how it voted on the executive compensation-related shareholder votes

[1] 15 U.S.C. 78a *et seq.*

[2] 17 CFR 274.129. Currently, Form N–PX is adopted under the Investment Company Act only. In this release, we are proposing to amend Form N–PX under both the Exchange Act and the Investment Company Act.

[3] 15 U.S.C. 80a–1 *et seq.*

[4] 17 CFR 270.30b1–4.

[5] Public Law 111–203, 124 Stat. 1376 (2010).

[6] To be codified at 15 U.S.C. 78n–1.

[7] *See* Section 14A(a)(3) of the Exchange Act (making the requirements of Section 14A(a) effective for shareholder meetings occurring after the end of the six-month period beginning on the date of enactment of the Dodd-Frank Act).

[8] Exchange Act Release No. 63124 (Oct. 18, 2010).

required by Sections 14A(a) and (b) (the "Section 14A Votes"), unless such vote is otherwise required to be reported publicly by rule or regulation of the Commission. Today, we are proposing rule and form amendments to implement this reporting requirement.

II. Proposed Amendments

To implement Section 14A(d) of the Exchange Act, we are proposing new rule 14Ad–1 under the Exchange Act, which, if adopted, would require institutional investment managers that are required to file reports under Section 13(f) of the Exchange Act to file their record of Section 14A Votes with the Commission annually on Form N–PX. We are also proposing to amend Form N–PX, which is currently used by registered management investment companies ("funds") to file their complete proxy voting records with the Commission, to accommodate the new filings by institutional investment managers. In addition, we are proposing certain technical and conforming amendments to our rules.

A. Class of Reporting Persons

We are proposing to require every institutional investment manager (as that term is defined in Section 13(f)(6)(A) of the Exchange Act [9]) that is required to file reports under Section 13(f) of the Act to file its record of Section 14A Votes on Form N–PX.[10] Thus, a person will become subject to the new reporting requirement if it meets two criteria: (1) The person is an institutional investment manager as defined in Section 13(f)(6)(A) of the Exchange Act; and (2) the person is required to file reports under Section 13(f) of the Exchange Act. As described in the following paragraph, these are the same persons that are required to report on Form 13F under the Exchange Act.[11]

Section 13(f)(6)(A) of the Exchange Act defines the term "institutional investment manager" to include "any person, other than a natural person, investing in or buying and selling securities for its own account, and any person exercising investment discretion with respect to the account of any other person." An institutional investment manager is required to file reports under Section 13(f) if the institutional investment manager exercises investment discretion [12] with respect to accounts holding Section 13(f) securities [13] having an aggregate fair market value on the last trading day of any month of any calendar year of at least $100 million.[14] Institutional investment managers meeting this threshold are required to file quarterly reports with the Commission on Form 13F disclosing their holdings of Section 13(f) securities for the final quarter of the calendar year in which the threshold is met and continuing for each of the first three quarters of the subsequent calendar year.[15] In order to implement the requirement of Section 14A(d) of the Exchange Act that "every institutional investment manager subject to section 13(f)" of the Exchange Act report its Section 14A Votes, we are proposing that an institutional investment manager required to report on Form 13F would also be required to report its Section 14A Votes on Form N–PX.

B. Scope of Reporting Obligation

We are proposing to require an institutional investment manager that is required to report on Form N–PX to include in the report the manager's proxy voting record (1) for each shareholder vote pursuant to Sections 14A(a) and (b) of the Exchange Act (2) with respect to which the manager, whether directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, had or shared the power to vote, or to direct the voting of, (3) any security.

1. Types of Votes Required To Be Reported

We are proposing to require an institutional investment manager that would be required to report on Form N–PX to include in the report the manager's record for each shareholder vote pursuant to Sections 14A(a) and (b) of the Exchange Act, *i.e.,* Section 14A Votes.[16] The scope of votes that would be required to be reported under the proposal is the same as the scope provided by new Section 14A(d) of the Exchange Act. The institutional investment manager, therefore, would be required to report votes required by Section 14A(a) on the approval of executive compensation and on the frequency of executive compensation approval votes, as well as votes required by Section 14A(b) on the approval of executive compensation that relates to an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of an issuer. Institutional investment managers would not be required to include votes on any other matters in the reports on Form N–PX.[17]

2. Voting Power

Under the proposal, an institutional investment manager would be required to report a Section 14A Vote for a security only if the manager, whether directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, had or shared the power to vote, or to direct the voting of, the security.[18] An institutional

[9] To be codified at 15 U.S.C. 78m(f)(6)(A). Section 929X of the Dodd-Frank Act redesignated former Section 13(f)(5) of the Exchange Act as Section 13(f)(6).

[10] Proposed rule 14Ad–1.

[11] Form 13F [17 CFR 249.325] is the form used for quarterly securities holdings reports under Section 13(f) of the Exchange Act by institutional investment managers that exercise investment discretion with respect to accounts holding certain equity securities having an aggregate fair market value of $100 million or more.

[12] "Investment discretion" has the meaning set forth in Section 3(a)(35) of the Exchange Act [15 U.S.C. 78c(a)(35)]. In addition, an institutional investment manager is "deemed to exercise 'investment discretion' with respect to all accounts over which any person under its control exercises investment discretion." Rule 13f–1(b) under the Exchange Act [17 CFR 240.13f–1(b)].

Under Section 3(a)(35) of the Exchange Act, "a person exercises 'investment discretion' with respect to an account if, directly or indirectly, such person (A) is authorized to determine what securities or other property shall be purchased or sold by or for the account, (B) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the Commission, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of this title and the rules and regulations thereunder."

[13] "Section 13(f) securities" mean "equity securities of a class described in section 13(d)(1) of the [Exchange] Act that are admitted to trading on a national securities exchange or quoted on the automated quotation system of a registered securities association." Rule 13f–1(c) under the Exchange Act [17 CFR 240.13f–1(c)]. Equity securities of a class described in Section 13(d)(1) of the Exchange Act [15 U.S.C. 78m(d)(1)] include, among other things, equity securities of a class which is registered pursuant to Section 12 of the Exchange Act, equity securities of an insurance company which would have been required to be so registered except for the exemption contained in Section 12(g)(2)(G) of the Exchange Act, and equity securities issued by a closed-end investment company registered under the Investment Company Act. The Commission publishes a list of Section 13(f) securities that is available on the Commission's Internet Web site at: *http://www.sec.gov/divisions/investment/13flists.htm.*

[14] Section 13(f)(1) of the Exchange Act [15 U.S.C. 78m(f)(1)]; rule 13f–1(a)(1) under the Exchange Act [17 CFR 240.13f–1(a)(1)].

[15] Rule 13f–1(a)(1).

[16] Proposed rule 14Ad–1(a); proposed Item 1 of Form N–PX.

[17] Funds would continue to be required to report their complete proxy voting record on Form N–PX. *See* rule 30b1–4 under the Investment Company Act; current and proposed Item 1 of Form N–PX (requiring disclosure of proxy voting information "for each matter relating to a portfolio security considered at any shareholder meeting held during the period covered by the report and with respect to which the [fund] was entitled to vote").

[18] Proposed rule 14Ad–1(a); proposed Item 1 of Form N–PX. This is similar to the language of rule

Continued

investment manager would be required to report a Section 14A Vote if the manager had or shared voting power over the particular Section 14A Vote, without regard to whether the manager had voting power over other matters. Whether a manager has the requisite voting power would depend on an analysis of all the relevant facts and circumstances.[19]

Basing an institutional investment manager's requirement to report a Section 14A Vote on whether it has or shares voting power with respect to the Section 14A Vote appears to be consistent with the plain language of Section 14A(d), which requires a manager to report on "how it voted" on Section 14A Votes. In the case of Section 14A Votes where an institutional investment manager does not have or share voting power, the manager would not, in our view, have anything to report under this statutory language.[20]

We note that reporting on Form 13F is based on "investment discretion" rather than "voting power."[21] As a result, the use of a test based on voting power for Form N–PX may contribute to discrepancies between securities reported by an institutional investment manager on Form 13F and securities for which votes are reported on Form N–PX. For example, if an institutional investment manager exercises investment discretion with respect to a particular Section 13(f) security held in a client's account, but the client retains all rights to vote proxies with respect to the security, the manager would report that security on its holdings report on Form 13F if it held the security at the end of a calendar quarter, but would not report any Section 14A Votes with respect to that security under our proposal.[22] Similarly, an institutional investment manager that has or shares voting power over a security, but is not required to report the security on Form 13F because it does not have investment discretion over the security, would be required to report Section 14A Votes with respect to that security provided that the institutional investment manager is otherwise required to file reports under Section 13(f) of the Exchange Act.

We request comment on the use of voting power as the basis for determining which Section 14A Votes would be reported by an institutional investment manager and, in particular, on the following issues:

- Should the reporting requirement be based on having the power to vote with respect to Section 14A Votes or should we use some other basis, such as investment discretion? Should we, as proposed, base the requirement to file on a manager having either sole or shared voting power?
- Should we provide guidance concerning the circumstances under which a manager has sole or shared voting power? For example, would it be helpful for the Commission to provide guidance regarding the application of the Form N–PX "sole or shared voting power" standard as it would apply to ERISA plans? Commenters who believe that guidance would be helpful are asked to specify the nature of the guidance that would be helpful.

3. Securities With Respect to Which Votes Are Required To Be Reported

We are proposing that an institutional investment manager report Section 14A Votes with respect to "any security" with respect to which it meets the voting power test described above. Thus, we are not proposing to limit in any way the types of securities with respect to which an institutional investment manager must report its Section 14A Votes.[23] As a result, the proposal would require an institutional investment manager to report Section 14A Votes with respect to a security without regard to whether the manager had previously reported or been required to report the security as a holding on Form 13F. For example, on Form 13F, a manager reports its holdings as of the end of the quarterly reporting period and is permitted to omit holdings of fewer than 10,000 shares (or less than $200,000 principal amount in case of convertible debt securities) and less than $200,000 aggregate fair market value.[24] Under the proposal, an institutional investment manager would be required to report Section 14A Votes without regard to whether the securities were held as of the close of any quarter and without regard to the size of the holding.

We request comment on the securities for which institutional investment managers would be required to file proxy voting records on Form N–PX, and, in particular, on the following issues:

- Should we, as proposed, require institutional investment managers to report Section 14A Votes with respect to "any security?" Should we, instead, limit in any way the securities with respect to which Section 14A Votes are required to be reported? For example, should we require Section 14A Votes to be reported only with respect to securities that a manager has previously reported or been required to report on Form 13F?
- Should we prescribe any threshold position size below which a manager would not be required to report its Section 14A Votes? For example, consistent with Form 13F, should a manager be permitted to omit Section 14A Votes from Form N–PX reports with respect to securities where it held fewer than 10,000 shares (or less than $200,000 principal amount in case of convertible debt securities) and less than $200,000 aggregate fair market value? If we adopt a reporting threshold that is different from the Form 13F reporting threshold, or adopt no threshold, will this make the information required to be reported on Form N–PX more difficult to track or impose any other burdens?

13d–3(a) under the Exchange Act [17 CFR 240.13d–3(a)], which provides that a beneficial owner of a security includes any person who, "directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares * * * [v]oting power which includes the power to vote, or to direct the voting of, such security. * * *"

[19] *Cf.* Exchange Act Release No. 13291 (Feb. 24, 1977) [42 FR 12342, 12344 (Mar. 3, 1977)] (stating that "[a]n analysis of all relevant facts and circumstances in a particular situation is essential in order to identify each person possessing the requisite voting power" to be considered a beneficial owner within the meaning of rule 13d–3 under the Exchange Act).

[20] This could arise, for example, where an investment manager to a plan that is subject to the Employee Retirement Income Security Act of 1974 ("ERISA") [29 U.S.C. 1001 *et seq.*] is expressly precluded from voting proxies by the plan document or the investment management contract. *See* 29 CFR 2509.08–2 ("DOL Interpretive Bulletin").

[21] Rule 13f–1(a)(1); General Instruction 1 to Form 13F. *See supra* note 12 (explaining "investment discretion").

[22] There are other circumstances in which the securities reported by an institutional investment manager on Form 13F may not correspond to the securities for which Section 14A Votes are reported by the manager on Form N–PX. For example, a manager may have voted proxies for a particular security and subsequently disposed of the security prior to the end of the calendar quarter. Under these circumstances, the proxy votes would be disclosed on the manager's Form N–PX report, but the holdings would not be included on a Form 13F report. *See also* discussion *infra* Part II.B.3 (discussing differences in reporting between Form 13F and Form N–PX).

[23] Section 14A(a), by its terms, applies to a proxy or consent or authorization for a shareholder meeting "for which the proxy solicitation rules of the Commission require compensation disclosure." Section 14A(b), by its terms, applies to any proxy or consent or authorization relating to "proxy or consent solicitation material (the solicitation of which is subject to the rules of the Commission pursuant to [Section 14A(a)])." The proxy rules apply to the solicitation of any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to Section 12 of the Exchange Act. Section 14(a) of the Exchange Act [15 U.S.C. 78n(a)]. See note 13 for a description of the securities required to be reported on Form 13F.

[24] *See* General Instruction 3 and Special Instruction 10 to Form 13F.

C. Time of Reporting

We are proposing to require institutional investment managers to report their Section 14A Votes annually on Form N–PX not later than August 31 of each year, for the most recent twelve-month period ended June 30.[25] This is the same schedule on which funds are required to report their complete proxy voting records on Form N–PX.[26] This reporting schedule is intended to have the same advantages for institutional investment manager reporting that it has for funds, namely, each institutional investment manager's proxy voting record will be available within a relatively short period of time after the proxy voting season, and all institutional investment managers will provide their voting records over a uniform July 1–June 30 period.[27] A uniform reporting schedule for all institutional investment managers and funds also would facilitate joint reporting that would eliminate duplicative vote reporting by multiple entities.[28]

We are proposing transition rules that govern the timing of an institutional investment manager's Form N–PX filing obligations whenever the manager enters and exits from the obligation to file Form 13F reports. An institutional investment manager would not be required to file a Form N–PX report for the twelve-month period ending June 30 of the calendar year in which the manager's initial filing on Form 13F is due.[29] For this purpose, an "initial filing" on Form 13F means any quarterly filing on Form 13F if no filing on Form 13F was required for the immediately preceding calendar quarter.[30] This transition rule is intended to provide institutional investment managers who become subject to the requirement to file Form N–PX reports sufficient time to implement the systems needed to record and report proxy votes.

For example, assume that an institutional investment manager does not meet the $100 million threshold test on the last trading day of any month in 2012 but does meet the $100 million threshold test on the last trading day of at least one month in 2013. As a result, the institutional investment manager is not required to file a Form 13F report in 2013 but is required to file a Form 13F report no later than February 14, 2014, for the period ending December 31, 2013.[31] Under the proposal, the manager would not be required to file a Form N–PX report for the twelve-month period ending June 30, 2014, but would be required to file a Form N–PX report no later than August 31, 2015, for the twelve-month period from July 1, 2014, through June 30, 2015. The manager would have a minimum of six months (December 31, 2013–June 30, 2014) before it is required to begin recording its Section 14A Votes for the purposes of reporting on Form N–PX.[32]

In addition, an institutional investment manager would not be required to file a report on Form N–PX with respect to any shareholder vote at a meeting that occurs after September 30 of the calendar year in which the manager's final filing on Form 13F is due. For this purpose, a "final filing" on Form 13F means any quarterly filing on Form 13F if no filing on Form 13F is required for the immediately subsequent calendar quarter.[33] Instead, the manager would be required to file a report on Form N–PX for the period July 1 through September 30 of the calendar year in which the manager's final filing on Form 13F is due. This short-period Form N–PX filing would be due no later than February 28 of the immediately following calendar year.[34] An institutional investment manager's obligation to file Form 13F reports always terminates with the September 30 report,[35] and this transition rule conforms the ending date for reporting Schedule 14A Votes with the ending date for Form 13F reporting. The February 28 due date provides a two-month period for filing after December 31, when the manager's Form 13F filing status will be determined for the coming year.[36]

For example, assume that an institutional investment manager ceases to meet the $100 million threshold in 2015. The manager's final report on Form 13F would be filed for the quarter ended September 30, 2015. The manager's final report on Form N–PX would include all Section 14A Votes cast during the period from July 1, 2015, through September 30, 2015, and would be required to be filed no later than February 28, 2016.

We request comment on the proposed time of reporting rules for institutional investment managers required to file Form N–PX reports and, in particular, on the following issues:

- Should we, as proposed, require institutional investment managers to report their Section 14A Votes annually on Form N–PX not later than August 31, for the most recent twelve-month period ended June 30? Should we instead require reporting as of some other period end date (*e.g.,* May 31 or December 31), or with a shorter or longer lag period after the end of the reporting period (*e.g.,* 1 month, 3 months, or 6 months)? Should we require reporting to occur more frequently than annually (*e.g.,* monthly, quarterly, or semi-annually)? If we require reporting on a schedule other than that proposed, should we also change the schedule on which funds report so that institutional investment managers and funds would report on the same schedule?
- We are proposing that an institutional investment manager would not be required to file a Form N–PX report for the twelve-month period ending June 30 of the calendar year in which the manager's initial filing on Form 13F is due. Is this transition rule appropriate for managers entering the

[25] Proposed rule 14Ad–1(a); proposed General Instruction A to Form N–PX.

[26] Rule 30b1–4.

[27] *See* Investment Company Act Release No. 25922 (Jan. 31, 2003) [68 FR 6564, 6569 (Feb. 7, 2003)] ("Form N–PX Adopting Release") (noting that the approach taken under Form N–PX "will have the advantages of making each fund's proxy voting record available within a relatively short period of time after the proxy voting season, [footnote omitted] and of providing disclosure of all funds' proxy voting records over a uniform period of time").

[28] As outlined in Part II.D below, our proposal would, under some circumstances, permit an institutional investment manager to satisfy all or part of its reporting obligations by referencing the proxy voting record that is reported on Form N–PX by a fund or another institutional investment manager.

[29] Proposed rule 14Ad–1(b); proposed General Instruction A to Form N–PX.

[30] Proposed rule 14Ad–1(b); proposed General Instruction A to Form N–PX.

[31] The obligation to file Form 13F arises when an institutional investment manager exercises investment discretion over accounts holding at least $100 million in Section 13(f) securities as of the "last trading day of any month of any calendar year." However, the manager's obligation to file Form 13F commences with the report for December 31 of that year, which is required to be filed within 45 days after December 31. Rule 13f–1(a)(1); General Instruction 1 to Form 13F.

[32] An institutional investment manager who crosses the $100 million threshold for the first time on December 31, 2013, would have six months before it is required to begin recording Section 14A Votes on July 1, 2014. By contrast, an institutional investment manager that passes the $100 million threshold on January 31, 2013, would have 17 months before it is required to begin recording Section 14A Votes on July 1, 2014.

[33] Proposed rule 14Ad–1(c); proposed General Instruction A to Form N–PX.

[34] Proposed rule 14Ad–1(c); proposed General Instruction A to Form N–PX.

[35] *See* rule 13f–1(a) (institutional investment manager that meets $100 million threshold on last trading day of any calendar year is required to file Form 13F for December 31 of that year and the first three calendar quarters of the subsequent calendar year).

[36] An institutional investment manager is required to file a report on Form 13F in the coming year if it meets the $100 million threshold on the last trading day of any month of the current calendar year. As a result, in cases where the manager does not meet the threshold in January through November, its status will not be determined until December 31.

Form 13F and Form N–PX filing requirements, or is some other rule more appropriate? For example, should we require an institutional investment manager to report Section 14A Votes for the period commencing January 1 (rather than July 1) of the calendar year in which the manager's initial filing on Form 13F is due? Or should we require an institutional investment manager to report Section 14A Votes for the period commencing on the first day of the month immediately following the date on which it meets the $100 million threshold? That is, if a manager meets the $100 million threshold on the last trading day of August 2013, should the manager be required to report Section 14A Votes commencing September 1, 2013, rather than July 1, 2014, as proposed? If we require institutional investment managers to report Section 14A Votes for periods earlier than proposed, what, if any, implementation issues would this raise for managers?

- Should we, as proposed, not require an institutional investment manager to file a Form N–PX report with respect to any shareholder vote at a meeting that occurs after September 30 of the calendar year in which the manager's final filing on Form 13F is due? Should we, instead, require an institutional investment manager to report Section 14A Votes cast at meetings that occur during some period after September 30 of the calendar year in which the manager's final filing on Form 13F is due? If so, what should that period be?

D. Joint Reporting of Proxy Votes

Section 14A(d) of the Exchange Act requires an institutional investment manager to report any Section 14A Vote "unless such vote is otherwise required to be reported publicly by rule or regulation of the Commission." In order to implement this provision and prevent duplicative reporting, we are proposing amendments to Form N–PX that would permit (1) a single institutional investment manager to report Section 14A Votes in cases where multiple institutional investment managers share voting power; and (2) an institutional investment manager to satisfy its reporting obligations by reference to the Form N–PX report of a fund that includes the manager's Section 14A Votes. This method for prevention of duplicative reporting is similar to that employed by Form 13F, which permits a single manager to include information regarding securities with respect to which multiple managers exercise investment discretion.[37]

We are proposing that if two or more institutional investment managers, each of which is required to report on Form N–PX for the reporting period, shared the power to vote, or to direct the voting of, the same securities on a Section 14A Vote, only one such manager must include the information regarding that vote in its Form N–PX report.[38] In addition, an institutional investment manager would not be required to report Section 14A Votes that are reported on a Form N–PX report that is filed by a fund.[39] An institutional investment manager may, however, choose to report Section 14A Votes that are also reported by another institutional investment manager or a fund.

If an institutional investment manager's Section 14A Votes are reported by another institutional investment manager or a fund, the non-reporting manager must file a Form N–PX report that identifies each institutional investment manager and fund reporting on its behalf.[40] The Form N–PX report of an institutional investment manager that, as permitted, reports Section 14A Votes that are subject to shared voting power must identify any other institutional investment managers on whose behalf the filing is made.[41] The Form N–PX report of a fund that reports proxy votes that would otherwise be required to be reported by an institutional investment manager must identify any institutional investment managers on whose behalf the filing is made.[42] This information is intended to help users of Form N–PX to readily identify all reports that contain Section 14A Votes of a particular manager.

We request comment on the proposal to address duplicative reporting and, in particular, on the following issues:

- Should we, as proposed, permit a single institutional investment manager to report Section 14A Votes in cases where multiple institutional investment managers share voting power? Should we, as proposed, permit an institutional investment manager to satisfy its reporting obligations by reference to the Form N–PX report of a fund that includes the manager's Section 14A Votes? Is there any reason not to permit joint reporting, *e.g.,* would it confuse users of Form N–PX or make Form N–PX harder to use? Are there other ways to address potentially duplicative reporting that are consistent with Section 14A(d) of the Exchange Act and that we should consider? Should we prohibit an institutional investment manager from reporting Section 14A Votes that are also reported by another manager or a fund? Would it confuse users of Form N–PX if, as permitted, joint reporting of Section 14A Votes is optional?

E. Form N–PX Reports

We are proposing to amend Form N–PX to accommodate reporting of Section 14A Votes by institutional investment managers. The amended form, as proposed, consists of three parts: Cover Page, Summary Page, and required proxy voting information.[43] The Cover Page and the Summary Page information would be required to be presented in the format and order provided in the form, and additional information would not be permitted in the Cover Page or Summary Page.[44] A report filed by an institutional investment manager would be required to be signed on behalf of the manager by an authorized person.[45]

1. The Cover Page

The Cover Page of Form N–PX would, as it does today, require the name of the reporting person, the address of its principal executive offices, the name and address of the agent for service, the telephone number of the reporting person, identification of the reporting period, and the reporting person's file number.[46] We are proposing to delete the requirement that the Cover Page include the date of the reporting person's fiscal year end which currently applies to Form N–PX filings by funds

[37] *See* Section 13(f)(6)(B) of the Exchange Act [to be codified at 15 U.S.C. 78m(f)(6)(B)] (directing the Commission to "adopt such rules as it deems necessary or appropriate to prevent duplicative reporting * * * by two or more institutional investment managers exercising investment discretion with respect to the same amount"); General Instruction 2 to Form 13F.

[38] Proposed General Instruction D.1 to Form N–PX.

[39] Proposed General Instruction D.2 to Form N–PX. Because Form N–PX will permit cross-references to Form N–PX reports filed by other institutional investment managers and by funds, we propose to delete the current instruction that prohibits incorporating any information by reference. *See* current General Instruction D to Form N–PX.

[40] Proposed General Instruction D.3 to Form N–PX.

[41] Proposed General Instruction D.4 to Form N–PX.

[42] Proposed General Instruction D.5 to Form N–PX.

[43] Proposed Special Instruction A.1 to Form N–PX.

[44] Proposed Special Instruction A.2 to Form N–PX.

[45] Proposed General Instruction E.2.a to Form N–PX. A report filed by a fund would continue to be required to be signed on behalf of the fund by its principal executive officer or officers. *Id.;* current General Instruction F.2 to Form N–PX.

[46] In the case of a fund, the file number is an Investment Company Act number beginning "811–." In the case of an institutional investment manager, the file number is a Form 13F number beginning "28–."

because the fiscal year end of the reporting person appears to be unrelated to the information reported on Form N–PX, which would be filed on a uniform July 1–June 30 basis. In addition, for funds, the fiscal year end information in Form N–PX duplicates information that is required in other Commission filings.[47]

Currently, Form N–PX does not expressly provide for amendments to a previously filed report. We are proposing to include a new section on the Cover Page of Form N–PX to be used in cases where the filing is an amendment to a previously filed Form N–PX report, *e.g.,* to correct errors in a previous filing or as part of the confidential treatment process.[48] This information is intended to facilitate the ability of users to link the information in multiple Form N–PX filings for a single reporting person that all relate to the same filing period. Amendments to a Form N–PX report must either restate the Form N–PX report in its entirety or include only information that is being reported in addition to the information already reported in a Form N–PX report for the same period. If a Form N–PX report is filed as an amendment, then the reporting person must check the amendment box on the Cover Page, enter the amendment number, and check the appropriate box to indicate whether the amendment is a restatement or adds new proxy voting entries.[49]

We are also proposing to require that the Cover Page include information that will help users to identify whether the reporting person is a fund or an institutional investment manager. If the reporting person is an institutional investment manager, this information would also help users to identify reports filed by other institutional investment managers and funds that contain Section 14A Votes of the reporting person under the provisions to prevent duplicative reporting. Specifically, the reporting person would be required to check a box in order to identify the report as one of the following four types: (1) Registered management investment company report; (2) institutional investment manager "voting" report when the report contains all Section 14A Votes of the manager; (3) institutional investment manager "notice" when the report contains no Section 14A Votes of the manager and all Section 14A Votes are reported by other institutional investment managers or funds under the provisions to prevent duplicative reporting; and (4) institutional investment manager "combination" report when the report contains some Section 14A Votes of the manager and some Section 14A Votes of the manager are reported by other institutional investment managers or funds under the provisions to prevent duplicative reporting. In addition, when the report type is in the third or fourth category, the Cover Page would be required to include a list of the file numbers and names of the other institutional investment managers and funds whose Form N–PX reports include Section 14A Votes of the reporting manager.[50]

We request comment on the proposed Cover Page of Form N–PX and, in particular, on the following issues:

- Should we adopt the Cover Page as proposed, or should we modify it in any way, *e.g.,* by adding or removing information? Would the proposed Cover Page adequately identify the reporting person and the reporting period? Would the proposed Cover Page adequately enable users to identify a reporting person's Form N–PX report for a given period and any amendments to that report? Would the proposed Cover Page adequately enable users to identify the type of reporting person? In the case of a report filed by an institutional investment manager, would the proposed Cover Page adequately enable users to identify reports filed by other persons that contain Section 14A Votes for which the manager had, or shared, voting power?

2. The Summary Page

We are proposing to add a new Summary Page to Form N–PX that is similar to the Summary Page in Form 13F and that is intended to enable users to readily identify any institutional investment managers (in addition to the person filing the report) whose Section 14A Votes are included on the Form N–PX report under the provisions to prevent duplicative reporting.[51] The Summary Page would be required to be included in any Form N–PX report that is filed by a fund.[52] It would also be required in any Form N–PX report filed by an institutional investment manager other than a "notice" report.[53] The Summary Page would not be required in a "notice" report because a notice report could not contain any Section 14A Votes at all and, therefore, would not contain any Section 14A Votes of other institutional investment managers.

The Summary Page of a Form N–PX report would be required to state the total number of institutional investment managers, not counting the reporting person, whose Section 14A Votes are included in the report. If there are no such institutional investment managers, the number zero ("0") should be entered.[54] The Summary Page would also be required to include a list of the institutional investment managers, other than the reporting person, whose Section 14A Votes are included. This information would be required to be provided using the title (*i.e.,* "List of Included Institutional Managers"), column headings, and format indicated in Form N–PX.[55] If a Form N–PX report does not report the proxy votes of an institutional investment manager other than the reporting person, the word "NONE" would be entered under the title and the column headings and list entries would not be included.[56] If a Form N–PX report does report the proxy votes of one or more institutional investment managers other than the reporting person, the list would be required to include all such managers (not including the reporting person) together with their respective Form 13F file numbers. In addition, each such manager in the list should be assigned a number (which need not be consecutive), and the list should be presented in sequential order.[57] These numbers would be used in identifying the particular manager(s) who had or shared the power to vote, or to direct the voting of, the securities voted.[58] Requiring the list to be sequential is intended to make the list easier to use. Permitting the list to be non-consecutive is intended to facilitate assigning the same number to the same manager across filings of different reporting persons and different time periods.

[47] *See, e.g.,* Form N–CSR [17 CFR 249.331 and 274.128] (cover page); Form N–Q [17 CFR 249.332 and 274.130] (cover page).

[48] *See, e.g.,* proposed Confidential Treatment Instruction 7 to Form N–PX (regarding the filing of amendments upon the final adverse disposition of a confidential treatment request or the expiration of previously granted confidential treatment).

[49] Proposed Special Instruction B.1 to Form N–PX.

[50] Proposed Special Instruction B.2 to Form N–PX.

[51] *See* Special Instructions to Form 13F (discussing the Summary Page).

[52] Proposed Special Instruction B.2.a to Form N–PX.

[53] Proposed Special Instructions B.2.b–d to Form N–PX.

[54] Proposed Special Instruction C.1 to Form N–PX.

[55] Proposed Special Instruction C.2 to Form N–PX.

[56] Proposed Special Instruction C.2.a to Form N–PX.

[57] Proposed Special Instruction C.2.b to Form N–PX. *Cf.* Special Instruction 8.b to Form 13F (requirement to assign sequential numbers to managers included in another manager's report on Form 13F).

[58] *See infra* note 87 and accompanying text.

We request comment on the proposed Summary Page of Form N–PX and, in particular, on the following issues:

• Should we adopt the Summary Page, as proposed, or should we modify it in any way? Will the Summary Page enable users to readily identify any institutional investment managers whose Section 14A Votes are included in a Form N–PX report?

3. Proxy Voting Information

We are proposing to require an institutional investment manager to disclose information for each Section 14A Vote relating to any security considered at any shareholder meeting held during the reporting period and with respect to which the manager had voting power.[59] If an institutional investment manager does not have any Section 14A Votes to report for the reporting period, the manager would be required to file a report with the Commission stating that the manager does not have proxy votes to report.[60] However, an institutional investment manager that files a "notice" report to indicate that the manager's Section 14A Votes are reported by other institutional investment managers or funds should file a Cover Page and required signature only and should not include a statement that the manager does not have proxy votes to report.[61]

We are proposing to require that the following information be disclosed for each proxy vote that is required to be included in a Form N–PX report of an institutional investment manager or a fund.[62] The information would be required to be disclosed in the order presented below.[63]

• The name of the issuer of the security;[64]

• The exchange ticker symbol of the security;[65]

• The Council on Uniform Securities Identification Procedures ("CUSIP") number for the security;[66]

• The shareholder meeting date;[67]

• A brief identification of the matter voted on;[68]

• For reports filed by funds (but not by institutional investment managers), whether the matter was proposed by the issuer or by a security holder;[69]

• The number of shares the reporting person was entitled to vote (for funds) or had or shared voting power over (for institutional investment managers);[70]

• The number of shares that were voted;[71]

• How the reporting person voted those shares (*e.g.,* for or against proposal, or abstain; for or withhold regarding election of directors) and, if the votes are cast in multiple manners (*e.g.,* for and against), the number of shares voted in each manner;[72]

• Whether the vote was for or against management's recommendation;[73] and

• Identification of each institutional investment manager on whose behalf the Form N–PX report is filed (other than the reporting person) and who had or shared voting power as to the securities voted by the number assigned to the institutional investment manager in the Summary Page.[74]

This information, which is intended to identify the security voted, the matter with respect to which the vote occurred, and how the reporting person voted, is substantially the same as the information currently required by Form N–PX. However, we are proposing to modify the format and content of the information that is currently required by Form N–PX in the following ways: (1) The information would be required to appear in a standardized order; (2) institutional investment managers would not be required to disclose whether a matter was proposed by the issuer or by a security holder; (3) information would be required about the number of shares the reporting person was entitled to vote (for funds) or had or shared voting power over (for institutional investment managers), and the number of shares that were voted; (4) the institutional investment managers who had or shared voting power for a matter would be identified; and (5) standardized descriptions would be required for Section 14A Votes.

As noted above, we are proposing to amend Form N–PX to require that information be disclosed in a standardized order.[75] This change is intended to facilitate comparisons of voting records among reporting persons.[76] This requirement would apply to both institutional investment managers and funds.

As proposed, Form N–PX would continue to require funds to disclose whether a matter was proposed by the issuer or by a security holder, but would not extend this requirement to institutional investment managers.[77] We are not proposing that institutional investment managers make this disclosure because Section 14A Votes relate exclusively to matters proposed by issuers and not by security holders.

We are proposing to amend Form N–PX to provide information about the number of shares voted which will, among other things, accommodate different votes on the same matter by the same reporting person.[78] This could occur, for example, when an institutional investment manager votes for a matter, on behalf of one client, and against the same matter, on behalf of a different client. We are concerned that, if we do not make specific provision for this situation, the information filed on Form N–PX could, in a number of cases, be rendered largely meaningless because it would indicate that a manager voted in multiple ways without providing any measure of the magnitude of the different votes.

[59] Proposed Item 1 of Form N–PX. As is currently the case, a fund would be required to disclose information for each matter relating to a portfolio security considered at any shareholder meeting held during the period covered by the report and with respect to which the fund was entitled to vote. *See* current and proposed Item 1 of Form N–PX.

[60] Proposed Item 1 of Form N–PX.

[61] Proposed Special Instruction B.2.c to Form N–PX.

[62] As is currently the case, if a fund offers multiple series of shares, the required information must be provided separately for each series. The term "series" means shares offered by a fund that represent undivided interests in a portfolio of investments and that are preferred over all other series of shares for assets specifically allocated to that series in accordance with rule 18f–2(a) under the Investment Company Act [17 CFR 270.18f–2(a)]. Proposed Special Instruction D.5 to Form N–PX; current Instruction 1 to Item 1 of Form N–PX.

[63] Proposed Special Instruction D.1 to Form N–PX.

[64] Proposed Item 1(a) of Form N–PX.

[65] Proposed Item 1(b) of Form N–PX. As is currently the case, the exchange ticker symbol may be omitted if it is not available through reasonably practicable means, *e.g.,* in the case of certain securities of foreign issuers. Proposed Special Instruction D.2 to Form N–PX; current Instruction 2 to Item 1 of Form N–PX.

[66] Proposed Item 1(c) of Form N–PX. As is currently the case, the CUSIP number may be omitted if it is not available through reasonably practicable means, *e.g.,* in the case of certain securities of foreign issuers. Proposed Special Instruction D.2 to Form N–PX; current Instruction 2 to Item 1 of Form N–PX.

[67] Proposed Item 1(d) of Form N–PX.

[68] Proposed Item 1(e) of Form N–PX.

[69] Proposed Item 1(f) of Form N–PX.

[70] Proposed Item 1(g) of Form N–PX.

[71] Proposed Item 1(h) of Form N–PX.

[72] Proposed Item 1(i) of Form N–PX. In the case of votes on the frequency of executive compensation votes, there would be four potential ways of voting (1-year frequency, 2-year frequency, 3-year frequency, or abstain).

[73] Proposed Item 1(j) of Form N–PX.

[74] Proposed Item 1(k) of Form N–PX.

[75] *See* proposed Special Instruction D.1 to Form N–PX.

[76] In July of this year, we published a concept release in which we requested comment on amending Form N–PX to require either a standardized reporting format or tagged information in order to facilitate comparisons of proxy voting records among funds. *See* Exchange Act Release No. 62495 (July 14, 2010) [75 FR 42982, 43008 (July 22, 2010)] ("Concept Release"). The comment period for the Concept Release closes on October 20, 2010.

[77] *See* proposed Item 1(f) of Form N–PX; *cf.* current Item 1(f) of Form N–PX (requirement currently applicable to funds).

[78] *See* Concept Release, *supra* note 76, 75 FR at 42994–95 (requesting comment on amending Form N–PX to require funds to disclose the actual number of shares voted).

For that reason, we are proposing to require disclosure of (1) The number of shares the reporting person was entitled to vote (for funds) or had or shared voting power over (for institutional investment managers); [79] (2) the number of those shares that were voted; [80] and (3) how the reporting person voted those shares (*e.g.,* for or against proposal, or abstain; for or withhold regarding election of directors) and, if the votes were cast in multiple manners (*e.g.,* for and against), the number of shares voted in each manner.[81] Because these disclosures will make it clear whether the reporting person cast a vote on the matter, we are also proposing to amend Form N–PX to remove the related disclosure requirement currently found in Item 1(g).[82] In disclosing the number of shares over which an institutional investment manager had or shared voting power, the manager would be required to report the number of shares over which it had sole voting power separately from the number of shares over which it had shared voting power. The manager would also be required to separately report shares when the groups of institutional investment managers who share voting power are different.[83]

We are proposing to extend the disclosures relating to the number of shares the reporting person was entitled to vote and the number of those shares that were voted in each manner to funds. In the case of Section 14A Votes, we believe these disclosures by funds are necessary to achieve consistent reporting with respect to institutional investment manager votes because a portion of the votes of those managers may be reported on Form N–PX reports filed by funds under the provisions to prevent duplicative reporting.[84] Therefore, unless we require funds to report this information, the record of institutional investment managers will be incomplete. In addition, information about the magnitude of a fund's voting power and the number of votes cast contribute to the transparency of proxy voting. For that reason, we are also proposing to extend the new requirements to the complete proxy voting records of funds. This is intended to improve transparency of fund proxy voting records and enable fund shareholders to better monitor their funds' involvement in the governance activities of portfolio companies.[85]

As described above, in order to prevent duplicative reporting, the Section 14A Votes of an institutional investment manager may, in some cases, be reported on the Form N–PX report of another institutional investment manager or a fund.[86] In order to ensure that the particular votes with respect to which each institutional investment manager had or shared voting power may be identified, we are proposing to require that the reporting person identify each institutional investment manager on whose behalf the Form N–PX report is filed and who had or shared the power to vote, or to direct the voting of, the securities voted. A manager would be identified by entering the number assigned to the manager in the Form N–PX Summary Page.[87]

In addition, we are proposing to require that, in the case of Section 14A Votes, standardized descriptions be used to provide the required brief identification of the matter voted on.[88] This standardization is intended to facilitate the ability of users to compare proxy voting records among reporting persons and would be required of funds as well as institutional investment managers. We are proposing standardization of descriptions with respect to Section 14A Votes because they can be readily identified in three different categories, because these votes were selected by Congress for special disclosure in Section 951 of the Dodd-Frank Act, and because uniform identification may make it easier to find these votes within the complete proxy voting records filed by funds. Under our proposal, votes pursuant to Section 14A(a)(1) of the Exchange Act would be identified as "14A Executive Compensation," votes pursuant to Section 14A(a)(2) of the Exchange Act would be identified as "14A Executive Compensation Vote Frequency," and votes pursuant to Section 14A(b) of the Exchange Act would be identified as "14A Extraordinary Transaction Executive Compensation." [89]

Finally, we are proposing a technical amendment to Form N–PX that would require reporting persons to disclose whether each reported vote was "for or against management's recommendation." [90] Currently, Form N–PX requires funds to disclose whether the vote was "for or against management." [91] This amendment is intended to clarify that the report is required to disclose how the vote was cast in relation to management's recommendation, as opposed to how the vote may have affected management.

We request comment on the information that we propose to require be disclosed in Form N–PX reports, and, in particular, on the following issues:

- We are proposing to require the disclosure of substantially the same information under amended Form N–PX that we currently require funds to disclose on Form N–PX. Should we modify the proposed content requirements in any way for either institutional investment managers or funds? Is there any information that we propose to require that should not be required? Is there additional information that should be required?
- Should we, as proposed, require the information in Form N–PX reports to be disclosed in a standardized order? Would this facilitate comparisons or be otherwise useful to users of this information? What costs, if any, would be associated with standardization? Should the requirement to standardize apply to institutional investment managers, funds, or both? If we standardize the order of the information in Form N–PX reports, should we use the order set forth in our proposal, or would some other order of information be more appropriate?
- Are there methods other than standardizing the order of information that would render the information reported on Form N–PX more useful? Should we require reporting persons to

[79] Proposed Item 1(g) of Form N–PX.

[80] Proposed Item 1(h) of Form N–PX.

[81] Proposed Item 1(i) of Form N–PX. In the case of a shareholder vote on the frequency of executive compensation votes, a reporting person would be required to disclose the number of shares, if any, voted in favor of each of 1-year frequency, 2-year frequency, or 3-year frequency, and the number of shares, if any, that abstained.

[82] *See* current Item 1(g) of Form N–PX (requiring disclosure of whether the fund cast its vote on a matter).

[83] *See* proposed Special Instruction D.4 to Form N–PX. For example, if the reporting institutional investment manager shares voting power with respect to 10,000 shares with Manager A and shares voting power with respect to 50,000 shares with Managers A and B, then the groups of 10,000 and 50,000 shares would be required to be separately reported. Similarly, a fund would be required to separately report shares with respect to which different institutional investment managers or groups of institutional investment managers have or share voting power.

[84] *See* discussion *supra* Part II.D.

[85] *See* Form N–PX Adopting Release, *supra* note 27, at 6580 (noting Commission's belief "that requiring funds to disclose their complete proxy voting records will benefit investors by improving transparency and enabling fund shareholders to monitor their funds' involvement in the governance activities of portfolio companies").

[86] *See* discussion *supra* Part II.D.

[87] *See* proposed Item 1(k) of Form N–PX. Form 13F includes a similar requirement. *See* Special Instruction 12.b.vii to Form 13F (identification of managers with shared investment discretion).

[88] Proposed Item 1(e) of Form N–PX; proposed Special Instruction D.3 to Form N–PX.

[89] *See* proposed Special Instruction D.3 to Form N–PX.

[90] Proposed Item 1(j) of Form N–PX. Management's recommendation would include any recommendation from a company's board of directors or any board committee (e.g., audit committee or compensation committee).

[91] Current Item 1(i) of Form N–PX.

provide the information reported on Form N–PX in interactive data format? Is it feasible for reporting persons to tag Form N–PX in a manner that provides for uniform identification of each matter voted (*e.g.,* for every reporting person to assign the same tag to a particular matter) if issuers of securities do not themselves create these tags by tagging their proxy statements? What alternatives exist, other than having issuers of portfolio securities tag their proxy statements and assign tags to each matter on their proxy statements, that could result in uniform tags being assigned by all reporting persons on Form N–PX to each matter? What, if any, costs would be associated with these alternative methods?

• Should we amend Form N–PX, as proposed, to require disclosure of the number of shares the reporting person was entitled to vote or had voting power over, the number of shares voted, and the number of shares voted in each manner? Is this quantitative information necessary to make the reports of institutional investment managers meaningful? Would this quantitative information make the reports of funds more useful than they are today? Should these requirements apply to both institutional investment managers and funds? For funds, should they apply to all matters or only to Section 14A Votes? What, if any, costs would be associated with disclosure of this quantitative information?

• Should we, as proposed, require a reporting person to identify, for each vote reported, each institutional investment manager who had or shared voting power as to the securities voted? Or is it sufficient to require a reporting person to disclose on the Summary Page the institutional investment managers for whom it is reporting, without identifying, for each vote reported, the institutional investment managers who have or share voting power? If we require identification of the institutional investment managers that have or share voting power for each vote reported, should we use the sequential numbering system that we have proposed for the Summary Page, or should we instead use the managers' Form 13F file numbers, *i.e.,* the numbers beginning "28–?"

• Should we, as proposed, require standardized descriptions to be used to identify Section 14A Votes? Is the proposed standardization likely to be useful to users of the information? Should we modify the proposed descriptions in any way? What would be the benefits and costs of requiring this standardization? What are the benefits of standardizing descriptions only with respect to Section 14A Votes while not standardizing descriptions with respect to other matters? Are there alternative methods for achieving any benefits that would accrue from such standardization, *e.g.,* by requiring standardized computer tags to be used to identify various types of proxy vote matters? What would be the costs associated with these alternatives?

F. Requests for Confidential Treatment

The Commission intends to make the information filed on Form N–PX publicly available through the Commission's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system.[92] Pursuant to rule 24b–2 under the Exchange Act,[93] which governs requests for confidential treatment of information required to be filed under the Act, an institutional investment manager could request confidential treatment of information reported on Form N–PX.[94] Generally, it does not appear that confidential treatment would be appropriate in order to prevent proxy voting information from being made public. It appears that confidential treatment could be appropriate, if at all, only in narrowly circumscribed circumstances where an institutional investment manager has filed a confidential treatment request for information reported on Form 13F that is pending or has been granted and where confidential treatment of information filed on Form N–PX would be appropriate in order to protect information that is the subject of the Form 13F confidential treatment request.[95]

We are proposing to include instructions in Form N–PX that prescribe the specific procedures to be used in requesting confidential treatment of information filed on Form N–PX, the required content of a confidential treatment request, and the required filing of information that is no longer entitled to confidential treatment.[96] These instructions are based on the Form 13F confidential treatment instructions, which apply in similar circumstances.[97] We note that current Form N–PX does not include any confidential treatment instructions. Currently, there is transparency of fund portfolio holdings information apart from Form N–PX,[98] and, as a result, we are not aware of any situation in which confidential treatment would be appropriate for information filed by funds on Form N–PX.

We request comment on the confidential treatment provisions of the proposed amendments to Form N–PX and, in particular, on the following issues:

• In what, if any, circumstances would it be appropriate for the Commission to grant confidential treatment to information filed on Form N–PX by institutional investment managers? Should Form N–PX or rules of the Commission identify certain circumstances in which confidential treatment may be appropriate?

• Are the proposed instructions to Form N–PX that prescribe the specific procedures to be used by institutional investment managers that are requesting confidential treatment, the required content of a confidential treatment request, and the required filing of information that is no longer entitled to confidential treatment appropriate? Should these instructions be modified in any way to address any aspect of confidential treatment requests?

G. Technical and Conforming Amendments

We are proposing two technical and conforming amendments. We are proposing to amend the heading of Subpart D of Part 249 of the Code of Federal Regulations to include new Section 14A of the Exchange Act and to indicate that Exchange Act reports are filed by both issuers and other persons (*e.g.,* institutional investment managers). We are also proposing amendments to reflect the fact that Form N–PX will be an Exchange Act form, as well as an Investment Company Act form.[99]

[92] *See* proposed Paperwork Reduction Act Information in Form N–PX (explaining that the Commission will make information filed on Form N–PX public); *see also* rule 80(c)(3) promulgated under the Freedom of Information Act [17 CFR 200.80(c)(3)] (stating that filings made through the EDGAR system are publicly available on the Commission's Web site).

[93] 17 CFR 240.24b–2.

[94] *See* proposed Confidential Treatment Instruction 1 to Form N–PX.

[95] Section 13(f)(3) of the Exchange Act provides that the Commission, as it determines to be necessary or appropriate in the public interest or for the protection of investors, may delay or prevent public disclosure of information filed on Form 13F in accordance with the Freedom of Information Act. Section 13(f)(3) also provides that any information filed on Form 13F that identifies the securities held by the account of a natural person or an estate or trust (other than a business trust or investment company) shall not be disclosed to the public.

[96] *See* proposed Confidential Treatment Instructions to Form N–PX.

[97] *See* Form 13F Instructions for Confidential Treatment Requests.

[98] Portfolio holdings information is required to be disclosed by funds on a quarterly basis with a 60-day lag, through semi-annual shareholder reports pursuant to rule 30e–1 under the Investment Company Act [17 CFR 270.30e–1] and Form N–Q.

[99] Proposed rule 30b1–4; proposed 17 CFR 249.326 and 274.129.

H. Compliance Dates

If the proposed amendments are adopted, the Commission expects to require institutional investment managers to file their first reports on Form N–PX covering Section 14A Votes at meetings that occur on or after January 21, 2011 (the first date on which the voting requirements of Section 14A apply to shareholder meetings), and ending on June 30, 2011. The reports would be required to be filed not later than August 31, 2011. We also expect to require that funds comply with the amendments to Form N–PX in their reports filed for the period July 1, 2010, through June 30, 2011, which are required to be filed not later than August 31, 2011, except that, for votes at meetings that occur before January 21, 2011, funds would be permitted to include the information currently required by Form N–PX in the format currently required by Form N–PX. The compliance dates are intended to provide a uniform mechanism of reporting votes at meetings that occur on or after January 21, 2011, because funds will be permitted to report Section 14A Votes for institutional investment managers. However, in order to reduce the burden of compliance, funds would not be required to report pre-January 21, 2011 votes using the new requirements.

We request comment on the proposed compliance dates and, in particular, on the following issues:

- Would the proposed compliance dates provide adequate lead time for institutional investment managers that would be required to file Form N–PX for the first time? Would the proposed compliance dates provide adequate lead time for funds that would be required to comply with the amendments to Form N–PX? What, if any, implementation issues would be raised for institutional investment managers, funds, and their service providers in complying with the proposals?
- How should we address any implementation issues? Should we, for example, permit delayed filing (*e.g.,* to September 30, October 31, November 30, or December 31, 2011) of Form N–PX for institutional investment managers, funds, or both for the period ended June 30, 2011, in order to provide more time to prepare the initial filings on revised Form N–PX? As another alternative, should we not require institutional investment managers to report Section 14A Votes that occur before July 1, 2011, on Form N–PX, with the result that institutional investment managers would file their first report on Form N–PX not later than August 31, 2012, for the period July 1, 2011, through June 30, 2012? If so, should we require institutional investment managers to report their Section 14A Votes that occur from January 21, 2011, through June 30, 2011, in some other manner, such as on their Web sites? For what period, if any, should we delay required compliance by funds with the revised Form N–PX requirements?

III. General Request for Comments

The Commission requests comment on the amendments proposed in this release, whether any further changes to our rules or forms are necessary or appropriate to implement the objectives of our proposed amendments, and on other matters that might affect the proposals contained in this release.

IV. Paperwork Reduction Act

Certain provisions of our proposal contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[100] We are submitting the proposed collections of information to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[101] The title for the existing collection of information is: "Form N–PX—Annual Report of Proxy Voting Record of Registered Management Investment Companies."[102] 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.

Section 14A(d) of the Exchange Act requires that every institutional investment manager subject to Section 13(f) of the Exchange Act report at least annually how it voted on the executive compensation-related shareholder votes required by Sections 14A(a) and (b) (the "Section 14A Votes"), unless such vote is otherwise required to be reported publicly by rule or regulation of the Commission. To implement Section 14A(d), we are proposing new rule 14Ad–1 under the Exchange Act, which, if adopted, would require institutional investment managers that are required to file reports under Section 13(f) of the Exchange Act to file their record of Section 14A Votes with the Commission annually on Form N–PX. We are also proposing to amend Form N–PX (OMB Control No. 3235–0582), which was adopted pursuant to Section 30 of the Investment Company Act[103] and is currently used by funds to file their complete proxy voting records with the Commission, to accommodate the new filings by institutional investment managers.

Form N–PX, including the proposed amendments, contains collection of information requirements. Form N–PX is currently used by funds to file their complete proxy voting records with the Commission. Compliance with the disclosure requirements of the form is mandatory. Responses to the disclosure requirements would not be kept confidential unless granted confidential treatment.

The proposed amendments to Form N–PX would accommodate reporting of Section 14A Votes by institutional investment managers. The amended form, as proposed, would consist of three parts: An amended Cover Page, a new Summary Page, and proxy voting information. Under the proposed amendments, funds and institutional investment managers would be required to disclose the following proxy voting information: (a) The name of the issuer of the security; (b) the exchange ticker symbol of the security; (c) the CUSIP number for the security; (d) the shareholder meeting date; (e) a brief identification of the matter voted on; (f) for reports filed by funds, whether the matter was proposed by the issuer or by a security holder; (g) the number of shares the reporting person was entitled to vote (for funds) or had or shared voting power over (for institutional investment managers); (h) the number of shares that were voted; (i) how the reporting person voted those shares (*e.g.,* for or against proposal, or abstain; for or withhold regarding election of directors) and, if the votes are cast in multiple manners (*e.g.,* for and against), the number of shares voted in each manner; (j) whether the vote was for or against management's recommendation; and (k) an identification of each institutional investment manager on whose behalf the Form N–PX report is filed (other than the reporting person) and who had or shared voting power as to the securities voted.

The Commission estimates that there are approximately 2,800 funds registered with the Commission, representing approximately 10,100 fund portfolios that are required to file Form N–PX reports. The 10,100 portfolios are comprised of approximately 6,200 portfolios holding equity securities and 3,900 portfolios holding no equity

[100] 44 U.S.C. 3501 *et seq.*

[101] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[102] We intend to rename the title for the collection of information relating to Form N–PX as "Form N–PX—Annual Report of Proxy Voting Record."

[103] 15 U.S.C. 80a–29.

securities.[104] The current PRA burden associated with Form N–PX is estimated to be 14.4 hours per response for portfolios holding equity securities and 0.17 hours (10 minutes) per response for portfolios holding no equity securities, for a total annual hour burden of approximately 89,900 hours when calculated using the current number of portfolios.[105] There are currently no external costs associated with Form N–PX for purposes of the PRA.

We are proposing to revise our current PRA estimates of the burden to funds of complying with Form N–PX. It is our understanding that most funds hire third-party service providers, such as proxy advisory firms, to assist with the administrative tasks associated with voting, recording voting decisions, and preparing the reports to be filed on Form N–PX. As a result, we are proposing to reduce our estimate of the current PRA burden of Form N–PX for portfolios holding equity securities from 14.4 hours to 7.2 hours[106] and add external costs of $1,000 per portfolio paid to third-party service providers.[107] We propose no changes to our current estimate for portfolios holding no equity securities because they generally have no proxy votes to report and therefore do not require third-party service providers to assist with proxy voting and preparing reports on Form N–PX. The revised aggregate annual PRA burden is approximately 45,300 internal hours[108] and $6.2 million in external costs.[109] We request comment on any aspect of the proposed revised PRA burden to funds of complying with Form N–PX.

We are also proposing to revise our estimates of the PRA burden associated with Form N–PX to reflect our proposed amendments to Form N–PX. For funds, the Commission estimates that compliance attorneys would spend an average of 1.5 hours per portfolio holding equity securities[110] and funds would incur no external costs[111] to comply with the proposed amendments to Form N–PX, which would include preparation of the amended Cover Page and the new Summary Page, disclosure of the proposed additional proxy voting information relating to the number of shares the fund was entitled to vote and the number of shares that were voted, the identification of each institutional investment manager on whose behalf the Form N–PX report is filed, and compliance with the requirements that information appear in a standardized order and use standardized descriptions for Section 14A Votes. We further estimate that the proposed amendments would not increase the hour burden for funds holding no equity securities because their reporting requirements would remain substantially the same. Therefore, we estimate that the proposed amendments would increase the total annual PRA burden for funds to comply with Form N–PX by approximately 9,300 hours[112] and would not increase or decrease external costs.

The Commission estimates that there are approximately 4,000 institutional investment managers that are required to file reports under Section 13(f) of the Exchange Act that would be required under the proposed amendments to file their record of Section 14A Votes with the Commission annually on Form N–PX.[113] We also estimate that approximately 200 amendments to Form N–PX reports will be filed annually by institutional investment managers as a result of the final adverse disposition of a request for confidential treatment or upon expiration of previously granted confidential treatment.[114] We further estimate that for each institutional investment manager required to file its record of Section 14A Votes on Form N–PX, compliance attorneys would spend an average of 8.7 hours per year to review filings on Form N–PX made under the proposal,[115] and 1 hour per amendment to review confidential treatment-related amendments to filings on Form N–PX under the proposal.[116] We also estimate that the proposed

[104] The estimate of 2,800 funds is based on the number of management investment companies currently registered with the Commission. The Commission staff estimates that there are approximately 5,700 portfolios that invest primarily in equity securities, 500 "hybrid" or bond portfolios that may hold some equity securities, 3,200 bond portfolios that hold no equity securities, and 700 money market fund portfolios, for a total of 10,100 portfolios required to file Form N–PX reports. The staff has based its portfolio estimates on a number of publications. *See* Investment Company Institute, Trends in Mutual Fund Investing (June 2010); Investment Company Institute, Closed-End Fund Assets (Second Quarter 2010); Investment Company Institute, Exchange Traded Fund Assets (June 2010); Investment Company Institute, Supplemental Trends Tables (June 2010).

[105] (6,200 portfolios that hold equity securities × 14.4 hours per year) + (3,900 portfolios holding no equity securities × 0.17 hours per year) = 89,943 hours. *See also* 74 FR 475 (Jan. 6, 2009) (most recent submission to OMB to request extension of the previously approved collection of information for Form N–PX).

[106] When we adopted Form N–PX in 2003, we estimated a PRA burden of 14.4 hours and no external costs. Form N–PX Adopting Release, *supra* note 27, at 6573–74. We also estimated that attorneys and programmers would divide time equally on compliance with the proxy voting disclosure requirements. *Id.* at 6576 n.77. Our revised estimate removes the estimated hours allocated to programmers because we believe that this burden is now generally borne through external costs charged by third-party service providers.

[107] This estimate is based on the Commission staff's consultations with third-party service providers that assist funds with the administrative tasks associated with voting, recording voting decisions, and preparing reports to be filed on Form N–PX.

[108] (6,200 portfolios holding equity securities × 7.2 hours per year) + (3,900 portfolios holding no equity securities × 0.17 hours per year) = 45,303 hours.

[109] (6,200 portfolios holding equity securities × $1,000 per year) + (3,900 portfolios holding no equity securities × $0 per year) = $6,200,000.

[110] We estimate that the revised current PRA burden of Form N–PX is 7.2 hours. For our proposed changes, we estimate an additional 1.5 hours based on the scope of the proposed additional disclosures in Form N–PX as compared to the current disclosures in Form N–PX.

[111] Based on Commission staff consultations with third-party service providers, we believe that the external costs of the proposed amendments will be included in the current fees already charged by the service providers for Form N–PX compliance.

[112] 6,200 portfolios holding equity securities × 1.5 hours per year = 9,300 hours per year.

[113] Based on Commission staff analysis of Form 13F reports filed with the Commission.

[114] *See* proposed Confidential Treatment Instructions 6 and 7 to Form N–PX. Our estimate is based on the number of Form 13F amendments received by the Commission during the year ended June 30, 2010, divided by four. We have assumed there will be fewer amendments for Form N–PX because we believe that an annual filing (as opposed to quarterly filings in the case of Form 13F) will result in fewer confidential treatment requests for Form N–PX. For purposes of this estimate, we are conservatively assuming that all 200 amendments filed are related to the adverse disposition of a request for confidential treatment or the expiration of previously granted confidential treatment, although some may be amendments filed to correct errors or omissions in a previous filing. Like the current PRA estimate for Form N–PX, our proposed estimate does not allocate a separate burden to amendments that merely correct errors or omissions in a separate filing. For that reason, and because we do not expect funds to file confidential treatment-related amendments, we are not including a burden estimate for amendments filed by funds. *See supra* text accompanying note 98.

[115] This estimate for institutional investment managers is the same as the revised estimate for funds under the proposed amendments (7.2 hours under the revised estimate + 1.5 hours under the proposed amendments). In arriving at this estimate, we are taking a conservative approach in assuming that institutional investment managers will incur the same hourly burden for filing reports on Form N–PX as funds, even though managers will only be required to report Section 14A Votes whereas funds are required to file their complete voting record. In addition, for purposes of this estimate, we are assuming that every manager will file its full record of Section 14A Votes on an institutional investment manager "voting" report, and not file an institutional investment manager "notice" or institutional investment manager "combination" report. The "notice" and "combination" reports would likely require a lesser hourly burden than the "voting" report because, while the "voting" report requires a manager to report all of its Section 14A Votes, the "notice" and "combination" reports permit a manager to reference another manager's report that includes all or part of the first manager's Section 14A Votes.

[116] We estimate that the burden for amendments to Form N–PX reports will be the same as the current hour burden for amendments to Form 13F reports, which is estimated to be 1 hour per amendment. *See* 74 FR 28076 (June 12, 2009) (most recent submission to OMB to request extension of the previously approved collection of information for Form 13F).

amendments would result in certain external costs for institutional investment managers to generate and maintain the information disclosed in Form N–PX reports, which we estimate to be $1,000 per year.[117] We estimate that the proposed amendments would result in a total annual PRA burden for institutional investment managers to comply with Form N–PX of approximately 35,000 hours[118] and $4 million in external costs.[119]

We estimate that if the proposed amendments to Form N–PX are adopted, the total annual PRA burden for all reporting persons (both funds and institutional investment managers) to comply with the requirements of Form N–PX would be approximately 89,600 hours[120] and approximately $10.2 million in external costs.[121] We do not believe that there will be any initial PRA burden that will be incurred beyond the annual PRA burden.[122] We further believe that many reporting persons are already tracking the data required to be reported by our proposal.[123]

Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comments 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 Commission's estimate of burden of the proposed collections of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology. We request comment and supporting empirical data on our burden and cost estimates for the proposed amendments, including the external costs that reporting persons may incur.

Persons wishing to submit comments on the collection of information requirements of the proposed amendments should direct them to the Office of Management and Budget, Attention Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503 and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–30–10. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–30–10, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549–0213. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this release.

V. Cost/Benefit Analysis

Section 14A(d) of the Exchange Act requires that every institutional investment manager subject to Section 13(f) of the Exchange Act report at least annually how it voted on Section 14A Votes, unless such vote is otherwise required to be reported publicly by rule or regulation of the Commission. To implement Section 14A(d), the Commission is proposing new rule 14Ad–1 under the Exchange Act, which, if adopted, would require institutional investment managers that are required to file reports under Section 13(f) of the Exchange Act to file their record of Section 14A Votes with the Commission annually on Form N–PX. The Commission is also proposing to amend Form N–PX, which is currently used by funds to file their complete proxy voting records with the Commission, to accommodate the new filings by institutional investment managers. The Commission is sensitive to the costs and benefits imposed by its rules and has identified certain costs and benefits of the proposed rule and form amendments, as described below.

A. Benefits

The proposed new rule and form amendments would make important information about Section 14A Votes by institutional investment managers publicly available. The information would include the number of shares over which the manager had or shared voting power, the number of shares voted, and how the shares were voted by the manager. For funds, the proposed amendments to Form N–PX would require funds to disclose enhanced information by presenting the information in a standardized order and by disclosing the number of shares that the fund was entitled to vote and the number of shares voted. We believe that the information required to be provided by our proposal would increase the transparency regarding Section 14A Votes by institutional investment managers and funds.

The proposed new rule and amendments to Form N–PX may benefit the securities markets by providing access to information about how institutional investment managers exercise proxies with respect to Section 14A Votes. We note that institutional investment managers that file reports on Form 13F exercised investment discretion over approximately $11.1 trillion in Section 13(f) equity securities as of December 31, 2009.[124] In many cases, the institutional investment managers also have or share the power to vote proxies relating to these equity securities. This voting power gives institutional investment managers significant ability collectively, and in some cases individually, to affect the outcome of shareholder votes and influence the governance of corporations. Institutional investment managers are thus in a position to significantly affect the future of corporations and, as a result, the future value of corporate securities.

The proposed amendments to Form N–PX would require both institutional investment managers and funds to disclose information in a standardized order. This change is likely to benefit investors and other market participants and users of the information by facilitating comparisons of voting records among reporting persons. We are also proposing to require that, in the case of Section 14A Votes, standardized descriptions be used to provide the

[117] The external cost estimate for institutional investment managers is the same as our revised estimate for funds. Based on the Commission staff's consultations with third-party service providers, we believe that the external costs to institutional investment managers under the proposed amendments would be approximately the same as the external costs to funds.

[118] (4,000 institutional investment managers making annual filings × 8.7 hours per filing) + (200 amendments filed annually × 1 hour per amendment) = 35,000 hours per year.

[119] 4,000 institutional investment managers × $1,000 per year = $4,000,000 per year.

[120] 45,303 hours under revised current burden for funds + 9,300 hours estimated to be incurred by funds under proposed amendments + 35,000 hours estimated to be incurred by institutional investment managers under proposed amendments = 89,603 hours.

[121] $6,200,000 under revised current burden for funds + $4,000,000 estimated to be incurred by institutional investment managers under proposed amendments = $10,200,000.

[122] Based on Commission staff consultations with funds and third-party service providers.

[123] *Id. See also* DOL Interpretive Bulletin, *supra* note 20 (noting the Department of Labor's view that an investment manager or other ERISA plan fiduciary would be required to maintain accurate records as to proxy voting decisions).

[124] Based on information obtained from the Thomson Reuters Institutional (13F) Holdings database.

required brief identification of the matter voted on. This standardization is intended to facilitate the ability of users to compare proxy voting records among reporting persons. We believe that fund investors may benefit because uniform identification should make it easier to find the Section 14A Votes within the complete proxy voting records filed by funds.

We are proposing amendments to Form N–PX to require disclosure of (1) the number of shares the reporting person was entitled to vote (for funds) or had or shared voting power over (for institutional investment managers); (2) the number of those shares that were voted; and (3) how the reporting person voted those shares and, if the votes were cast in multiple manners (*e.g.,* for and against), the number of shares voted in each manner. The proposed amendments to Form N–PX provide more detailed information as compared to the current form. The additional information is necessary to accommodate the possibility of different votes on the same matter by a reporting person. This information would be required of funds, as well as institutional investment managers, and we believe that the additional information may benefit fund investors by helping them to understand a fund's proxy voting record.

B. Costs

The new rule and form amendments would lead to some additional costs for institutional investment managers and funds and fund investors. The resulting costs may include both internal costs (for compliance attorneys to review the required disclosures) and external costs (such as costs associated with third-party service providers to collect and report the information disclosed in Form N–PX reports). If an institutional investment manager has voting power with respect to a client's securities, these costs may be passed on to the client.

First, if adopted, our proposals would impose costs on institutional investment managers because they would implement the disclosure requirements of Section 14A by requiring institutional investment managers to file their record of Section 14A Votes with the Commission annually on Form N–PX. Based on our PRA analysis, we estimate that the costs for each institutional investment manager attributable to the proposed new rule and form amendments would be approximately $2,350 in internal costs for compliance attorneys per annual filing,[125] $270 in internal costs for compliance attorneys per amendment,[126] and $1,000 in external costs for third-party service providers[127] to prepare, review, and submit the required disclosure. We estimate that the aggregate annual costs imposed by the proposed rule and form amendments on institutional investment managers would be approximately $13.5 million.[128]

Second, if adopted, our proposals would impose costs on funds because the proposals would modify the format and content of the information required by Form N–PX in the following ways: (1) The information would be required to appear in a standardized order; (2) information would be required about the number of shares the fund was entitled to vote and the number of shares that were voted; (3) the institutional investment managers who had or shared voting power for a matter would be identified; and (4) standardized descriptions would be required for Section 14A Votes. Based on our PRA analysis, we estimate that the costs for each portfolio that holds equity securities attributable to the proposed form amendments would be approximately $400 per year in internal costs for compliance attorneys to review the required disclosure.[129] We estimate that the aggregate annual costs imposed by the proposed form amendments on funds would be approximately $2.5 million.[130]

These proposals are intended to implement the disclosure required by Section 14A(d) of the Exchange Act, which was added by Section 951 of the Dodd-Frank Act. In general, the costs and other economic effects that result from requiring such disclosure are mandated under Section 14A(d). We believe that our proposal to use Form N–PX to implement the congressionally mandated proxy vote reporting requirements would mitigate the costs of compliance, because the existing form is supported by a number of third-party service providers and is already used by the many institutional investment managers who currently file Form N–PX reports on behalf of funds. We further believe that many reporting persons are already tracking the data required to be reported by our proposal. Finally, the proposal would mitigate compliance costs by including provisions intended to prevent duplicative reporting of Section 14A Votes.

C. Request for Comments

We request comments on all aspects of this cost-benefit analysis, including identification of any additional costs or benefits of, or suggested alternatives to, the proposed amendments. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a)(2) of the Exchange Act requires the Commission, in adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[131] Further, Section 3(f) of the Exchange Act requires the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[132] Section 2(c) of the Investment Company Act requires the Commission, when

[125] We estimate that compliance attorneys will spend 8.7 hours to review annual filings on Form N–PX. *See supra* note 115 and accompanying text. The hourly wage rate of $270 for a compliance attorney is based on the salary information from the Securities Industry and Financial Markets Association, Report on Management & Professional Earnings in the Securities Industry 2009, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. Therefore, the internal costs associated with this burden equal approximately $2,350 per institutional investment manager (8.7 hours × $270 per hour = $2,349).

[126] We estimate that compliance attorneys will spend 1 hour per amendment to review amendments to filings on Form N–PX. *See supra* note 116 and accompanying text. For hourly wage rate information, *see supra* note 125. Therefore, the internal costs associated with this burden equals approximately $270 per amendment (1 hour × $270 per hour = $270).

[127] *See supra* note 117 and accompanying text.

[128] ($2,349 in internal costs per annual filing × 4,000 institutional investment managers) + ($270 in internal costs per amendment × 200 amendments) + ($1,000 in external costs per institutional investment manager × 4,000 investment managers) = $13,450,000.

[129] We estimate that compliance attorneys would spend an additional 1.5 hours to review the materials. *See supra* note 110 and accompanying text. For hourly wage rate information, *see supra* note 125. Therefore, the internal costs associated with this burden equal approximately $400 per fund (1.5 hours × $270 per hour = $405). We estimate that no additional external costs would result from the proposal. *See supra* note 111.

[130] 6,200 portfolios holding equity securities × $405 in internal costs per year = $2,511,000.

[131] 15 U.S.C. 78w(a)(2).

[132] 15 U.S.C. 78c(f).

engaging in rulemaking that requires it to consider or determine whether an action is consistent with the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[133]

The proposed new rule and form amendments are intended to implement the disclosure required by Section 14A(d) of the Exchange Act, which was added by Section 951 of the Dodd-Frank Act. In general, the burden on competition and effects on efficiency, competition, and capital formation, if any, that result from requiring such disclosure are mandated under Section 14A(d). We believe that our proposal to use Form N–PX to implement the congressionally mandated proxy vote reporting requirements would promote efficiency because the existing form is supported by a number of third-party service providers and is already used by the many institutional investment managers who currently file Form N–PX reports on behalf of funds.

Because the proposed new rule 14Ad–1 and amendments to Form N–PX apply equally to all institutional investment managers that are required to file reports under Section 13(f) of the Exchange Act, we do not anticipate that any competitive disadvantages would be created. To the contrary, we anticipate that our proposed new rule and form amendments may encourage competition by raising awareness about institutional investment manager voting on Section 14A Votes and facilitate differentiation among institutional investment managers. Although we recognize that the proxy vote reporting requirements may require institutional investment managers and funds to expend resources that could be used for other purposes, we do not anticipate that the proposed new rule and form amendments would impose an undue burden on competition or efficiency because we believe that many reporting persons are already tracking the data required to be reported by our proposal. Our proposal implements the requirements of Section 14A(d) in a manner that is intended to minimize the costs for reporting persons and may have a positive effect on capital formation.

We request comment on whether the proposed rule and form amendments, if adopted, would promote efficiency, competition, and capital formation. We also request comment on whether the proposed rule and form amendments would impose a burden on competition. Commenters are requested to provide empirical data and other factual support for their views if possible.

VII. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act.[134] It relates to the Commission's proposed new rule 14Ad–1 under the Exchange Act and proposed amendments to Form N–PX under the Exchange Act and the Investment Company Act.

A. Reasons for, and Objectives of, Proposed New Rule and Proposed Form Amendments

Section 14A(d) of the Exchange Act requires that every institutional investment manager subject to Section 13(f) of the Exchange Act report at least annually how it voted on Section 14A Votes, unless such vote is otherwise required to be reported publicly by rule or regulation of the Commission. To implement Section 14A(d), the Commission is proposing new rule 14Ad–1 under the Exchange Act, which, if adopted, would require institutional investment managers that are required to file reports under Section 13(f) of the Exchange Act to file their record of Section 14A Votes with the Commission annually on Form N–PX. The Commission is also proposing to amend Form N–PX, which is currently used by funds to file their complete proxy voting records with the Commission, to accommodate the new filings by institutional investment managers.

B. Legal Basis

The Commission is proposing new rule 14Ad–1 pursuant to the authority set forth in Sections 13, 14A, 23(a), 24, and 36 of the Exchange Act. The Commission is proposing amendments to Form N–PX pursuant to the authority set forth in sections 13, 14A, 23(a), 24, and 36 of the Exchange Act and sections 8, 30, 31, 38, and 45 of the Investment Company Act.

C. Small Entities Subject to the Rule

The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[135] The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.

The Commission's rules under the Exchange Act that define a "small business" and "small organization" do not provide a definition specifically covering institutional investment managers. The Commission's rules do, however, provide definitions with respect to the terms "person" and "broker or dealer." Under our rules, "small business" and "small organization," when used with reference to (1) a person other than an investment company, generally means a person with total assets of $5 million or less on the last day of its most recent fiscal year; and (2) a broker or dealer, generally means a broker or dealer that has total capital of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared and is not affiliated with any person that is not a small business or small organization.[136]

We believe that the categories "person" and "broker or dealer" are appropriate categories of entities for purposes of analyzing whether the proposed rule and form amendments would have a significant economic impact on a substantial number of small entities that are institutional investment managers that are required to file reports under Section 13(f). We believe that institutional investment managers that invest in or buy and sell securities for their own account would be covered under the "person" category. Institutional investment managers that exercise investment discretion with respect to the account of another person generally will be either a "broker or dealer" or otherwise be in the "person" category. Therefore, we believe that the affected managers would be covered under the categories "person" or "broker or dealer."

With respect to institutional investment managers that invest in or buy and sell securities for their own account, such managers are only required to file reports under Section 13(f) if they hold at least $100 million in Section 13(f) securities as of the last trading day of any calendar month during any year.[137] Because of this threshold, these institutional investment managers are unlikely to hold $5 million or less in total assets at the end of their fiscal year. Therefore, we do not believe that these types of institutional investment managers would be small entities for purposes of the Regulatory Flexibility Act.

For institutional investment managers that exercise investment discretion with respect to accounts of other persons, we believe that such managers generally will be either broker-dealers or other

[133] 15 U.S.C. 80a–2(c).

[134] 5 U.S.C. 603 *et seq.*

[135] 5 U.S.C. 601(6).

[136] 17 CFR 240.0–10.

[137] 17 CFR 240.13f–1.

persons. The Commission believes that it is unlikely that an institutional investment manager that exercises investment discretion over at least $100 million in Section 13(f) securities will hold $5 million or less in total assets, or have total capital of less than $500,000 if it is a broker-dealer. Therefore, the Commission believes that few, if any, of these types of institutional investment managers would be considered small entities for purposes of the Regulatory Flexibility Act.

The Commission's rules under the Investment Company Act define a "small business" or "small organization" for purposes of the Regulatory Flexibility Act to mean an investment company that, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[138] We estimate that approximately 154 funds meet this definition. The proposed amendments to Form N–PX may affect the 154 funds that may be considered small entities.

D. Reporting, Recordkeeping, and Other Compliance Requirements

We are proposing new rule 14Ad–1 under the Exchange Act, which, if adopted, would require institutional investment managers that are required to file reports under Section 13(f) of the Exchange Act to file their record of how they voted on Section 14A Votes with the Commission annually on Form N–PX. We are also proposing to amend Form N–PX, which is currently used by funds to file their complete proxy voting records with the Commission, to accommodate the new filings by institutional investment managers.

Proposed new rule 14Ad–1, if adopted, would apply to institutional investment managers required to file reports under Section 13(f) of the Exchange Act. We are proposing to require an institutional investment manager that is required to report on Form N–PX to include in the report the manager's proxy voting record for each Section 14A Vote with respect to which the manager, whether directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, had or shared the power to vote, or to direct the voting of, any security. We are also proposing to require institutional investment managers to report their Section 14A Votes annually on Form N–PX not later than August 31 of each year, for the most recent twelve-month period ended June 30.

The proposed amendments to Form N–PX would apply to institutional investment managers and funds, including those that are small entities. We are proposing to include a new section on the Cover Page of Form N–PX where the reporting person would provide information in cases where the form is filed as an amendment to a previously filed Form N–PX report. We are also proposing to require that the Cover Page include information that would help users to identify whether the reporting person is a fund or an institutional investment manager. We are proposing to add a new Summary Page to Form N–PX, on which a reporting person would be required to state the total number of institutional investment managers, not counting the reporting person, whose Section 14A Votes are included in the report, and include a list of such institutional investment managers, together with their respective Form 13F file numbers.

In addition, we are proposing to amend Form N–PX to require that information be disclosed in a standardized order. Under the proposed amendments, funds and institutional investment managers would be required to disclose the following proxy voting information: (a) The name of the issuer of the security; (b) the exchange ticker symbol of the security; (c) the CUSIP number for the security; (d) the shareholder meeting date; (e) a brief identification of the matter voted on; (f) for reports filed by funds, whether the matter was proposed by the issuer or by a security holder; (g) the number of shares the reporting person was entitled to vote (for funds) or had or shared voting power over (for institutional investment managers); (h) the number of shares that were voted; (i) how the reporting person voted those shares and, if the votes are cast in multiple manners, the number of shares voted in each manner; (j) whether the vote was for or against management's recommendation; and (k) an identification of each institutional investment manager on whose behalf the Form N–PX report is filed (other than the reporting person) and who had or shared voting power as to the securities voted.

To prevent duplicative reporting, we are proposing amendments to Form N–PX that would permit (1) a single institutional investment manager to report Section 14A Votes in cases where multiple institutional investment managers share voting power; and (2) an institutional investment manager to satisfy its reporting obligations by reference to the Form N–PX report of a fund that includes the manager's Section 14A Votes.

Finally, we are proposing to require that, in the case of Section 14A Votes, standardized descriptions be used to provide the required brief identification of the matter voted on. Under our proposal, votes pursuant to Section 14A(a)(1) of the Exchange Act would be identified as "14A Executive Compensation," votes pursuant to Section 14A(a)(2) of the Exchange Act would be identified as "14A Executive Compensation Vote Frequency," and votes pursuant to Section 14A(b) of the Exchange Act would be identified as "14A Extraordinary Transaction Executive Compensation."

For purposes of the cost/benefit analysis, we have estimated that the aggregate annual costs imposed by the proposed rule and form amendments on institutional investment managers would be approximately $13.5 million.[139] We have further estimated that the aggregate annual costs imposed by the proposed form amendments on funds would be approximately $2.5 million.[140]

The Commission solicits comment on these estimates and the anticipated effect the proposed amendments would have on small entities subject to the rule.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap, or conflict with the proposed rule and rule and form amendments.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small issuers. In connection with the proposed amendments, the Commission considered the following alternatives: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed amendments for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposed amendments, or any part thereof, for small entities.

The Commission believes that, at the present time, special compliance or

[138] 17 CFR 270.0–10.

[139] *See supra* note 128 and accompanying text.

[140] *See supra* note 130 and accompanying text.

reporting requirements for small entities, or an exemption from coverage for small entities, would not be appropriate or consistent with investor protection. Proposed new rule 14Ad–1 and amendments to Form N–PX, if adopted, would apply to institutional investment managers that are required to file reports under Section 13(f) of the Exchange Act. Our proposal is intended to implement the disclosure required by Section 14A(d) of the Exchange Act, which was added by Section 951 of the Dodd-Frank Act. In light of the congressional mandate, we believe it is important for the disclosure to apply to all institutional investment managers that are required to file reports under Section 13(f) of the Exchange Act, regardless of their size.

The proposed amendments to Form N–PX would also apply to funds. In the case of Section 14A Votes, we believe this is necessary to achieve consistent reporting with respect to institutional investment manager votes because a portion of the votes of those managers will be reported on Form N–PX reports filed by funds under the provisions to prevent duplicative reporting. Therefore, unless we require funds to report this information, the record of institutional investment managers will be incomplete. In addition, information about the magnitude of a reporting person's voting power and the number of votes cast contributes to the transparency of proxy voting. For that reason, we are also proposing to extend the new requirements to the complete proxy voting records of funds. This is intended to improve transparency of fund proxy voting records and enable fund shareholders to better monitor their funds' involvement in the governance activities of portfolio companies. Therefore, we believe it is important for the proposed amendments to apply to all funds, regardless of size.

We have endeavored through the proposed amendments to Form N–PX to minimize the regulatory burden on institutional investment managers and funds, including small entities, while meeting our regulatory objectives. Form N–PX is supported by a number of third-party service providers and is already used by the many institutional investment managers who currently file Form N–PX reports on behalf of funds. We have endeavored to clarify, consolidate, and simplify the requirements applicable to institutional investment managers and funds, including those that are small entities. Finally, we do not consider the use of performance rather than design standards to be consistent with the congressional mandate in the Dodd-Frank Act.

G. Request for Comment

The Commission encourages the submission of written comments with respect to any aspect of this analysis. Comment is specifically requested on the number of small entities that would be subject to the proposed rule and form amendments and the likely impact of the proposal on those small entities. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. These comments will be considered in the preparation of the Final Regulatory Flexibility Analysis if the proposed amendments are adopted and will be placed in the same public file as comments on the proposed amendments themselves.

VIII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[141] a rule is "major" if it results or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

We request comment on whether our proposal would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment, or innovation.

IX. Statutory Authority

The Commission is proposing new rule 14Ad–1 pursuant to the authority set forth in Sections 13, 23(a), 24, and 36 of the Exchange Act [15 U.S.C. 78m, 78w(a), 78x, and 78mm] and Section 951(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Commission is proposing amendments to rule 30b1–4 pursuant to the authority set forth in Section 951(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and Sections 8, 30, 31, 38, and 45 of the Investment Company Act [15 U.S.C. 80a–8, 80a–29, 80a–30, 80a–37, and 80a–44]. The Commission is proposing amendments to Form N–PX pursuant to the authority set forth in Sections 13, 23(a), 24, and 36 of the Exchange Act [15 U.S.C. 78m, 78w(a), 78x, and 78mm]; Section 951(d) of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and Sections 8, 30, 31, 38, and 45 of the Investment Company Act [15 U.S.C. 80a–8, 80a–29, 80a–30, 80a–37, and 80a–44].

[141] Public Law 104–21, Title II, 110 Stat. 857 (1996).

List of Subjects

17 CFR Parts 240 and 249

Reporting and recordkeeping requirements, Securities.

17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of Proposed Rule and Form Amendments

For the reasons set out in the preamble, the Commission proposes to amend Title 17, Chapter II, of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 is amended by adding the following citation in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350 and 12 U.S.C. 5221(e)(3) unless otherwise noted.

* * * * *

Section 240.14Ad–1 is also issued under sec. 951(d), Pub. L. 111–203, 124 Stat. 1376.

* * * * *

2. Section 240.14Ad–1 is added to read as follows:

§ 240.14Ad–1 Report of proxy voting record.

(a) Subject to paragraphs (b) and (c) of this section, every institutional investment manager (as that term is defined in section 13(f)(6)(A) of the Act (15 U.S.C. 78m(f)(6)(A))) that is required to file reports under section 13(f) of the Act (15 U.S.C. 78m(f)) shall file an annual report on Form N–PX (§§ 249.326 and 274.129 of this chapter) not later than August 31 of each year, for the most recent twelve-month period ended June 30, containing the institutional investment manager's proxy voting record for each shareholder vote pursuant to sections 14A(a) and (b) of the Act (15 U.S.C.

78n–1(a) and (b)) with respect to which the manager, whether directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, had or shared the power to vote, or to direct the voting of, any security.

(b) An institutional investment manager is not required to file a report on Form N–PX (§§ 249.326 and 274.129 of this chapter) for the twelve-month period ending June 30 of the calendar year in which the manager's initial filing on Form 13F (§ 249.325 of this chapter) is due pursuant to § 240.13f–1 of this part. For purposes of this paragraph, "initial filing" on Form 13F means any quarterly filing on Form 13F if no filing on Form 13F was required for the immediately preceding calendar quarter.

(c) An institutional investment manager is not required to file a report on Form N–PX (§§ 249.326 and 274.129 of this chapter) with respect to any shareholder vote at a meeting that occurs after September 30 of the calendar year in which the manager's final filing on Form 13F (§ 249.325 of this chapter) is due pursuant to § 240.13f–1 of this part. An institutional investment manager is required to file a Form N–PX for the period July 1 through September 30 of the calendar year in which the manager's final filing on Form 13F is due pursuant to § 240.13f–1 of this part; this filing is required to be made not later than February 28 of the immediately following calendar year. For purposes of this paragraph, "final filing" on Form 13F means any quarterly filing on Form 13F if no filing on Form 13F is required for the immediately subsequent calendar quarter.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

3. The authority citation for part 249 is amended by adding the following citation in numerical order to read as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

Section 249.326 is also issued under sec. 951(d), Pub. L. 111–203, 124 Stat. 1376.

* * * * *

4. The heading for Subpart D is revised to read as follows:

Subpart D—Forms for Annual and Other Reports of Issuers and Other Persons Required Under Sections 13, 14A, and 15(d) of the Securities Exchange Act of 1934

5. Section 249.326 is added to read as follows:

§ 249.326 Form N–PX, annual report of proxy voting record.

This form shall be used by institutional investment managers to file an annual report pursuant to § 240.14Ad–1 of this chapter containing the manager's proxy voting record.

Note: The text of Form N–PX does not, and these amendments will not, appear in the Code of Federal Regulations.

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

6. The authority citation for part 270 is amended by adding the following citation in numerical order to read as follows:

Authority: 15 U.S.C. 80a–1 *et seq.,* 80a–34(d), 80a–37, and 80a–39, unless otherwise noted.

* * * * *

Section 270.30b1–4 is also issued under sec. 951(d), Pub. L. 111–203, 124 Stat. 1376.

* * * * *

§ 270.30b1–4

7. Section 270.30b1–4 is amended by removing the phrase "Form N–PX (§ 274.129 of this chapter)" and adding in its place "Form N–PX (§§ 249.326 and 274.129 of this chapter)".

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

8. The authority citation for part 274 is amended by adding the following citation in numerical order to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l,* 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

* * * * *

Section 274.129 is also issued under sec. 951(d), Pub. L. 111–203, 124 Stat. 1376.

* * * * *

9. The heading of § 274.129 is revised to read as follows:

§ 274.129 Form N–PX, annual report of proxy voting record.

* * * * *

10. Form N–PX (referenced in §§ 249.326 and 274.129) is revised to read as follows:

Note: The text of Form N–PX does not, and these amendments will not, appear in the Code of Federal Regulations.

OMB APPROVAL
OMB Number:
Expires:
Estimated average burden hours per response

Form N–PX

Annual Report of Proxy Voting Record

General Instructions

A. Rule as to Use of Form N–PX.

Form N–PX is to be used for reports pursuant to Section 30 of the Investment Company Act of 1940 ("Investment Company Act") and Rule 30b1–4 under the Investment Company Act (17 CFR 270.30b1–4) by all registered management investment companies, other than small business investment companies registered on Form N–5, to file their complete proxy voting record. Form N–PX is also to be used for reports pursuant to Section 14A(d) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 14Ad–1 under the Exchange Act (17 CFR 240.14Ad–1) by institutional investment managers subject to Section 13(f) of the Exchange Act ("Institutional Managers") to file their proxy voting record regarding votes pursuant to Sections 14A(a) and (b) of the Exchange Act. Form N–PX is to be filed not later than August 31 of each year for the most recent twelve-month period ended June 30.

An Institutional Manager is not required to file a report on Form N–PX for the twelve-month period ending June 30 of the calendar year in which the manager's initial filing on Form 13F is due pursuant to Rule 13f–1 under the Exchange Act. An Institutional Manager is not required to file a report on Form N–PX with respect to any shareholder vote at a meeting that occurs after September 30 of the calendar year in which the manager's final filing on Form 13F is due pursuant to Rule 13f–1 under the Exchange Act. An Institutional Manager is required to file a Form N–PX for the period July 1 through September 30 of the calendar year in which the manager's final filing on Form 13F is due pursuant to Rule 13f–1 under the Exchange Act; this filing is required to be made not later than February 28 of the immediately following calendar year. For purposes of this paragraph, an "initial filing" on Form 13F means any quarterly filing on Form 13F if no filing on Form 13F was required for the immediately preceding calendar quarter, and "final filing" on Form 13F means any quarterly filing on

Form 13F if no filing on Form 13F is required for the immediately subsequent calendar quarter.

B. Application of General Rules and Regulations.

The General Rules and Regulations under the Investment Company Act and the Exchange Act contain certain general requirements that are applicable to reporting on any form under those Acts. These general requirements should be carefully read and observed in the preparation and filing of reports on this form, except that any provision in the form or in these instructions shall be controlling.

C. Preparation of Report.

1. This form is not to be used as a blank form to be filled in, but only as a guide in preparing the report in accordance with Rules 12b–11 (17 CFR 240.12b–11) and 12b–12 (17 CFR 240.12b–12) under the Exchange Act (for reports filed by Institutional Managers) and Rules 8b–11 (17 CFR 270.8b–11) and 8b–12 (17 CFR 270.8b–12) under the Investment Company Act (for reports filed by registered management investment companies). The Commission does not furnish blank copies of this form to be filled in for filing.

2. The instructions to this form are not to be filed with the report. When preparing the report, omit all bracketed text.

D. Rules To Prevent Duplicative Reporting.

1. If two or more Institutional Managers, each of which is required by Rule 14Ad–1 to file a report on Form N–PX for the reporting period, shared the power to vote, or to direct the voting of, the same securities on a vote pursuant to Section 14A(a) or (b) of the Exchange Act, only one such Institutional Manager must include the information regarding that vote in its report on Form N–PX.

2. An Institutional Manager is not required to report proxy votes that are reported on a Form N–PX report that is filed by a registered management investment company.

3. An Institutional Manager that had or shared the power to vote, or to direct the voting of, any security with respect to proxy votes that are reported by another Institutional Manager or Managers pursuant to General Instruction D.1, or are reported on a Form N–PX report filed by a registered management investment company, must identify each Institutional Manager and registered management investment company reporting on its behalf in the manner described in Special Instruction B.2.c. and d.

4. An Institutional Manager reporting proxy votes that are subject to shared voting power pursuant to Instruction D.1 must identify any other Institutional Managers on whose behalf the filing is made in the manner described in Special Instruction C.2.

5. A registered management investment company reporting proxy votes that would otherwise be required to be reported by an Institutional Manager must identify any Institutional Managers on whose behalf the filing is made in the manner described in Special Instruction C.2.

E. Signature and Filing of Report.

1. If the report is filed in paper pursuant to a hardship exemption from electronic filing (*see* Item 201 *et seq.* of Regulation S–T (17 CFR 232.201 *et seq.*)), eight complete copies of the report shall be filed with the Commission. At least one complete copy of the report filed with the Commission must be manually signed. Copies not manually signed must bear typed or printed signatures.

2. a. For reports filed by registered management investment companies, the report must be signed on behalf of the registered management investment company by its principal executive officer or officers. For reports filed by Institutional Managers, the report must be signed on behalf of the Institutional Manager by an authorized person.

b. The name and title of each person who signs the report shall be typed or printed beneath his or her signature. Attention is directed to Rule 12b–11 under the Exchange Act and Rule 8b–11 under the Investment Company Act concerning manual signatures and signatures pursuant to powers of attorney.

Special Instructions

A. Organization of Form N–PX

1. This form consists of three parts: the Form N–PX Cover Page ("Cover Page"), the Form N–PX Summary Page ("Summary Page"), and the proxy voting information required by the form ("Proxy Voting Information").

2. Present the Cover Page and the Summary Page information in the format and order provided in the form. Do not include any additional information on the Cover Page or Summary Page.

B. Cover Page

1. Amendments to a Form N–PX report must either restate the Form N–PX report in its entirety or include only proxy voting information that is being reported in addition to the information already reported in a current public Form N–PX report for the same period. If the Form N–PX report is filed as an amendment, then the reporting person must check the amendment box on the Cover Page, enter the amendment number, and check the appropriate box to indicate whether the amendment (a) is a restatement or (b) adds new Proxy Voting Information. Each amendment must include a complete Cover Page and, if applicable, a Summary Page.

2. Designate the Report Type for the Form N–PX report by checking the appropriate box in the Report Type section of the Cover Page, and include, where applicable, the List of Other Persons Reporting for this Manager (on the Cover Page), the Summary Page, and the Proxy Voting Information, as follows:

a. For a report by a registered management investment company, check the box for Report Type "Registered Management Investment Company Report," omit from the Cover Page the List of Other Persons Reporting for this Manager, and include both the Summary Page and the Proxy Voting Information.

b. For a report by an Institutional Manager that includes all proxy votes required to be reported by the Institutional Manager, check the box for Report Type "Institutional Manager Voting Report," omit from the Cover Page the List of Other Persons Reporting for this Manager, and include both the Summary Page and the Proxy Voting Information.

c. For a report by an Institutional Manager, when all proxy votes required to be reported by the Institutional Manager are reported by another Institutional Manager or Managers or by one or more registered management investment companies, check the box for Report Type "Institutional Manager Notice," include (on the Cover Page) the List of Other Persons Reporting for this Manager, and file the Cover Page and required signature only.

d. For a report by an Institutional Manager, if only part of the proxy votes required to be reported by the Institutional Manager are reported by another Institutional Manager or Managers or one or more registered management investment companies, check the box for Report Type "Institutional Manager Combination Report," include (on the Cover Page) the List of Other Persons Reporting for this Manager, and include both the Summary Page and the Proxy Voting Information.

C. Summary Page

1. Include on the Summary Page the number of included Institutional Managers. Enter as the number of included Institutional Managers the total number of Institutional Managers listed in the list of included Institutional Managers on the Summary Page, and do not count the reporting person filing this report. *See* Special Instruction C.2. If none, enter the number zero ("0").

2. Include on the Summary Page the list of included Institutional Managers. Use the title, column headings, and format provided.

a. If this Form N–PX report does not report the proxy votes of any Institutional Manager other than the reporting person, enter the word "NONE" under the title and omit the column headings and list entries.

b. If this Form N–PX report reports the proxy votes of one or more Institutional Managers other than the reporting person, enter in the list of included Institutional Managers all such Institutional Managers together with their respective Form 13F file numbers, if known. (The Form 13F file numbers are assigned to Institutional Managers when they file their first Form 13F.) Assign a number to each Institutional Manager in the list of included Institutional Managers, and present the list in sequential order. The numbers need not be consecutive. Do not include the reporting person filing this report.

D. Proxy Voting Information

1. Disclose the information required by Item 1 in the order presented in paragraphs (a)–(k) of Item 1.

2. The exchange ticker symbol or CUSIP number required by paragraph (b) or (c) of Item 1 may be omitted if it is not available through reasonably practicable means, *e.g.,* in the case of certain securities of foreign issuers.

3. Item 1(e) requires a brief identification of the matter for all matters. In responding to Item 1(e), the reporting person should identify any matter that is a shareholder vote pursuant to Section 14A of the Exchange Act in the following manner:

a. Identify a Section 14A(a)(1) vote as "14A Executive Compensation."

b. Identify a Section 14A(a)(2) vote as "14A Executive Compensation Vote Frequency."

c. Identify a Section 14A(b) vote as "14A Extraordinary Transaction Executive Compensation."

4. In responding to Item 1(g), an Institutional Manager must report the number of shares over which the Institutional Manager had sole voting power separately from the number of shares over which the Institutional Manager had shared voting power. In responding to Item 1(g), an Institutional Manager also must separately report shares when the groups of Institutional Managers who share voting power are different. For example, if the reporting Institutional Manager shares voting power with respect to 10,000 shares with Manager A and shares voting power with respect to 50,000 shares with Managers A and B, then the groups of 10,000 and 50,000 shares must be separately reported. In responding to Item 1(g), a registered management investment company must separately report shares with respect to which different Institutional Managers or groups of Institutional Managers have or share voting power.

5. In the case of a reporting person that is a registered management investment company that offers multiple series of shares, provide the information required by Item 1 separately for each series. The term "series" means shares offered by a registered management investment company that represent undivided interests in a portfolio of investments and that are preferred over all other series of shares for assets specifically allocated to that series in accordance with Rule 18f–2(a) under the Investment Company Act (17 CFR 270.18f–2(a)).

Confidential Treatment Instructions

1. A reporting person should make requests for confidential treatment of information reported on this form in accordance with Rule 24b–2 under the Exchange Act (17 CFR 240.24b–2).

2. Paragraph (b) of Rule 24b–2 requires a person filing confidential information with the Commission to indicate at the appropriate place in the public filing that the confidential portion has been so omitted and filed separately with the Commission. A reporting person should comply with this provision by including on the Summary Page, after the number of included Institutional Managers and prior to the list of included Institutional Managers, a statement that confidential information has been omitted from the public Form N–PX report and filed separately with the Commission.

3. A reporting person must file in paper, in accordance with Rule 101(c)(1)(i) of Regulation S–T (17 CFR 232.101(c)(1)(i)), all requests for and information subject to the request for confidential treatment. If a reporting person requests confidential treatment with respect to information required to be reported on Form N–PX, the reporting person must file in paper with the Secretary of the Commission an original and two copies of the Form N–PX reporting information for which the reporting person requests confidential treatment.

4. A reporting person requesting confidential treatment must provide enough factual support for its request to enable the Commission to make an informed judgment as to the merits of the request. If a request for confidential treatment of information filed on Form N–PX relates to a request for confidential treatment of information included in an Institutional Manager's filing on Form 13F, the Institutional Manager should so state and identify the related request. In such cases, the Institutional Manager need not repeat the analysis set forth in the request for confidential treatment in connection with the Form 13F filing. The Institutional Manager's request, however, must explain whether and, if so, how the Form N–PX and Form 13F confidential treatment requests are related.

5. State the period of time for which confidential treatment of the proxy voting information is requested. The time period specified may not exceed one (1) year from the date that the Form N–PX report is required to be filed with the Commission. The request must include a justification of the time period for which confidential treatment is requested, as required by Rule 24b–2(b)(2)(ii).

6. At the expiration of the period for which confidential treatment has been granted (the "Expiration Date"), the Commission, without additional notice to the reporting person, will make the proxy voting information public unless a *de novo* request for confidential treatment of the information that meets the requirements of Rule 24b–2 and these Confidential Treatment Instructions is filed with the Commission at least fourteen (14) days in advance of the Expiration Date.

7. Upon the final adverse disposition of a request for confidential treatment, or upon the expiration of the confidential treatment previously granted for a filing, unless a hardship exemption is available, the reporting person must submit electronically, within six (6) business days of the expiration or notification of the final disposition, as applicable, an amendment to its publicly filed Form N–PX report that includes the proxy voting information as to which the Commission denied confidential treatment or for which confidential treatment has expired. An amendment filed under such circumstances must not be a restatement; the reporting

person must designate it as an amendment which adds new proxy voting information. The reporting person must include at the top of the Form N–PX Cover Page the following legend to correctly designate the type of filing being made:

This filing lists proxy vote information reported on the Form N–PX filed on (date) pursuant to a request for confidential treatment and for which (that request was denied/confidential treatment expired) on (date).

Paperwork Reduction Act Information

Form N–PX is to be used by a registered management investment company, other than a small business investment company registered on Form N–5 (17 CFR 239.24 and 274.5), to file reports with the Commission pursuant to Section 30 of the Investment Company Act and Rule 30b1–4 thereunder. Form N–PX is also to be used by an institutional investment manager subject to Section 13(f) of the Exchange Act to file reports with the Commission as required by Section 14A(d) of the Exchange Act and Rule 14Ad–1 thereunder. Form N–PX is to be filed not later than August 31 of each year, containing the reporting person's proxy voting record for the most recent twelve-month period ended June 30. The Commission may use the information provided on Form N–PX in its regulatory, disclosure review, inspection, and policymaking roles.

Registered management investment companies and institutional investment managers are required to disclose the information specified by Form N–PX, and the Commission will make this information public. Registered management investment companies and institutional investment managers are not required to respond to the collection of information contained in Form N–PX unless the Form displays a currently valid Office of Management and Budget ("OMB") control number. Please direct comments concerning the accuracy of the information collection burden estimate and any suggestions for reducing the burden to the Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090. The OMB has reviewed this collection of information under the clearance requirements of 44 U.S.C. 3507.

Form N–PX

Annual Report of Proxy Voting Record

Form N–PX Cover Page

_____

(Name of reporting person) (For registered management investment companies, provide exact name of registrant as specified in charter)

_____

(Address of principal executive offices) (Zip code)

_____

(Name and address of agent for service)

Telephone number of reporting person, including area code:

_____

Report for the [year ended June 30, ____] [period July 1, ____ to September 30, ____]

Commission Investment Company Act or Form 13F File Number: [811-] [28-]____

Check here if amendment ☐; Amendment number: _____

This Amendment (check only one):

☐ is a restatement.

☐ adds new proxy voting entries.

Report Type (check only one):

☐ Registered Management Investment Company Report.

☐ Institutional Manager Voting Report (Check here if all proxy votes of this reporting manager are reported in this report.)

☐ Institutional Manager Notice (Check here if no proxy votes reported are in this report, and all proxy votes are reported by other reporting person(s).)

☐ Institutional Manager Combination Report (Check here if a portion of the proxy votes for this reporting manager are reported in this report and a portion are reported by other reporting person(s).)

List of Other Persons Reporting for this Manager:

[If there are no entries in this list, omit this section.]

Investment Company Act or Form 13F File Number	Name
[811–] [28–]	.....

[Repeat as necessary.]

FORM N–PX SUMMARY PAGE

Number of Included Institutional Managers: ____

List of Included Institutional Managers:

Provide a numbered list of the name(s) and 13F file number(s) of all Institutional Managers with respect to which this report is filed, other than the reporting person filing this report.

[If there are no entries in this list, state "NONE" and omit the column headings and list entries.]

No.	Form 13F File No.	Name
.....	28-	.....

[Repeat as necessary.]

Form N–PX

Item 1. Proxy Voting Record.

If the reporting person is a registered management investment company, disclose the following information for each matter relating to a portfolio security considered at any shareholder meeting held during the period covered by the report and with respect to which the reporting person was entitled to vote. If the reporting person is an Institutional Manager, disclose the following information for each shareholder vote pursuant to Sections 14A(a) and (b) of the Exchange Act considered at any shareholder meeting held during the period covered by the report and with respect to which the reporting person, whether directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, had or shared the power to vote, or to direct the voting of, any security. If a reporting person does not have any proxy votes to report for the reporting period, the reporting person shall file a report with the Commission stating that the reporting person does not have proxy votes to report.

(a) The name of the issuer of the security;

(b) The exchange ticker symbol of the security;

(c) The Council on Uniform Securities Identification Procedures ("CUSIP") number for the security;

(d) The shareholder meeting date;

(e) A brief identification of the matter voted on;

(f) For reports filed by registered management investment companies, disclose whether the matter was proposed by the issuer or by a security holder;

(g) The number of shares the reporting person was entitled to vote (for registered management investment

companies) or had or shared voting power over (for Institutional Managers);

(h) The number of shares in (g) that were voted;

(i) How the reporting person voted the shares in (h) (*e.g.,* for or against proposal, or abstain; for or withhold regarding election of directors) and, if the votes were cast in multiple manners (*e.g.,* for and against), the number of shares voted in each manner;

(j) Whether the votes disclosed in (i) represented votes for or against management's recommendation; and

(k) Identify each Institutional Manager on whose behalf this Form N–PX report is being filed (other than the reporting person) and who had or shared the power to vote, or to direct the voting of, the securities voted by entering the number assigned to the Institutional Manager in the List of Included Managers.

Signature

[See General Instruction E]

Pursuant to the requirements of the [Securities Exchange Act of 1934 (for Institutional Managers)] [Investment Company Act of 1940 (for registered management investment companies)], the reporting person has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

(Reporting Person) _____

By (Signature and Title)* _____

Date _____

* Print the name and title of each signing officer under his or her signature.

By the Commission.

Dated: October 18, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–26536 Filed 10–27–10; 8:45 am]

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